OFFICE OF JUDICIAL EDUCATION

WISCONSIN JURY INSTRUCTIONS

CRIMINAL

Wisconsin Criminal Jury Instructions Committee

[Cite as Wis JI-Criminal]

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OFFICE OF JUDICIAL EDUCATION
1/2024

WISCONSIN JURY INSTRUCTIONS

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VOLUME I

Wisconsin Criminal Jury Instructions Committee

[Cite as Wis JI-Criminal]

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

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WISCONSIN
JURY
INSTRUCTIONS
CRIMINAL

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

Reporter:
Bryce Pierson
Office of Judicial Education

Published by
Wisconsin Court System
Office of Judicial Education

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SUMMARY OF CONTENTS

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FOREWORD

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

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

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

July 2023

Bryce Pierson
Legal Advisor & Committee Reporter
Office of Judicial Education

COMMITTEE HISTORY

Foundation of the Wisconsin Criminal Jury Instructions 1959-1962

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

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

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

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

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

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

Development of the Original Model Instructions

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

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

Court Reorganization and Publication Incorporation into the Wisconsin Court System

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

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

Characteristics of the Wis JI-Criminal Model

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

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

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

How to Use the Model Jury Instructions[12]

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

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

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

INQUIRIES AND SUGGESTIONS

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

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

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

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

Judges

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

Advisory Members

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

Reporter

Bryce Pierson	Wis. Office of Judicial Edu.

The Criminal Jury Instructions CommitteeMembers and Advisors

Judges

Gerald Boileau	Marathon Co.	1960-1975 Chair
William Gramling	Waukesha Co.	1960-1976
Milton Meister	Washington Co.	1960-1978
Herbert Steffes	Milwaukee Co.	1960-1975
Clarence Whiffen	Racine Co.	1960-1961
Henry Gergen	Dodge Co.	1961-1990 Chair
Ervin Zastrow	Walworth Co.	1965-1976 Chair
James Levi	Portage Co.	1965-1984 Chair
John Buchen	Sheboygan Co.	1974-1989
James Seering	Sauk Co.	1974-1989
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John Bartholomew	St. Croix Co.	1976-1989
Robert Stoltz	Washington Co.	1977-1978
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Robert Landry	Milwaukee Co.	1979-1991
Michael Torphy	Dane Co.	1979-1992
Donald Steinmetz	Milwaukee Co.	1979-1980
Fred Fink	Wood Co.	1980-1985
Patrick Madden	Milwaukee Co.	1983-1994
Richard Becker	Washington Co.	1984-1994
Fred Fleishauer	Portage Co.	1986-1996
Raymond Gieringer	Adams Co.	1988-1991
Mark Gempeler	Waukesha Co.	1988-1998
Gregory Peterson	Eau Claire Co.	1990-2002 Chair
William Carver	Winnebago Co.	1990-2000
Victor Manian	Milwaukee Co.	1991-2003 Chair
James Eaton	Barron Co.	1991-2001
Angela Bartell	Dane Co.	1992-2002
Michael Fisher	Kenosha Co.	1992-2002

James Schwalbach	Washington Co.	1994-1997
Thomas Doherty	Milwaukee Co.	1994-1998
Edward Zappen	Wood Co.	1996-2006 Chair
John DiMotto	Milwaukee Co.	1997-2007 Chair
Kitty Brennan	Milwaukee Co.	1998-2008
James Daley	Rock Co.	1998-2008 Chair
Donald Zuidmulder	Brown Co.	1998-2008
Mark Mangerson	Oneida Co.	2000-2010 Chair
Scott Needham	St. Croix Co.	2001-2011 Chair
Don Hassin	Waukesha Co.	2002-2012 Chair
Steve Ebert	Dane Co.	2002-2007
Annette Ziegler	Washington Co.	2002-2007
John Franke	Milwaukee Co.	2003-2008
Thomas Flugaur	Portage Co.	2006-2016 Chair
Jeffrey Kremers	Milwaukee Co.	2007-2017 Chair
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Mel Flanagan	Milwaukee Co.	2008-2016
Rebecca Dallet	Milwaukee Co.	2008-2018
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Guy Reynolds	Sauk Co.	2011-2018
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Stephanie Rothstein	Milwaukee Co.	2016-2022
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Frederick Rosa	Milwaukee Co.	2017-2022
Mitch Metropulos	Outagamie Co.	2013-2023 Chair
Jane Carroll	Milwaukee Co.	2018-2023

Advisory Members

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

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

Randall Paulson	1996-2001
Charles Vetzner	2001-2007

Univ. of Wis. Law School

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

Reporters

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

Copy Editors

Barbara Muckler	1966-1978
Roger Bruesewitz	1978-2001

Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

4. The Committee's principal objectives were:

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

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

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

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

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

8. INTRODUCTION TO THE 1962 EDITION:

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

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

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

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

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

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

their teaching, research, and service responsibilities.

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

IN MEMORIAM
TO HONOR THE MEMORY OF HERBERT J. STEFFES

Circuit Judge Herbert J. Steffes died July 19, 1975. He was a member of the Criminal Jury Instructions Committee from 1960 to 1975.

Born on June 18, 1904, reared on Milwaukee's south side, graduated from Marquette University as a Juris Doctor, his full life was devoted to public service in Milwaukee.

Intellectual, erudite, articulate, precise in expression, his speech became his art form at work and in lighter moments.

This accomplishment and his study of the law was nourished by dedication toward the goal of excellence. His continuous effort to increase understanding and assume responsibility marked his career well recognized in his own time.

He became a judge and served his electors for three decades.

His notable career included the service of many offices of organizations in his profession: Wisconsin District Attorney's Association; Wisconsin Board of Criminal Court Judges; Wisconsin Board of Circuit Court Judges; Milwaukee and American Bar Associations; and Council of Judges of the National Council on Crime and Delinquency. He passed on his store of knowledge in criminal law to thousands of students. A member of the Marquette University Law School faculty for many years, he also served on the faculties of the Wisconsin State Trial Judges College and the National College of State Trial Judges. He served on the committee which formulated the Wisconsin Criminal Code of 1955 and the Criminal Procedure Codes of 1949 and of 1970 and was an initial member of the Wisconsin Board of Criminal Judges Uniform Jury Instruction Committee. His contribution of exemplary instructions are a priceless contribution to this practical work.

For 30 years, Judge Steffes presided with wisdom, firmness, fairness, and compassion over the criminal court. As he regretted the fading of the guiding light of stare decisis from the judicial firmament, so do we lament his passing from our judicial scene.

CRIMINAL JURY INSTRUCTIONS
COMMITTEE

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IN MEMORIAM
TO HONOR THE MEMORY OF WILLIAM A. PLATZ

William A. Platz died on December 12, 1975. He was a member of the Criminal Jury Instructions Committee from 1960 to 1975.

No memorial can express more fully the outstanding contribution he made to the law and to the justice system than the one he etched in the memory of every person who knew him. He was respected and liked by everyone.

William A. Platz was born in Watertown, Wisconsin, on November 10, 1910. Following graduation from Marquette University, he entered the University of Wisconsin Law School where he was editor-in-chief of the Wisconsin Law Review and a member of the Order of the Coif. He served, from time to time, as a member of the Wisconsin Law Faculty.

He joined the staff of the State of Wisconsin Office of the Attorney General in 1937 and there began his work in the field of criminal law. He made major contributions to the 1949 and 1970 revisions of the Wisconsin Code of Criminal Procedure and was a principal architect of the Wisconsin Criminal Code of 1955, the first entirely new Criminal Code in the history of this nation. His services as adviser for Wisconsin Jury Instructions-Criminal extended from the time of the project's inception in 1960 until his death.

William A. Platz had no peer in the field of criminal law. For nearly four decades, he was counsel to every district attorney and every law enforcement officer in the State of Wisconsin, always available and willing, cheerfully, to give advice. And no more knowledgeable, trustworthy help was available anywhere.

He possessed not just a singular knowledge and devotion to the justice system but a keen wit and fine sense of humor as well. His wit and his wisdom forever remain with all who knew this fine outstanding man.

The members of the Committee share with everyone the great sense of loss from his untimely death. He is greatly missed.

CRIMINAL JURY INSTRUCTIONS
COMMITTEE

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IN MEMORIAM
TO HONOR THE MEMORY OF ROBERT J. STOLTZ

Reserve Judge Robert J. Stoltz died December 2, 1978. He was a member of the Criminal Jury Instructions Committee from 1977 to 1978.

Born in Milwaukee, Wisconsin, on September 6, 1912, he spent his boyhood in Milwaukee. He obtained his preparatory education at Campion High School in Prairie du Chien, Wisconsin, and graduated from Marquette University Law School with an L.L.B. in 1935. He was a partner in the law firm of Schloemer, Stoltz & Merriam of West Bend, Wisconsin, from 1935-1960. He was elected county judge for Washington County, Wisconsin, in 1960 and held that position until his retirement from the bench in January 1978.

He served his peers and general mankind with complete devotion to excellence and fairness. Always keenly aware of the individual and his or her particular circumstances, he will be remembered for his innovative and just sentencing techniques.

His unselfish devotion to mankind was continually exhibited by his willingness to serve his fellow man as not only a county judge but also as Chief Judge of the 6th Judicial District Court (1976-1978), a faculty member of the Wisconsin Judicial College (1969-1971), a faculty member of the National College of State Judiciary in Reno, Nevada (1975), Clerk of the West Bend, Wisconsin School District (1947-1959), and as a member of numerous boards of directors and bar associations. He served on the Criminal Jury Instructions Committee from 1977 until his untimely death.

He will be remembered for his firmness, fairness, compassion, and awareness of the individual environment of his fellow man.

While his accomplishments were many, fair and just, he will not be remembered because of them alone. He will be remembered, always, as a brother, husband, and father. His passing has affected all of us and leaves a void not easily filled.

CRIMINAL JURY INSTRUCTIONS
COMMITTEE

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IN MEMORIAM
TO HONOR THE MEMORY OF WILLIAM E. GRAMLING

Circuit Judge William E. Gramling died October 19, 1980. He was a member of the Criminal Jury Instructions Committee from 1960 to 1976.

During his lifetime, he came to be respected, honored, and loved by a host of friends. A man of honesty, integrity, and goodly competence, it was his basic human qualities which marked him as a man who will long be remembered.

Born in Milwaukee on March 2, 1913, he attended Marquette High School, Marquette University, and Marquette Law School. His parochial education led to unswerving devotion and service to his church. His many undertakings as officer, trustee, and active member served well the interests of his parishes. He became a member of the Milwaukee Archdiocesan School Board. From his parish, he received the Catholic Memorial Award.

Judge Gramling was very active in civic affairs. In turn, he was chairman of the Young Republicans and then of the Republican Party of Waukesha County. He was a member and officer of the Lions Club, the American Legion, the Dousman's Businessman Association, the Waukesha Chamber of Commerce, the Elm Brook Hospital Board, and was a director and chairman of the board of two banks. He also served in the U.S. Army and was a special agent of the F.B.I.

His professional life saw him chairing the Waukesha County Bar Association and the State Boards of County Judges, Criminal Court Judges, and Circuit Judges. Before he became county judge in 1952 and circuit judge in 1956 and finally chief judge in Waukesha, he practiced law in Milwaukee, Dousman, and then in Waukesha with the firm of Love, Davis, and Gramling.

Judge Gramling was an exceptional person. He had unusual understanding of human considerations, abilities, and frailties. As a judge, he was able carefully to make determinations and orders to the end that justice was done. He became a member of the Criminal Jury Instructions Committee at the time the project began in 1960 and served faithfully until his illness. As a committee member formulating jury instructions, he was a practical and knowledgeable contributor. His philosophy favored simple, plain talk instructions to aid jury understanding and foster fair and just verdicts. He believed communication among persons required direct, common, unstilted language.

As with all of his friends, the Committee sorely misses Judge Gramling; it

will never be the same without him.

CRIMINAL JURY INSTRUCTIONS
COMMITTEE

IN MEMORIAM
TO HONOR THE MEMORY OF GERALD BOILEAU

Judge Gerald Boileau died on January 30, 1981. He was a member of the Criminal Jury Instructions Committee from 1960 to 1977.

Judge Boileau was born in Woodruff, Wisconsin, on January 15, 1900. He attended the AEF University in France and graduated from Marquette University Law School in 1923. In 1926, he was elected the first full-time district attorney in Marathon County, Wisconsin. He served eight years as a U.S. Congressman for the Seventh District from 1930 to 1938.

In 1942, he was elected to fill an unexpired term as circuit judge for the 16th Judicial Circuit. He served as circuit judge from 1942 until his retirement in January of 1970. He then served as a full-time reserve judge in Milwaukee, Kenosha, and Janesville, filling in for judges who were ill.

Judge Boileau was very active during his judicial career. He served as chairman of the State Board of Circuit Judges, Criminal Court Judges, and Wisconsin Criminal Jury Instructions Committee, and the State Judicial Council during his memberships on those bodies.

He played a major role in the revision of the state's criminal code in 1955, serving as chairman of the Advisory Committee to the legislature. For many years, he led the Wisconsin Criminal Jury Instructions Committee as its chairman. His name appears as the author of the first introduction to these published instructions in 1962. Of all the memberships and service on both the political and judicial levels, he was most proud of his service on this Committee.

Judge Boileau had a unique ability derived from serving in all three branches of our government. He was not only a scholar and teacher but also a leader, and he used his abilities to the utmost to better the criminal justice system.

Judge Boileau realized that the law had to be fluid. His work on the Criminal Jury Instructions Committee was an invaluable contribution to the judicial system. The effort he and his Committee put forth in the early 1960s came to be recognized not only in our state but also throughout the nation as a model system of criminal jury instructions.

Judge Boileau's service for 27 years as a circuit judge is illustrative of the high esteem his colleagues and the public had for him. He was considered a giant in

the judicial system.

His death is a great loss not only to his family and those who knew him but also to all the citizens of the state.

CRIMINAL JURY INSTRUCTIONS
COMMITTEE

IN MEMORIAM
TO HONOR THE MEMORY OF HUGH R. O'CONNELL

Judge Hugh R. O'Connell died on June 30, 1987. He was a member of the Criminal Jury Instructions Committee from 1976 to 1983.

He was born on July 22, 1919, in New Butler, Wisconsin, and raised in Milwaukee. He served in the military service for four years during World War II. He was graduated "with distinction" from Arizona State College and Marquette University Law School, where he was made a member of Alpha Sigma Nu, the Jesuit Honor Society.

He served as an assistant district attorney in Milwaukee County for 10 years and was elected to the position of District Attorney of Milwaukee County in 1964, where he served until his election to the circuit bench in 1968. He served with distinction in this position until his retirement in 1983.

Among the many organizations which he served during his career were the Wisconsin District Attorneys Association, the Wisconsin Circuit Court Judges Association, the Wisconsin Bar Association, and the Wisconsin Criminal Court Judges Uniform Jury Instructions Committee.

In addition to Judge O'Connell's reverence for the law, he had a broad knowledge of literature and history. One of his favorite quotations was from George Eliot, "Justice is like the kingdom of God; it is not without us as a fact; it is within us as a great yearning."

Judge O'Connell was regarded by his fellow judges and the attorneys who practice before him as a man of erudition; a gentleman and scholar who acquitted himself well both on and off the bench.

He is missed not only by his family and his many friends, but all of those who worked to improve the criminal justice system.

CRIMINAL JURY INSTRUCTIONS
COMMITTEE

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IN MEMORIAM
TO HONOR THE MEMORY OF FRED A. FINK

Circuit Judge Fred A. Fink died October 16, 1985. He was a member of the Criminal Jury Instructions Committee from 1981 to 1985.

Fred A. Fink was born July 21, 1921. He attended Marshfield public schools and two years of college before enlisting in the Army Air Corp in 1942. He served as a bombardier on a B-24, flying 48 combat missions in Africa, the Middle East, and Europe before his discharge in 1945. His service continued in the reserves of the Air Force until 1981.

On discharge from active duty, Fred Fink returned to his university studies. By 1948, he received a bachelor of laws degree from the University of Wisconsin at Madison. Thereafter, he practiced law in Marshfield and served as general manager and counsel to a local firm there. He took office as Wood County Judge on January 1, 1962. Elected to four successive terms as the County Judge and then Circuit Judge of Branch 2 Wood County, Judge Fink had a 24-year judicial career.

He was an active participant in numerous organizations of the legal profession. Included among them were the Board of County Judges, the Board of Criminal Court Judges, and the Voluntary Association of Trial Judges of Wisconsin. He served as an officer of the Trial Judges Association for three years. He was a past member of the Judicial Commission and the Wisconsin Council on Criminal Justice. He served as chairman of the Uniform Bond Committee and a member of the Administrative Committee of the Courts. He became a member of the Wisconsin Criminal Jury Instructions Committee and served on the Criminal Justice Committee of the National Conference of the State Trial Judges. He was the Chief Judge of the Sixth Administrative District of Courts from 1984 until his death.

Judge Fink was also involved in many civic activities in his community, including the First Presbyterian Church, Boy Scouts, the American Legion, Elks, and the Masons.

Judge Fink's dealings with citizens and lawyers were always direct, concerned, and fair. He could be forceful when necessary but was compassionate in seeing that justice was done. Beneath his gruff exterior was a man whose compassion and sense of fair play were his trademarks on the bench. Off the bench, he was always accessible to lawyers, court personnel, and the general public. Although he wore the dignity of the bench well, he never forgot

the humility which the office also requires.

CRIMINAL JURY INSTRUCTIONS
COMMITTEE

IN MEMORIAM
TO HONOR THE MEMORY OF JAMES H. LEVI

Circuit Judge James H. Levi died November 29, 1984. He was a member of the Criminal Jury Instructions Committee from 1965 to 1984.

Born in Stevens Point, Wisconsin, on July 16, 1913, he attended school there through the second year of college. He then went on to Notre Dame University where he graduated with a bachelor of law degree in 1937. After his admission to the State Bar of Wisconsin in July of that year, he returned to Stevens Point to work for Hardware Mutuals, now Sentry Insurance. In 1942, he enlisted in the U.S. Army Air Force. Commissioned as a lieutenant, he served in Africa and Europe from 1942 through 1945.

After the war, Jim Levi returned to Stevens Point and engaged in private practice. An appointment as County and Juvenile Court Judge brought him to the bench in 1951 after two terms as Portage County District Attorney. After three reelections to the county court, Judge Levi successfully ran for the circuit court bench in 1968. Reelected in 1975, he served as circuit judge until his retirement in 1981.

Throughout this period, Judge Levi consistently and dependably provided public service for which he received honors from the community and through a papal award. In addition, he contributed to his profession through service on the Board of County Judges, the Board of Juvenile Court Judges, the Board of Criminal Court Judges, a supreme court committee to establish the Judicial Code of Ethics, and the Wisconsin Criminal Jury Instructions Committee. As chairman of this committee from 1976 until his death, he demonstrated his excellent leadership, moving the agenda, providing direction, and finding consensus.

Never a colorful or flamboyant figure, Judge Levi was held in high esteem for his stable temperament, compassion, intelligence, integrity, and conscientiousness. He exhibited a genuine affection for his fellow man and often expressed concern for ensuring justice for all -- not only defendants in court but for victims as well.

CRIMINAL JURY INSTRUCTIONS
COMMITTEE

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IN MEMORIAM
TO HONOR THE MEMORY OF ERWIN C. ZASTROW

Circuit Judge Erwin C. Zastrow died on June 27, 1987. He was a member of the Criminal Jury Instructions Committee from 1965 to 1976.

He was born on May 18, 1917, in Genoa City, Wisconsin. He served in the military service for four years during World War II as a bomber pilot with the final rank of captain. He graduated from the University of Wisconsin Law School, joined the Morrissy and Morrissy Law Firm in Walworth County in 1945, and served as district attorney in Walworth County for 14 years from 1947 to 1961, when he became Walworth County Judge and later Circuit Judge. He served with distinction in this position until he retired in 1976.

He married Jean Wenzel on September 9, 1944, and had two daughters, Linda Cook and Janet Nettekoven, one granddaughter, Jennifer, and two grandsons, Luke and Anthony.

Among the many other organizations which he served during his career were the American Legion Post 45, V.F.W. Post 6375, the Wisconsin State Bar, and St. John's Lutheran Church of Walworth. He served as the chairman of the Criminal Jury Instructions Committee for the two years preceding his retirement.

In addition to Judge Zastrow's reverence for the law, he had a broad acquaintance in Wisconsin, especially among the judges and attorneys, and he was most respected. Judge Zastrow was regarded by his fellow judges and the attorneys who practiced before him as a very fair man of learning, a gentleman, and a scholar who acquitted himself well both on and off the bench.

He is missed not only by his family and his many friends but also by all of those who worked to improve the criminal justice system.

COMMITTEE ON CRIMINAL JURY
INSTRUCTIONS

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The following resolution was unanimously passed by the Wisconsin Board of Criminal Court Judges at its annual meeting in June of 1961:

WHEREAS, the Honorable Gerald J. Boileau has been the only Chairman of this Board's Committee on Criminal Jury Instructions, and;

WHEREAS, the monumental work of this Committee, which will ultimately lead to the publication of model instructions for the use of Courts of this State, is due largely to the untiring and dynamic leadership of the Honorable Gerald J. Boileau, and;

WHEREAS, the Honorable Gerald J. Boileau has in the past made significant contributions to the advancement of his profession in that he has been Chairman of the Wisconsin Board of Circuit Judges, Chairman of the Wisconsin Board of Criminal Court Judges, a member of the Judicial Council of this State for many years, and Chairman of the Criminal Code Advisory Committee which drafted the new Criminal Code in its final version;

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

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INTRODUCTION TO THE 1962 EDITION

The Wisconsin Board of Criminal Court Judges, realizing that no ready reference work was available to assist the bench and bar of the State of Wisconsin in the preparation of jury instructions in criminal cases, authorized and directed our committee, consisting of five trial judges, to study the problem and submit to the Board such suggested instructions as, in the committee's opinion, would assist judges and trial lawyers in the submission of criminal cases to juries.

Prof. Frank J. Remington, of The University of Wisconsin Law School, and Mr. William Platz, Assistant Attorney General of Wisconsin, graciously accepted our invitation to become unofficial members of the committee and have made substantial contributions to what success we may have achieved. The University of Wisconsin Extension Law Department, under the direction of Prof. William Bradford Smith, has provided research assistants and has paid all expenses necessarily incurred in the preparation of these instructions.

The committee has met on an average of once a month for the past three years, such meetings lasting from one to three days. All members, both official and unofficial, have been most regular in their attendance at meetings. These were the committee's principal objectives:

1. To prepare instructions that would accurately and concisely state the law in a way that would be meaningful and helpful to a jury.

2. To make readily available such instructions as a trial judge would likely need in the trial of a criminal case to a jury.

3. To revise instructions that had been in general use prior to the enactment of the Criminal Code of Wisconsin, which became effective July 1, 1956, and to make such changes therein as seemed advisable as a result of such enactment; and generally, to relate the instructions to the new Criminal Code.

4. To make certain that all such instructions were in conformity with the decisions of the Wisconsin Supreme Court.

In the progress of our work the research staff presented proposed drafts. These drafts were prepared after a study of all available material. At our meetings the committee analyzed every instruction minutely, giving thorough consideration to every word and phrase in the prepared draft and to all available

authorities and precedents which seemed to be pertinent. Many instructions were corrected and rewritten many times. Finally, each instruction had the unanimous approval of the committee. Certainly, we make no claim that these instructions are free from error. We proposed to continue our work as a permanent committee, adding new instructions from time to time, and correcting previously approved instructions when errors are called to our attention. We invite suggestions from the bench and bar. We hope this work will, to some extent at least, achieve its objectives.

Gerald J. Boileau, Chairman
Committee on Jury Instructions - Criminal

PREFACE TO THE 1962 EDITION

Wisconsin Jury Instructions-Criminal is published in loose-leaf form to facilitate additions, revisions, and corrections to the instructions. The committee on criminal instructions is continuing its work and is actively engaged in drafting additional instructions. The Committee intends to submit for publication an instruction covering each of the substantive offenses in the criminal code for which a jury instruction is needed. When the instructions for the criminal code are completed, the committee plans to draft instructions on those offenses covered by the motor vehicle code which are most frequently involved in a jury trial.

In addition to the general instructions, instructions on defenses to criminal liability, and instructions on certain crimes, this book includes instructions on paternity proceedings and ordinance violations.

Unlike instructions drafted for the purpose of a particular case, each instruction was, necessarily, drafted to cover the particular rule of law involved without reference to a specific fact situation. While the general instructions and the instructions on defenses and defensive matters may frequently be used without change, instructions on the substantive offenses may often have to be modified to fit the needs of the particular case. The user, therefore, should consider each instruction a model to be examined carefully before use for the purpose of determining what modifications are necessitated by the facts of the particular case. In addition, the effect of the instructions upon each other must be considered. When, for example, conspiracy or solicitation is submitted, or where separate included offenses are submitted, it may be necessary to modify the instructions.

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

To the extent possible, the organization of the instructions follows the organization of the criminal code. A comparative table of criminal code or statute section numbers and corresponding instruction numbers is found at the beginning of the book for convenient reference. Thus, the user can readily find

the instruction or instructions covering the particular criminal code section or statute involved.

The book itself may be cited as "Wis JI-Criminal" and each instruction by adding the appropriate number. For example, "FIRST DEGREE MURDER: CAUSE NOT IN ISSUE" may be cited as "Wis JI-Criminal 1100." It is suggested, however, that these instructions be referred to by their citations only when the user requests that the instruction be given verbatim. If the attorney modifies one of these instructions, it is requested that he point out the nature of the change and the reason therefore.

John H. Bowers
Editor

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1 SUGGESTED INSTRUCTIONS

The suggestions made here are recommendations only, intended to offer some guidance as to a logical order for assembling the instructions. Individual practices may vary and may be equally effective.

Instructions with titles in boldface are those the Committee recommends be given in every case. The other instructions should be given when supported by the evidence. Not all possible general instructions are listed here. Omitted are those that are especially tied to unusual or rarely-occurring factual situations.

50 Preliminary Instruction: Juror's Conduct; Evidence; Transcripts Not Available; Credibility; Substantive Issues; Opening Statement

100 Opening Instructions

110 - 125 Statement Of The Issues [Number Of Defendants; Lesser Included Offenses; Number Of Counts]

1010 - et seq. Instructions Defining The Crime Charged

Lesser Included Offenses

Defenses [JI 600 - 885, 950, 951]

Penalty Enhancers [JI 980 - 999A]

140 Burden Of Proof And Presumption Of Innocence

145 Information Not Evidence

247 Verdict As To Defendant Only

103 Evidence Defined

COMMENT

Wis JI-Criminal 1 was originally published as SM-5 in 1966. It was revised and republished as Wis JI-Criminal 1 in 1995 and revised in 2000 and 2011. This revision was approved by the Committee in October 2015; it reflected a change in the title of Wis JI-Criminal 180.

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5 COMMENT: GENDER NEUTRAL LANGUAGE

This is intended to explain the Committee's approach to the use of gender neutral language in the Wis JI-Criminal and to provide references for users who wish to use gender neutral language in revising or supplementing the published instructions.

Substantive Gender Bias

The Committee attempts to prepare instructions that are free from substantive gender bias. By substantive bias, we mean statements that indicate that one gender is to be treated differently from the other in applying the law as described in the instructions. An example would be indicating that a witness was less likely to be credible because of gender.[1]

Pronouns

The instructions, as originally drafted, followed then-accepted rules of grammar and statutory drafting in using the masculine form of pronouns to refer to antecedents of mixed or unknown gender.[2] In 1991, the Committee agreed that the general use of the masculine form of pronouns was perceived as gender bias and determined that it should be avoided. The Committee began redrafting the instructions to avoid using the masculine form using several different techniques.[3]

Beginning with Release No. 28 in December 1991, general instructions commonly used in most cases have been reviewed to eliminate the masculine form of pronouns. Instructions published before Release No. 28 have also been reviewed and modified accordingly. The Committee has found that it is necessary to review each instruction individually to ensure that no substantive changes result from changing or eliminating a pronoun.[4]

The Committee's current drafting format requires that all new instructions use gender neutral language.[5] Where a defendant or victim's name is not appropriate, instructions include reference to "he or she" and "him or her."

References to the Defendant

The instructions, as originally drafted, used masculine pronouns to refer to the criminal defendant. The Committee did not believe that such a formatting style implicated concerns of gender neutrality because it was expected that all such references would be modified when the case involved a female defendant. The Committee has always assumed that the

published instructions will be tailored to the facts of each case. This includes modifying all pronouns to match their antecedents, as failure to do so may confuse the jury. See the dissenting opinion in Betchkal v. Willis, 127 Wis.2d 177, 190, 378 N.W.2d 684 (1985). The Committee's current drafting format provides both "he" and "she" pronouns when referring to the criminal defendant.[6]

Where users encounter an instruction that has not yet been revised in accord with these principles, some of the techniques described in the notes below may help with any revision that may be required.[7]

COMMENT

Wis JI-Criminal 5 was approved by the Committee in December 1991. This revision was approved by the Committee in December 2022; it updated the comment to more accurately reflect the position of scholarly writing and style guides concerning the use of gender neutral language.

The 1991 recommendations for revising the uniform jury instructions were made by the Civil Law Subcommittee of the Wisconsin Equal Justice Task Force. While that subcommittee focused on the Wisconsin Jury Instructions-Civil, one of its recommendations provided as follows:

> The Wisconsin Criminal Jury Instructions Committee should review and revise their instructions to remove gendered language and replace it with gender inclusive or gender neutral language and reformat the instructions to allow choices to particularize any instruction for a specific case.

Report of the Wisconsin Equal Justice Task Force, p. 24.

1. No instances of explicit substantive gender bias have been brought to the Committee's attention. To confront the danger of implicit gender bias, the Committee has published Wis JI-Criminal 50 which, in giving the jury general instruction on its duties, includes the following statement:

> All people deserve fair treatment in our system of justice, regardless of their race, national origin, religion, age, ability, gender identity, sexual orientation, education, income level, or any other personal characteristic. People make assumptions and form opinions from their own personal backgrounds and experiences. Generally, we are aware of these things, but you should consider the possibility that you have biases of which you may not be aware which can affect how you evaluate information and make decisions.

2. Section 990.001(2) provides: "Words importing one gender extend and may be applied to any gender."

3. Some of the common techniques are:

- rewriting to avoid the problem. Often, the pronoun or the phrase in which it appears can simply be dropped. Or the sentence can easily be rewritten to make the pronoun unnecessary.

- substituting nouns for pronouns. The instructions often suggest using the name or title of a person; repeating the name or title avoids use of a pronoun and adds clarity as well.

- substituting plural pronouns for a singular pronoun. Using "witnesses . . . their" in place of "witness . . . his" usually works well.

- substituting a gender neutral pronoun. Using "one" in place of "his" or "her" is grammatically correct but often increases the complexity of an instruction, making it more difficult to understand.

- using gender neutral terms. The instructions typically use "police officer" instead of "policeman," "firefighter" instead of "fireman," etc.

For a summarization of these and other techniques, see Garner, A Dictionary of Modern Legal Usage, p. 499 (Oxford, 1987) and Melinkoff, Legal Writing: Sense and Nonsense, pp. 48 51 (West, 1982). Several other guides are also available. It has been the Committee's experience that rewriting can virtually always increase gender neutrality and clarity at the same time.

4. Changes in meaning can result if pronouns are changed without a careful eye on the substantive effect. For example, a criminal statute was revised several years ago to substitute "in personal possession" for "in his possession." See § 943.12, Possession of Burglarious Tools. One could argue that "personal possession" has a specific substantive meaning that changed the statute.

5. The Committee believes it is following the view of most of the commentators on current usage in general and the law in particular. While the rules of grammar on the pronoun issue are described as unsettled, there is consensus that it is best to avoid the problem where it is possible to do so. See, for example, Garner, A Dictionary of Modern Legal Usage, p. 499 (Oxford, 1987); Melinkoff, Legal Writing: Sense and Nonsense, pp. 48 51 (West, 1982).

6. The use of singular "they."

The singular "they" is a generic third-person singular pronoun in English. In the past, formal writing and style guides, including the APA Publication Manual, the MLA Handbook, and the AP Stylebook, did not endorse the use of "they" as a singular third-person pronoun. However, most guides now wholly support the use of "they" or accept its use in limited cases as a singular and or gender neutral pronoun. Still, others, like the Chicago Manual of Style, take a stronger stance, deeming it too informal and ungrammatical, and recommend avoiding its use. Nevertheless, such a position is a recommendation, not a prohibition, and allows writers to make the final determination.

The Committee recognizes that such usage continues gaining scholarly acceptance and believes that it is wise to make an effort to determine what is appropriate for a particular situation. Additionally, the Committee believes that it is acceptable to use "they" or "their" instead of "he" or "she" when referring to a single person unless doing so would create undue confusion.

7. See note 3, supra.

50 PRELIMINARY INSTRUCTION: JURORS' CONDUCT; EVIDENCE; TRANSCRIPTS NOT AVAILABLE; CREDIBILITY; SUBSTANTIVE ISSUES; OPENING STATEMENT

Before the trial begins, there are certain instructions you should have to better understand your functions as a juror and how you should conduct yourself during the trial.

Your duty is to decide the case based only on the evidence presented at trial and the law given to you by the court. Anything you may see or hear outside the courtroom is not evidence. All people deserve fair treatment in our system of justice, regardless of their race, national origin, religion, age, ability, gender identity, sexual orientation, education, income level, or any other personal characteristic. People make assumptions and form opinions from their own personal backgrounds and experiences. Generally, we are aware of these things, but you should consider the possibility that you have biases of which you may not be aware which can affect how you evaluate information and make decisions.[1]

You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by any bias for or against any party, witness, or attorney. Personal opinions, preferences or biases have no place in a courtroom, where our goal is to treat all parties equally and to arrive at a just and proper verdict based on the evidence.

Do not begin your deliberations and discussion of the case until all the evidence is presented and I have instructed you on the law. Do not discuss this case among yourselves or with anyone else until your final deliberations in the jury room. This order is not limited to face-to-face conversations. It also extends to all forms of electronic communications.

Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any information about this case or your experience as a juror.

We will stop, or "recess," from time to time during the trial. You may be excused from the courtroom when it is necessary for me to hear legal arguments from the lawyers. If you come in contact with the parties, lawyers, (interpreters,) or witnesses, do not speak with them. For their part, the parties, lawyers, (interpreters,) and witnesses will not contact or speak with the jurors. Do not listen to any conversation about this case.

Do not research any information that you personally think might be helpful to you in understanding the issues presented. Do not investigate this case on your own or visit the scene, either in person or by any electronic means. Do not read any newspaper reports or listen to any news reports on radio, television, over the internet, or any other electronic application or tool about this trial. Do not consult dictionaries, computers, electronic applications, social media, the internet, or other reference materials for additional information. Do not seek information regarding the public records of any party or witness in this case. Any information you obtain outside the courtroom could be misleading, inaccurate, or incomplete. Relying on this information is unfair because the parties would not have the opportunity to refute, explain, or correct it.

Do not communicate with anyone about this trial or your experience as a juror while you are serving on this jury. Do not use a computer, cell phone, or other electronic device,

including personal wearable electronics, applications, or tools with communication capabilities, to share any information about this case. For example, do not communicate by telephone, blog post, e-mail, text message, instant message, social media post, or in any other way, on or off the computer.

Do not permit anyone to communicate with you about this matter, either in person, electronically, or by any other means. If anyone does so despite your telling them not to, you should report that to me. I appreciate that it is tempting when you go home in the evening to discuss this case with another member of your household, but you may not do so. This case must be decided by you, the jurors, based on the evidence presented in the courtroom. People not serving on this jury have not heard the evidence, and it is improper for them to influence your deliberations and decision in this case. After this trial is completed, you are free to communicate with anyone in any manner.

These rules are intended to assure that jurors remain impartial throughout the trial. If any juror has reason to believe that another juror has violated these rules, you should report that to me. If jurors do not comply with these rules, it could result in a new trial involving additional time and significant expense to the parties and the taxpayers.

You are to decide the case solely on the evidence offered and received at trial.

EVIDENCE [WIS JI-CRIMINAL 103]

Evidence is:

First, the sworn testimony of witnesses, both on direct and cross-examination,

regardless of who called the witness.

Second, the exhibits the court has received, whether or not an exhibit goes to the jury room.

Third, any facts to which the lawyers have agreed or stipulated or which the court has directed you to find.

OBJECTIONS [ADD WIS-JI CRIMINAL 148 IF DESIRED]

NOTETAKING [ADD WIS-JI CRIMINAL 55 OR 56 IF DESIRED]

QUESTIONS BY JURORS [ADD WIS-JI CRIMINAL 57 IF DESIRED]

TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY [WIS-JI CRIMINAL 58]

You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced during the trial.

POLICE REPORTS [ADD WIS JI-CRIMINAL 59 IF DESIRED]

CREDIBILITY OF WITNESSES [WIS JI-CRIMINAL 300]

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony

of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

In your determination of credibility, you must avoid any and all bias based on the witness's race, national origin, religion, age, ability, gender identity, sexual orientation, education, income level, or any other personal characteristic.

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

SUBSTANTIVE INSTRUCTIONS – ELEMENTS OF THE CRIME

BURDEN OF PROOF [ADD WIS JI-CRIMINAL 140 IF DESIRED]

OPENING STATEMENTS [WIS JI-CRIMINAL 101]

The lawyers will now make opening statements. The purpose of an opening statement is to give the lawyers an opportunity to tell you what they expect the evidence will show so that you will better understand the evidence as it is introduced during the trial. I must caution you, however, that the opening statements are not evidence.

COMMENT

Wis JI-Criminal 50 was originally published in 1991 and revised in 1995, 1999, 2001, 2003, 2009, and 2020. The 2020 revision expanded on the use of social media and other digital tools. This revision was approved by the Committee in June 2022; it expanded the range of personal characteristics that may affect jurors consideration of the evidence. It also added to the comment.

The 2009 revision added cautions regarding use of computers, cell phones and other electronic communication devices and about communicating via blogs, e mail, text messages, etc. See page 2. The Committee tried to integrate those cautions into the broader concerns addressed by the instruction: deciding the case only on the basis of evidence introduced at trial, not communicating with others about the case while it is pending, and not making up one's mind until all the evidence is in. Communication by jurors after the trial is concluded, whether or not by electronic means, is covered by the general rule that jurors may, but are not required to, discuss their jury service with anyone. See Wis JI-Criminal 525.

The Michigan Supreme Court has adopted a rule requiring judges to instruct jurors not to use electronic communication devices during trials. See, Amendment of Rule 2.511 of the Michigan Court Rules, June 30, 2009, ADM File No. 2008 33.

This instruction as originally published dealt only with juror conduct during the trial. The 1999 revision added the material relating to defining "evidence," credibility, substantive instructions, and opening statements. These are matters that, in the Committee's judgment, are most typically included in the preliminary instructions. Adding other general material or giving fewer instructions than recommended here are matters within the discretion of the individual trial judge. Practice apparently varies as to repeating the instructions included here as part of the final instructions in the case. The Committee concluded that the instructions defining the offense and the instruction on the burden of proof should always be included in the final instructions.

In 2021, the Committee examined the issue of bias as it pertained to the jury instructions. Specifically, a comprehensive review of scholarly articles concerning the emerging concept of implicit bias was

conducted, which included reports from the National Center for State Courts and the American Bar Association. After much discussion, the Committee determined that current non-exhaustive list of personal characteristics should be expanded. Language was also added that clarified that any personal preferences, opinions, prejudices, stereotypes, sympathies, or biases must not influence a juror's decision.

The Committee also concluded that attorneys have an important role in addressing bias. Research regarding the efficacy of jury instructions addressing the impact of implicit bias is still evolving.

1. For further information regarding the selection of impartial juries see, Achieving an Impartial Jury (AIJ) Toolbox, American Bar Association, 17-18 (2015), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf; Elek, J. & Miller, A. The Evolving Science on Implicit Bias: An Updated Resource for the State Court Community, National Center for State Courts (March 2021), https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/911.

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55 NOTETAKING PERMITTED

You are not required to but you may take notes during this trial, except during the opening statements and closing arguments. The court will provide you with materials.

In taking notes, you must be careful that it does not distract you from carefully listening to and observing the witnesses.

You may rely on your notes to refresh your memory during your deliberations. Otherwise, keep them confidential. After the trial, the notes will be collected and destroyed.

COMMENT

Wis JI-Criminal 55 was originally published as Wis JI-Criminal 101 in 1983 and renumbered in 1991. It was republished without substantive change in 2000.

This instruction is drafted to implement § 972.10(1)(a).

Under the statute, the court must decide whether the jury should be allowed to take notes. The only Wisconsin decision discussing notetaking preceded the statute by several years, see Fischer v. Fischer, 31 Wis.2d 293, 142 N.W.2d 857 (1965).

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56 NOTETAKING NOT ALLOWED

Do not take notes during the trial. Taking notes will not be permitted in this case because:

[STATE REASONS].[1]

COMMENT

Wis JI-Criminal 56 was originally published as Wis JI-Criminal 102 in 1983. It was renumbered in 1991 and republished without substantive change in 2000.

1. If notetaking is not allowed, the court must state the reasons for the determination on the record. See § 972.10(1)(a)2.

The statute does not require that the stating of reasons be done in the presence of the jury, but it may be a good practice to tell the jurors why they are not being allowed to take notes.

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57 INSTRUCTION ON JUROR QUESTIONING OF WITNESSES

You will be given the opportunity to submit written questions for the witnesses called to testify in this case. You are not encouraged to submit large numbers of questions because questioning witnesses is primarily the responsibility of counsel. Questions may be submitted only in the following manner.

After both lawyers have finished questioning a witness, and only at this time, if there are additional questions you would like the witness to answer you may then submit a written question for that witness. If you want to submit a question, simply raise your hand and the bailiff will collect your written question. Questions must be directed to the witness and not to the lawyers or the judge. After consulting with counsel, I will determine if your question is legally proper. If I determine that your question may properly be asked, I will ask it. If I do not allow a particular question to be asked, do not guess about what the answer might have been. Do not draw any conclusion from the fact that a question was not asked.

COMMENT

Wis JI-Criminal 57 was originally published in 1992 and republished without substantive change in 2000, when the comment was updated. This revision was approved by the Committee in October 2013; it revised the text and revised the comment to include material that formerly appeared in Special Material 8 Juror Questioning Of Witnesses.

This instruction is provided as a possible guide for those judges who wish to allow jury questioning of witnesses during trial. Questions to the judge from jurors during deliberations raise different issues.

There is no specific statutory or case law authority in Wisconsin requiring or prohibiting juror questioning of witnesses. The only appellate decision to consider the issue is State v. Darcy N. K., 218 Wis.2d 640, 581 N.W.2d 567 (Ct. App. 1998), where the court found that the failure to allow juror questions did not prejudice the defendant. This part of the decision is consistent with the conclusion that trial courts have implied or inherent authority to allow juror questioning. See § 906.11: "The judge shall exercise reasonable control over the mode and order of interrogating witnesses. . . ." The court also concluded that when juror questions are

allowed, "a trial court should employ safeguards recommended by the Criminal Jury Instructions Committee." The court's decision incorporated Section III. Recommended Procedures if Questions are Allowed and Section IV. Jury Instructions from Special Material 8 Juror Questioning Of Witnesses [c. 1992].

The discussion below is a revision of material originally published in SM-8, which was withdrawn when its substance was incorporated here. Section III., referred to in Darcy N. K., appears under the heading Recommended Procedures if Questions are Allowed. The text of JI 57 contains a revised version of the instruction recommended in Section IV. of SM-8, also referred to in Darcy N. K.

Advantages and Disadvantages

a. Advantages
   i. Allows jurors to resolve issues that are important to them.
   ii. Brings out relevant material the lawyers missed.
   iii. Aids jury deliberations by reducing the number of uninformed jurors or resolving questions in the courtroom that would prolong or distract deliberations.
   iv. Increases juror attentiveness.
   v. Increases juror satisfaction; decreases frustration and discontent.
   vi. Helps lawyers direct their cases toward the issues jurors are concerned about.
   vii. Promotes compliance with the admonition that jurors are not to do research on their own.

b. Disadvantages
   i. Disrupts trial strategy of the lawyers who intentionally left a question unasked.
   ii. Jurors anticipate where the case is going and jump ahead of the lawyers.
   iii. Makes jurors less impartial and more partisan.
   iv. Questions may be to the disadvantage of clients.
   v. Disrupts or delays courtroom procedure and order.

If a trial court decides to allow juror questions, notice should be given to counsel. If counsel objects, proceeding with juror questions should be supported by findings on the record.

Recommended Procedures if Questions are Allowed

There appears to be consensus on the basic procedures to be followed if juror questions are allowed. The major aspects are as follows:

a. Whether to allow questions lies within the judge's discretion.
b. Jurors should be given preliminary instructions advising them of the right to submit questions and explaining the procedure to be used.
c. After a witness is interrogated by counsel, but before the witness leaves the stand, the jurors are asked if they have any questions.
d. Questions are submitted in writing to the judge and are shown to the lawyers, who may object without the jury knowing of it.
e. The judge reviews the questions and any objections.
f. If the judge sustains the objection, the jury is advised that questions cannot be asked.
g. If the judge overrules the objection, the judge asks the question.
h. Lawyers are allowed to follow up on issues raised by juror questions.
i. Make a record of the juror questions submitted and asked.

Jury Instructions

If the jury is to be allowed to ask questions, a preliminary instruction telling the jury about the procedure ought to be given. Thus, the content of the instruction is dependent upon the type of procedure that is adopted. Wis JI-Criminal 57 is based on the procedure outlined above.

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58 TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY

You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced during the trial.

COMMENT

Wis JI-Criminal 58 was originally published in 1992 and republished without substantive change in 2000. The Committee approved this revision in April 2022; it added to the comment.

The purpose of this instruction is to correct any misimpressions jurors may have about the immediate availability of written transcripts of the trial testimony.

This is not intended to encourage jury requests for the rereading of testimony. However, "When a jury has questions regarding testimony, 'the jury has a right to have that testimony read back to it, subject to the discretion of the trial judge to limit the reading.'" See State v. Anderson, 2006 WI 77, ¶83, 291 Wis.2d 673, 717 N.W.2d 74 citing Kohlhoff v. State, 85 Wis.2d 148, 159, 270 N.W.2d 63 (1978). Anderson was abrogated in part by State v. Alexander, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126 on different grounds.

[Note: Anderson, supra, was abrogated in part by State v. Alexander, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126. In Alexander, the supreme court held that "Anderson changed what should have been a fact-specific due-process inquiry (did the communication between the judge and jury deny the defendant a fair and just hearing?) into an absolute Confrontation Clause right to be present whenever the trial court speaks with members of the jury. Alexander, supra, ¶28. The court in Alexander thus withdrew all language from Anderson intimating such a right."].

The judge may choose to summarize the testimony in lieu of having it read. Salladay v. Town of Dodgeville, 85 Wis. 318, 323, 55 N.W. 696 (1893). See also, Kohlhoff v. State, supra at 160. In Kohlhoff, the jury requested clarification of the defendant's testimony. Subsequent to this request, a conference was held in chambers and out of the presence of the jury between the defendant, respective counsel, and the trial judge. The record reflects that during the conference, a portion of the testimony was read, and that both

counsel and the defendant participated in regard to the trial judge's summary. However, the record did not set forth in detail what was actually discussed. In its holding, the supreme court took the opportunity to make two observations. First, when a jury poses a question regarding testimony that has been presented, "the judge may, in the exercise of his [or her] discretion, choose to present a summary of the testimony to the jury instead of having it read." Id. at 160. However, the court further provided that "the far better practice is to have the testimony read to the jury." Second, conferences such as the in chambers meeting conducted in Kohlhoff should be fully transcribed. Id. For other cases applying these standards, see State v. Tarrell, 74 Wis.2d 647, 659, 247 N.W.2d 696 (1976); and Jones v. State, 70 Wis.2d 41, 57 58, 233 N.W.2d 430 (1975).

59 POLICE REPORTS

During the course of a trial, the attorneys may refer to or use police reports with witnesses. Normally, these police reports will not be provided to you. If you are not provided with a police report, you should use your collective memory regarding any reference to police reports.

COMMENT

Wis JI-Criminal 59 was approved by the Committee in March 2001.

Because references are made to police reports in so many cases, this instruction has also been incorporated into Wis JI-Criminal 50, **PRELIMINARY INSTRUCTION . . .**

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60 PRELIMINARY INSTRUCTION: USE OF AN INTERPRETER FOR A WITNESS

No matter what language people speak, they have the right to have their testimony heard and understood. You are about to hear a trial in which an interpreter will translate for one or more of the witnesses. The interpreter is required to remain neutral. The interpreter is required to translate between English and [insert appropriate other language] accurately and impartially to the best of the interpreter's skill and judgment.

The evidence you are to consider is only that provided through the official court interpreter. Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English translation. You must disregard any different meaning of the non-English words.

You must evaluate interpreted testimony as you would any other testimony. That is, you must not give interpreted testimony any greater or lesser weight than you would if the witness had spoken English.

ADD THE FOLLOWING IF APPROPRIATE:

[Keep in mind that a person might speak some English without speaking it fluently. That person has the right to the services of an interpreter. Therefore, you shall not give greater or lesser weight to a person's translated testimony based on your conclusions, if any, regarding the extent to which that person speaks English.]

COMMENT

Wis JI-Criminal 60 was originally published in 1994 and revised in 1999. This revision was approved by the Committee in August 2002.

This instruction is intended for use when an interpreter is necessary for translating the testimony of a witness. Interpreters are also used in other situations: where a juror requires an interpreter (see Wis JI-Criminal 61); and, when the defendant requires the assistance of an interpreter (see Wis JI-Criminal 62). See State v. Santiago, 206 Wis.2d 3, 556 N.W.2d 687 (1996), which discusses the different functions of an interpreter.

A Code of Ethics for Court Interpreters was adopted as Chapter SCR 63, effective July 1, 2002.

This instruction is adapted from an instruction from the state of Oregon which is copyrighted by the Oregon State Bar and is reprinted with permission. See Oregon Criminal Jury Instruction Number 1001A, Uniform Criminal Jury Instructions (Oregon CLE 1994). The Oregon instruction is discussed in Vol 8, No. 15 BNA Criminal Practice Manual 331-32 (July 20, 1994).

The Committee concluded that an instruction like this may be helpful in alleviating some of the doubts a jury may have about evaluating testimony presented through an interpreter.

The second paragraph of the instruction is based on an instruction required by the Delaware Supreme Court. See Diaz v. State, 743 A.2d 1166 (Del. Supr. 1999).

The Committee also recommends asking jurors during voir dire whether any of them speak or understand the language involved in the interpretation.

Section 906.04, Wisconsin Rules of Evidence, provides: "An interpreter is subject to the provisions of chs. 901 to 911 relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation."

61 PRELIMINARY INSTRUCTION: USE OF AN INTERPRETER FOR A JUROR

One of the jurors requires help from an interpreter. The role of the interpreter is to provide communications assistance, so that the juror can hear the evidence and participate effectively in jury deliberations. An interpreter must interpret truly, accurately, completely, and impartially, in accordance with the standards prescribed by law and the code of ethics for court interpreters. An interpreter may not offer any opinion on the proceedings, or ask any questions, or participate in the jury's deliberations. An interpreter may not disclose or comment upon anything that happens in jury deliberations unless ordered to do so by the court. During the deliberations, address the juror directly and speak as freely as if an interpreter was not there. Please do not engage the interpreter in conversation, except to speak with the juror.

COMMENT

Wis JI-Criminal 61 was originally published in 2003. This revision updated the Comment and was approved by the Committee in June 2003.

This instruction was based on suggestions of the Wisconsin Supreme Court's Court Interpreter Committee for cases involving hearing impaired jurors. Persons who are not "able to read and understand the English language" are not qualified for jury service; the clerk shall strike their names from the list of prospective jurors. §§ 756.02 and 756.04(9). State v. Carlson, 2003 WI 40, ¶2, 261 Wis.2d 97, 661 N.W.2d 51.

A Code Of Ethics For Court Interpreters was adopted as Chapter SCR 63, effective July 1, 2002.

Two other instructions address the use of an interpreter: Wis JI-Criminal 60 is intended for cases where a witness uses an interpreter; Wis JI-Criminal 62 is intended for cases where the defendant uses an interpreter. See State v. Santiago, 206 Wis.2d 3, 556 N.W.2d 687, which discusses the different functions of an interpreter.

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62 PRELIMINARY INSTRUCTION: USE OF AN INTERPRETER FOR THE DEFENDANT

TO BE GIVEN ONLY UPON THE DEFENDANT'S REQUEST

The defendant requires help from an interpreter. The role of the interpreter is to provide communications assistance, so that the defendant can hear the evidence, understand the proceedings, and communicate with defense counsel.

ADD THE FOLLOWING IF APPROPRIATE:

[Keep in mind that a person might speak some English without speaking it fluently. That person has the right to the services of an interpreter. Therefore, you must not give greater or lesser weight to a person's translated statements based on your conclusions, if any, regarding the extent to which that person speaks English.]

COMMENT

Wis JI-Criminal 62 was approved by the Committee in August 2002.

This instruction was based on suggestions of the Wisconsin Supreme Court's Court Interpreter Committee. A Code Of Ethics For Court Interpreters was adopted as Chapter SCR 63, effective July 1, 2002.

Two other instructions address the use of an interpreter: Wis JI-Criminal 60 is intended for cases where a witness uses an interpreter; Wis JI-Criminal 61 is intended for cases where a juror uses an interpreter. See State v. Santiago, 206 Wis.2d 3, 556 N.W.2d 687, which discusses the different functions of an interpreter.

The Committee concluded that this instruction should be given only if requested by the defendant, because the defendant may prefer not to call attention to the need to use an interpreter.

In cases where the defendant uses a court-appointed interpreter it may be appropriate for the court to assure that the defendant has been made aware of the following admonitions, also suggested by the Court Interpreter Committee:

An interpreter is prohibited from becoming personally involved in this case in any manner. The interpreter may not offer any information or advice to you. If you have any questions during this trial, you should ask your attorney or this court. The interpreter is permitted to interpret such questions but not to answer them. Please do not try to engage the interpreter in any conversation, about this case or about anything at all. If you cannot understand the interpreter, please tell the court.

Because this information is not directed primarily to the jury, the Committee concluded that it need not be published as an instruction. It is included here as a potential resource for the courts.

70 PRELIMINARY INSTRUCTION: DEFENDANT PROCEEDING PRO SE

[TO BE GIVEN IF THE DEFENDANT HAS EXPRESSLY WAIVED COUNSEL AND HAS CHOSEN TO PROCEED PRO SE.]

The defendant has a constitutional right to represent (himself) (herself). I have advised the defendant that the same rules apply whether a lawyer acts for (him) (her) or (he) (she) acts for (himself) (herself). The defendant has decided to represent (himself) (herself) and this decision must not influence your verdict in any manner.

ADD THE FOLLOWING IF STANDBY COUNSEL HAS BEEN APPOINTED:

[I have appointed (name of lawyer) to be available to give legal advice to the defendant if the defendant requests it.][1]

COMMENT

Wis JI-Criminal 70 was originally published in 1998. This revision was approved by the Committee in June 2000.

This instruction is for the case involving a defendant who has expressly waived counsel and has chosen to proceed pro se. It is recommended for use after voir dire is completed and before presentation of the case begins. The Committee concluded that in a case involving a pro se defendant, a jury may wonder why the defendant has no lawyer and that it is best to tell the jury something rather than ignore the issue and possibly encourage speculation. The instruction is adapted in part from No. 1.06, Federal Criminal Jury Instructions, by Potuto, Saltzburg, and Perlman.

This instruction is **not** recommended for use in a case where the defendant has been found to have forfeited the right to counsel. Express waiver and forfeiture of counsel are discussed in detail in **SM-30 WAIVER AND FORFEITURE OF COUNSEL; SELF-REPRESENTATION; STANDBY COUNSEL; "HYBRID REPRESENTATION"; COURT APPOINTMENT OF COUNSEL**.

1. The role of standby counsel is discussed in SM-30, supra, at section IV.

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100 OPENING INSTRUCTIONS

Members of the jury:

The court will now instruct you upon the principles of law which you are to follow in considering the evidence and in reaching your verdict.

It is your duty to follow all of these instructions. Regardless of any opinion you may have about what the law is or ought to be, you must base your verdict on the law I give you in these instructions. Apply that law to the facts in the case which have been properly proven by the evidence. Consider only the evidence received during this trial and the law as given to you by these instructions and from these alone, guided by your soundest reason and best judgment, reach your verdict.

If any member of the jury has an impression of my opinion as to whether the defendant is guilty or not guilty, disregard that impression entirely and decide the issues of fact solely as you view the evidence. You, the jury, are the sole judges of the facts, and the court is the judge of the law only.

COMMENT

Wis JI-Criminal 100 was originally published in 1962, revised in 1983 and republished without change in 1991. This revision was approved by the Committee in May 1999.

This instruction may be given either before the taking of evidence, at the close of the evidence, or at both times.

The second paragraph of the instruction was adapted from a revision of a standard California instruction discussed in Charrow and Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," 79 Columbia L. Rev. 1306, 1342 (1979).

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101 OPENING STATEMENTS

The lawyers will now make opening statements. The purpose of an opening statement is to give the lawyers an opportunity to tell you what they expect the evidence will show so that you will better understand the evidence as it is introduced during the trial. I must caution you, however, that the opening statements are not evidence.

COMMENT

Wis JI-Criminal 101 was originally published in 1999. This revision was approved by the Committee in February 2001.

The 2001 revision modified the second sentence to substitute the phrase "give the lawyers an opportunity to tell you what they expect the evidence will show" for "outline for you what each side expects to prove. " The revision is believed to be a more accurate statement.

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103 EVIDENCE DEFINED

Evidence is:

First, the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness.

Second, the exhibits the court has received, whether or not an exhibit goes to the jury room.[1]

Third, any facts to which the lawyers have agreed or stipulated[2] or which the court has directed you to find.

Anything you may have seen or heard outside the courtroom is not evidence. You are to decide the case solely on the evidence offered and received at trial.

COMMENT

Wis JI-Criminal 103 was originally published in 1983 and republished without change in 1991. This revision was approved by the Committee in December 1999.

The instruction is modeled after an instruction suggested in "Communicating With Juries: Problems And Remedies," by Judge William W. Schwarzer, 69 Calif. L. Rev. 731 (1981).

The 1999 revision added the following to the sentence relating to exhibits: "whether or not an exhibit goes to the jury room." Wis JI-Criminal 155, EXHIBITS, continues to be published as an optional instruction for use where more detailed advice about the status of exhibits is believed to be helpful.

1. Permitting exhibits to be taken to the jury room is a decision resting within the discretion of the trial court. For a discussion of factors bearing on this discretionary decision, see Payne v. State, 199 Wis. 615, 629-30, 227 N.W. 258 (1929).

2. Also see Wis JI-Criminal 162, AGREED FACTS. If the agreed facts go to an element of the crime, a personal waiver by the defendant is required. See State v. Villarreal, 153 Wis.2d 323, 450 N.W.2d 519 (Ct. App. 1989), discussed in Wis JI-Criminal 162, footnote 1 and SM-21, Waiver of Jury Trial, at section III. C. Partial Jury Trial Waiver.

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110 ONE DEFENDANT: SINGLE COUNT: NO INCLUDED OFFENSE

The (information) (complaint) in this case charges that:

[READ THE CHARGE IN THE INFORMATION OR COMPLAINT.]

To this charge, the defendant has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

COMMENT

Wis JI-Criminal 110 was originally published in 1962 and revised in 1979 and 1990. It was republished without substantive change in 2000.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

Where the defendant has entered a special plea of not guilty by reason of mental disease or defect, the court should so instruct by using the appropriate instructions from the series beginning at Wis JI-Criminal 600.

See Wis JI-Criminal 480 for a corresponding instruction on verdicts submitted.

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112 ONE DEFENDANT: SINGLE COUNT: LESSER INCLUDED OFFENSES

The information in this case charges that:

[READ THE CHARGE IN THE INFORMATION.]

To this charge, the defendant has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON THE OFFENSE CHARGED, OMITTING THE LAST PARAGRAPH.]

If you are not so satisfied, you must not find the defendant guilty of (charged crime),[1] and you should consider whether the defendant is guilty of (lesser included crime)[2] in violation of Section _____ of the Criminal Code of Wisconsin, which is a lesser included offense of (charged crime).

Make Every Reasonable Effort to Agree

You should make every reasonable effort[3] to agree unanimously on your verdict on the charge of (charged crime) before considering the offense of (lesser included crime). However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of (charged crime), you should consider whether the defendant is guilty of (lesser included crime).

[READ INSTRUCTION ON THE LESSER INCLUDED OFFENSE,[4] OMITTING THE WORDS: "AS CHARGED IN THE (INFORMATION) (COMPLAINT)" IF THEY APPEAR.]

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant committed (charged crime), the offense charged in the information, you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense(s) I have submitted to you.

If you are not satisfied beyond a reasonable doubt that the defendant committed (either one) (any) of the offenses I have submitted to you, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 112 was originally published in 1962 and revised in 1979, 1985, 1990, 1991, and 1996. It was republished without substantive change in 2000.

The 1996 revision changed the text preceding note 1 to conform it to the approach used in instructions with built-in lesser included offenses. See, for example, Wis JI-Criminal 1012, 1014, 1018, and 1022. The revised language is more consistent with the basic premise of the instruction that unanimous agreement on "not guilty" in the charged crime is not necessary before proceeding to consider the lesser included crime. See note 3, below.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

For an alternative way of handling lesser included offenses, see Wis JI-Criminal 112A. Instead of repeating the full instruction in the lesser included offenses, Wis JI-Criminal 112A focuses on the fact which distinguishes the greater offense from the lesser.

Where the defendant has entered a special plea of not guilty by reason of mental disease or defect, the court should so instruct by using the appropriate instructions from the series beginning at Wis JI-Criminal 600.

Wis JI-Criminal 112 is intended to provide a "bridge" or "transition" between the charged crime and a lesser included offense. Some suggested uniform instructions that deal with two or more related offenses have the "transition" built in, making separate use of Wis JI-Criminal 112 unnecessary. (See, for example, Wis JI-Criminal 1012, 1014, 1018, and 1022 dealing with homicide charges and Wis JI-Criminal 6035 and 6036 dealing with controlled substance charges.)

This instruction refers only to the charge "in the information" rather than to the charge "in the (information) (complaint)" because the Committee concluded that lesser included offenses are submitted almost exclusively where the charged crime is a felony. There may be cases, however, where a misdemeanor offense is charged and a lesser included offense is submitted. For example, an attempt could be submitted as a lesser included offense to a charge of misdemeanor theft or battery. See §§ 939.32(1) and 939.66(4). In such cases, the reference to "information" should be changed to "complaint."

1. Here state the short title of the offense charged. Ordinarily, the Criminal Code titles may be used, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

2. Here state the short title of the lesser included offense.

An instruction on a lesser included offense should be given only if the lesser offense is an included offense under § 939.66 and if the evidence reasonably supports acquittal on the greater offense and conviction on the lesser. See SM-6 for a discussion of the evidentiary rules and of problems that may arise in deciding whether to submit lesser included offenses.

3. This paragraph attempts to provide a bridge between the charged crime and the lesser included offense. An unpublished opinion of the Wisconsin Court of Appeals — Pharr v. State, June 18, 1979 — commended this problem to the attention of the Committee.

The court in Pharr reviewed the prior published version of Wis JI-Criminal 112 and found that it had "inherent infirmities": neither the phrase, "If you find the defendant not guilty," nor, "If, however, you are not so satisfied, . . ." advises the jury how it is to arrive at the conclusion that it is not satisfied of guilt. The following was suggested as an improvement:

> We think a pattern jury instruction would better inform the jury of its options without any coercive effect, if it apprised the jury that when deadlocked upon a less than unanimous vote on the guilt of the defendant with respect to the charge in the information or complaint, it may proceed to consider the next lesser included offense. "Deadlocked" could be defined as the jury's conclusion, after full and complete consideration of the evidence, that unanimous agreement is impossible, and that further deliberation on the charged offense would be fruitless. Similar instructions could be formulated to prescribe the same approach to multiple counts and subsequent lesser included offenses.

The basis for the court's decision was the assumption that it would be error for the instruction to require the jury to be unanimous in finding the defendant not guilty of the charged crime before considering the lesser offense. This conclusion was found to be implicit in earlier Wisconsin Supreme Court decisions, Payne v. State, 199 Wis. 615, 227 N.W. 258 (1929), and Dillon v. State, 137 Wis. 655, 119 N.W. 352 (1909). For a discussion of the advantages and disadvantages of requiring unanimity, see United States v. Tsanas, 572 F.2d 340 (2d Cir. 1978). For the view that requiring unanimity on the offense charged is error, see State v. Ogden, 35 Or. App. 91, 580 P.2d 1049 (1978), and People v. Johnson, 83 Mich. App. 1, 268 N.W.2d 259 (1978).

At the other extreme from requiring unanimity is to allow the jury to consider any of the submitted offenses without regard to sequence. The Pharr decision rejected this theory. Other cases also support the usual practice of asking the jury to first consider the charged crime before moving on to consider lesser included offenses. State v. McNeal, 95 Wis.2d 63, 288 N.W.2d 874 (Ct. App. 1980): Pharr v. Israel, 629 F.2d 1278 (7th Cir. 1980).

The Committee concluded that Wis JI-Criminal 112 treats the problem correctly: the jury is told to make every reasonable effort to reach unanimous agreement on the charged crime before moving on to the lesser included crime.

4. If more than one lesser included offense is submitted, the substance of Wis JI-Criminal 112 should be repeated for each offense.

112A LESSER INCLUDED OFFENSE: ALTERNATIVE STYLE

The information in this case charges that:

[READ THE CHARGE IN THE INFORMATION.]

To this charge, the defendant has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON THE CRIME CHARGED, OMITTING THE LAST PARAGRAPH.]

If you are not so satisfied, you must not find the defendant guilty of (crime charged), and you should consider whether the defendant is guilty of (lesser included crime) in violation of Section _____ of the Criminal Code of Wisconsin, which is a lesser included offense of (crime charged).

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on your verdict on the charge of (crime charged) before considering the offense of (lesser included crime). However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of (crime charged), you should consider whether the defendant is guilty of (lesser included crime).

The difference between (crime charged) and (lesser included crime) is that (crime charged) requires one additional element: (here identify the fact which distinguishes the crime charged from the lesser included crime).

If you are satisfied beyond a reasonable doubt that all the elements of (crime charged) were present, except the element requiring that _____, you should find the defendant guilty of (lesser included crime) .

In other words, if you are satisfied beyond a reasonable doubt that the defendant (here summarize elements of the lesser included crime), you should find the defendant guilty of (lesser included crime) .

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant committed (crime charged) , the offense charged in the information, you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense I have submitted to you.

If you are not satisfied beyond a reasonable doubt that the defendant committed either one of the offenses I have submitted to you, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 112A was originally published in 1985 and revised in 1990 and 1996. It was republished without substantive change in 2000.

The 1996 revision changed the third paragraph of the instruction to conform it to the approach used in instructions with built-in lesser included offenses. See, for example, Wis JI-Criminal 1012, 1014, 1018, and 1022. The revised language is more consistent with the basic premise of the instruction that unanimous agreement on "not guilty" in the charged crime is not necessary before proceeding to consider the lesser included crime. See note 3, Wis JI-Criminal 112.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

This instruction provides an alternative way of presenting a lesser included offense to the jury. The uniform instruction, Wis JI-Criminal 112, requires reading the instruction for the charged crime and also the instruction for the lesser included offense. This will usually result in substantial repetition without clearly identifying the difference between the two offenses.

Wis JI-Criminal 112A highlights the difference between the greater and lesser offenses rather than rereading the full instruction for the lesser included crime. It is especially suitable for those cases where a single element distinguishes the greater from the lesser offense, such as armed robbery and unarmed robbery. Wis JI-Criminal 112A EXAMPLE illustrates how Wis JI-Criminal 112A would be used for such a case.

Wis JI-Criminal 112A is not suitable for cases where the difference between the greater and lesser offenses is not clearly specified by a single element.

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112A EXAMPLE ARMED ROBBERY: ROBBERY (UNARMED)

The information in this case charges that:

[READ THE CHARGE IN THE INFORMATION.]

To this charge, the defendant has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON ARMED ROBBERY, OMITTING THE LAST PARAGRAPH.]

If you are not so satisfied, you must not find the defendant guilty of armed robbery, and you should consider whether the defendant is guilty of unarmed robbery in violation of § 943.32(1) of the Criminal Code of Wisconsin, which is a lesser included offense of armed robbery.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on your verdict on the charge of armed robbery before considering the offense of unarmed robbery. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of armed robbery, you should consider whether the defendant is guilty of unarmed robbery.

The difference between armed robbery and unarmed robbery is that armed robbery requires one additional element: that the defendant used or threatened to use a dangerous weapon.

If you are satisfied beyond a reasonable doubt that all the elements of armed robbery were present, except the element requiring that the defendant used or threatened to use a dangerous weapon, you should find the defendant guilty of unarmed robbery.

In other words, if you are satisfied beyond a reasonable doubt that the defendant took property from the person of _____, that the defendant took the property with the intent to steal, and that the defendant used force against _____ with intent to overcome _____'s physical resistance to the taking or carrying away of the property, you should find the defendant guilty of unarmed robbery.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant committed armed robbery, the offense charged in the information, you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense I have submitted to you.

If you are not satisfied beyond a reasonable doubt that the defendant committed either one of the offenses I have submitted to you, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 112A EXAMPLE was originally published in 1985 and revised in 1990, 1991, and 1997. It was republished without substantive change in 2000.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

115 ONE DEFENDANT: TWO COUNTS

The first count of the (information) (complaint) in this case charges that:

[READ THE CHARGE IN THE FIRST COUNT OF THE INFORMATION OR COMPLAINT.]

To this charge, the defendant has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON THE OFFENSE CHARGED IN THE FIRST COUNT.]

The second count of the (information) (complaint) charges that:

[READ THE CHARGE IN THE SECOND COUNT.]

To this charge, the defendant has also entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON THE OFFENSE CHARGED IN THE SECOND COUNT.]

COMMENT

Wis JI-Criminal 115 was originally published in 1962 and revised in 1979, 1990, and 1991. It was republished without substantive change in 2000.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

Where more than two counts are charged, or where an offense charged includes a lesser offense, this instruction will need to be altered accordingly. If there are two or more counts charging like offenses, the instruction should be altered so that those counts are read in succession and only one instruction given on the elements of that particular offense. See Wis JI-Criminal 115 EXAMPLE.

Where the defendant has entered a special plea of not guilty by reason of mental disease or defect, the court should so instruct by using the appropriate instructions from the series beginning at Wis JI-Criminal 600.

See Wis JI-Criminal 484 for corresponding instruction on verdicts submitted.

115 EXAMPLE MULTIPLE CHARGES OF FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS: THREE VICTIMS

INSTRUCTION RENUMBERED C

SEE WIS JI-CRIMINAL 116 EXAMPLE

COMMENT

Wis JI-Criminal 115 EXAMPLE was originally published in 1987 and revised in 1990 and 2000. It was revised and renumbered as Wis JI-Criminal 116 EXAMPLE in 2004.

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116 MULTIPLE CHARGES OF THE SAME OFFENSE: DIFFERENT VICTIMS

The defendant is charged with three separate counts of (name of offense) .

The first count of the information in this case charges that:

[READ THE CHARGE IN THE FIRST COUNT.]

The second count of the information in this case charges that:

[READ THE CHARGE IN THE SECOND COUNT.]

The third count of the information in this case charges that:

[READ THE CHARGE IN THE THIRD COUNT.]

CONTINUE WITH ADDITIONAL COUNTS AS NECESSARY

The defendant has entered a plea of not guilty to each of these charges which means the State must prove every element of each offense charged beyond a reasonable doubt.

Statutory Definition of the Crime

(Name of offense) , as defined in § _____ of the Criminal Code of Wisconsin is committed by one who (refer to the uniform instruction for the summary definition of the offense) .

State's Burden of Proof

Before you may find the defendant guilty of any count of _____, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following ___elements were present with respect to that count.

Elements of the Crime That the State Must Prove

SET FORTH THE ELEMENTS AS PROVIDED IN THE UNIFORM INSTRUCTIONS, INCLUDING DEFINITIONS. THE WORDING OF SOME ELEMENTS MAY NEED TO BE CHANGED TO FIT THIS FORMAT. IF THE INSTRUCTION CALLS FOR A NAME TO BE USED, IT WILL USUALLY BE SUFFICIENT TO REFER TO "THE PERSON NAMED IN THAT COUNT."[1]

1. As to each count, _____.

2. As to each count, _____.

3. As to each count, _____.

4. As to each count, _____.

CONTINUE WITH ADDITIONAL ELEMENTS OR COUNTS AS NECESSARY

Jury's Decision

THE COMMITTEE RECOMMENDS SEPARATE CLOSING PARAGRAPHS FOR EACH COUNT[2]

If you are satisfied beyond a reasonable doubt that all __ elements of (name of offense) have been proved as to Count One, you should find the defendant guilty of (name of offense) as charged in Count One.

If you are not so satisfied, you must find the defendant not guilty as to Count One.

If you are satisfied beyond a reasonable doubt that all __ elements of (name of offense) have been proved as to Count Two, you should find the defendant guilty of (name of offense) as charged in Count Two.

If you are not so satisfied, you must find the defendant not guilty as to Count Two.

If you are satisfied beyond a reasonable doubt that all __ elements of (name of offense) have been proved as to Count Three, you should find the defendant guilty of (name of offense) as charged in Count Three.

If you are not so satisfied, you must find the defendant not guilty as to Count Three.

CONTINUE WITH ADDITIONAL COUNTS AS NECESSARY

COMMENT

Wis JI-Criminal 116 was approved by the Committee in August 2003.

This instruction is intended to illustrate how Wis JI-Criminal 115 and 484 might be modified for a case involving three charges of the same offense against one defendant. Some changes may also be necessary in the instruction for the underlying offense. It may be helpful to distinguish the counts by referring the name of the victim, the date of the offense, the premises involved, or a similar means of identifying each count. Wis JI-Criminal 116 EXAMPLE shows how the instruction might be adapted for a case involving multiple charges of sexual assault of a child.

The instruction was developed because it had come to the Committee's attention that there had been problems in developing clear and accurate instructions for the multiple count case. Repeating complete instructions for each count is not desirable or necessary. While no single approach is absolutely required or clearly preferable, certain constructions, such as using "either-or," "and-or," "either or both," etc., should, in the Committee's judgment, be avoided. This instruction is offered as an illustration of one way to approach the multiple count case. The objective is to avoid unnecessary repetition while clearly setting forth the facts necessary to constitute each crime charged.

1. For example, applying the model to burglary would yield the following:

1. As to each count, the defendant intentionally entered the building named in that count.
2. As to each count, the defendant entered the building without the consent of the person in lawful possession.
3. As to each count, the defendant knew that the entry was without consent.
4. As to each count, the defendant entered the building with intent to steal.

2. The Committee recommends that separate closing paragraphs be used for each count, as indicated in the instruction. This will assure that the jury focuses on the elements for each charge.

As an alternative, it may be possible to provide a single closing paragraph to cover all counts. Something like the following would be required:

If you are satisfied beyond a reasonable doubt that all ___ elements of (name of offense) have been proved as to any count, you should find the defendant guilty of (name of offense) as charged in that count.

If you are not so satisfied as to any count, you must find the defendant not guilty as to that count.

116 EXAMPLE MULTIPLE CHARGES OF FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS: THREE VICTIMS

The defendant is charged with three separate counts of first degree sexual assault of a child.

The first count of the information in this case charges that:

[READ THE CHARGE IN THE FIRST COUNT.]

The second count of the information in this case charges that:

[READ THE CHARGE IN THE SECOND COUNT.]

The third count of the information in this case charges that:

[READ THE CHARGE IN THE THIRD COUNT.]

The defendant has entered a plea of not guilty to each of these charges which means the State must prove every element of each offense charged beyond a reasonable doubt.

Statutory Definition of the Crime

First degree sexual assault of a child, as defined in § 948.02(1) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with a person who has not attained the age of 13 years.

State's Burden of Proof

Before you may find the defendant guilty of any count of first degree sexual assault of a child, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present with respect to that count.

Elements of the Crime That the State Must Prove

1. As to each count, the defendant had sexual contact with the person named in that count.

2. As to each count, the person named in that count had not attained the age of 13 years.

Meaning of Sexual Contact

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

[THE COMMITTEE RECOMMENDS SEPARATE CLOSING PARAGRAPHS FOR EACH COUNT.][1]

If you are satisfied beyond a reasonable doubt that both elements of first degree sexual assault of a child have been proved as to Count One, you should find the defendant guilty of first degree sexual assault of a child as charged in Count One.

If you are not so satisfied, you must find the defendant not guilty as to Count One.

If you are satisfied beyond a reasonable doubt that both elements of first degree sexual assault of a child have been proved as to Count Two, you should find the defendant guilty of first degree sexual assault of a child as charged in Count Two.

If you are not so satisfied, you must find the defendant not guilty as to Count Two.

If you are satisfied beyond a reasonable doubt that both elements of first degree sexual assault of a child have been proved as to Count Three, you should find the defendant guilty of first degree sexual assault of a child as charged in Count Three.

If you are not so satisfied, you must find the defendant not guilty as to Count Three.

COMMENT

This instruction was originally published as Wis JI-Criminal 115 EXAMPLE in 1987 and revised in 1990 and 2000. This revision renumbered it Wis JI-Criminal 116 EXAMPLE and was approved by the Committee in August 2003.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

This instruction is intended to illustrate how Wis JI-Criminal 116 might be modified for a case involving three charges of the same offense against one defendant. It also illustrates the changes that are necessary in the instruction for the underlying offense (in this example, Wis JI-Criminal 2102, **FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS — § 948.02(1))**.

It had come to the Committee's attention that there had been problems in developing clear and accurate instructions for the multiple count case. While no single approach is absolutely required or clearly preferable, certain constructions, such as using "either-or," "and-or," "either or both," etc., should, in the Committee's judgment, be avoided. Wis JI-Criminal 116 EXAMPLE is, therefore, offered as an illustration of one way to modify and combine the standard instructions for a multiple count case. The objective is to avoid unnecessary repetition while clearly setting forth the facts necessary to constitute each crime charged.

1. The Committee recommends that separate closing paragraphs be used for each count, as indicated in the instruction. This will assure that the jury is accurately informed of the facts necessary to constitute guilt for each charge.

As an alternative, it may be possible to provide a single closing paragraph to cover all counts. Something like the following would be required:

> If you are satisfied beyond a reasonable doubt that both elements of first degree sexual assault have been proved as to any count, you should find the defendant guilty of first degree sexual assault of a child as to that count.
>
> If you are not so satisfied as to any count, you must find the defendant not guilty as to that count.

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117 ONE DEFENDANT: TWO COUNTS: CONVICTION FOR ONLY ONE PROPER

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 117 was originally published in 1964 and revised in 1979. It was withdrawn in 1990. This was republished without change in 2000.

This instruction dealt with a case where two charges were submitted to the jury but conviction for only one was proper. Because such cases seldom, if ever, come up in practice, the Committee concluded that the instruction was no longer necessary and should be withdrawn.

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120 TWO DEFENDANTS: SINGLE COUNT: NO INCLUDED OFFENSE

The (information) (complaint) in this case charges that:

[READ THE CHARGE IN THE INFORMATION OR COMPLAINT.]

To this charge, each of the defendants has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

It is for you to determine, as to each defendant, whether that defendant is guilty or not guilty of the offense charged. You must make a finding as to each defendant separately, and, at the close of these instructions, the court will submit to you separate verdicts regarding each defendant.

[READ INSTRUCTION ON THE OFFENSE CHARGED.]

COMMENT

Wis JI-Criminal 120 was originally published in 1966 and revised in 1979 and 1990. This revision was approved by the Committee in January 2000.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

Where the defendant has entered a special plea of not guilty by reason of mental disease or defect, the court should so instruct by using the appropriate instructions from the series beginning at Wis JI-Criminal 600.

See Wis JI-Criminal 490 for corresponding instruction on verdicts submitted.

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122 TWO DEFENDANTS: SINGLE COUNT: INCLUDED OFFENSE

The information in this case charges that:

[READ THE CHARGE IN THE INFORMATION.]

To this charge, each of the defendants has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION FOR THE CHARGED CRIME, OMITTING LAST TWO PARAGRAPHS.]

If you are satisfied beyond a reasonable doubt that the defendant (first defendant) did (list the elements of the charged crime), you should find the defendant (first defendant) guilty of (charged crime) as charged in the information.

If you are not so satisfied, you must not find the defendant (first defendant) guilty of (charged crime),[1] and you should consider whether (first defendant) is guilty of (lesser included crime),[2] in violation of § ___ of the Criminal Code of Wisconsin, which is a lesser included offense of (charged crime).

If you are satisfied beyond a reasonable doubt that the defendant (second defendant) did (list the elements of the charged crime), you should find the defendant (second defendant) guilty of (charged crime) as charged in the information.

If you are not so satisfied, you must not find the defendant (second defendant) guilty of (charged crime),[3] and you should consider whether (second defendant) is guilty of (lesser included crime),[4] in violation of § ___ of the Criminal Code of Wisconsin, which is a lesser included offense of (charged crime).

Make Every Reasonable Effort to Agree

With respect to each defendant, you should make every reasonable effort[5] to agree unanimously on your verdict on the charge of (charged crime) before considering the offense of (lesser included crime). However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge against one defendant of (charged crime), you should consider whether that defendant is guilty of (lesser included crime).

[READ INSTRUCTION FOR LESSER INCLUDED CRIME, OMITTING LAST TWO PARAGRAPHS.]

If you are satisfied beyond a reasonable doubt that the defendant (first defendant) did (list the elements of lesser included crime), you should find the defendant (first defendant) guilty of (lesser included crime).

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

If you are satisfied beyond a reasonable doubt that the defendant (second defendant) did (list the elements of the lesser included crime), you should find the defendant (second defendant) guilty of (lesser included crime).

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

It is for you to determine, as to each defendant, whether that defendant is guilty or not guilty of an offense. You must make a finding as to each defendant separately, and, at the close of these instructions, the court will submit to you separate verdicts regarding each defendant.

You are not, in any event, to find a defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that a defendant committed (charged crime), the offense charged in the information, you should find that defendant guilty of that offense, and you must not find that defendant guilty of the other lesser included offense I have submitted to you.

If you are not satisfied beyond a reasonable doubt that a defendant committed either one of the offenses I have submitted to you, as to that defendant you must make a finding of not guilty.

COMMENT

Wis JI-Criminal 122 was originally published in 1962 and revised in 1979, 1990, and 1996. This revision was approved by the Committee in January 2000.

The 1996 revision changed the text preceding notes 1 and 3 to conform it to the approach used in instructions with built-in lesser included offenses. See, for example, Wis JI-Criminal 1012, 1014, 1018, and 1022. The revised language is more consistent with the basic premise of the instruction that unanimous agreement on "not guilty" in the charged crime is not necessary before proceeding to consider the lesser included crime. See note 3, Wis JI-Criminal 112.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

Where the defendant has entered a special plea of not guilty by reason of mental disease or defect, the court should so instruct by using the appropriate instructions from the series beginning at Wis JI-Criminal 600.

See Wis JI-Criminal 492 for corresponding instruction on verdicts submitted.

This instruction refers only to the charge "in the information" rather than to the charge "in the (information) (complaint)" because the Committee concluded that lesser included offenses are submitted almost exclusively where the charged crime is a felony. There may be cases, however, where a misdemeanor offense is charged and a lesser included offense is submitted. For example, an attempt could be submitted as a lesser included offense to a charge of misdemeanor theft or battery. See §§ 939.32(1) and 939.66(4). In such cases, the reference to "information" should be changed to "complaint."

1. Here state the short title of the offense charged. Ordinarily, the Criminal Code titles may be used, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

2. Here state the short title of the lesser included offense.

3. Note 1, supra.

4. Note 2, supra.

5. See note 3, Wis JI-Criminal 112.

125 TWO DEFENDANTS: TWO COUNTS

The first count of the (information) (complaint) in this case charges that:

[READ THE CHARGE IN THE FIRST COUNT OF THE INFORMATION OR COMPLAINT.]

To this charge, each of the defendants has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON THE OFFENSE CHARGED IN THE FIRST COUNT.]

The second count of the (information) (complaint) charges that:

[READ THE CHARGE IN THE SECOND COUNT.]

To this charge, each of the defendants has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON THE OFFENSE CHARGED IN THE SECOND COUNT.]

It is for you to determine, as to each defendant, whether that defendant is guilty or not guilty of the offenses charged in the (information) (complaint). You must make a finding as to each defendant separately, and, at the close of these instructions, the court will submit to you separate verdicts regarding each defendant.

COMMENT

Wis JI-Criminal 125 was originally published in 1962 and revised in 1979, 1990, and 1991. This revision was approved by the Committee in January 2000.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

Where there are more than two counts, or where an offense charged includes a lesser offense, this instruction will need to be altered accordingly. If there are two or more counts charging like offenses, the instruction should be altered so that those counts are read in succession and only one instruction given on the elements of that particular offense.

Where the defendant has entered a special plea of not guilty by reason of mental disease or defect, the court should so instruct by using the appropriate instructions from the series beginning at Wis JI-Criminal 600.

See Wis JI-Criminal 494 for corresponding instruction on verdict submitted.

127 TWO DEFENDANTS: TWO COUNTS: CONVICTION FOR ONLY ONE PROPER

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 127 was originally published in 1962 and revised in 1979. It was withdrawn in 1990. This was republished without change in 2000.

This instruction dealt with a case where two charges were submitted to the jury but conviction for only one was proper. Because such cases seldom, if ever, come up in practice, the Committee concluded that the instruction was no longer necessary and should be withdrawn.

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128 CHARGES DISPOSED OF DURING TRIAL

At the beginning of the trial, I described the charges against the defendant. Count specify number , charging identify crime , has been disposed of[1] and is no longer part of this case. Count specify number , charging identify crime , remains. Do not guess about or concern yourselves with the reasons for this disposition. It must not affect your consideration of the charges that remain.

[Do not consider evidence that related only to the count that has been disposed of.][2]

COMMENT

Wis JI-Criminal 128 was approved by the Committee in February 2014.

This instruction is intended to be used when charges are disposed of during trial. The jury would have been informed of all charges at the beginning of the trial and should be advised not to concern themselves with why those charges are no longer in the case.

1. The term "disposed of" is used because it is general enough to apply to two common situations: where a count is dismissed during trial and where a guilty plea is entered to a count after trial has begun.

2. The sentence in brackets should be given when the judge decides that it would be helpful to the jury after considering the specific facts in the case. Sometimes evidence may be easily distinguished as pertaining only to the disposed-of counts, as where the events leading to the charge occurred on a different date than the remaining counts. Other times, the evidence may relate to a single occurrence that supported the multiple charges and separating the evidence may not be possible. If there has been a motion to strike certain evidence – because it related only to a disposed-of count – the jury should be instructed to disregard the stricken evidence. Where the evidence relating to the disposed-of count is unfairly prejudicial to the defendant, the court may need to evaluate the need for a mistrial.

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140 BURDEN OF PROOF AND PRESUMPTION OF INNOCENCE

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

Presumption of Innocence

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

State's Burden of Proof

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

Reasonable Hypothesis

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

Meaning of Reasonable Doubt

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

of life.[4]

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

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

COMMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

jury believes and relies upon to support its verdict.

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

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

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

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

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

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140A BURDEN OF PROOF: FORFEITURE ACTIONS

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

The burden of establishing every fact necessary to constitute guilt is upon the (State) (City) (County) of _____. Before you can return a verdict of guilty, you must be satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the defendant is guilty.

Clear, satisfactory, and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that the defendant is guilty because of its greater weight and clear convincing power.

"Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.

COMMENT

This instruction replaced Wis JI-Criminal 2050 (81962) in 1993. It was revised in 1998 to update the Comment. It was republished without substantive change in 2000 when it was renumbered from Wis JI-Criminal 140.1 to 140A. This revision was approved by the Committee in October 2010. It added the last two paragraphs, which are adapted from Wis JI-Civil 205.

This instruction is intended for use as part of the general instructions immediately following the instruction on the offense charged. Instructions are published for several forfeiture actions, primarily for traffic offenses. A model for offenses not covered by published instructions is also provided, see Wis JI-Criminal 2680.

The suggested order of instructions for forfeiture actions is as follows:

Wis JI-Criminal 100 – OPENING INSTRUCTIONS (First paragraph only)
110 – ONE DEFENDANT: SINGLE COUNT: NO INCLUDED OFFENSE
___ – [INSTRUCTION ON OFFENSE CHARGED]
140A – BURDEN OF PROOF: FORFEITURE ACTIONS
190 – WEIGHT OF EVIDENCE
300 – CREDIBILITY OF WITNESSES
460 – CLOSING INSTRUCTION
480 – VERDICTS SUBMITTED FOR ONE DEFENDANT: SINGLE COUNT
515A – FIVE-SIXTHS VERDICT AND SELECTION OF PRESIDING JUROR: FORFEITURE ACTIONS

The "clear, satisfactory, and convincing" standard applies to forfeiture actions involving acts which are also made criminal by state statute. See City of Milwaukee v. Wilson, 96 Wis.2d 11, 21-22, 291 N.W.2d 452 (1980). The same standard applies to all municipal ordinance violations tried in municipal court, see § 800.08(3). Apparently, an ordinance violation with no criminal counterpart, tried in circuit court, may require only the regular civil burden of proof. There appears to be no logical reason for this anomaly.

141 WHERE IDENTIFICATION OF DEFENDANT IS IN ISSUE

The identification of the defendant is an issue in this case and you should give it your careful attention. You should consider the reliability of any identification made by a witness, whether made in or out of court. You should consider the credibility of a witness making an identification of the defendant in the same way you consider credibility of any other witness.

Identification evidence involves an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and later to make a reliable identification.

Consider the witness' opportunity for observation, how long the observation lasted, how close the witness was, the lighting, the mental state of the witness at the time, the physical ability of the witness to see and hear the events, and any other circumstances of the observation.

You should also consider the period of time which elapsed between the witness' observation and the identification of the defendant and any intervening events which may have affected or influenced the identification.

In evaluating the identification evidence, you are to consider those factors which might affect human perception and memory and all the influences and circumstances relating to the identification. Then give the evidence the weight you believe it should receive.

If you find that the crime alleged was committed, before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the defendant is the person

who committed the crime.

COMMENT

Wis JI Criminal 141 was originally published in 1971 and revised in 1980, 1987, 1991, 2000, 2005, 2006, 2008, 2012, and 2013. This revision was approved by the Committee in August 2021; it added to the Comment.

The Committee has reviewed this instruction often in recent years, as issues relating to eyewitness identification have received increased attention in the appellate courts. The following offers a helpful summary of the current state of knowledge on eyewitness identification and cites many of the leading articles: Richard A. Wise and Martin A. Safer, "A Survey of Judges' Knowledge and Beliefs About Eyewitness Testimony," pp. 6 16, Court Review, Spring 2003.

In 2004, the Committee considered a range of alternatives before publishing a revised instruction in 2005 that, in the Committee's judgment, reflects the best approach. Despite the attention being paid to identification issues, the Committee did not discover a new model instruction that it believed was suitable for adoption in Wisconsin. The 2005 revision borrowed a few sentences from Instruction 3.06, Federal Jury Instructions of the Seventh Circuit (West 1980). [Note: That instruction has been substantially modified in the current 7th Circuit instructions. See No. 308, Pattern Criminal Jury Instructions for the Seventh Circuit (1998).]

The 2005 revision attempts to communicate the principle that the same considerations apply to identification witnesses as to other witnesses but that the identification issue deserves careful attention. Thus, some of the material repeats considerations included in the general credibility instruction. See Wis JI-Criminal 300. Minor additions were made to the text of the instruction in the 2006 revision. Subsequent revisions have added to and reorganized the Comment.

Jury instructions are one part of the response to perceived special problems with eyewitness identification testimony. Wisconsin cases addressing these issues are summarized below. The potential importance of a jury instruction on eyewitness identification, in the context of other safeguards, was recognized by the United States Supreme Court in Perry v. New Hampshire, 565 U.S. 228, 132 S.Ct. 716 (2012). The issue was whether rules regarding pretrial screening of allegedly suggestive identification procedures applied where police were not responsible for the suggestiveness. The court concluded they were not, in part because of the availability of other safeguards:

> When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

The Perry decision includes a reference to specific cautionary jury instructions used in a variety of jurisdictions. [See the decision at footnote 7.]

Wisconsin Cases Citing Wis JI-Criminal 141

Wis JI-Criminal 141 [© 1971] was cited with approval in Chapman v. State, 69 Wis.2d 581, 230

N.W.2d 824 (1975), State v. Williamson, 84 Wis.2d 370, 267 N.W.2d 337 (1978), and Hampton v. State, 92 Wis.2d 450, 285 N.W.2d 868 (1979. In all three cases, the Wisconsin Supreme Court upheld the trial court's refusal to give a more detailed identification instruction of the type adopted by several circuits of the United States Court of Appeals under their supervisory powers. See, for example, United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972) and United States v. Hodges, 515 F.2d 650 (7th Cir. 1975).

In Blackwell v. State, 42 Wis.2d 615, 167 N.W.2d 587 (1969), the court recognized that giving an identification instruction "should be encouraged in narcotics-undercover agent cases" because "there is a stronger possibility of misidentification in narcotics cases where an undercover agent may file as many as 100 arrest warrants upon completion of his term of duty." Blackwell, 42 Wis.2d at 625, citing, Salley v. United States, 353 F.2d 897 (D.C. Cir. 1965).

Also see Johnson v. State, 85 Wis.2d 22, 270 N.W.2d 153 (1978), State v. McGee, 52 Wis.2d 736, 190 N.W.2d 893 (1971), and Johns v. State, 14 Wis.2d 119, 109 N.W.2d 490 (1961).

In State v. Amos, 153 Wis.2d 257, 278, 450 N.W.2d 503 (Ct. App. 1989), the court endorsed Wis JI-Criminal 141 as a correct statement of the law in the context of rejecting the defendant's claim that the trial court erred in refusing to give a requested theory of defense instruction (that someone else committed the crime). On theory of defense instructions generally, see Wis JI-Criminal 700.

The Wisconsin Supreme Court reviewed a trial court's refusal to give the more detailed version of Wis JI-Criminal 141 in State v. Waites, 158 Wis.2d 376, 462 N.W.2d 206 (1990). The court held that ". . . the circuit court did not abuse its discretion by giving the limited version of Wis JI-Criminal 141. The limited version, in combination with other instructions and evidence presented to the jury during the trial, sufficiently focused the jury's attention on the issue of identification." 158 Wis.2d 376, 380. However, the court recommended the use of the more detailed instruction in some cases:

> We recognize the dangers inherent in identification testimony when the identity of the criminal is an important issue in a case. In such an instance, we recommend the use of the more detailed instruction to avoid subsequent challenges to the accuracy of such jury instructions. We do not, however, require that the more detailed instruction be given in all situations where the accuracy of the eyewitness identification is an issue. Such a holding would remove some of the circuit court's discretion in giving instructions. Rather, we conclude that the circuit court should determine whether to give the more detailed instruction, basing its decision on factors such as the significance of the identification issue, the nature of other instructions and the danger of misidentification. This determination is not subject to reversal unless the circuit court abuses its discretion.

158 Wis.2d 376, 383 84.

Wisconsin Cases Considering Eyewitness Identification Issues

In State v. Roberson, 2019 WI 102, 389 Wis.2d 190, 935 N.W.2d 813, the Wisconsin Supreme Court abrogated State v. Dubose, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, rejecting its necessity test that applied to the admissibility of show-up identification testimony. The Wisconsin Supreme Court reaffirmed that reliability is the linchpin in determining the admissibility of identification testimony. It held that "Due process does not require the suppression of evidence with sufficient 'indicia of reliability.'" Id. ¶3, citing Perry v. New Hampshire, 565 U.S. 228, 232 (2012). The Wisconsin Supreme Court reaffirmed pre-Dubose case law establishing the following test for the admissibility of eyewitness identification testimony: "A

criminal defendant bears the initial burden of demonstrating that a showup was impermissibly suggestive. If a defendant meets this burden, the State must prove that "under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." Id. ¶4.

In State v. Shomberg, 2006 WI 9, 288 Wis.2d 1, 709 N.W.2d 370, the Wisconsin Supreme Court addressed the admissibility of expert testimony on matters relating to identification procedures. The court held that it was not error to exclude expert testimony in a trial to the court held in 2002. But the court noted that "in the intervening years, much has been learned about the processes and limitations of memory," pointing to the court's decision in Dubose (now since abrogated as noted above) new guidelines for identification procedures promulgated by the Wisconsin Department of Justice, and the recently enacted "Criminal Justice Reform Act," 2005 Wisconsin Act 60. The court also noted:

> ¶17. Were this case to come before the circuit court today, given the developments that have occurred in the interim, it is highly likely that the judge would have allowed the expert to testify on factors that influence identification and memory.

The court declined to adopt "a presumption of admissibility" of expert testimony in eyewitness identification cases, citing concern that doing so would all but eliminate circuit court discretion. "However, we encourage circuit court judges to carefully consider, in each case, whether the admissibility of the eyewitness expert testimony would be helpful to the trier of fact." 2006 WI 9, ¶43.

In State v. Hibl, 2006 WI 52, ¶31, 290 Wis.2d 595, 714 N.W.2d 194, the Wisconsin Supreme Court recognized that an identification derived from an accidental confrontation resulting in a witness's spontaneous identification lacking law enforcement involvement does not implicate the defendant's due process rights. Although most such identifications will be for the jury to assess, the circuit court still has a limited gate-keeping function. It may exclude such evidence under § 904.03 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The court elaborated on the circuit court's obligation:

> In exercising its gate-keeping function, the court should consider whether cross-examination or a jury instruction will fairly protect the defendant from the unreliability of the identification. . . We urge circuit courts, with assistance from the litigants before them, to take into consideration the evolving body of law on eyewitness identification. Any test for reliability and suggestiveness in the eyewitness identification context should accommodate this still-evolving jurisprudence, along with the developing scientific research that forms some of its underpinnings.
> 2006 WI 52, &54.

Jury Instructions on Eyewitness Identification

For many years, the most-cited eyewitness identification instruction was the "Telfaire" instruction. It takes its name from the case in which it was offered as a model for use in the District of Columbia, United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). The text of the complete Telfaire instruction can be found at 469 F.2d 552 (D.C. Cir. 1972), at 558 (Appendix). The Committee concluded that including a long list of factors like that in the Telfaire model was not an effective approach. The jury should be told how to evaluate those factors in light of the circumstances in the particular case. This, in the Committee's judgment, is more effectively done by advocacy by the lawyers than by a listing of factors by the court.

The Committee specifically rejected language in the Telfaire instruction and in other models that advises the jury that they must find the defendant not guilty if there is a reasonable doubt about the accuracy of the eyewitness identification. The Committee concluded that this statement goes too far: there may be

sufficient evidence in addition to the identification that could overcome weakness in the identification and satisfy the "beyond a reasonable doubt" standard.

The American Bar Association Criminal Justice Section completed an extensive review of eyewitness identification procedures in 2004, including a review of jury instructions. That study concluded that the Telfaire instruction "omits many important factors and can be misleading, for example, by suggesting witness confidence is a good predictor of eyewitness accuracy when the research shows otherwise." American Bar Association Statement Of Best Practices For Promoting The Accuracy Of Eyewitness Identification Procedures Dated August, 2004. [Available on the ABA website: www.abanet.org/leadership/2004/ annual/111c.doc.] The report identified a modified instruction based on Telfaire and the instruction provided in People v. Wright, 43 Cal. 3d 399 (1987), as having been recognized as better approaches.

The Kansas Supreme Court has ordered trial judges to stop using jury instructions that told jurors they could consider how certain the witness was in evaluating an identification. The court concluded that "witness certainty" is a poor indicator of the reliability of an identification. Mitchell v. Kansas, No. 99,163, May 11, 2012.

On July 19, 2012, the New Jersey Supreme Court, by rule, approved new jury instructions on eyewitness identification, use of which will be required after Sept. 4, 2012. There are actually three instructions B one for in-court IDs, one for out-of-court IDs, and one for in- and out-of-court IDs. They are based on State v. Henderson, 208 N.J. 208 (2011), which directed that new instructions be prepared that focus on various factors recognized by research.

Cross-racial Identifications

The Committee considered adding something to the instruction to address cross-racial identifications but decided that a generally applicable statement could not be drafted. The propriety of an instruction on this factor, and any other relating to influences on the identification process, depends on there being an evidentiary basis for the existence of the factor and for the effect it is accorded. The latter may be satisfied by expert testimony or a recognition by appellate courts. Some courts have recognized that special considerations apply to cross-racial identifications. For example, the New Jersey Supreme Court has directed trial courts to address the issue. See, State v. Cromedy, 727 A.2d 457 (N.J. 1999). Other courts have held that a special instruction on cross-racial identification is not required. See, for example, Smith v. State, 857 A.2d 1198 (Md. App. 2004), which includes an extensive discussion of the issue and references to many relevant resources. The Wisconsin Supreme Court has not required a special instruction and has referred to the issue only indirectly: ". . . [I]n this case, the usual dangers inherent in eyewitness identification may have been exacerbated because this was a cross-race identification." State v. McMorris, 213 Wis.2d 156, 170, 570 N.W.2d 384 (1997). A footnote to the quoted material cited articles discussing cross-race identification. 213 Wis.2d 156, 170, at footnote 9. While some model instructions reviewed by the Committee refer to "common knowledge" or to what "studies show" in describing a factor's effect on the identification process, the Committee concluded that those were not sufficient bases on which to base an instruction to the jury on the cross-racial issue or any other specified factor

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145 INFORMATION NOT EVIDENCE

(An information) (A complaint) is nothing more than a written, formal accusation against a defendant charging the commission of one or more criminal acts. You are not to consider it as evidence against the defendant in any way. It does not raise any inference of guilt.[1]

COMMENT

Wis JI-Criminal 145 was originally published in 1962. Footnote 1 was added in 1976. It was republished without substantive change in 1992 and 2000.

1. Where two or more charges are joined in a single information, there may be a need for a cautionary instruction to cure the possible prejudice to the defendant. Peters v. State, 70 Wis.2d 22, 223 N.W.2d 420 (1975). The instruction is most effective if given at the time the verdict is submitted. Give Wis JI-Criminal 484.

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146 PRECAUTIONARY STATEMENT: ANONYMOUS AND "NUMBERS" JURIES

INCLUDE THE FOLLOWING WHEN THE COURT HAS DETERMINED THAT JURORS WILL NOT BE REFERRED TO BY NAME OR THAT OTHER JUROR INFORMATION MUST BE RESTRICTED

I have decided that for the convenience of court and counsel, we will refer to jurors by numbers. This should not influence your verdict in any manner.

COMMENT

This instruction was approved by the Committee in April 2003.

Whenever a court restricts any juror information, including referring to a juror by number instead of by name, the court must make an individualized determination that the restriction of information is necessary and must take reasonable precautions to minimize any prejudicial effect to the defendant. When juror information is restricted, there is a danger that the jurors will interpret the special measures as reflecting on the defendant's guilt or character. The general instruction on the presumption of innocence is not sufficient to address this issue. Therefore, "the circuit court, at a minimum, must make a precautionary statement to the jury that the use of numbers instead names should in no way be interpreted as a reflection of the defendant's guilt or innocence. . . A precautionary statement must not mislead a jury, but must be based on factors and influences that are relevant in a particular case." State v. Tucker, 2003 WI 12, ¶23, ¶24.

While it may be necessary to tailor the precautionary statement for the facts of a particular case, the Committee offers this instruction as a general model.

In State v. Britt, 203 Wis.2d 25, 553 N.W.2d 528 (Ct. App. 1996), the trial court had ruled that the jurors' names, addresses, and places of employment could not be publicly revealed in open court or on the record; however, both parties had access to all juror information via written questionnaires. This was considered to be an "anonymous jury" and its use upheld by the court of appeals because there was a strong reason to believe that the jury needed protection and reasonable precautions were taken to minimize any prejudicial effect to the defendant.

In State v. Tucker, 2003 WI 12, ___ Wis.2d ___, 657 N.W.2d 374, the trial court used only numbers to refer to the jurors, although both parties had access to all juror information, including the jurors' names. The Wisconsin Supreme Court held that this practice, termed a "numbers jury," was subject to the same requirements as those that apply to an anonymous jury and found that the trial court erred in two respects. First, the trial court did not make an individualized determination that the jurors needed protection based on the specific circumstances of the case. Second, the trial court did not take adequate precautions to minimize any prejudicial effect.

See SM-20, Voir Dire, for further discussion of anonymous and "numbers" juries.

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147 IMPROPER QUESTIONS

Disregard entirely any question that the court did not allow to be answered. Do not guess at what the witness' answer might have been. If the question itself suggested that certain information might be true, ignore the suggestion and do not consider it as evidence.

COMMENT

Wis JI-Criminal 147 was originally published in 1962 and revised in 1983 and 1991. This revision made nonsubstantive editorial changes and was approved by the Committee in May 1999.

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148 OBJECTIONS OF COUNSEL; EVIDENCE RECEIVED OVER OBJECTION

Attorneys for each side have the right and the duty to object to what they consider are improper questions asked of witnesses and to the admission of other evidence which they believe is not properly admissible. You should not draw any conclusions from the fact an objection was made.

By allowing testimony or other evidence to be received over the objection of counsel, the court is not indicating any opinion about the evidence. You jurors are the judges of the credibility of the witnesses and the weight of the evidence.

COMMENT

This instruction was originally published as Wis JI-Criminal 215 in 1962 and revised in 1983 and 1991. This revision renumbered it as Wis JI-Criminal 148 and was approved by the Committee in May 1999.

The weight of the evidence and the credibility of witnesses is for the jury. Haley v. State, 207 Wis. 193, 196, 240 N.W. 829 (1932); State v. John, 11 Wis.2d 1, 11, 103 N.W.2d 304 (1960); State v. Lunz, 86 Wis.2d 695, 705, 273 N.W.2d 767 (1979).

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150 STRICKEN TESTIMONY

During the trial, the court has ordered certain testimony to be stricken. Disregard all stricken testimony.

COMMENT

Wis JI-Criminal 150 was originally published in 1962, revised in 1983, and republished without change in 1992. This revision added to the comment and was approved by the Committee in May 1999.

This instruction may be given at the time the testimony is stricken, at the end of the trial, or at both times.

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152 VIEW OF SCENE[1]

You will now be taken to _____ in the custody of the bailiff.

During your trip to and from _____, or while there, you are not to discuss this case with anyone. While at _____, you are not to talk, and no one is to talk to you about the case except the judge.

You are to remain with the other jurors. You are not to conduct an independent investigation of _____ now or at any time during the trial.

Going to _____ is to enable you to better understand the evidence which is introduced in the courtroom and to assist you in weighing and applying that evidence.

What you see there is not evidence in the case and should not be considered as evidence.[2]

COMMENT

Wis JI-Criminal 152 was originally published in 1966 and revised in 1983 and 1991. This revision added footnote 2 and was approved by the Committee in May 1999.

Section 972.06 provides that the "court may order a view by the jury."

A view of the premises is discretionary with the court. Max L. Bloom Co. v. United States Casualty Co., 191 Wis. 524, 529-30, 210 N.W. 689 (1927).

It is improper for counsel to call the attention of the jurors to facts at the scene. Sasse v. State, 68 Wis. 530, 537, 32 N.W. 849 (1887). Where attorneys desire that the jury notice certain things at the site viewed, they should not take it upon themselves to point these out but should work through the court.

1. The instruction is to be given prior to the view. Upon returning from the view, or at the end of the case, or at both times, it may be appropriate to repeat the last two paragraphs, modified as follows:

> Going to (state what was viewed) was to enable you better to understand the evidence presented in the courtroom, and to assist you in weighing and applying that evidence.
>
> What you saw there is not evidence in the case and should not be considered as evidence.

2. The Committee realizes that the distinction that this instruction attempts to make can be a difficult one. Specifically, the troublesome statement is: "What you see there is not evidence in the case and should not be considered as evidence."

However, the Committee confirmed that this is a correct statement of the law. The most recent case to address jury views is State v. Coulthard, 171 Wis.2d 573 (Ct. App. 1992). The court stated: "The purpose of a jury view is to assist the jury in understanding the evidence." Citing: Townsend v. State, 257 Wis. 329, 43 N.W.2d 458 (1950).

In State v. Marshall, 92 Wis.2d 101, 284 N.W.2d 592 (1979), also cited in Coulthard, the court upheld the trial court's decision to allow a view and stated: ". . . the jury was specifically instructed that the view of the scene was not evidence and was not to be considered by it as evidence."

Section 805.08(4) allows jury views in civil cases:

> (4) Jury View. On motion of any party, the jury may be taken to view any property, matter or thing relating to the controversy between the parties when it appears to the court that the view is necessary to a just decision. . . .

In American Family Mutual Insurance Co. v. Shannon, 120 Wis.2d 560, 356 N.W.2d 175 (1984), the court found it was error for the trial judge, sitting without a jury, to make "an unrequested, unannounced, unaccompanied and unrecorded" view of an accident scene. After concluding that the same rules apply to views by the judge or a jury, the court reiterated the standard reflected in Wis JI-Criminal 152:

> . . . the viewing of the scene by a judge is justified if it enables the judge to better understand, correctly weigh, and assess the respective credibility of the evidence. A view and the facts or information thereby derived must not be considered as evidence independent of that produced in the course of the trial. The correct purpose of the view is to aid the judge to better understand and weigh the evidence, not to obtain new evidence or independently determine credibility.

So, although the rule that the view is not evidence may be difficult to apply, it remains the law in the state and the Committee determined that it should be communicated to the jury.

154 SUMMARY OF EVIDENCE

The court has allowed the use of a chart to organize the evidence and to assist you in understanding it. The chart itself is not evidence.[1] It is a summary of some of the evidence that was presented. However, it is the evidence that controls. You should rely on the chart only to the extent that you believe it accurately and properly summarizes the evidence.

COMMENT

Wis JI-Criminal 154 was originally published in 2001. This revision was approved by the Committee in June 2011.

This is an optional instruction to be read, if used at all, at the time an organizational chart or other summary is used by counsel. Any chart or summary inevitably involves editing and selectivity, and it is advisable to tell the jury that it is the actual evidence, not the summary, that controls. This instruction does not apply to "summaries" admitted under § 910.06. See footnote 1.

A trial court's admission of a chart summarizing testimony was affirmed in State v. Olson, 217 Wis.2d 730, 579 N.W.2d 802 (Ct. App. 1998). The chart, which listed the various instances of sexual contact addressed by the evidence, was not considered to be a "summary" of evidence under § 910.06 but was received as "a summary exhibit." [Also referred to as a "pedagogical device."] The court of appeals concluded that the cautionary instruction given by the trial court was a correct statement of the law. That instruction provided:

> I want to caution you with respect to any reliance on this exhibit in that it is to some extent a summary of evidence that was presented at trial.
>
> You observed the manner and way in which the State proceeded with the use of this exhibit, but it is the evidence that controls, and it is your recollection of the evidence that controls, and you should only rely on any summary to the extent that it's consistent with your recollection and to the extent that you feel it accurately and properly summarizes or reflects evidence that you have heard in the case.
>
> So I have received it, but I just want to caution you that it is received as a summary exhibit, and it is the evidence, and the testimony, and your recollection of that which controls.

State v. Olson, supra at 736.

1. This instruction is intended for cases where a party has used a chart, diagram, or other device to help explain or organize the evidence. It is not to be used where "summaries" have been admitted under § 910.06; those summaries are evidence.

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155 EXHIBITS

An exhibit becomes evidence only when received by the court. An exhibit marked for identification and not received is not evidence. An exhibit received is evidence, whether or not it goes to the jury room.

COMMENT

Wis JI-Criminal 155 was originally published in 1962, revised in 1983 and republished without substantive change in 1991 and 2000. A non-substantive editorial correction was made to the Comment in 2018.

The Committee considers giving a separate instruction on exhibits to be optional since its substance is now incorporated in Wis JI-Criminal 103, **EVIDENCE DEFINED**. This instruction may be appropriate where more detailed advice about the status of exhibits is believed to be helpful.

Permitting exhibits to be taken to the jury room is a decision resting within the discretion of the trial court. For a discussion of factors bearing on this discretionary decision, see Payne v. State, 199 Wis. 615, 629-30, 227 N.W. 258 (1929).

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157 REMARKS OF COUNSEL

Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion.

COMMENT

Wis JI-Criminal 157 was originally published in 1962 and was revised in 1983 and 1991. This revision involved nonsubstantive editorial changes and was approved by the Committee in May 1999.

The "remarks" addressed by this instruction refer to statements by counsel that are not made in opening statement or closing argument, for which there are separate instructions. See Wis JI-Criminal 101, **OPENING STATEMENT**, and Wis JI-Criminal 160, **CLOSING ARGUMENT**.

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158 RECORDING PLAYED TO THE JURY

You are about to (hear an audio recording) (hear and view an audiovisual recording). Recordings are proper evidence and you may consider them, just as any other evidence. Listen carefully; some parts may be hard to understand.

[You may consider the actions of a person, facial expressions, and lip movements that you can observe on videotapes to help you to determine what was actually said and who said it.]

[You will be provided a transcript to help you listen to the recording. If you notice any difference between what you heard on the recordings and what you read in the transcript(s), you must rely on what you heard, not what you read.]

COMMENT

Wis JI-Criminal 158 was approved by the Committee in February 2010. This revision was approved by the Committee in June 2022; it added to the comment.

This draft was based on an instruction adapted from The Pattern Jury Instructions for the 7th Circuit, 3.17. [Available online at http://www.ca7.uscourts.gov/Pattern_Jury_Instr/pjury.pdf.]

Effective January 1, 2010, SCR 71.01 (2) is amended to create new subsection (e):

(2) All proceedings in the circuit court shall be reported, except for the following:

. . .

(e) Audio recordings of any type that are played during the proceeding, marked as an exhibit, and offered into evidence. If only part of the recording is played in court, the part played shall be precisely identified in the record.

In the Matter of Amendment of Supreme Court Rule 71.01 Regarding Required Reporting of Court Proceedings. 2009 WI 104

If the jury requests that a recording be played back during jury deliberations, the jury should return to the courtroom and the recording should be played for the jury in open court. See State v. Anderson, 2006 WI 77, ¶¶30-31, 291 Wis.2d 673, 717 N.W.2d 74 (overruled in part on other grounds. See State v. Alexander, 2013 WI 70, ¶¶26-28, 349 Wis. 2d 327, 833 N.W.2d 126).

The Committee recommends that the court or the parties should make a record of exactly what was played during deliberations by noting the beginning and end times from the exhibit.

A helpful summary of the procedures that a trial judge should follow when an audio/visual recording has been received into evidence and played at trial and a jury requests to listen to or watch the recording during deliberations is provided in SM-9 When a Jury Requests to Hear/See Audio/Visual Evidence During Deliberations.

160 CLOSING ARGUMENTS OF COUNSEL

Consider carefully the closing arguments of the attorneys, but their arguments and conclusions and opinions are not evidence. Draw your own conclusions from the evidence, and decide upon your verdict according to the evidence, under the instructions given you by the court.

COMMENT

Wis JI-Criminal 160 was originally published in 1962, revised in 1983, and republished without change in 1991. This revision was approved by the Committee in May 1999.

Wis JI-Criminal 160 (© 1962) was cited with approval in State v. Draize, 88 Wis.2d 445, 455-565, 276 N.W.2d 784 (1979).

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161 AGREED TESTIMONY

The district attorney and the attorney for the defendant have stipulated or agreed that if (name of witness) had been called as a witness, (he) (she) would have testified as follows:

[state agreed testimony]

You will consider that testimony in the same manner as if it had been given under oath here in court.

COMMENT

Wis JI-Criminal 161 was approved by the Committee in December 1995 and was republished without substantive change in 2000.

This instruction is designed for situations where the parties have agreed that if a witness had been called to testify, the witness would have testified to certain facts. The jury is instructed to regard that agreed testimony in the same manner as if it had been given by a live witness in court.

For an instruction on agreed facts, see Wis JI-Criminal 162.

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162 AGREED FACTS

[IF THE AGREED FACTS GO TO AN ELEMENT OF THE CRIME, A PERSONAL WAIVER BY THE DEFENDANT IS REQUIRED.][1]

The district attorney and the attorney for defendant have stipulated or agreed to the existence of certain facts, and you must accept these facts as conclusively proved. (In this case, the district attorney and defendant's attorney have stipulated to the following facts:)

[state the agreed facts][2]

COMMENT

Wis JI-Criminal 162 was originally published in 1962 and revised in 1983. The comment was updated in 1990. The 1995 revision added the bracketed material at note 1. The instruction was republished without substantive change and with an updated comment in 2000.

The Committee recommends giving this instruction at the time the stipulation is received and as part of the instructions at the end of the case.

While the instruction states that the "district attorney and the attorney for the defendant have stipulated," it is good practice to assure that the defendant understands and joins in the agreement. This avoids later argument whether the stipulation involved an issue on which the defendant's personal participation was required or merely a matter of trial tactics within the purview of defense counsel. See Poole v. United States, 832 F.2d 561 (11th Cir. 1987).

Strictly speaking, a stipulation is an agreement between the parties. As such, the state is not required to join in a proposed stipulation. However, an offer by the defendant to admit a fact may make further proof of that fact unnecessary, either because such proof would be irrelevant or because its probative value would be outweighed by the risk of unfair prejudice. See State v. McCallister, 153 Wis.2d 523, 451 N.W.2d 764 (Ct. App. 1989).

Also see Meyers v. State, 193 Wis. 126, 127, 213 N.W. 645 (1927): ". . . the admission of the existence of a fact dispenses with proof thereof."

The trial court's role with regard to stipulations offered by the parties was discussed in Birts v. State, 68 Wis.2d 389, 395-96, 228 N.W.2d 351 (1975):

> . . . as a matter of public policy the entire judicial process in a criminal or civil proceeding is a search for truth, and the trial court's important role as a fact finder should not be usurped by the district attorney entering into a stipulation on a matter of fact which, in the end, has to be determined by the finder of fact. . . .
>
> Therefore, we conclude that the trial court possessed the power to refuse to accept the stipulation proposed by the assistant district attorney in this case and, in so refusing, was free to make findings contrary to its terms.

The Birts case involved a stipulation offered in connection with a motion to withdraw a guilty plea. The parties offered to agree that the defendant would not have pled guilty had he known of the effect on his mandatory release date.

1. Special caution must be exercised when an offered stipulation removes an element of the crime from the jury's consideration. In that situation, the defendant must personally waive the right to have the jury find the element beyond a reasonable doubt. See State v. Villarreal, 153 Wis.2d 323, 450 N.W.2d 519 (Ct. App. 1989), discussed in the Comment to Wis JI-Criminal 990. But see State v. Benoit, 229 Wis.2d 630, 600 N.W.2d 193 (Ct. App. 1999): it was not error to fail to obtain an express, personal, waiver where a stipulation as to nonconsent was obtained in a burglary case.

2. The last portion of this instruction (in parentheses) is optional because the Committee has concluded that by attempting to paraphrase stipulations, the trial judge may commit unintentional error by doing so incorrectly. This danger can be minimized if all stipulations are required to be put into writing before being accepted by the court.

162A LAW NOTE: STIPULATIONS

CONTENTS

Scope

This Law Note addresses the issues that arise when a defendant offers to agree that a fact is established.

I. True Stipulations

A. Definition

Strictly speaking, a "stipulation" is an agreement between the parties that a fact will be accepted as established.[1] The agreement – the stipulation – is a substitute for proof of a fact by testimony or other evidence.[2]

Because a true stipulation is an agreement between the parties, neither the state nor the defendant is required to enter into a stipulation. [See Part III. Offers to Stipulate; "Concessions"]

B. Recommended Procedure

The Committee recommends that the following procedure be used when the parties offer a stipulation:

- the parties should clearly identify the agreement on the record;

- personal inquiry should be made of the defendant to establish that he or she agrees with the stipulation[3];

- the jury is instructed to accept the stipulated fact as conclusively proved;

- the instruction also provides for an optional sentence in which the agreed facts would be stated. The sentence is described as optional because the Committee

concluded that by attempting to paraphrase stipulations, the trial judge may commit unintentional error by doing so incorrectly. This danger can be minimized if all stipulations are required to be put into writing before being accepted by the court.

C. Jury Instruction

Wis JI-Criminal 162, Agreed Facts, provides as follows:

> The district attorney and the attorney for the defendant have stipulated or agreed to the existence of certain facts, and you must accept those facts as conclusively proved.

II. Stipulations That Go To An Element Of The Crime

A. In General

The Committee believes the following are the correct legal principles to apply where a stipulation goes to an element of the crime:

- a stipulation may be offered as to proof of an element;

- as with any other stipulation, the agreement of both parties is required;

- when a stipulation is accepted as to proof of an element, a waiver should be obtained; what the defendant is waiving is not the submission of the element as part of the offense definition, but rather the right not to have a verdict directed as to an element of the crime[4];

- an element of the crime is, with one exception,[5] never completely removed from the jury's consideration.

B. Recommended Procedure

When using the term "stipulation," this discussion refers to a true stipulation – agreed to by both the defense and the prosecution.

- As with any other stipulation, the court should address the defendant personally to assure that the defendant understands the stipulation and joins in it.

• The court should also make sufficient inquiry of the defendant to assure that defendant knowingly and understandingly waives the right to what is in effect a partial directed verdict on an element of the crime.[6]

• With one exception, the element will still be presented to the jury as part of the offense definition.

• As with any other stipulation, the jury will be told to accept the facts stipulated to – here, an element – as conclusively proved.

C. Example: Possession Of A Firearm By A Felon – § 941.29

The stipulation would state that the parties agree that the defendant had been convicted of a felony [or satisfied one of the other categories covered by the statute].[7]

A waiver should be obtained from the defendant, confirming his or her understanding that the jury will be instructed to accept the element as proved.[8]

The "convicted of a felony" element would still be included in the offense definition and included in the jury instructions.

The jury would be instructed that:

"The parties have agreed that the defendant was convicted of a felony before (date of offense) and you must accept this as conclusively proved."[9]

Proof of the nature of the felony and evidence of the circumstances giving rise to the felony conviction is not admissible.[10]

D. Exception: Operating With A Prohibited Alcohol Concentration – Stipulation that goes to the "status element" removes that element from the jury's consideration

Under Wisconsin's operating while intoxicated [OWI] laws, the prohibited alcohol concentration level is reduced if the driver has prior convictions, suspensions or revocations related to OWI. Originally, two or more priors reduced the level from 0.10 to 0.08. Under current law, three or more priors reduce the applicable level from 0.08 to 0.02. Because the fact of priors changes the substantive definition of the crime, that fact is an element to be submitted to the jury.

The 0.08 version of the law was addressed in State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997). The Wisconsin Supreme Court referred to the prior convictions element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions or revocations [the relevant number under prior law], the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 628, 646. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 628, 651. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 628, 649-50.

The court gave explicit direction to the trial courts as to how to handle this situation:

> When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The "prohibited alcohol concentration" means 0.08 . . .
> 214 Wis.2d 628, 651-52.

Wis JI-Criminal 2660C applies the Alexander rule to 0.02 offenses under current law. The third element addresses the fact of three or more priors and has been placed in brackets. If the defendant admits the "status element," the instruction is to be given with two elements: operating a vehicle, and, having an alcohol concentration of more than 0.02. If the defendant does not admit the "status element," the instruction should be given with a third element: having three or more prior convictions, suspensions or revocations as counted under § 343.307(1). Because the defendant's admission removes an element from the jury's consideration, the record should reflect the defendant's acknowledgment that a jury determination is, in effect, being waived on the "status element."

NOTE: Under the procedure required by the Alexander decision, the stipulation procedure described in this Law Note does not apply:

1) Agreement by the state that the fact of priors is established is not required.
2) Consent by the state to the waiver of jury trial on the prior conviction element is not required.
3) The prior conviction element is completely withdrawn from the jury's consideration.

The Alexander procedure – whereby an element is actually removed from the jury's consideration – has not been extended to other situations. See, State v. Warbelton, 2009 WI 6, 315 Wis.2d 253, 759 N.W.2d 557.[11]

The Committee recommends adopting this same procedure in a second situation: where the prohibited alcohol concentration is reduced to 0.02 for those who satisfy the "status element" of being subject to an order under § 343.301 to install an ignition interlock device. See Wis JI-Criminal 2600D.

III. Offers to Stipulate; "Concessions"

True stipulations should be distinguished from offers to stipulate or offers to concede that a fact is established. The latter have been referred to as "Wallerman stipulations," taking their name from the court of appeals decision in State v. Wallerman, 203 Wis.2d 158, 552 N.W.2d 128 (Ct. App. 1996). Wallerman involved a postconviction challenge to other acts evidence that had been admitted on the issues of motive and intent. The court of appeals found that the defendant was not entitled to relief because he had failed to affirmatively concede the motive and intent issues. However, the court set out a four-part methodology for trial courts to use in situations where the defendant did offer to concede an issue. 203 Wis.2d 158, 167-168.

The Wallerman decision was relied on by State v. DeKeyser, 221 Wis.2d 435, 585 N.W.2d 668 (Ct. App. 1998), where the court of appeals reversed a conviction due to ineffective assistance of counsel. The court found that counsel engaged in deficient performance by failing to offer a Wallerman stipulation to avoid the admissibility of other acts evidence.

The Wisconsin Supreme Court addressed "Wallerman stipulations" in State v. Veach, 2002 WI 110, ¶118, 255Wis.2d 390, 645 N.W.2d 913, holding that if offers to stipulate or concede are not accepted or joined in by the prosecution, the court is not required to accept them:

> We determine that to the extent that Wallerman and DeKeyser imply that the state and the circuit court are obliged to accept Wallerman stipulations, those cases are incorrect and must be overruled. . . While we do not hold that Wallerman stipulations are invalid per se, we do hold that, with the exception of stipulations as to the defendant's status, the state and the court are not obligated to accept stipulations to elements of a crime even if the stipulations are offered in compliance with the four-part test set forth in Wallerman.

COMMENT

Wis JI-Criminal 162A was approved by the Committee in February 2011.

1. See, for example, Black's Law Dictionary, 7th Edition: "A voluntary agreement between opposing parties concerning some relevant point."

2. ". . . [T]he admission of a fact dispenses with proof thereof." Myers v. State, 193 Wis. 126, 127, 213 N.W. 645 (1927).

3. It is good practice to assure that the defendant understands and joins in the agreement. This avoids later argument about whether the stipulation involved an issue on which the defendant's personal participation was required or merely a matter of trial tactics within the purview of defense counsel. See Poole v. United States, 832 F.2d 561 (11th Cir. 1987).

4. This might be called a "partial jury trial waiver," a term Wisconsin appellate courts have used primarily to refer to completely withdrawing an element from the jury's consideration. See, for example, State v. Warbelton, 2009 WI 6, 315 Wis.2d 253, 759 N.W.2d 557; State v. Benoit, 229 Wis.2d 630, 600 N.W.2d 193 (Ct. App. 1999); State v. Villarreal, 153 Wis.2d 323, 450 N.W.2d 519 (Ct. App. 1989). That brings into play the rule that the state, and the trial court, are not required to join in that complete waiver. However, the right to a jury trial can be viewed as incorporating additional rights, such as not directing a verdict against the defendant on an element of the crime. When a stipulation is accepted as to an element, that element still goes to the jury and the jury is told the element is "conclusively proved." Telling the jury that an element is "conclusively proved" implicates the right not to have a verdict directed on an element. Thus, the Committee recommends that the trial court assure that the record shows that the defendant understands this and waives the right not to have a verdict [partially] directed against him. Whether this is done as part of the stipulation procedure or viewed as a separate waiver inquiry should not make any difference. A general question about whether the defendant "is still interested in" entering into a stipulation is not sufficient. State v. Hauk, 2002 WI App 226, 257 Wis.2d 579, 652 N.W.2d 393.

5. The Wisconsin Supreme Court has recognized one situation where an element can be removed from the jury's consideration: a stipulation going to the prior convictions, suspensions, or revocations that reduce the prohibited alcohol concentration from 0.08 to 0.02. See State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997), discussed below at Section II. D. The Committee has concluded that the Alexander approach should also apply in a second situation: where the prohibited alcohol concentration is reduced to 0.02 for those who satisfy the "status element" of being subject to an order under § 343.301 to install an ignition interlock device. See Wis JI-Criminal 2600D.

6. A suggested script regarding the waiver of the right to full jury consideration of the element:

> Your right to a jury trial includes the right to have the jury consider all relevant evidence as to each element of the crime. If the proposed stipulation is accepted as to an element of the crime charged against you, that element will still be presented to the jury but the jury will be told that the element is "conclusively proved." Do you understand? Do you wish to proceed with the proposed stipulation?

For an example of a complete waiver inquiry, see note 8, below.

7. The example is for violations of § 941.29 involving possession of a firearm by a person convicted of a felony. However, the statute also applies to other categories of individuals. See § 941.29(1)(a) through (g).

8. An example of a complete waiver inquiry is as follows:

TO THE DEFENDANT:

1. Do you understand that one of the elements of the crime of felon in possession of a firearm is that you have been convicted of a felony before the date of this offense?

2. Do you understand that you have the right to have a jury, that is, twelve people, decide whether or not the state has proved beyond a reasonable doubt that you have been convicted of a felony before the date of this offense?

3. Do you understand that the State has to convince each member of the jury that you have been convicted of a felony before the date of this offense?

4. With this stipulation, you are agreeing that I tell the jury that you have been convicted of a felony before the date of this offense, and that they are to accept this fact as conclusively proved?

5. Has your attorney explained the pros and cons, that is, the advantages and disadvantages of entering into this agreement?

6. Have you had enough time to talk all of this over with your attorney?

7. Has anyone pressured you or threatened you in any way, or made any promises to you, to get you to enter into this agreement?

8. Are you entering into this agreement of your own free will?

9. Have you had enough time to make your decision?

TO DEFENSE COUNSEL:

1. Are you satisfied that your client thoroughly understand (his) (her) right to enter into this agreement regarding (his) (her) prior conviction or to not enter into this agreement?

2. Are you satisfied that your client is entering into this agreement freely, voluntarily, intelligently, and knowingly?

FINDING: The court is also satisfied that the defendant is entering into this agreement freely, voluntarily, intelligently, and knowingly. The court therefore accepts the stipulation.

9. This is the approach recommended in Wis JI-Criminal 1343, the instruction for violations of § 941.29. It is consistent with the description of the effect of a stipulation in a prosecution for violating § 941.29 in State v. McAllister, 153 Wis.2d 523, 451 N.W.2d 764 (Ct. App. 1989).

10. Old Chief v. United States, 519 U.S. 172 (1997); State v. McAllister, supra, note 9. "When the defendant agrees to a sanitized stipulation admitting the prior conviction, there is no need for further proof relating to the nature of the conviction." State v. Warbelton, 2009 WI 6, ¶53, 315 Wis.2d 253, 759 N.W.2d 557.

11. In State v. Warbelton, 2009 WI 6, 315 Wis.2d 253, 759 N.W.2d 557, the defendant urged that the Alexander approach be applied to the crime of stalking under § 940.32(2m)(a) which provides an increased penalty for stalking offenses where the defendant has a previous conviction for a violent crime. The Wisconsin Supreme Court declined to extend Alexander:

> ¶46 Despite the parallels between Alexander and this case, we decline to extend Alexander's holding to the stalking statute. Alexander is limited to prosecutions for driving while under the influence of an intoxicant or with a prohibited alcohol concentration. In these unique cases, the risk of unfair prejudice is extremely high given the likelihood that jurors will make prohibited inferences based on the fact of multiple prior convictions, suspensions, or revocations.

165 JUDICIALLY NOTICED FACTS

CAUTION: IT IS ERROR TO GIVE THIS INSTRUCTION AS TO FACTS THAT CONSTITUTE AN ELEMENT OF THE CRIME.

The court has taken judicial notice of certain facts and you are directed to accept the following as true:

[state facts judicially noticed]

COMMENT

Wis JI-Criminal 165 was originally published in 1966 and revised in 1983. It was republished without substantive change in 1991 and 2000. This revision was approved by the committee in December 2002.

The Committee recommends giving this instruction at the time judicial notice is taken and as part of the instructions at the end of the case.

Section 902.01 of the Wisconsin Rules of Evidence addresses judicial notice.

The caution at the top of the instruction was added in response to the decision in State v. Harvey, 2002 WI 65, 254 Wis.2d 442, 649 N.W.2d 189, which held that it is error to give a judicial notice jury instruction as to facts that constitute an element of the crime. In Harvey, the defendant was charged with possession of cocaine with intent to deliver "within 1,000 feet of Penn Park." The state rested without introducing proof that Penn Park was a city park. Harvey moved for a directed verdict on the penalty enhancer and the state moved to reopen. The trial judge denied both motions, but took judicial notice that Penn Park was a city park. The judge instructed the jury that "[t]he Court has taken judicial notice of certain facts and you are directed to accept the following as true: Penn Park is a city park located in the City of Madison, Dane County, Wisconsin."

The Wisconsin Supreme Court held that the facts constituting the "within 1,000 feet of . . ." penalty enhancer under § 961.49 are the same as elements of the crime, and that the jury instruction on judicially noticed facts directed a verdict on an element. "This had the effect of not merely undermining but eliminating the jury's opportunity to reach an independent, beyond-a-reasonable-doubt decision on that element, and was therefore constitutional error." 2002 WI 65, ¶34. But the error was harmless: because the fact was "undisputed and indisputable . . . it is clear beyond a reasonable doubt that a properly instructed, rational jury would have found the defendant guilty of the enhanced offense." 2002 WI 65, ¶48.

The decision did not hold that it was improper for the trial court to take judicial notice of status of the park and did not directly state that the jury instruction provision of the judicial notice statute – § 902.01(7) – was unconstitutional. The decision did hold that implementing sub. (7) as to an element of the crime is a due process violation.

Section 902.01(7) differs from the federal version of the comparable evidence rule as it is applied in criminal cases. While the Wisconsin provision states that the judge "shall instruct the jury to accept as established any facts judicially noticed" without distinguishing between civil and criminal cases, the federal version provides that the jury in a criminal case is to be instructed that it "may, but is not required to, accept as conclusive any fact judicially noticed." Federal Rule of Evidence 201(g). The court in Harvey declined to rewrite the Wisconsin rule to follow the federal approach. 2002 WI 65, ¶34.

In light of Harvey, the continued viability of the holding in State ex rel. Cholka v. Johnson, 96 Wis.2d 704, 713, 292 N.W.2d 841 (1980), is doubtful. The case holds that it was proper for the trial court to take judicial notice of the fact that Southern Comfort is an intoxicating liquor and that excessive consumption of an intoxicating liquor can cause death.

"A trial court . . . may . . . take judicial notice of a fact that is not subject to reasonable dispute, but it may not establish as an adjudicative fact that which is known to the judge as an individual." State v. Peterson, 222 Wis.2d 449, 457, 588 N.W.2d 84, (Ct. App. 1998). Thus, it was error for a trial judge to "rely on his own experience on the river at night to determine whether the videotape was an accurate portrayal of the demonstration." 222 Wis.2d 449, 458.

170 CIRCUMSTANTIAL EVIDENCE

It is not necessary that every fact be proved directly by a witness or an exhibit. A fact may be proved indirectly by circumstantial evidence. Circumstantial evidence is evidence from which a jury may logically find other facts according to common knowledge and experience.

Circumstantial evidence is not necessarily better or worse than direct evidence. Either type of evidence can prove a fact.

Whether evidence is direct or circumstantial, it must satisfy you beyond a reasonable doubt that the defendant committed the offense before you may find the defendant guilty.

IF EVIDENCE OF FLIGHT, ESCAPE, OR CONCEALMENT HAS BEEN ADMITTED, SEE WIS JI-CRIMINAL 172. IF EVIDENCE OF POSSESSION OF RECENTLY STOLEN PROPERTY HAS BEEN ADMITTED, SEE WIS JI-CRIMINAL 173.

COMMENT

Wis JI-Criminal 170 was originally published in 1966 and revised in 1978 and 1991. This revision was approved by the Committee in June 1999.

The 1999 revision involved a substantial rewriting of the former instruction, adapted from Wis JI-Civil 230. One change is to make it applicable to evidence submitted by either the state or the defendant. The need to change the old model to account for defense evidence was one of the issues in State v. Shah, 134 Wis.2d 246, 397 N.W.2d 492 (1986), where the jury was told that the general instruction on circumstantial evidence could apply to the defendant's evidence and that they should "interpolate how that would apply to the defendant rather than the state." The problem was that instruction referred to the "beyond a reasonable doubt" burden. While the court found that a reasonable jury would not be misled by these statements, the Committee concluded that it was advisable to rewrite Wis JI-Criminal 170 in a manner that could be applied to evidence presented by either the state or the defense.

Circumstantial evidence questions are often paired with the "reasonable hypothesis of innocence" issue. Reference to the latter issue is part of the burden of proof instruction, see Wis JI-Criminal 140, footnote 2. Also see State v. Poellinger, 153 Wis.2d 493, 451 N.W.2d 752 (1990). The following shows how the two issues are often combined:

The evidence does not have to remove every possibility before a conviction can be sustained. See State v. Eberhardt, 40 Wis.2d 175, 161 N.W.2d 287 (1968). The test stated in State v. Johnson, 11 Wis.2d 130, 136, 104 N.W.2d 379 (1960), is 'that all the facts necessary to warrant a conviction on circumstantial evidence must be consistent with each other and with the main fact sought to be proved and the circumstances taken together must be of a conclusive nature leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused and no other person committed the offense charged.' The circumstantial evidence must, however, be sufficiently strong to exclude every reasonable theory of innocence, that is, the evidence must be inconsistent with any reasonable hypothesis of innocence. This is a question of probability, not possibility. State v. Shaw, 58 Wis.2d 25, 29, 205 N.W.2d 132 (1973).

For good general discussions of circumstantial evidence, see Schwantes v. State, 127 Wis. 160, 106 N.W 237 (1906); Spick v. State, 140 Wis. 104, 121 N.W. 664 (1909); State v. Johnson, 11 Wis.2d 130, 104 N.W.2d 379 (1960); and State ex rel. Hussong v. Froelich, 62 Wis.2d 577, 215 N.W.2d 390 (1974).

It has been held to error to refuse to give a requested instruction on circumstantial evidence when the state's case depends wholly or substantially upon such evidence. Kollock v. State, 88 Wis.663, 60 N.W. 817 (1894); Colbert v. State, 125 Wis. 423, 104 N.W. 61 (1905). However, it is not error to refuse to give a requested instruction when circumstantial evidence is not a substantial part of the state's case. Anderson v. State, 133 Wis. 601, 114 N.W. 112 (1907). And it has been held that the failure to instruct in the absence of a request is not error. Spick v. State, 140 Wis. 104, 121 N.W. 664 (1909).

172 CIRCUMSTANTIAL EVIDENCE: FLIGHT, ESCAPE, CONCEALMENT

Evidence has been presented relating to the defendant's conduct [after the alleged crime was committed] [after the defendant was accused of the crime]. Whether the evidence shows a consciousness of guilt, and whether consciousness of guilt shows actual guilt, are matters exclusively for you to decide.

COMMENT

Wis JI-Criminal 172 was originally published in 1978 and revised in 1991. This revision was approved by the Committee in September 1999.

This instruction may be used when sufficient evidence of flight or other conduct after the alleged crime has been offered to sustain a finding of guilty knowledge. Whether to give an instruction on this topic is within the discretion of the court. If this instruction is given, it may be appropriate to include it immediately after, or as part of, Wis JI-Criminal 170, **CIRCUMSTANTIAL EVIDENCE**.

A strong argument can be made that an instruction on this topic is unnecessary, but the Committee decided to republish this revised version rather than withdraw the instruction entirely. An instruction on this topic may continue to be requested, especially where case law can be found supporting the concept addressed here. The material below summarizes the relevant legal authority and points out the potential problems that need to be avoided in attempting to craft an instruction on this topic.

As a general rule, it has been held that evidence of flight, escape, or concealment by an accused has probative value as to guilt. The most typical situation involves flight from the crime scene. See Wangerin v. State, 73 Wis.2d 427, 437, 243 N.W.2d 448 (1976). The rule extends to escapes from custody while the charges are pending. State v. Knighten, 212 Wis.2d 833, 839-40, 569 N.W.2d 770 (Ct. App. 1997); Gauthier v. State, 28 Wis.2d 412, 419-20, 137 N.W.2d 101 (1965). Evidence of flight by a codefendant can be admissible if it "was so closely connected with the commission of the crime as to be admissible as **res gestae**." State v. Winston, 120 Wis.2d 500, 504, 355 N.W.2d 553 (Ct. App. 1984).

The rule has been extended beyond "flight" to other "criminal acts of an accused which are intended to obstruct justice or avoid punishment [which] are admissible to prove a consciousness of guilt of the principal criminal charge." State v. Bettinger, 100 Wis.2d 691, 698, 303 N.W.2d 585 (1981) [evidence of bribery is admissible to show consciousness of guilt on a charge of sexual assault]; State v. Neuser, 191 Wis.2d 131, 144, 528 N.W.2d 49 (Ct. App. 1995) [evidence of a threatening phone call is admissible to show consciousness of guilt on a charge of aggravated battery]. Also see Peters v. State, 70 Wis.2d 22, 30, 233 N.W.2d 420 (1975) [evidence of a fabricated alibi is relevant to a burglary charge]. Evidence of noncriminal acts of concealment are also covered. State v. Paulson, 118 Wis. 89, 94 N.W.2d 771 (1903).

For a recent discussion of the admissibility of flight evidence, see State v. Miller, 231 Wis.2d 447, 605 N.W.2d 567 (Ct. App. 1999). Admitting flight evidence is within the court=s discretion even if other criminal charges based on the same conduct have been severed. Miller, 231 Wis.2d 447, 461-62.

The propriety of giving correct instructions on flight evidence is also generally recognized. See Devitt and Blackmar, Federal Jury Practice and Instructions, § 15.08. However, at least one state, Missouri, has apparently determined that instructions on flight should not be given. State v. Coleman, 254 S.W.2d 27 (Mo., 1975). The Wisconsin Supreme Court has not specifically reviewed flight instructions but has recognized their propriety in an unpublished opinion. State v. Gill, per curiam, May 2, 1978.

A series of United States Supreme Court cases have discussed the limits on flight instructions. Instructions that refer to flight as a "silent admission of guilt," or which include such language as "the wicked flee, when no man pursueth, but the innocent are as bold as a lion," have been found clearly erroneous. Hickory v. United States, 160 U.S. 408, 16 S.Ct. 327, 40 L.Ed. 474 (1896); Alberty v. United States, 162 U.S. 499, 16 S.Ct. 864, 40 L.Ed. 1051 (1896); Starr v. United States, 164 U.S. 627, 17 S.Ct. 223, 41 L.Ed. 577 (1896). However, there is no error in instructing the jury in a way that is not misleading, on the well-settled law that the flight of the accused is competent evidence against him as having a tendency to establish guilt. Allen v. United States, 164 U.S. 492, 17 S.Ct. 156, 41 L.Ed. 530 (1896); and Bird v. United States, 187 U.S. 118, 23 S.Ct. 42, 47 L.Ed. 100 (1902).

There are a number of problems in developing a fair flight instruction. First, characterizing the evidence as evidence of "flight" prejudges an issue that is often for the jury to determine. In many cases the jury will first have to decide whether the defendant's actions did constitute "flight." In State v. Sullivan, 203 A.2d 179 (1964), the Supreme Court of New Jersey was concerned with the misuse of "flight" when the evidence showed only "departure." Departure alone raises no inference of guilt, and "[f]or departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt." Sullivan, supra, at 192. The uniform instruction tries to meet this problem by using the general term "conduct" instead of "flight."

A second problem is that even if the conduct amounts to "flight," it may be engaged in by people who are not guilty of a crime. This was recognized by the United States Supreme Court in Alberty v. United States:

> . . . it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. . . . Innocent men sometimes hesitate to confront a jury - not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves. Alberty v. United States, 162 U.S. 499, 511, 16 S.Ct. 864, 40 L.Ed. 1051 (1896).

Thus flight evidence is probative of guilt only insofar as it indicates a consciousness of guilt and insofar as consciousness of guilt indicates actual guilt. United States v. Myers, 55 F.2d 1036 (5th Cir. 1977); and Miller v. United States, 320 F.2d 767 (D.C. Cir. 9163) (concurring opinion). The uniform instruction tries to state this connection in a forthright manner.

Finally, it has been held that an "antiflight" instruction need not be given where the defendant asks that the jury be instructed that his failure to flee should be considered as a circumstance in his favor. United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972).

The previous version of the instruction used the general term "conduct or whereabouts" instead of "flight," "escape," "concealment," etc. The Committee believed that using the latter to characterize the defendant's conduct answers one of the questions that the jury must consider: did the conduct of the defendant constitute flight? This revision deletes Awhereabouts@ in favor of relying on Aconduct@ as a general term allowing consideration of a broader range of conduct than the physical fleeing from the scene of a crime. However, great caution must be taken not to use this instruction when the "conduct" involves the defendant's silence at the time of arrest. It is improper for the judge or the prosecutor to comment on that type of conduct. See Reichhoff v. State, 76 Wis.2d 375, 251 N.W.2d 470 (1977), and cases cited therein.

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173 CIRCUMSTANTIAL EVIDENCE — POSSESSION OF RECENTLY STOLEN PROPERTY

Evidence has been presented that the defendant possessed recently stolen property. Whether the evidence shows that the defendant [knew the property had been stolen] [or] [participated in some way in the taking of the property] is exclusively for you to decide. Consider the time and circumstances of the possession in determining the weight you give to this evidence.

COMMENT

Wis JI-Criminal 173 was originally published in 1980. It was revised in 1987 and republished without change in 1991. This revision was approved by the Committee in October 1999.

This instruction may be used when sufficient evidence of unexplained possession of recently stolen property has been offered to sustain a finding of guilty knowledge or participation in the taking of the property by the defendant. Whether to give an instruction on this topic is within the discretion of the court. If this instruction is given, it may be appropriate to include it immediately after, or as part of, Wis JI-Criminal 170, **CIRCUMSTANTIAL EVIDENCE**.

See Wis JI-Criminal 920 for a definition and discussion of "possession."

A strong argument can be made that an instruction on this topic is unnecessary, but the Committee decided to republish this revised version rather than withdraw the instruction entirely. An instruction on this topic may continue to be requested, especially where case law can be found supporting the concept addressed here. That case law presents potential problems, especially since the concept has often been addressed by reference to a "presumption" flowing from possession of recently stolen property. Instructing in those terms is to be avoided.

Caution should be exercised in giving an instruction on this topic because the relevance of evidence of possession of recently stolen property can vary a great deal, depending on the facts of the case. An 1880 decision of the Wisconsin Supreme Court described the issue and offered a caution about instructing the jury:

> It is evident that mere possession of stolen goods by a party accused ought not to be in every case, if in any, sufficient evidence to justify a conviction. Take the case of a reputable citizen, whose character is such that no suspicion of crime has attached to him, charged with stealing a horse, and the only proof is that the horse was found, the next morning after he was stolen, in his stable, the stable being one which could be entered without the aid of the accused. Clearly in such a case the presumption of innocence would outweigh the inference of guilt arising out of the fact of possession. So, if a purse of money had been stolen in a crowd, and soon after the theft the same had been found

> in the pocket of a man of known reputable character, the pocket being such that the purse could have been put there without his knowledge, the circumstance would hardly raise a suspicion sufficient to lean a charge of theft upon. It is not so much the mere possession of the stolen goods, as it is the nature of the possession; whether it is an open and unconcealed one, or whether the goods are such as the person found in possession thereof would probably be possessed of in a lawful way. If property of great value should be found in the possession of one known to be poor, so as to render it highly improbable that he had purchased it, an inference of guilt would arise much stronger than if such property were found in the possession of a man of wealth, who would probably purchase goods of such value. It would be impossible to enumerate the variety of circumstances attending the mere possession of stolen goods, which would lessen or increase the inference of guilty possession. In directing a jury, therefore, as to the weight they should give to the possession of stolen goods or the instruments of crime as evidence of guilt, care should be taken not to place too much importance upon the mere possession, but their attention should be called to the character of the possession and the circumstances attending it.

Ingalls v. State, 48 Wis. 647, 657-58, 4 N.W. 785 (1880).

The evidentiary rule that unexplained possession of recently stolen goods may raise an inference that the possessor is guilty of the taking of the property is generally recognized in Wisconsin. This rule was described by the Wisconsin Supreme Court in State v. Johnson, 11 Wis.2d 130, 104 N.W.2d 379 (1960):

> Mere possession of stolen property raises no inference of guilt, but Wisconsin from early times has followed the rule that unexplained possession of recently stolen goods raises an inference of greater or less weight, depending on the circumstances, that the possessor is guilty of the theft and also of burglary if they were stolen in a burglary. Such inference being in the nature of a presumption of fact calls for an explanation of how the possessor obtained the property. Such presumption is not conclusive and may be rebutted.

State v. Johnson, at 139.

Johnson has been cited with approval in State v. Bohachef, 50 Wis.2d 694, 185 N.W.2d 339 (1971); Gautreaux v. State, 52 Wis.2d 489, 190 N.W.2d 542 (1971); and Day v. State, 61 Wis.2d 236, 212 N.W.2d 489 (1973).

However, it should be noted that each of the cited cases dealt only with the sufficiency of the evidence, judged from the viewpoint of the appellate court. None dealt with the propriety of a jury instruction.

The propriety of a jury instruction dealing with the effect of unexplained possession of recently stolen property was recognized by the United States Supreme Court in Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973). Barnes approved an instruction that advised the jury as follows: "Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." Note that Barnes dealt with a finding of knowledge that the property had been stolen. The Wisconsin cases expanded this rule to apply to a finding of guilt on the underlying theft itself. It should also be noted that Barnes involved a case tried in federal court, where the trial judge has greater latitude in commenting on the evidence than a state trial judge has.

While the most recent Wisconsin Supreme Court cases dealt with the issue only in reviewing the sufficiency of the evidence, a series of four older decisions specifically considered jury instructions. In Ryan v. State, 83 Wis. 486, 53 N.W. 836 (1892), a jury instruction on the presumption arising from possession of recently stolen property was approved. The court held it was not error to give such an instruction because it was clearly indicated that the presumption applied only if the possession was unexplained and if guilt was supported by all the evidence.

In Ingalls v. State, 48 Wis. 647, 4 N.W. 785 (1880), a conviction was reversed because the instruction on the presumption arising from possession of stolen property was error. The same conclusion was reached in State v. Snell, 46 Wis. 524, 1 N.W. 225 (1879). In both cases, the court based its decision on the overemphasis given to the possession of the property. In the earliest case in the series, Graves v. State, 12 Wis. 659 (1860), a jury instruction on the presumption was criticized but not found to be grounds for reversal because there was a lack of proper objection and an assumption by the appellate court that the jury instructions that were not part of the appellate record probably stated the law correctly.

The Committee advises that caution be used in trying to translate the evidentiary rule discussed above into a jury instruction. For one thing, following the language from the Johnson case and instructing the jury in terms of a "presumption calling for an explanation" might shift the burden of proof to the defendant or relieve the prosecution of its burden to prove all elements of the crime beyond a reasonable doubt. A second concern is the emphasis on the possession of stolen property being "unexplained." While the probative value of possession rests on it being unexplained, including such emphasis in the jury instruction creates a danger of impermissibly commenting on the defendant's failure to testify. For that reason, the Committee has omitted "unexplained" from the instruction.

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175 MOTIVE

[USE THE TWO SENTENCES IN BRACKETS ONLY IF INTENT IS AN ELEMENT OF THE CRIME CHARGED.]

[Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not.]

[USE THE FOLLOWING IN ALL CASES WHERE AN INSTRUCTION ON MOTIVE IS BELIEVED TO BE APPROPRIATE.]

"Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

COMMENT

Wis JI-Criminal 175 was originally published in 1962, revised in 1983, and republished without change in 1991. This revision was approved by the Committee in February 1999 and was intended to make the instruction more understandable without changing its meaning.

The original version of this instruction was based on statements in Cupps v. State, 120 Wis. 504, 518, 97 N.W. 210 (1904), and Wittig v. State, 235 Wis. 274, 292 N.W. 879 (1940). More recent cases have restated this general rule, for example:

> Motive is not an element of any crime and does not by itself establish guilt or innocence. But evidence of motive is relevant if it meets the same standards of relevance as other evidence. Motive is an evidentiary circumstance which may be given as much weight as the fact finder deems it is entitled to.

State v. Berby, 81 Wis.2d 677, 688, 260 N.W.2d 798 (1977).

The admissibility of evidence of motive is to be evaluated on the same terms as other evidence: it must be relevant and its probative not outweighed by danger of unfair prejudice. Kelly v. State, 75 Wis.2d 303, 320, 249 N.W.2d 800 (1977); State v. Phillips, 99 Wis.2d 46, 54-5, 298 N.W.2d 239 (Ct. App. 1980).

If evidence of motive is admitted, the defendant is entitled to challenge it. The original version of this instruction included the following statement in the comment: "It was held in Runge v. State, 160 Wis. 8, 150 N.W.2d 977 (1915), that where it was claimed by the state that one motive for the uxoricide [wife killing] was defendant's desire to secure his wife's property, he was entitled, upon request, to have the jury instructed as to the law under which, upon her death, her property would descend to other persons."

Other cases analyzing the admissibility of evidence of motive include: State v. Jansky, 258 Wis. 182, 45 N.W.2d 78 (1950); Holmes v. State, 76 Wis.2d 259, 251 N.W.2d 56 (1977); Milenkovic v. State, 86 Wis.2d 272, 283 N.W.2d 320 (Ct. App. 1978).

Also see two cases addressing the problems that arise when the evidence of motive involves evidence of "other acts" covered by the rules in ' 904.02. State v. Tabor, 191 Wis.2d 482, 529 N.W.2d 915 (Ct. App. 1995); State v. Ingram, 204 Wis.2d 177, 554 N.W.2d 833 (Ct. App. 1996).

180 STATEMENTS OF DEFENDANT

The State has introduced evidence of (a statement) (statements) which it claims (was) (were) made by the defendant. It is for you to determine how much weight, if any, to give to (the) (each) statement.

In evaluating (the) (each) statement, you must determine three things:[1]

- whether the statement was actually made by the defendant. Only so much of a statement as was actually made by a person may be considered as evidence.
- whether the statement was accurately restated here at trial.
- whether the statement or any part of it ought to be believed.

ADD THE FOLLOWING IF A STATEMENT RESULTING FROM AN UNRECORDED CUSTODIAL INTERROGATION IS ADMITTED AT A TRIAL FOR A FELONY AND NO EXCEPTION APPLIES

[It is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony. You may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in this case.]

CONTINUE WITH THE FOLLOWING IN ALL CASES

You should consider the facts and circumstances surrounding the making of (the) (each) statement, along with all the other evidence in determining how much weight, if any, the statement deserves.

COMMENT

Wis JI-Criminal 180 was originally published in 1962 and revised in 1967, 1991, 1999, 2007, and 2008. This revision was approved by the Committee in July 2015; it changed the title to "Statements of Defendant" and added to the Comment; no change was made in the text.

1. The list that follows may be modified where a matter listed is not at issue in the case. For example, if there is a recorded statement, the first two matters may not be subject to dispute.

The Recording Requirement – § 973.155

The 2007 revision of this instruction was intended to comply with requirements imposed by 2005 Wisconsin Act 60. Act 60 created § 968.073, Recording custodial interrogations, which provides that "it is the policy of this state" to make an audio or audio-visual recording of any custodial interrogation of a person suspected of committing a felony, unless certain exceptions apply. Act 60 also created § 972.115, Admissibility of defendant's statement, which, in sub. (2)(a) provides that if a statement resulting from an unrecorded custodial interrogation is admitted at trial B and no exception applies B the court "shall instruct" the jury as follows:

> . . . . it is the policy of this state to make an audio and visual recording of a custodial interrogation of a person suspected of committing a felony and the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case.

These sections were enacted with a delayed effective date: "The treatment of sections 968.073 and 972.115 of the statutes first applies to custodial interrogations . . .conducted on January 1, 2007." Section 51, 2005 Wisconsin Act 60.

The recording requirement applies only to statements that are the result of interrogation, not to a suspect's "unsolicited comment about his presence in the area . . . not provoked by any statement or action" on the part of police. State v. Banks, 2010 WI App 107, 328 Wis.2d 107, 790 N.W.2d 526. The Wisconsin rule regarding recording interrogation would apply to an interview by Milwaukee police officers of a defendant in a St. Paul, Minnesota, jail, not the Minnesota rule – which requires suppression of unrecorded statements. State v. Townsend, 2008 WI App 20, 307 Wis.2d 694, 746 N.W.2d 493. [However, the rule did not apply in Townsend because the interrogation occurred in 2004 and the Wisconsin rule applies beginning with interrogations conducted on January 1, 2007.]

In State v. Jerrell C. J., 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110, the Wisconsin Supreme Court mandated, under its supervisory power, that "custodial interrogations of juveniles . . . be electronically recorded where feasible, and without exception when questioning occurs at a place of detention." ¶3, ¶58. Though phrased as a mandate to police agencies, the court characterized its holding as a rule of evidence, that "would render the unrecorded interrogations and any resultant written confession inadmissible as evidence in court." ¶47. Jerrell C. J. did not discuss a cautionary instruction as an alternative remedy. The Jerrell C. J. rule is codified in § 938.195 and § 938.31 and specifies suppression of the statement as the remedy.

One of the exceptions to the recording requirement is that "exigent public safety circumstances existed that prevented the making of" a recording or "rendered the making of such a recording unfeasible." § 972.155(2)(a)5. The same exception applies to the recording requirement for juvenile cases, which was found to apply in State v. Joel I.-N., 2014 WI App 119, 358 Wis.2d 404, 856 N.W.2d 654. Also see, State v. Dionicia M., 2010 WI App 134, 329 Wis.2d 524, 791 N.W.2d 236, where the court found that recording was feasible and that the juvenile code suppression remedy applies.

State v. Moore, 2015 WI 54, 363 Wis.2d 376, 864 N.W.2d 827, involved the arrest and interrogation of a 15 year old who was later waived to adult court where his trial took place. The court considered which remedy applies in this situation: suppression under the juvenile code rule or a jury instruction under § 972.155. The court did not resolve that question:

> Resolving the question of remedy here would yield no satisfactory answer. Fortunately, that is not necessary on the facts of this case. . . No four members of this court agree on the proper remedy for violation of § 938.195 in the criminal prosecution of a person under the age of 17, but a majority does agree that any error in admitting Moore's confession was harmless in this case. ¶¶90, 91.

Voluntariness and Trustworthiness

This instruction is to be used when evidence has been admitted relating to a statement made by the defendant. For the statement to have been admissible, the court will have determined that it was obtained in compliance with Miranda and that it was voluntarily made. The statement must still be evaluated by the jury in terms of its "trustworthiness," that is, its weight and credibility. Jackson v. Denno, 378 U.S. 368 (1964); Lego v. Twomey, 404 U.S. 477 (1972); State ex rel. Goodchild v. Burke, 27 Wis.2d 244, 258-65, 133 N.W.2d 753 (1965); State v. Verhasselt, 83 Wis.2d 647, 659, 266 N.W.2d 342 (1978). The jury should also consider whether the statement was accurately related at trial by the witness. State v. Miller, 35, Wis.2d 454, 465, 151 N.W.2d 157 (1967).

While the determination of "voluntariness" is for the court and the evaluation of "trustworthiness" is for the jury, it is obvious that many of the same facts are relevant to both determinations. However, the legal issues are different. The court will have determined that the statement is admissible by the time the jury hears it and the jury is not reviewing or duplicating that legal finding. Rather, the jury is to determine the weight and credibility of the statement. While case law has referred to this as "trustworthiness," the Committee concluded that there was little value in retaining the use of that term in the instruction and it was eliminated in the 1999 revision in favor of referring simply to "weight."

A variety of special circumstances may affect the weight, or trustworthiness, of a statement. In cases where a statement is of great importance, the court may find it appropriate to add to the standard instruction to recognize the special circumstances. However, the substance of the addition would be to advise the jury to consider the special circumstances in terms of the weight the statement is to be accorded. Instructions formerly published, which highlighted certain special circumstances, have been withdrawn (Wis JI-Criminal 182, 185, and 187, all copyright 1962).

The Wisconsin Supreme Court has discussed a variety of special circumstances in terms of their effect on the trustworthiness of confessions:

- whether the statement was preceded or followed by other statements. Lang v. State, 178 Wis. 114, 189 N.W. 558 (1922); State v. Schlise, 86 Wis.2d 26, 271 N.W.2d 619 (1979).

- whether the defendant suffered from mental incapacity. State v. Bronston, 7 Wis.2d 627, 97 N.W.2d 504 (1959).

- whether the defendant was so intoxicated that his statement was not credible. State v. Verhasselt, 83 Wis.2d 647, 266 N.W.2d 342 (1978).

- whether the statement was signed by the defendant (not relevant). Kutchera v. State, 69 Wis.2d 834, 230 N.W.2d 750 (1975).

- whether the statement was corroborated by other evidence in the case. Larson v. State, 86 Wis.2d 187, 271 N.W.2d 647 (1978); Schultz v. State, 82 Wis.2d 737, 264 N.W.2d 245 (1978); Triplett v. State, 65 Wis.2d 365, 222 N.W.2d 689 (1974); Holt v. State, 17 Wis.2d 468, 117 N.W.2d 626 (1962).

In State v. Bannister, 2007 WI 86, 302 Wis.2d 158, 734 N.W.2d 892, the Wisconsin Supreme Court held that the common law rule that a confession must be corroborated is a rule of sufficiency of the evidence, not admissibility. It is sufficient that there is corroboration of any "significant fact" — it need not establish elements of the crime or relate to a particular fact within the confession. Under the facts of the Bannister case, evidence of morphine in the blood of Michael Wolk was evidence that he used morphine, and corroborated Bannister's confession that he delivered morphine to Wolk.

182 CONFESSIONS AND ADMISSIONS: SERIES OF STATEMENTS

185 CONFESSIONS AND ADMISSIONS: MENTAL CONDITION OF DEFENDANT IN ISSUE

187 CONFESSIONS AND ADMISSIONS: EVIDENCE THAT DEFENDANT DID NOT UNDERSTAND INTERROGATOR

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 182, 185, and 187 were originally published in 1962. They were withdrawn by the Committee in 1982. This version was republished without change in 1991 and 2000.

The special circumstances dealt with by the above instructions are now to be addressed by Wis JI-Criminal 180. See the Comment to that instruction for further discussion.

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190 WEIGHT OF EVIDENCE

The weight of evidence does not depend on the number of witnesses on each side. You may find that the testimony of one witness is entitled to greater weight than that of another witness or even of several other witnesses.

COMMENT

Wis JI-Criminal 190 was originally published in 1962 and revised in 1983 and 1991. This revision was approved by the Committee in August 1999 and was intended to make the instruction more understandable without changing its meaning.

For discussion of the relationship between the number of witnesses and the credibility of testimony, see Banks v. State, 51 Wis.2d 145, 153, 186 N.W.2d 250 (1971), and Ruiz v. State, 75 Wis.2d 230, 234, 249 N.W.2d 277 (1977). Also see O'Brien v. Chicago & N.W. Ry. Co., 92 Wis.2d 340, 66 N.W.2d 363 (1896); Hack v. State, 141 Wis. 346, 354, 124 N.W. 492 (1910).

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195 JUROR'S KNOWLEDGE

In weighing the evidence, you may take into account matters of your common knowledge and your observations and experience in the affairs of life.

COMMENT

Wis JI-Criminal 195 and comment were originally published in 1962 and revised in 1983. This version was republished without change in 1992 and 2000.

Solberg v. Robbins Lumber Co., 147 Wis. 259, 133 N.W. 28 (1911), is the source of the rule that individual knowledge, observation, and experience might be used.

The application of common knowledge and of individual observation and experience to the evidence for the purpose of drawing inferences was approved in DeKeuster v. Green Bay W. R.R. Co., 264 Wis. 476, 59 N.W.2d 452 (1953); McCarthy v. Weber, 265 Wis. 70, 60 N.W.2d 716 (1953); Coenen v. Van Handel, 269 Wis. 6, 68 N.W.2d 435 (1955).

This is an optional instruction. It is a proper supplemental instruction and was so used in Solberg, supra.

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200 EXPERT[1] OPINION TESTIMONY: GENERAL

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

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

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

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

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

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

COMMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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200A EXPERT TESTIMONY: MORE THAN ONE EXPERT

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 200A was withdrawn in 2000. Its substance was added to Wis JI-Criminal 200.

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201 OPINION OF A NONEXPERT WITNESS

Ordinarily, a witness may testify only about facts. However, in this case (name of witness) was allowed to give an opinion as to (identify the subject on which an opinion was given) .[1]

In determining the weight you give to this opinion, you should consider the witness' opportunity to observe what happened and the extent to which the opinion is based on that observation.

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

COMMENT

Wis JI-Criminal 201 was originally published in 1983 and revised in 1991 and 2000. This revision was approved by the Committee in July 2011; it added reference to 2011 Wisconsin Act 2 to the Comment.

This instruction is for the situation where a nonexpert witness is allowed to testify in the form of an opinion. § 907.01.

Section 907.01 was amended by 2011 Wisconsin Act 2 to read as follows:

> 907.01 Opinion testimony by lay witnesses. If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:
>
> (1) Rationally based on the perception of the witness.
>
> (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
>
> (3) Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02(1).

Subsections (1) and (2) were part of the prior statute; subsection (3) was created by Act 2.

The rule is in accord with prior Wisconsin case law which had rejected the proposition that lay witnesses may testify only to fact, not opinion. See Bennett v. State, 54 Wis.2d 727, 735, 196 N.W.2d 704 (1972), and York v. State, 45 Wis.2d 550, 173 N.W.2d 693 (1970).

The requirement that admissible opinion be "rationally based on the perception of the witness" is the standard rule that a witness' testimony must be based on first hand knowledge or observation. The second requirement, that the opinion be "helpful to a clear understanding of his testimony or the determination of a fact in issue," allows the trial judge to exclude evidence that will not assist the jury. See the Committee Notes to Rule 907.01, 59 Wis.2d R205-06 (1973). The third requirement, that the opinion not be based on "scientific, technical, or other specialized knowledge" under § 907.02 is apparently intended to emphasize that opinion by a lay witness is not the same as "expert opinion testimony."

The primary reason for the rule allowing nonexperts to sometimes testify in opinion form is the recognition of the difficulty that witnesses may have in presenting certain testimony in a way that technically does not involve an "opinion." For example, it would be extremely difficult, if not impossible, for a witness to describe how fast a car was traveling if the witness was not allowed to express it in terms of an opinion as to the car's speed. The expression of this testimony in terms of miles per hour is technically an opinion but is permitted in order to save time and to assure that the jury gets relevant information in a useful form. The testimony is not actually being admitted as a conclusion that the jury is to accept as true. Rather, it is being admitted to show the impression or conclusion reached by the witness, which may be helpful to the jury in understanding the facts. Practical concerns require that it be allowed to be phrased in terms of an opinion. This concept was explained in connection with a "lay opinion" on sanity in Duthey v. State:

> A little consideration of the reasons why anything more than evidence of the actual physical facts observed by the witness should be allowed to be stated would greatly aid courts and counsel in this field. First, it is obvious that one not an expert can no more aid the jury by an expert opinion as to sanity than any other fact or condition. If all the physical facts can be stated, the jury are as competent to form an opinion as the witness, and their province ought not to be invaded. But all experience teaches the frequent if not general impossibility of stating all things which the eye and ear note in an interview with another, the wildness of the eye, the incoherence of the ideas in speech, hurried or erratic manner, and the like. Ordinarily it is impossible for the narrator either to remember the specific acts, words, and gestures or to adequately describe them so as to convey to his hearer their significance to the real information desired, namely, the mental state, without stating that they were excited, incoherent, unreasonable, unusual, or the like, all of which is but statement of conclusion or opinion. Hence the rule has grown that the ordinary observer may so state his impression of his interview. Courts have seemingly been unable to express verbal distinctions between the mere statement by a witness as to the impression on his mind of certain acts narrated as fully as he can and a declaration of opinion generally that the person was sane or insane, and a direct inquiry as to such opinion is now sanctioned by the weight of authority, with which the expressions in our own decisions agree. The subject received lucid treatment at the pen of Harlan, J., in Conn. Mut. L. Ins. Co. v. Lathrop, 111 U.S. 612, 4 Sup. Ct. 533, which case presents ideal illustration of the best manner of propounding the proper question to the witness. After a conversation had been narrated, the manner described as agitated, face flushed and expressionless, the question was propounded, substantially. What impression was made upon your mind by the conduct, actions, manner, expressions, and conversation which you observed? This was fully approved. We do not mean that there would be error in the direct inquiry as to witness's opinion as to the person's sanity, based, of course, on what he saw and heard; but the form quoted above is much more likely to prevent confusion in the mind of the witness and to impress the jury with the true significance of the testimony.

Duthey v. State, 131 Wis. 178, 186-87, 111 N.W. 222 (1907).

1. Wisconsin cases have recognized the admissibility of opinion testimony by nonexpert witnesses on the following subjects:

a. Bodily appearance or condition – Heiting v. Heiting, 64 Wis.2d 110, 218 N.W.2d 334 (1974); Freven v. Brenner, 19 Wis.2d 445, 114 N.W.2d 334 (1962); Stanislawski v. Metropolitan Life Ins. Co., 231 Wis. 572, 286 N.W. 10 (1939).

b. Collective facts – State v. Ewald, 63 Wis.2d 165, 216 N.W.2d 213 (1974); York v. State, 45 Wis.2d 550, 173 N.W.2d 693 (1970).

c. Condition of land/real property – Konrad v. State, 4 Wis.2d 532, 91 N.W.2d 203 (1958).

d. Crop damage estimate – Watry v. Hiltgen, 16 Wis. 543 (1863).

e. Defective condition of machinery – S.F. Bowser v. Savidusky, 154 Wis. 76, 142 N.W. 182 (1913).

f. Drunkenness – State v. Bailey, 54 Wis.2d 679, 196 N.W.2d 664 (1972); Milwaukee v. Bichel, 35 Wis.2d 66, 150 N.W.2d 419 (1967).

g. Identification – State v. Schmack, 264 Wis. 333, 58 N.W.2d 668 (1953).

h. Mental condition – Cramer v. Theda Clark Memorial Hospital, 45 Wis.2d 147, 172 N.W.2d 427 (1969); In re Will of Zych, 251 Wis. 108, 28 N.W.2d 316 (1947).

i. Pain and suffering – Drexler v. All-American Life & Casualty Co., 72 Wis.2d 420, 241 N.W.2d 401 (1976); Heiting v. Heiting, 64 Wis.2d 110, 218 N.W.2d.334 (1974); Werner v. Chicago & Northwestern Ry. Co., 105 Wis. 300, 81 N.W. 416 (1900).

j. Presence of blood – Cullen v. State, 26 Wis.2d 652, 133 N.W.2d 284 (1965), cert. denied, 382 U.S. 863, 86 S.Ct. 126, 15 L.Ed.2d 101 (1965).

k. Room temperature – Leopold v. VanKirk, 29 Wis. 548 (1872).

l. Speed – Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); Bennett v. State, 54 Wis.2d 727, 196 N.W.2d 704 (1972); Pagel v. Kees, 23 Wis. 462, 127 N.W.2d 816 (1964).

m. Estimating time of day – Schwantes v. State, 127 Wis. 160, 106 N.W. 237 (1906).

n. Value of personal property – Wilbersheid v. Wilbersheid, 77 Wis.2d 40, 252 N.W.2d 76 (1977); Estate of Ensz v. Brown Ins. Agency, Inc., 66 Wis.2d 193, 223 N.W.2d 903 (1974); Trible v. Tower Ins. Co., 43 Wis.2d 172, 168 N.W.2d 148 (1969).

o. Value of real estate – Clay v. Bradley, 74 Wis.2d 153, 246 N.W.2d 142 (1976); Genge v. City of Baraboo, 72 Wis.2d 531, 241 N.W.2d 183 (1976); Trible v. Tower Ins. Co., 43 Wis.2d 172, 168 N.W.2d 148 (1969).

p. Weather conditions/temperature – Curtis v. Chicago & Northwestern Ry. Co., 18 Wis. 327 (1864).

q. Opinion formed by judge about writing's authenticity – Jax v. Jax, 73 Wis.2d 572, 243 N.W.2d 831. (1976).

202 POLYGRAPH EVIDENCE

[INSTRUCTION WITHDRAWN]

COMMENT

Originally published in 1976, Wis JI-Criminal 202 was withdrawn by the Committee in 1981. It was republished without change in 1991. The comment was updated in 1999. This revision updated the comment and was approved by the Committee in October 2008.

Polygraph results are not admissible.

The instruction was withdrawn due to the decision of the Wisconsin Supreme Court in State v. Dean, 103 Wis.2d 228, 307 N.W.2d 628 (1981). In Dean, the court reviewed the admission-by-stipulation rule announced in State v. Stanislawski, 62 Wis.2d 730, 216 N.W.2d 8 (1974), and concluded that the rule should no longer be followed.

> To conclude, we have not undertaken to evaluate the reliability of the polygraph. We recognize today, as we did in Stanislawski, that the science and art of polygraphy have advanced and that the polygraph has a degree of validity and reliability. We are, nevertheless, not persuaded that the reliability of the polygraph is such as to permit unconditional admission of the evidence. Our analysis of and our experience with the Stanislawski rule lead us instead to conclude that the Stanislawski conditions are not operating satisfactorily to enhance the reliability of the polygraph evidence and to protect the integrity of the trial process as they were intended to do.
>
> The Stanislawski rule which appeared in 1974 to be a reasonable compromise between unconditional admission of and unconditional rejection of polygraph evidence does not appear at this time to be the satisfactory compromise, and we decline to continue to permit the admission of polygraph evidence pursuant to the rule set forth in Stanislawski.
>
> We also reject the alternative of awaiting continued refinement of the Stanislawski rule on a case-by-case method. Adequate standards have not developed in the seven years since Stanislawski to guide the trial courts in exercising their discretion in the admission of polygraph evidence. The lack of such standards heightens our concern that the burden on the trial court to assess the reliability of stipulated polygraph evidence may outweigh any probative value the evidence may have.
>
> For the reasons we have set forth, we hold that hereafter it is error for the trial court to admit polygraph evidence unless a Stanislawski stipulation was executed on or before September 1, 1981.

103 Wis.2d 228, 278-279.

In State v. Ramey, 121 Wis.2d 177, 359 N.W.2d 177 (Ct. App. 1984), the court affirmed that Dean established a rule of blanket exclusion of polygraph evidence on public policy grounds, regardless of the possibility that a stronger showing of polygraph accuracy might be made than was made in the Dean case.

In United States v. Scheffer, 118 S. Ct. 1261 (1998), the United States Supreme Court upheld Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court martial proceedings. The defendant's claim that the flat rule of exclusion deprived him of his constitutional right to present a defense was rejected. The court found that the lack of scientific consensus concerning the reliability of polygraphs means that individual jurisdictions "may reasonably reach differing conclusions as to whether polygraph evidence should be admitted" and therefore, Rule 707's rule of per se exclusion "is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence." Wisconsin has, by virtue of the Dean decision, the equivalent of the rule reviewed in Scheffer.

Offers to take a polygraph test may be admissible.

Appellate decisions recognize a distinction between evidence of polygraph test results and evidence of an offer to take or a refusal to take a polygraph test. The cases suggest that evidence of the latter may be admissible as relevant to credibility despite the Dean rule. The distinction was first noted in State v. Hoffman, 106 Wis.2d 185, 316 N.W.2d 143 (Ct. App. 1982), but the court found that even if the distinction existed, the defendant had failed to make a sufficient showing to justify cross-examining a witness about whether he had offered to take a polygraph test. The issue was revisited in State v. Wofford, 202 Wis.2d 523, 551 N.W.2d 46 (Ct. App. 1996), where the court held that allowing a witness to refer to a polygraph test and the test results was error. The court concluded that the testimony was not within the potential exception mentioned in Hoffman.

In State v. Santana-Lopez, 2000 WI App 122, 237 Wis. 2d 332, 613 N.W.2d 918, the defendant told the police that he would take a polygraph and DNA tests. The trial court excluded this evidence. The court of appeals reversed and remanded for the trial court to reconsider the ruling under the following guidelines:

> [A]n offer to take a polygraph test and an offer to undergo a DNA analysis are relevant to the state of mind of the person making the offer B so long as the person making the offer believes that the test or analysis is possible, accurate, and admissible. Simply put, an offer to undergo DNA testing, like an offer to take a polygraph examination, may reflect a consciousness of innocence.
> 2004 WI App 122 ¶4.

In State v. Pfaff, 2004 WI App 31, 269 Wis. 2d 786, 676 N.W.2d 562, the court acknowledged the potential admissibility of an offer to take a polygraph test, but found that the defendant's agreement to submit to a polygraph test at the request of his attorney did not constitute an "offer:"

> ¶30 . . . We hold that when the defense attorney plants the seed for the idea of offering to take a polygraph test, the probative value of such an offer as "consciousness of innocence" is diminished to a level where it no longer assists on the question of guilt or innocence. Instead, it takes the jury into the realm of speculation and likely confusion.

Principles applicable to polygraph testing are equally applicable to voice stress analysis.

> "Principles applicable to polygraph testing are equally applicable to voice stress analysis. See Wis. Stat. § 905.065(1); 7 Daniel D. Blinka, Wisconsin Evidence § 5065.1 (2d ed. 2001) (concluding that there is little reason to treat the forms of honesty testing mentioned in § 905.065 differently, 'at least under the present state of the scientific art). We see no reason at this time to treat these two methods of "honesty testing" differently.'"

State v. Davis, 2008 WI 71, &20.

Voluntary statements that are not "closely associated" with voice stress analysis may be admissible.

"When a statement is so closely associated with the voice stress analysis that the analysis and statement are one event rather than two events, the statement must be suppressed." State v. Davis, 2008 WI 71, ¶2, citing State v. Greer, 2003 WI App 112, ¶¶9-12, 265 Wis.2d 463, 666 N.W.2d 518.

In Davis, the certification from the Court of Appeals and the state urged the court to consider why all statements should not be admissible [if voluntary] regardless of any connection to a voice stress analysis test. Test results, and expert opinion interpreting those results, would be inadmissible. But any statement of the defendant would be admissible subject to regular voluntariness and Miranda analysis. The Davis decision concluded the answer was simple: Rule 905.065 precludes it. The rule was created by Chapter 319, Laws of 1979 [effective date: May 18, 1980] but had not been a major factor in the polygraph decisions that preceded Davis.

905.065 Honesty Testing Devices

This statute creates a privilege for persons subject to an honesty test:

(2) GENERAL RULE OF THE PRIVILEGE. A person has a privilege to refuse to disclose and to prevent another from disclosing any oral or written communications during or any results of an examination using an honesty testing device in which the person was the test subject.

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205 EXPERT[1] TESTIMONY: HYPOTHETICAL QUESTIONS

During the trial, a witness was told to assume certain facts and then was asked for an opinion based upon that assumption. This is called a hypothetical question.

The opinion does not establish the truth of the facts upon which it is based. Consider the opinion only if you believe the assumed facts upon which it is based have been proved. If you find that the facts stated in the hypothetical question have not been proved, then the opinion based on those facts should not be given any weight.

COMMENT

Wis JI-Criminal 205 was originally published in 1976 and revised in 1983, 1991 and 2000. This revision was approved by the Committee in October 2018; it eliminated the word "expert" from the text of the instruction.

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

The instruction is based on McGaw v. Wassmann, 263 Wis. 486, 492 N.W.2d 920 (1953), citing Will of McGovern, 241 Wis. 99, 3 N.W.2d 717 (1942), and on Baxter v. Chicago & NW Ry., 104 Wis. 307, 330, 80 N.W. 644 (1899). See Ford v. State, 206 Wis. 138, 140, 238 N.W. 865 (1931).

Section 907.05, Wisconsin Rules of Evidence, permits experts to testify to their opinions without disclosure of underlying facts unless the judge requires otherwise. Questions calling for expert opinion, therefore, need not be in hypothetical form.

A hypothetical question may be based on facts not yet in evidence. However, at the conclusion of testimony every assumption in which the hypothetical question is based must be supported by facts in evidence. Novitzke v. State, 92 Wis.2d 302, 307 N.W.2d 904 (1979). Also see Rabata v. Dohner, 45 Wis.2d 111, 172 N.W.2d 409 (1969).

For a case approving the use of a hypothetical question, see State v. Owen, 202 Wis.2d 620, 636-38, 551 N.W.2d 50 (Ct. App. 1996).

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

215 OBJECTIONS OF COUNSEL: EVIDENCE RECEIVED OVER OBJECTION

[INSTRUCTION RENUMBERED]

COMMENT

Wis JI-Criminal 215 was renumbered Wis JI-Criminal 148 in 2000.

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220 EVIDENCE: LIMITED PURPOSE: STATEMENT OF CODEFENDANT

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 220 was originally published in 1962. It was withdrawn by the Committee in 1969. This withdrawal note was approved by the Committee in 1985 and was revised in August 1987. It was republished without change in Release No. 28—12/91. This revision added the paragraph discussing Gray v. Maryland and was approved by the Committee in June 1998.

Wis JI-Criminal 220, Evidence: Limited Purpose: Statement of Codefendant, was originally intended for use at the joint trial of codefendants where the statement of one defendant was admitted into evidence. Its purpose was to caution that the statement was to be considered only against the defendant who made it.

Wis JI-Criminal 220 was withdrawn in 1968 after the U.S. Supreme Court decided Bruton v. United States, 391 U.S. 123 (1968). Bruton dealt with the following situation: (1) there is a joint trial of two or more codefendants; (2) the out-of-court statement of one defendant is introduced against him; (3) that defendant does not take the stand at trial; (4) the statement implicates a codefendant; and (5) the statement is not directly admissible against the codefendant under the rules of evidence. Bruton was concerned about the "spillover effect" of admitting the statement: even though admitted only against the person who made it, the statement implicates the codefendant and is likely to have a serious prejudicial effect. Because the codefendant is unable to cross-examine the maker of the statement, his right to confrontation is violated. The use of a cautionary jury instruction was not enough to cure the error because a confession that incriminates an accomplice is so "inevitably suspect" and "devastating" that the ordinary assumption that the jury will be able to follow faithfully its instructions could not be applied. 391 U.S. 123, 136. Severance of defendants was identified as the required remedy because cautionary instructions alone could not overcome the prejudicial effect. Wis. Stat. § 971.12(3), was enacted in 1970 to codify the Bruton rule, requiring severance in any case where the district attorney "intends to use the statement of a codefendant which implicates another defendant in the crime charged."

Severance may not be required if all references to the other defendant are removed from the codefendant's statement. "[I]f references to codefendants are 'effectively' excised and the jury is properly instructed, no Bruton violation occurs." Cranmore v. State, 85 Wis.2d 722, 746, 271 N.W.2d 402 (Ct. App. 1978). Also see Pohl v. State, 96 Wis.2d 290, 291 N.W.2d 554 (1980). "Excising" also satisfies § 971.12(3) because the excised statement "no longer 'implicates another defendant' and therefore does not fall within the prohibition of the statute." Cranmore, 85 Wis.2d 722, 747-48.

Editing or "redacting" the codefendant's confession was approved by the United States Supreme Court in Richardson v. Marsh, 481 U.S. 200 (1987). The Court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." The decision reversed the holding of the U.S. Court of Appeals for the Sixth Circuit which had ruled the confession

inadmissible because the defendant was linked to it by other evidence. Thus, the Court rejected the "evidentiary linkage" or "contextual implication" approach to Bruton questions adopted by some courts.

Both Richardson and Cranmore emphasize the need for a limiting instruction when an edited or "redacted" confession of a nontestifying codefendant is admitted at a joint trial. See Wis JI-Criminal 221 for an instruction for the case where the confession does not explicitly name the defendant.

In Gray v. Maryland, 118 S. Ct. 1151 (1998), the court reviewed a redacted confession: wherever the defendant's name appeared in the codefendant's confession, a blank space or the word "deleted" was substituted. The court found that this was insufficient to satisfy the interests addressed by Bruton. Richardson v. Marsh was distinguished on the ground that the statement in that case was edited to remove all reference to anyone other than the codefendant who made the statement. The court concluded:

> Unless the prosecutor wishes to hold separate trials or to use separate juries or to abandon use of the confession, he must redact the confession to reduce significantly or to eliminate the special prejudice that the Bruton Court found. Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indication of alteration, however, leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that, in our view, the law must require the same result.

Two other situations present variations on the Bruton problem. One was a short-lived exception for "interlocking" confessions. The other is an exception for cases where the codefendant's confession, which is hearsay, is admitted for a nonhearsay purpose.

(1) Interlocking Confessions: Parker v. Randolph

In 1979, the U.S. Supreme Court decided Parker v. Randolph, 442 U.S. 62 (1979), holding (in a plurality decision) that "interlocking confessions" do not implicate the Bruton rule. When each defendant has confessed, the jury's exposure to the codefendant's confession cannot have the "devastating effect" that was the concern in Bruton. Proper limiting instructions are required: "A crucial assumption underlying that system [the jury system] is that juries will follow the instructions given them by the trial judge." 442 U.S. 62, 73.

Though Parker v. Randolph was only a plurality decision, it has been adopted by the Wisconsin Court of Appeals. See State v. Smith, 117 Wis.2d 399, 344 N.W.2d 711 (Ct. App. 1983); State v. Denny, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984). Denny also held that because interlocking confessions present an exception to Bruton, they present an exception to the § 971.12(3) which was intended to codify Bruton. 120 Wis.2d 614, 620.

In Cruz v. New York, 481 U.S. 186 (1987), the Court repudiated the plurality decision of Parker v. Randolph. Cruz held that the codefendant's confession is not admissible even if it is closely parallelled by (that is, "interlocks" with) a confession of the defendant. The Court rejected the reasoning of the Parker v. Randolph plurality that the "devastating effect" is absent in the interlocking confession case. Rather, Cruz says the devastating effect is even greater in such cases, requiring full application of the Bruton rule.

No published decision of a Wisconsin appellate court has revisited the interlocking confessions issue since Cruz was decided.

(2) Nonhearsay Purpose: Tennessee v. Street

In Tennessee v. Street, 471 U.S. 409 (1985), the U.S. Supreme Court held that the Bruton rule was not implicated by the introduction of an accomplice's confession for a nonhearsay purpose – rebutting the defendant's testimony that his own confession was coercively derived from the accomplice's statement. The statement was not introduced to prove what happened at the murder scene, so it raises no confrontation clause concerns.

The Court said the only similarity to Bruton is that the statement could have been misused by the jury. This danger can be effectively addressed by a limiting instruction directing the jury to consider the statement for the nonhearsay purpose only.

Wis JI-Criminal 220B, Law Note, discusses Tennessee v. Street.

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220A CAUTIONARY INSTRUCTION: INTERLOCKING CONFESSIONS

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 220A was originally approved by the Committee in November 1985. It was withdrawn in August 1987. It was republished without change in Release No. 28—12/91. This revision updated the comment and was approved by the Committee in June 1998.

In Parker v. Randolph, 442 U.S. 62, (1969), a plurality of the U.S. Supreme Court held that "interlocking confessions" do not implicate the mandatory severance rule of Bruton v. United States, 391 U.S. 123 (1968). For a discussion of Bruton and the cases that followed it, see the Withdrawal Note to Wis JI-Criminal 220.

Though Parker v. Randolph was only a plurality decision, it was adopted by the Wisconsin Court of Appeals. See State v. Smith, 117 Wis.2d 399, 344 N.W.2d 711 (Ct. App. 1983); State v. Denny, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984). Denny also held that because interlocking confessions present an exception to Bruton, they present an exception to § 971.12(3) which was intended to codify Bruton. 120 Wis.2d 614, 620.

In Cruz v. New York, 481 U.S. 186 (1987), the Court repudiated the plurality decision of Parker v. Randolph. Cruz held that the codefendant's confession is not admissible even if it is closely parallelled by (that is, "interlocks" with) a confession of the defendant. The Court rejected the reasoning of the Parker v. Randolph plurality that the "devastating effect" is absent in the interlocking confession case. Rather, Cruz says the devastating effect is even greater in such cases, requiring full application of the Bruton rule.

No published decision of a Wisconsin appellate court has revisited the interlocking confessions issue since Cruz was decided.

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220B LAW NOTE: STATEMENT OF ACCOMPLICE ADMITTED FOR NONHEARSAY PURPOSE

COMMENT

Wis JI-Criminal 220B was originally published in 1985 and revised in 1987. This version was republished without change in Release No. 28—12/91.

This note discusses the use of an accomplice's confession in the trial of a single defendant, where evidence of that confession is admitted for a nonhearsay purpose. In Tennessee v. Street, 471 U.S. 409 (1985), the U.S. Supreme Court held that the mandatory severance rule of Bruton v. United States, 391 U.S. 123 (1968), was not implicated where the confession of an accomplice was admitted for a nonhearsay purpose. See the discussion of Bruton in Wis JI-Criminal 220, Withdrawal Note.

In Street, the confession of an accomplice was introduced to rebut the defendant's testimony that his own statement was coercively derived from the accomplice's statement. The Court held that since the statement was not introduced to prove what happened at the murder scene (that would have been a "hearsay purpose" — to prove the truth of the statement), admission raises no confrontation clause concerns.

The Court said the only similarity to Bruton is that the statement could have been misused by the jury. This danger can be effectively addressed by a limiting instruction directing the jury to consider the statement for the nonhearsay purpose only.

The Wisconsin appellate courts have not yet adopted the Tennessee v. Street rule. Although the situation comes close to implicating the constitutional concerns of Bruton, the basis for the decision was the distinction between hearsay and nonhearsay purpose. Whether such a distinction will be adopted in Wisconsin is not known at the time this Note was prepared. On one hand, the Wisconsin courts have tended to follow the United States Supreme Court's lead on issues like this. See, for example, State v. Smith, 117 Wis.2d 399, 344 N.W.2d 711 (1983), adopting the plurality decision in Parker v. Randolph, 442 U.S. 62 (1969), on the interlocking confessions issue. Parker v. Randolph's exception for interlocking confessions has been repudiated. See Cruz v. New York, 481 U.S. 186 (1987), discussed at Wis JI-Criminal 220A, Withdrawn. On the other hand, it is difficult to admit evidence for a limited purpose and, more importantly, difficult to assure that a juror will use the evidence only for the limited purpose. (See sample instruction below.) This may lead Wisconsin trial and appellate courts to use considerable caution in the Tennessee v. Street situation by making a careful evaluation of the probative value of the evidence compared to its unfairly prejudicial effect. See § 904.03, Wis. Rules of Evidence.

Limiting instructions are inherently difficult. One for this situation is especially difficult to evaluate in a general form. An instruction adapted for the facts of Tennessee v. Street might read as follows:

> Evidence has been received of a statement made out-of-court by Clifford Peele.
>
> This evidence is to be considered only for the purpose of rebutting the defendant's testimony that his own confession was a coerced copy of Peele's statements.
>
> It must not be considered as proof of the facts contained in the statement.

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221 STATEMENT OF CODEFENDANT: STATEMENT DOES NOT MENTION DEFENDANT[1]

Evidence has been received of a statement made by defendant (name) . It may be used only in considering whether defendant (name) is guilty or not guilty. It must not be used or considered in any way against defendant (name other defendant) .

COMMENT

Wis JI-Criminal 221 was approved by the Committee in August 1987 and republished without change in Release No. 28C12/91. The comment was updated in 1999. It was republished without substantive change in 2000.

1. This instruction is intended for the situation reviewed by the United States Supreme Court in Richardson v. Marsh, 481 U.S. 200 (1987). The case involved application of the so-called Bruton rule (see discussion in the Comment to JI-220) to a case where the following facts are present: (1) there is a joint trial of two or more codefendants; (2) the statement of one defendant is introduced against him; (3) that defendant does not take the stand at trial; and (4) the statement does not expressly mention the other defendant.

The Court in Richardson held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." (Emphasis added.) The decision reversed the holding of the U.S. Court of Appeals for the Sixth Circuit which had ruled the confession inadmissible because the defendant was linked to it by other evidence. Thus, the Court rejected the "evidentiary linkage" or "contextual implication" approach to Bruton questions adopted by some courts.

The Richardson decision appears to be consistent with Wisconsin law: "[I]f reference to codefendants are 'effectively' excised and the jury is properly instructed, no Bruton violation occurs." (Emphasis added.) Cranmore v. State, 85 Wis.2d 722, 746, 271 N.W.2d 402 (Ct. App. 1978).

In Gray v. Maryland, 118 S. Ct. 1151 (1998), the Court reviewed a redacted confession: wherever the defendant's name appeared in the codefendant's confession, a blank space or the word "deleted" was substituted. The Court found that this was insufficient to satisfy the interests addressed by Bruton. Richardson v. Marsh was distinguished on the ground that the statement in that case was edited to remove all reference to anyone other than the codefendant who made the statement. The Court concluded:

> Unless the prosecutor wishes to hold separate trials or to use separate juries or to abandon use of the confession, he must redact the confession to reduce significantly or to eliminate the special prejudice that the Bruton Court found. Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indication of alteration, however, leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that, in our view, the law must require the same result.

While edited (or "redacted" or "excised") confessions present an exception to Bruton's mandatory severance rule, trial courts retain the discretionary power under § 971.12(3) to order separate trials or "provide whatever other relief justice requires" if "it appears that a defendant or the state is prejudiced by a joinder of crimes or defendants." Where a joint trial "would be unduly prejudicial . . . the interests of administrative efficiency must yield to the mandates of due process." Haldane v. State, 85 Wis.2d 182, 189, 270 N.W.2d 75 (1978). Two such situations are cases involving antagonistic defenses, Jung v. State, 32 Wis.2d 541, 145 N.W.2d 684 (1966), Lampkins v. State, 51 Wis.2d 564, 187 N.W.2d 164 (1971), or where an entire line of evidence relevant to the liability of only one defendant may be treated as evidence against all the defendants by the trier of fact simply because the defendants are tried jointly. State v. Nutley, 24 Wis.2d 527, 129 N.W.2d 155 (1964).

In a joint trial where the statement of one defendant does not explicitly refer to a codefendant, the trial court retains its usual discretionary power to disallow the statement if their probative value is outweighed by the danger of unfair prejudice. § 904.03, Wis. Rules of Evidence.

222 JOINT TRIAL: EVIDENCE ADMISSIBLE AS TO ONE DEFENDANT ONLY

Evidence has been received relating to (describe evidence). It may be used only in considering whether defendant (name) is guilty or not guilty. It must not be used or considered in any way against defendant (name other defendant).

COMMENT

Wis JI-Criminal 222 was originally published in 1994 and was republished without substantive change in 2000.

This instruction is intended for the case where a "single line of evidence" is admitted during the joint trial of codefendants. This is evidence admissible against one defendant but not the other. An alternative to ordering separate trials in such cases is to give a cautionary instruction. When evidence is admitted for a limited purpose, a limiting instruction must be given upon request. § 901.06.

In State v. Patricia A. M., 168 Wis.2d 724, 484 N.W.2d 380 (Ct. App. 1992), the court of appeals reversed a conviction because a required cautionary instruction was not given. The case involved the joint trial of codefendants; evidence admissible only as to one defendant was allowed. The court of appeals held that the limiting instruction required by State v. DiMaggio, 49 Wis.2d 565 (1971), should have been given. The Wisconsin Supreme Court reversed, holding that the disputed evidence was admissible as to both defendants, thus avoiding the issue whether a cautionary instruction was necessary. 176 Wis.2d 542, 500 N.W.2d 289 (1993).

DiMaggio approached the issue from the standpoint of reviewing a trial court's refusal to order separate trials for codefendants. One defendant claimed the trial judge should have severed his case when evidence was admitted that related only to one defendant. The court affirmed the trial court's refusal to do so, indicating that the trial court gave a cautionary instruction which was an adequate substitute for severance. The court of appeals decision in Patricia A. M. stated that such an instruction must be given even in the absence of a request since it is the trial judge's duty to follow up once the severance motion was denied. Since the Wisconsin Supreme Court found that the evidence in Patricia A. M. was admissible as to both defendants, it was not necessary for the court to address the necessity or effectiveness of a jury instruction. The Committee concluded that DiMaggio was still a viable decision and drafted this instruction for use in the "single line of evidence" case.

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225 INSTRUCTING ON A "PRESUMED FACT" THAT IS AN ELEMENT OF THE CRIME — § 903.03(3)

Evidence has been received that: (here identify the "basic facts")[1] _____.

If you are satisfied beyond a reasonable doubt that (state the basic facts) _____, you may find from this evidence alone that (identify the "presumed facts")[2] _____, but you are not required to do so. You are the sole judges of the facts, and you must not find that the defendant (state the presumed fact) unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.[3]

COMMENT

Wis JI-Criminal 225 was originally published in 1987. The list of statutes beginning on page 3 was amended in February 1989 and January 1990. The instruction was republished without substantive change in 2000.

This instruction is intended to provide a framework for instructing the jury on "presumptions" in criminal cases as required by § 903.03. Most of the commonly used "presumptions" and "prima facie cases" are covered by either separate instructions on the specific evidentiary device (see, for example, JI-230 relating to a blood alcohol test) or parts of the uniform instruction for the crime to which the evidentiary device relates (see, for example, Wis JI-Criminal 1468, **ISSUE OF WORTHLESS CHECK**). The text of § 903.03 appears after note 3.

The need for an instruction arises when the legislature or the courts recognize that a certain fact or set of facts should be accorded "prima facie" or "presumptive" effect in proving the existence of other facts. For example, § 943.24(3)(a) provides that "proof that, at the time of issuance, the person did not have an account with the drawee" is "prima facie evidence that the person at the time he or she issued the check or other order for the payment of money, intended it should not be paid." The statutes refer to these evidentiary devices in a variety of ways, but the Committee has concluded that they should all be treated in the same way — as permissive inferences. An attempt to list all statutes in the Criminal Code that recognize "presumptions" or "prima facie" cases follows at the end of this comment.

Discussions of "presumptions" can become exceedingly complex. But understanding their impact in jury instructions in Wisconsin criminal cases can be simplified if one remembers that they only point out certain inferences that jurors are free to make but which jurors are not required to make. "Presumptions" cannot be employed to undercut the basic requirements that all facts necessary to constitute the crime (the "elements") be established beyond a reasonable doubt. Given that the effect of the "presumption" and the "prima facie case" is to create a "permissive inference," the Committee concluded that the words "presumption," "prima facie," or "inference," or their variations, should not be used in instructing the jury.

Two limitations on presenting these evidentiary devices to the jury should be noted. First, where the presumed fact is an element of the crime, the "presumption" cannot be submitted to the jury unless the evidence, as a whole, would allow the jury to be satisfied beyond a reasonable doubt that the presumed fact exists. See § 903.03(2). The presumption alone cannot justify submitting the case to the jury if the evidence as a whole is not sufficient.

Second, no inference or presumption may be submitted in a particular case unless, based on the facts of that case, the presumed fact is "more likely than not" to follow from the basic fact. This is the test set forth by the United States Supreme Court in County Court of Ulster County v. Allen, 442 U.S. 140 (1979). The Court held that if a statutory "presumption" creates a permissive inference (which is what "presumptions" and "prima facie cases" do in Wisconsin – see § 903.03(1)), defendants cannot challenge its constitutionality "on its face" by referring to hypothetical situations. Its validity may, however, be challenged as applied to the facts of a particular case. The test is whether ". . . there is a 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from' the former." 442 U.S. 140, 165, citing Tot v. United States, 319 U.S. 463, 467 (1943), and Leary v. United States, 395 U.S. 6, 36 (1969). Ulster County involved a statutory "presumption" that anyone present in a car was in possession of weapons found in the car. Under the circumstances of that case (three adult males with a 16-year-old girl and guns in her purse), the Court found the "presumption" was validly submitted to the jury. If the facts had been different, involving a defendant who was a hitchhiker, for example, it would have been error to submit the "presumption" to the jury – under those facts, it could not be said that the presumed fact (possession of the gun) was "more likely than not to flow from" the basic fact (presence in the automobile).

1. The "basic facts" are those which give rise to the "presumption" or "prima facie case." In the issue of worthless check example, evidence that the defendant did not have an account with the bank on which the check is drawn is evidence of the "basic facts" which give rise to the "presumption" that the defendant intended the check not be paid.

2. The "presumed fact" is the fact that results from the application of the "presumption" or "prima facie case." In the issue of worthless checks example, "intent that the check not be paid" is the "presumed fact" which may be found from the proof of the basic fact: no account with the bank on which the check is drawn.

3. Applying the suggested instruction to the worthless check example would result in the following:

Evidence has been received that the defendant did not have an account with the bank on which the check was drawn.

If you are satisfied beyond a reasonable doubt that the defendant did not have an account with the bank on which the check was drawn, you may find from this evidence alone that the defendant intended the check not be paid, but you are not required to do so. You are the sole judges of the facts, and you must not find the defendant intended the check not be paid unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.

Section 903.03 of the Wisconsin Rules of Evidence sets forth rules relating to presumptions in criminal cases.

903.03 Presumptions in criminal cases. (1) Scope. Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(2) Submission to jury. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

(3) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

Criminal Code Statutes Using
"Presumptions" or "Prima Facie" Cases

Statute	Title	Evidentiary Device
940.19(6)*	Battery	"A rebuttable presumption..."[a]
940.225(6)**	Sexual Assault	"...shall not be presumed..."[b]
941.36(2)	Fraudulent Tapping of Electric Wires or Gas or Water Meters or Pipes	"...is presumptive evidence ..."
943.20(1)(b)	Theft by Employee or Bailee	"...is prima facie evidence of..."

943.21(2), (2m)	Fraud on Hotel or Restaurant Keeper	"...prima facie evidence...is shown by..."; A...constitutes prima facie evidence of...@
943.24(3)	Issue of Worthless Checks	"...is prima facie evidence that..."
943.25(3)	Transfer of Encumbered Property	"It is prima facie evidence..."
943.37(3)***	Alteration of Property Identification Marks	"...is prima facie evidence of..."[c]
943.41(3)(a), (b) & (e), (4)(a) & (b)	Financial Transaction Card Crimes	"...is prima facie evidence..."
(5)(a), (6)(d)	" "	"...shall be presumed..."
943.455(2)	Theft of Commercial Mobile Service	"The intent required ... may be inferred ..."
943.46(2) (a), (d)-(g)	Theft of Cable Television Service	"The intent required ... may be inferred ..."
943.50(2)	Retail Theft	"...is evidence of..."
943.61(3)	Theft of Library Material	"...is evidence of..."
945.05(2)	Dealing in Gambling Devices	"...is prima facie evidence of..."
946.42(3)(e)	Escape	"...is prima facie evidence of ..."
948.02(6)****	Sexual Assault of a Child	"...shall not be presumed incapable of ..."
948.13(3)	Child Sex Offender Working with Children	"...is prima facie evidence that ..."
948.22(4)	Failure to Support	"...is prima facie evidence of..."
948.62(2)	Receiving Stolen Property From a Child	"...is prima facie evidence that..."

* The implementation of this presumption was discussed in State v. Crowley, 143 Wis.2d 324, 422 N.W.2d 847 (1988).

** This section does not actually create the same sort of evidentiary device as found in the other statutes. Rather, it is intended to state a rule of substantive law: that a person may be prosecuted for the sexual assault of his or her spouse.

*** In State v. Hamilton, 146 Wis.2d 426, 432 N.W.2d 108 (1988), the court found that the word "similar" in subsec. (3) "can be understood in different ways by reasonable people and that the statute is therefore ambiguous." The court then went on to define it: ". . . within the context of sec. 943.37(3), items must be comparable, substantially alike or capable of standing in the place of the other before they are similar."

**** This section does not actually create the same sort of evidentiary device as found in the other statutes. Rather, it is intended to state a rule of substantive law: that a person may be prosecuted for the sexual assault of his or her spouse.

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230 PRIMA FACIE EFFECT OF A TEST RESULT SHOWING AN ALCOHOL CONCENTRATION OF 0.08 GRAMS OR MORE: OFFENSES INVOLVING "UNDER THE INFLUENCE" — § 885.235(1g)(c)

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[1]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[2] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[3] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[4]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However,

the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

COMMENT

Wis JI-Criminal 230 was originally published in 1962 and was revised in 1974, 1982, 1985, 1993, 1994, 1999, and 2004. This revision was approved by the Committee in June 2005.

The text of this instruction is incorporated into most substantive offense instructions to which it may apply.

The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. For persons with two or fewer priors, a test showing 0.08 grams or more is prima facie evidence of being "under the influence of an intoxicant." § 885.235(1)(c). The change applies to all offenses committed on or after September 30, 2003.

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

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. As to alcohol test results generally, see Wis JI-Criminal 2600, Section VII.

1. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII., B.

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

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

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

232 EVIDENCE OF A TEST RESULT SHOWING AN ALCOHOL CONCENTRATION OF 0.04 GRAMS OR MORE BUT LESS THAN 0.08 GRAMS: OFFENSES INVOLVING "UNDER THE INFLUENCE" — § 885.235(1g)(b)

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[1]

WHERE TEST RESULTS SHOWING 0.04 GRAMS OR MORE BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

The law provides that an analysis showing that there was [.04 grams or more but less than .08 grams of alcohol in 100 milliliters of the defendant's blood] [.04 grams or more but less than .08 grams of alcohol in 210 liters of the defendant's breath] at the time of the test may be considered by you in determining whether the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating). However, by itself it is not a sufficient basis for finding that a person was under the influence of an intoxicant at the time of the alleged (driving) (operating).

Therefore, you may consider this evidence regarding a blood-alcohol test along with all of the other credible evidence in the case, giving to it the weight you believe it is entitled to receive.[2]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[3]

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

COMMENT

Wis JI-Criminal 232 was originally published in 1962 and was revised in 1974, 1980, 1982, 1985, 1993, 1994, 1999, and 2004. This revision corrected a typographical error.

This instruction is cross-referenced in the instructions for operating while intoxicated offenses.

This revision reflects the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. Act 30 changed § 885.235(1g)(b) to refer to the range of 0.04 to 0.08. That section provides that results in this range are relevant evidence on the issue of being "under the influence" but are not to be given any prima facie effect. The change applies to all offenses committed on or after September 30, 2003.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of JI 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. As to alcohol test results generally, see Wis JI-Criminal 2600, Section VII.

1. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII., B.

2. Section 885.235(1g)(b) provides that test results in the 0.04-0.08 range are relevant evidence on the issue of being "under the influence" but are not to be given any prima facie effect.

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

234 BLOOD-ALCOHOL CURVE

Evidence has been received that, within three hours after the defendant's alleged (driving) (operating) of a motor vehicle, a sample of the defendant's (breath) (blood) (urine) was taken. An analysis of the sample has also been received. This is relevant evidence that the defendant (had a prohibited alcohol concentration) (was under the influence) at the time of the alleged (driving) (operating). Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider the evidence regarding the analysis of the (breath) (blood) (urine) sample and the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case, giving it the weight you believe it is entitled to receive.

COMMENT

Wis JI-Criminal 234 was originally published in 1993 and revised in 1999. This revision was approved by the Committee in 2003.

This paragraph should be added to the instruction for the offense when there is evidence of an issue relating to the "blood alcohol curve." The text of this instruction has been part of the instructions for individual drunk driving offenses since 1982. It was first published as a freestanding instruction in 1993.

The presence of a prohibited alcohol concentration at the time of operation is the significant issue. The relevance of a test result showing a prohibited alcohol concentration at some time after operation will vary, depending on many factors, including the person's physical condition, what the person had to eat, what the person drank, the length of time over which the drinks were consumed, etc. The problem of the so-called blood-alcohol curve is discussed in State v. Vick, 104 Wis.2d 678, 312 N.W.2d 489 (1981).

Vick presented a situation where the defendant claimed his blood was absorbing alcohol at the time he was arrested and that therefore the blood alcohol concentration had not reached the prohibited level at the time of driving but only reached that level later at the time of the test. If the evidence in a case presents this problem, the instruction on the prima facie effect of test results may not be appropriate since there may be no "rational connection" between the alcohol concentration at the time of the test and a prohibited alcohol concentration at the time of driving. (See Ulster Co. v. Allen, 442 U.S. 140 (1979), for a discussion of the "rational connection" requirement when instructing the jury on statutory presumptions.)

The Committee concluded that where there is a problem with the "blood-alcohol curve," it is preferable to treat the test result as relevant evidence rather than instruct the jury to give it "prima facie effect."

235 REFUSAL OF DEFENDANT TO FURNISH SAMPLE FOR ALCOHOL TEST

Testimony has been received that the defendant refused to furnish a (breath) (blood) (urine) sample for chemical analysis. You should consider this evidence along with all the other evidence in the case, giving to it the weight you believe it is entitled to receive.

COMMENT

Wis JI-Criminal 235 was originally published in 1962. The comment was updated in 1982, 1983, 1985, 2004 and 2021. Nonsubstantive editorial changes were made in 1992 and 2000. This revision was approved by the Committee in February 2021; it restored the reference to "blood" in the text and added to the Comment.

The 2018 revision removed reference to a blood test in light of decisions from the United States and Wisconsin Supreme Courts. In Birchfield v. North Dakota, 579 U.S. ___, 136 S.Ct. 2160 (2016), the court held that it is unconstitutional to make it a crime to refuse a warrantless blood test after being lawfully arrested for OWI – where exigent circumstances were not shown. However, the court also stated:

> "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws and nothing we say here should be read to cast doubt on them." 136 S.Ct. 2160, 2185-86.

In State v. Dalton, 2018 WI 85, 383 Wis.2d 147, 914 N.W.2d 120, the defendant was subjected to a warrantless blood draw that was justified by exigent circumstances. The Wisconsin Supreme Court held that a trial court erred by expressly relying on the defendant's refusal to consent to the blood draw to increase his sentence within the allowed statutory range:

> Dalton was criminally punished for exercising his constitutional right. Established case law indicates that this is impermissible. ¶61.
>
> . . . the circuit court violated Birchfield by explicitly subjecting Dalton to a more severe criminal penalty because he refused to provide a blood sample absent a warrant. ¶67.

Neither Birchfield nor Dalton holds that commenting on a blood test refusal is improper, but in 2018, the Committee decided to remove reference to a blood test from the text of the instruction to avoid possible issues as the area of the law continued to develop. However, after the 2021 decision in State v. Levanduski, 2020 WI App 53, 393 Wis.2d 674, 948 N.W.2d 411, the Committee decided to restore the reference to a blood test.

In Levanduski, the court resolved an issue arguably left open by Birchfield by holding that when an officer reads Wisconsin's "Informing the Accused" form to an OWI suspect, and the suspect refuses a blood draw, the refusal can be used against him or her at trial. Specifically, § 343.305(3)(a) states that "upon

arrest for a violation of § 346.63(1) … a law enforcement officer may request the person to provide one or more samples of his or her blood, breath or urine." If an officer determines that a sample is necessary, he or she must read the "Informing the Accused" form provided in § 343.305(4), which states in part:

> "If you refuse to take any test that this agency requests, your operating privileges will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court." Wis. Stat. § 343.305(4).

The defendant in Levanduski claimed that using a person's refusal to submit to a warrantless search violates the Fourth Amendment. However, the court in Levanduski noted that numerous decisions have referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences. Relying primarily on Birchfield and Dalton, the court concluded that imposing civil penalties and evidentiary consequences for refusals are lawful under the Fourth Amendment as they are distinct from criminal penalties. Levanduski, 393 Wis.2d 674, ¶13. Therefore, the language provided in § 343.305(4) correctly states the law and the fact that a suspect refused testing can be used against him or her in court as a means of showing consciousness of guilt. Id., citing State v. Zielke, 137 Wis.2d 39, 49-50, 403 N.W.2d 427 (1987).

In State v. Albright, 98 Wis.2d 663, 298 N.W.2d 196 (Ct. App. 1980), the court of appeals reaffirmed that evidence of a defendant's refusal to take a chemical test was relevant and constitutionally admissible in a drunk driving prosecution. "A reasonable inference from refusal to take a mandatory breathalyzer test is consciousness of guilt. The person is confronted with a choice of the penalty for refusing a test, or taking a test which constitutes evidence of his sobriety or intoxication. Perhaps the most plausible reason for refusing the test is consciousness of guilt, especially in view of the option to taking an alternative test." 98 Wis.2d 663, 668-69. The evidence being relevant and there being no right to refuse to take a test, the court held there was no rationale for prohibiting comment on the refusal. See also South Dakota v. Neville, 459 U.S. 553, 556 103 S.Ct. 916 (1983).

In State v. Lemberger, 2017 WI 39, 369 Wis.2d 224, 880 N.W.2d 183, the Wisconsin Supreme Court rejected a claim that trial counsel provided ineffective assistance in failing to challenge the prosecutor's comment on Lemberger's refusal to take a breath test:

> Thus, the law was settled at the time of Lemberger's trial that, upon his lawful arrest for drunk driving, Lemberger had no constitutional or statutory right to refuse to take the breathalyzer test and that the state could comment at trial on Lemberger's improper refusal to take the test. ¶29.

The court also noted that the decision in Birchfield v. North Dakota, 579 U.S. ___, 136 S.Ct. 2160 (2016), confirmed that persons lawfully arrested for drunk driving have no right to refuse a breath test. ¶34.

The defendant's explanation for the refusal is also admissible. Since the relevance of the refusal is that it tends to indicate a consciousness of guilt,

> [t]he corollary of that rule is that any evidence that tends to rebut or diminish the force of that permissible inference is also relevant, for it tends to make less probable the fact of intoxication – a fact of consequence in this action, and, therefore, equally admissible. Thus, evidence that would tend to show that the refusal was for reasons unrelated to a consciousness of guilt or the fear that the test would reveal the intoxication, tends to abrogate, or at least diminish, the reasonableness of the inference to be drawn from an unexplained refusal to take the alcohol test.

State v. Bolstad, 124 Wis.2d 576, 585-86, 370 N.W.2d 576 (1985).

For a more complete discussion of the case law on this topic, see Wis JI-Criminal 2600 Introductory Comment at Sec. VII., F.

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237 ALCOHOL CONCENTRATION CHART

A chart showing estimated alcohol concentrations has been received in evidence and may be considered in arriving at a verdict. This chart is prepared by the Department of Transportation and shows estimated concentrations of alcohol as determined by comparing the number of drinks consumed with the weight of the person who consumed them. The chart has a formula for determining the amount of alcohol "burned up" over time by the drinker.

The estimates in the chart are based on estimates of the results under average circumstances. The actual alcohol concentration in any particular case will depend on many factors, including the metabolic rate of the person, which is the rate at which the body burns up alcohol, the actual alcohol content of the drinks, the amount of food in the person's stomach, and other factors.

This evidence was received for the purpose of helping you make your decision, if it does help you. You are not bound by this evidence. You should carefully consider the evidence along with all the other evidence in the case, giving to it just such weight as you decide it is entitled to receive.

COMMENT

Wis JI-Criminal 237 was approved by the Committee in March 1985 and was republished without substantive change in 1992 and 2000.

The 1994 revision of this instruction deleted the reference to "blood" alcohol concentration. The current versions of the Department of Transportation charts are titled "Alcohol Chart."

In State v. Hinz, 121 Wis.2d 282, 360 N.W.2d 56 (Ct. App. 1984), the Wisconsin Court of Appeals held it was error to exclude the DOT-published chart relating Blood Alcohol Concentration (BAC) to the number of drinks consumed, adjusted for body weight. The court compared the BAC chart to the standard stopping distance chart and found no reason for treating the two differently.

The court further noted the standard civil jury instruction for the stopping distance chart and stated, "[w]e perceive no reason why the correlative limitations of the blood alcohol chart should not be explained to the jury in the same manner." 121 Wis.2d 282, 288. The civil instruction referred to in Hinz has been withdrawn. See the note at Wis JI-Civil 255.

The court in Hinz further listed what the "correlative limitations" are for the BAC chart: "Blood alcohol content may vary from the chart's estimate because of metabolic rate, the actual alcohol content of the drinks consumed, the amount of food in the stomach, and other factors." 121 Wis.2d 282, 286.

Hinz seems to assume that the actual chart will go to the jury, as opposed to there being only testimony, based on the chart, about what the defendant's BAC probably was. Wis JI-Criminal 237 is based on the Hinz decision.

245 TESTIMONY OF ACCOMPLICES

You have heard testimony from (name accomplice) who stated that (he) (she) was involved in the crime charged against the defendant. You should consider this testimony with caution and great care, giving it the weight you believe it is entitled to receive. You should not base a verdict of guilty upon it alone, unless after consideration of all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty.

COMMENT

Wis JI-Criminal 245 was originally published in 1962 and was revised in 1983 and 1992. This revision was approved by the Committee in January 2000.

The 1999 revision involved a substantial rewriting of the former instruction, based in part on instruction 3.22, Federal Criminal Jury Instructions of the Seventh Circuit (West, 1980). The revision was intended to make the instruction more understandable without changing the meaning.

When this instruction is used, it should be given immediately after the general instruction on credibility of witnesses, see Wis JI-Criminal 300.

In cases where the accomplice has been granted immunity or other concessions, see Wis JI-Criminal 246. In State v. Nerison, the court of appeals had reversed Nerison's conviction because the trial testimony of two accomplices "was so indelibly and irreparably tainted by the state's actions in securing it that its admission violated Nerison's due process rights." The court of appeals found that the state had "crossed the line" in bargaining with the accomplices for specific testimony. 130 Wis.2d 313, 387 N.W.2d 128 (Ct. App. 1986). The Wisconsin Supreme Court reversed, holding that the due process line referred to by the court of appeals was not crossed due to the presence of corroborating evidence of guilt and the fact that all the traditional due process safeguards were made available: full disclosure of the state's agreement with the accomplices, cross-examination of the witnesses, and a specific jury instruction on the credibility of the accomplices. 136 Wis.2d 37, 401 N.W.2d 1 (1987). The Nerison court did not explicitly require a cautionary instruction in all cases, but giving an instruction should be carefully considered, given the court's emphasis on an instruction as one of the three important safeguards.

Other Wisconsin cases that discuss instructions on accomplice testimony have been concerned with whether it was error to fail to give an instruction. Most cases have found there to be no error, sometimes because the witness was not actually an accomplice, see Cheney v. State, 44 Wis.2d 454, 174 N.W.2d 1 (1969), or because the testimony of the accomplice was not uncorroborated, see Cheney, supra, Bizzle v. State, 65 Wis.2d 730, 233 N.W.2d 577 (1974), and State v. Linse, 93 Wis.2d 163, 286 N.W.2d 554 (1980). But see Abaly v. State, 163 Wis. 609, 158 N.W. 308 (1916), where the court held it was prejudicial error to refuse to give an accomplice testimony instruction.

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246 TESTIMONY OF A WITNESS GRANTED IMMUNITY OR OTHER CONCESSIONS

You have heard testimony from (name of witness) who has received [immunity] [concessions].

["Immunity" means that (name of witness)'s testimony and evidence derived from that testimony cannot be used in a later criminal prosecution against (name of witness).]

[(Describe concessions).]

This witness, like any other witness, may be prosecuted for testifying falsely.

You should consider whether receiving [immunity] [concessions] affected the testimony and give the testimony the weight you believe it is entitled to receive.

COMMENT

Wis JI-Criminal 246 was originally published in 1983 and was revised in 1992. This revision was approved by the Committee in January 2000.

The 1999 revision expanded the instruction to cover other concessions that may have been extended to a witness in addition to or instead of a formal grant of immunity. The other concessions might involve agreements by the state not to charge (see State v. Jones, 217 Wis.2d 57, 576 N.W.2d 580 (Ct. App. 1998), to reduce or dismiss other charges, to agree to a recommended sentence, etc. Because there may be a dispute about whether concessions were actually granted, the Committee recommends this instruction be used in this form only where there is no dispute about the existence and nature of the concessions.

An earlier version of this instruction (© 1983) described "transactional immunity": the immunity grant meant that the witness could not be prosecuted for involvement in any crime about which the witness testified. The Wisconsin immunity statutes were amended by 1989 Wisconsin Act 122 (effective date: January 31, 1990) to provide that all immunity grants are for "use immunity." For example, § 972.085 provides as follows:

972.085 Immunity; use standard. Immunity from criminal or forfeiture prosecution under ss. 13.35, 17.16(7), 77.61(12), 93.17, 111.07(2)(b), 128.16, 133.15, 139.20, 139.39(5), 195.048, 196.48, 551.56(3), 553.55(3), 601.62(5), 767.47(4), 767.65(21), 776.23, 885.15, 885.24, 885.25(2), 891.39(2), 968.26, 972.08(1) and 979.07(1), provides immunity only from the use of the compelled testimony or evidence in subsequent criminal or forfeiture proceedings, as well as immunity from the use of evidence derived from that compelled testimony or evidence.

The original version of this instruction was labeled "optional." The Wisconsin Supreme Court has held it is not error to refuse to give a special instruction on the testimony of a witness who has been granted immunity, provided that the jury was aware of the immunity grant and was given the instruction on credibility of witnesses. See Linse v. State, 93 Wis.2d 163, 168, 286 N.W.2d 554 (1980), and Loveday v. State, 74 Wis.2d 503, 520-21, 247 N.W.2d 116 (1976).

A more recent case, however, indicated that where an immunity grant or other concessions have been made to a witness, a cautionary instruction is an important part of the due process safeguards to which a defendant is entitled. In State v. Nerison, the court of appeals had reversed Nerison's conviction because the trial testimony of two accomplices "was so indelibly and irreparably tainted by the state's actions in securing it that its admission violated Nerison's due process rights." The court of appeals found that the state had "crossed the line" in bargaining with the accomplices for specific testimony. 130 Wis.2d 313, 387 N.W.2d 128 (Ct. App. 1986). The Wisconsin Supreme Court reversed, holding that the due process line referred to by the court of appeals was not crossed due to the presence of corroborating evidence of guilt and the fact that all the traditional due process safeguards were made available: full disclosure of the state's agreement with the accomplices, cross-examination of the witnesses, and a specific jury instruction on the credibility of the accomplices. 136 Wis.2d 37, 401 N.W.2d 1 (1987).

The court in Nerison did not explicitly require a specific cautionary instruction in all cases. But given the emphasis on an instruction as one of three important safeguards, the Committee concluded in 1991 that it was best to remove the "optional" designation from this instruction.

This instruction is drafted in neutral terms so that it could be applied to a witness called by either the state or the defendant. The concerns discussed in Nerison, supra, are directed at state witnesses and do not necessarily apply to a defense witness. See State v. Miller, 231 Wis.2d 447, 605 N.W.2d 567 (Ct. App. 1999).

Immunity may be granted only upon the motion of the prosecutor. The court cannot grant immunity sua sponte; the defendant does not have the right to compel the state to request immunity for a defense witness. Hebel v. State, 60 Wis.2d 325, 210 N.W.2d 695 (1973); Sanders v. State, 69 Wis.2d 242, 230 N.W.2d 845 (1975); Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975); State v. Evers, 163 Wis.2d 725, 472 N.W.2d 828 (Ct. App. 1991).

While the defendant has no reciprocal right to immunity grants for defense witnesses, the rule is tempered by two considerations. First, the Wisconsin Supreme Court has noted that the prosecutor's duty is "'to seek justice, not merely to convict.' When the prosecutor is considering whether or not to make a motion for immunity, he should bear in mind this predominant objective of impartial justice, and not merely whether the evidence will be favorable to the prosecution. He should not hesitate to move for immunity solely on the basis that the testimony thus elicited might exonerate the defendant." Peters, supra, 70 Wis.2d 22, 41. Second, developments in other contexts suggest that a prosecutor's refusal to request immunity for a defense witness based solely on tactical considerations may violate due process. See McMorris v. Israel, 643 F.2d 458 (7th Cir.

1981), where, under Wisconsin's since-abandoned polygraph stipulation rule, it was held that a prosecutor must have valid, nontactical reasons for refusing to enter into a stipulation.

For a discussion of several issues relating to immunity grants, see SM-55.

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247 VERDICT AS TO DEFENDANT ONLY

There is evidence in the case which, if believed, indicates that more than one person was involved in the commission of the offense. The fact that the other person(s) is (are) not on trial is not material. You are to determine only whether the defendant, _____, is guilty or not guilty.

COMMENT

Wis JI-Criminal 247 and comment were originally published in September 1980, revised in 1983, and was republished without change in 1992 and 2000.

This instruction was prepared for use in cases where the testimony clearly indicates that more than one person was involved in the crime. The jury may speculate as to why only the defendant is on trial. This instruction advises the jury not to allow such speculation to affect its verdict.

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255 STATE NEED NOT PROVE EXACT DATE OF COMMISSION: SPECIFIC DATE ALLEGED

If you find that the offense charged was committed by the defendant, it is not necessary for the State to prove that the offense was committed on the precise date alleged in the (information) (complaint). If the evidence shows beyond a reasonable doubt that the offense was committed on a date near the date alleged, that is sufficient.

COMMENT

Wis JI-Criminal 255 was originally published in 1962. It was revised in 1983 and republished without change in 1991. It was revised in 1999 and was republished without change in 2000.

The 1998 revision made nonsubstantive editorial changes in the text and changed the title to indicate that this instruction is to be used only where the charging document alleges that the offense occurred on a specific date. For cases where the charge alleges that the offense occurred during a period of time, Wis JI-Criminal 255A should be used.

CAUTION: This instruction should not be used when evidence of more than one criminal act has been admitted in support of a single charge or where the evidence points to a particular hour or date of commission, and the defendant has produced evidence of an alibi. See Abaly v. State, 163 Wis. 609, 158 N.W. 308 (1916), and Eaton v. State, 252 Wis. 420, 31 N.W.2d 618 (1947).

In Jensen v. State, 36 Wis. 598, 154 N.W.2d 769 (1967), the court held it was error to give this instruction in a case where there were two offenses in question which occurred very close to each other in time and where there was general testimony to the effect that the acts (of sexual intercourse) occurred several times. The court said the instruction "was designed for a fact situation in which one offense only is alleged, or where, if there are multiple offenses, there is absolutely no confusion in anyone's mind as to their separateness in time." 36 Wis.2d 598, 604-05.

In many cases, it will be necessary for the jury to agree that a particular act was committed by the defendant. The time the act was allegedly committed is one way to identify the particular act, but the legal issue is more one of jury agreement than "time of the offense." Regarding jury agreement when there is evidence of more than one criminal act, see Wis JI-Criminal 515.

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255A STATE NEED NOT PROVE EXACT DATE OF COMMISSION: PERIOD OF TIME ALLEGED

If you find that the offense charged was committed by the defendant, it is not necessary for the State to prove that the offense was committed on a specific date. If the evidence shows beyond a reasonable doubt that the offense was committed during the time period alleged in the (information) (complaint), that is sufficient.

COMMENT

Wis JI-Criminal 255A was originally published in 1999 and republished without substantive change in 2000.

This instruction is intended to be used where the charging document alleges that the offense occurred during a period of time. For cases where the charge alleges that the offense occurred on a specific date, Wis JI-Criminal 255 should be used.

This instruction was drafted in response to the decision in State v. Dodson, 219 Wis.2d 65, 580 N.W.2d 181 (1998), where the Wisconsin Supreme Court held that a trial court committed error in giving a revised version of Wis JI-Criminal 255 in a case where the charging document referred to a period of time rather than a specific date. The court concluded that the revised instruction was "internally inconsistent, falsely stated the law and misled the jury." 219 Wis.2d 65, 85.

In a case like Dodson, where the charging document refers to a period of time, it is sufficient that the jury be satisfied that the offense occurred at any point within that period of time. This instruction is intended simply to reinforce that rule for the jury. Use of Wis JI-Criminal 255, in its published form or with modification, is not necessary in that type of case. The Committee concluded that no reference to the dates is required; the general reference in the instruction referring to a finding that the offense occurred "at the time and place alleged in the (complaint) (information)" will be sufficient.

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260 TIME OF OFFENSE: WHERE STATE NOT REQUIRED TO ELECT
265 TIME OF OFFENSE: WHERE STATE HAS ELECTED

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 260 and 265 were originally published in 1962. They were withdrawn in 1983. An editorial correction was made in the comment in 1985. This version was republished without change in 1992. The comment was modified in 2000.

The standard instructions on "time of the offense" are Wis JI-Criminal 255 and 255A. They are suitable for all cases where the time of the offense is not in issue and where there is evidence of a single criminal act. For cases where the jury must unanimously agree on a particular criminal act and there has been evidence of more than one possible criminal act, Wis JI-Criminal 517 should be used.

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267 VENUE — § 971.19

[THIS INSTRUCTION IS TO BE GIVEN ONLY WHEN VENUE IS A CONTESTED ISSUE IN THE CASE. IT SHOULD BE SUBSTITUTED FOR THE "JURY DECISION" PARAGRAPHS IN THE OFFENSE INSTRUCTION.][1]

A criminal case is required to be tried in the county where the crime was committed. However,

[where two or more acts are required for the commission of any offense, the trial may be in any county in which any of such acts occurred.][2]

[where an offense is committed in or within one-fourth of a mile of the boundary of two or more counties, the trial may be in any of such counties.][3]

[where the offense has been committed in, or against a vehicle, the trial may be in any county through which the vehicle has passed or in the county where the travel began or ended.][4]

[if the act causing death is in one county and death occurs in another, the trial may be in either county.[5] (If neither location can be determined, the trial may be held in the county where the body was found.)][6]

[if the offense began outside the state but was completed within the state, the trial may be held in the county where the crime was completed.][7]

If you are satisfied beyond a reasonable doubt that the defendant committed the offense charged (or _____, a lesser included offense) and that[8]

[one of the acts required for the commission of the offense was committed in _____ County,]

[the offense was committed on or within one-fourth of a mile of the boundary of _____ County,]

[the vehicle involved in this offense passed through _____ County or that the travel began or ended in _____ County,]

[(the act causing death or that the death itself occurred in _____ County) (that the body was found in _____ County),]

[the offense was completed in _____ County,]

you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 267 was originally published in 1979. The comment was revised in 1983, 1990, 2000, and 2006. This revision was approved by the Committee in October 2010; it involved editorial corrections to the text and updating the Comment.

Section 971.19(1) provides that criminal actions are to be tried in the county where the crime was committed except as otherwise provided in that section. This instruction deals with the generally applicable exceptions under subs. (2) through (6). The offense-specific exceptions in subs. (7) through (12) are not included in the instruction. The Committee concluded that the instruction need be given only when venue is contested and only when one of the exceptions under § 971.19 applies. In all other cases, the Committee believes the finding of venue is adequately covered by the standard verdict forms (Wis JI-Criminal 480 and ff.), which provide for a finding of guilty "as charged in the information."

Venue is not an element of the crime but rather it is a matter of procedure and designates the geographic division of the state in which the action is to be tried. Nevertheless, venue must be proved beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Venue may be established by circumstantial evidence; direct testimony is not required, Smazal, supra, 31 Wis.2d at 363.

In State v. Swinson, 2003 WI App 45, 261 Wis.2d 633, 660 N.W.2d 12, the Court held that "[a] specific instruction on venue needs to be given only when venue is contested." &26. [Note 1 to Wis JI-Criminal 267 was cited with apparent approval.] Also see State v. Schultz, 2010 WI App 124, 329 Wis.2d 424, 791 N.W.2d 190.

Neither statute nor case law (other than Swinson) in Wisconsin specifically requires that the finding of venue be made by the jury. However, that it is the jury's function finds implicit support in a number of cases. See, for example, State v. Dombrowski, supra, Smazal v. State, supra, State v. Coates, 262 Wis. 469, 55 N.W.2d 353 (1952), Piper v. State, 202 Wis. 58, 231 N.W. 162 (1930), Kellar v. State, 174 Wis. 67, 182 N.W. 321 (1921), and Davis v. State, 134 Wis. 632, 115 N.W. 150 (1908).

The instruction provides for selecting from the alternatives provided in brackets. As adapted for a case involving the first bracketed alternative, the instruction would read as follows:

> A criminal case is required to be tried in the county where the crime was committed. However, where two or more acts are required for the commission of any offense, the trial may be in any county in which any of such acts occurred.
>
> If you are satisfied beyond a reasonable doubt that the defendant committed the offense charged and that one of the acts required for the commission of the offense was committed in _____ County, you should find the defendant guilty.
>
> If you are not so satisfied, you must find the defendant not guilty

For a discussion of probable cause sufficient to show venue under the general venue requirement in § 971.19(1), see State v. Anderson, 2005 WI 54, 280 Wis.2d 104, 695 N.W.2d 731.

For crimes committed in a "precinct" of a state prison, venue properly lies in the county in which the institution is located, see § 302.02. In such cases, it may be helpful to instruct the jury that they need not be concerned about the fact that the offense actually took place outside the county in which the court is located.

The issue of venue is different from the issue of the territorial jurisdiction of the state of Wisconsin over criminal conduct. The latter is addressed by § 939.03. See Wis JI-Criminal 268 LAW NOTE: JURISDICTION.

In State v. Jensen, 2010 WI 38, 324 Wis. 2d 586, 782 N.W.2d 415, the court held that the exception in sub. (12) applies to a prosecution begun before the exception was created.

1. The Committee concluded that the instruction need be given only when venue is contested and only when one of the exceptions under § 971.19 applies. In all other cases, the Committee believes the finding of venue is adequately covered by the standard verdict forms (Wis JI-Criminal 480 and ff.), which provide for a finding of guilty "as charged in the (information) (complaint)."

2. Section 971.19(2). Under this subsection, venue for a conspiracy case properly lies in any county where a member of the conspiracy performed an act which effected the object of the conspiracy. State v. Cavallari, 214 Wis.2d 42, 54-55, 571 N.W.2d 176 (Ct. App. 1997).

Facts were found to be sufficient to establish venue under § 971.19(2) in a theft by fraud case in State v.

Swinson, 2003 WI App 45, 261 Wis.2d 633, 660 N.W.2d 12.

3. Section 971.19(3).

4. Section 971.19(4).

5. Section 971.19(5).

6. Section 971.19(5). Read only if county where act or death occurred cannot be determined.

7. Section 971.19(6).

8. Select the alternative that matches the alternative selected above.

268 LAW NOTE: JURISDICTION — § 939.03

Section 939.03 defines the scope of the state's territorial jurisdiction over crime. State v. Randle, 2002 WI App 116, ¶12, 252 Wis.2d 743, 647 N.W.2d 324.

"Territorial jurisdiction is an issue for the jury if it involves unresolved factual disputes; however, whether Wisconsin has jurisdiction under the law for a crime based on an undisputed set of facts is an issue of law for the circuit court." State v. Anderson, 2005 WI 54, at footnote 5, 280 Wis.2d 104, 695 N.W.2d 731. [Citing State v. Brown, 2003 WI App 34, ¶¶25-27, 260 Wis.2d 125, 659 N.W.2d 110.][1]

The decision in Anderson is consistent with the conclusions reflected in the previously published version of this Law Note:

> The Committee concluded that if the jurisdiction issue depends upon contested issues of fact, those issues are for the jury to determine, using the beyond a reasonable doubt standard. If the charging document does not properly allege that the crime was committed within the territorial jurisdiction of the state of Wisconsin, the trial court should grant a motion to dismiss. If there is a dispute about jurisdiction that presents a purely legal question, that is, whether the law confers jurisdiction over an undisputed factual situation, that question should be decided by the court. But if the charging document sufficiently alleges facts in support of jurisdiction and there is a dispute about those facts, the issue will be for the jury to decide.

Where jurisdiction is submitted to the jury, the Committee concluded that it can usually be accomplished under the standard verdict instructions which include the statement: ". . . as charged in the (information) (complaint)." See Wis JI-Criminal 480-494.

In cases involving the special circumstances addressed by § 939.03 – where some acts are committed outside the state – an instruction on venue as suggested in Wis JI-Criminal 267 ought to be sufficient to cover the territorial jurisdiction issue as well.[2]

One of those special circumstances is identified in § 939.03(1)(a), which requires that one of the constituent elements of an offense "takes place" in Wisconsin. The mental element of first degree intentional homicide is a constituent element under this statute and is shown to "take place" "upon proof that the defendant committed an act in Wisconsin manifesting an intent to kill." State v. Anderson, supra, 2005 WI 54, ¶3.

COMMENT

Wis JI-Criminal 268 was originally published in 1990. The comment was updated in 1998 and 2005. This revision was approved by the Committee in June 2021; it added to the comment.

Before 2002, there was no direct case law authority in Wisconsin indicating that the issue of territorial jurisdiction is, like venue, a question for the jury and, if so, what the burden of persuasion is. That lack of authority has been partially addressed by the cases cited in the text above. Wisconsin's approach is consistent with what appears to be the majority rule – that the territorial jurisdiction issue is for the jury. For example, the Model Penal Code treats venue and jurisdiction as elements that must be proved beyond a reasonable doubt. §§ 1.12 and 1.13(a), Model Penal Code and Commentaries, American Law Institute (1985).

The Wisconsin court of appeals has held that "a crime involving a failure to act is committed at the place where the act is required to be performed." State v. Gantt, 201 Wis.2d 206, 548 N.W.2d 134 (Ct. App. 1996). The Gantt decision upheld the Wisconsin conviction for failure to pay child support where the order was entered in Wisconsin but both the parent and the child resided out of state.

Relying in part on Gantt, the Wisconsin court of appeals concluded that under § 939.03(1)(c), a Wisconsin circuit court had territorial jurisdiction over a registrant whose § 301.45(6) violation occurred exclusively in another state. See State v. Triebold, 2021 WI App 13, 396 Wis.2d 176, 955 N.W.2d 415. The Triebold decision affirmed the defendant's Wisconsin conviction under § 301.45(6) for failing to update his address with Wisconsin authorities after he moved from one residence in Minnesota to another.

1. Also see State v. Bratrud, 204 Wis.2d 445, 448-49, 555 N.W.2d 669 (Ct. App. 1996): "When the location of the 2 acts which form the basis for a criminal charge is in dispute and the information pleads that the acts occurred in the State of Wisconsin, subject matter jurisdiction depends upon a question of fact, to be determined by the jury or, in the case of a plea, by the trial court." Note that Bratrud involved a guilty plea, not a case where the jurisdiction issue was contested in the trial court. The court of appeals held that the jurisdiction issue was waived because the information to which the plea was entered alleged that the crime was committed in Wisconsin.

2. This conclusion was noted in State v. Brown, 2003 WI App 34, ¶10 and footnote 10, 260 Wis.2d 125, 659 N.W.2d 110, but was not relied on because the court found that an instruction was not required in that case. Note that the provisions of § 939.03 Jurisdiction of state over crime, are not an exact match for those relating to venue in § 971.19 Place of trial. That is, it appears that § 939.03 may establish jurisdiction in situations where § 971.19 may not establish venue.

270 EVIDENCE AS TO DEFENDANT'S CHARACTER — § 904.04(1)(a)

Testimony has been received regarding the character of the defendant for _____.[1]

Consider this along with all the other evidence in arriving at your verdict, giving it the weight you believe it is fairly entitled to receive.

COMMENT

Wis JI-Criminal 270 was originally published in 1962 and revised in 1983, 1991, and 1998. It was republished without substantive change in 2000.

The 1998 revision substantially modified the text by eliminating references that tied the character evidence directly to the beyond a reasonable doubt standard. The Committee concluded that those references were unnecessary and more likely to be confusing to the jury than helpful.

This instruction is intended for use only when evidence of a defendant's "pertinent trait of character" has been admitted under § 904.04(1)(a). Evidence offered under this rule is presented for its circumstantial value: the defendant is trying to show that his or her character at the time of the alleged offense was such that it is unlikely that he or she committed the crime. Character evidence will have probative value only if it relates to a character trait that is relevant to the offense charged. Thus, the statute requires that the evidence be of a "pertinent" character trait.

When evidence of character is admissible, proof may be by testimony as to reputation or testimony in the form of an opinion. On cross-examination, inquiry is allowed into specific instances of conduct. (Sec. 904.05.)

Because the justification for the admission of character evidence is that a person of such character would be less likely to commit the crime charged, only evidence relating to the defendant's character before the crime was committed should be admissible. This will usually involve knowledge obtained or opinions formed prior to the alleged commission of the crime charged. The test would be one of basic relevance: Does the proffered evidence tend to establish the defendant's character at the time the alleged crime was committed?

1. The pertinent character trait should be identified in the blank provided in the instruction. Examples would be: "being peaceable and law-abiding" (where the charge involved assaultive behavior); "being honest and having integrity" (where the charge involved dishonesty or corruption); "always telling the truth" (where the charge involved fraud).

Character Evidence Generally

This instruction is adapted from that which was approved in Niezorawski v. State, 131 Wis. 166, 177, 111 N.W. 250 (1907). In that case the court stated:

. . . With reference to evidence of the good reputation of defendant the instructions requested were:

> If you believe the testimony of the witness called who testified to the good reputation of the defendant as to his honesty and integrity, such testimony may be in itself sufficient to raise in your minds a reasonable doubt as to his guilt of the offense charged in the indictment, and if you entertain such doubt you must return a verdict of not guilty.

The defendant had no more right to have this evidence separately pointed out by the court to the jury as such which may be in itself sufficient to raise a reasonable doubt than he would have to take any other item of evidence from which an inference favorable to the defendant might be raised and call it separately to the attention of the jury with this particular comment, almost suggestion. The charge of the court on this subject shows the proper way of presenting such matters to the jury by instruction. We quote it for precedent:

> Testimony has been received as to the good reputation of the defendant for honesty and integrity previous to the time it is alleged he committed the offense charged in the indictment. Such testimony of good reputation should be considered by you in connection with all the other evidence in the case, and if after such consideration you entertain any reasonable doubt as to the guilt of the defendant, you must acquit him; but if from all the evidence in the case, including the testimony as to the good reputation of the defendant, you are satisfied of his guilt beyond a reasonable doubt, then it is immaterial what his reputation has heretofore been as to honesty and integrity.

The instruction requested in the Niezorawski case and found to be improper is similar to the so-called standing alone instruction that has been considered by several federal courts. The United States Court of Appeals for the Seventh Circuit has rejected the "standing alone" instruction for federal prosecutions. In United States v. Burke, 781 F.2d 1234 (7th Cir. 1985), the court overruled an earlier decision and rejected the uniform instruction for the circuit which had provided:

> You should consider character evidence together with and in the same manner as all the other evidence in the case. Character evidence alone may create a reasonable doubt of the defendant's guilt." (Pattern instruction 3.15, Federal Criminal Jury Instructions of the Seventh Circuit)

Burke rejected the instruction for several reasons:

(1) No evidence should be considered "standing alone."

(2) If any evidence is to be singled out, character evidence is the wrong kind. "It does not speak to the question whether the accused committed the crime. People of impeccable reputation may commit crimes, and when they are charged with crime the question is whether they did it, not whether they enjoy a high social standing. . . . Character evidence is a dispensation from the ordinary rules of evidence, and a curious dispensation it is. It aids exclusively the well-connected." 781 F.2d 1234, 1239.

(3) Two U.S. Supreme Court decisions [Michelson v. United States, 335 U.S. 469 (1848); Edgington v. United States, 164 U.S. 361 (1896)] cited as supporting a "standing alone" instruction are distinguished: the usually-cited portions were either dictum or addressed to different issues.

The Burke case has a complete and interesting discussion of character evidence that helps to put the approach used in Wis JI-Criminal 270 in context. Its conclusion regarding the "standing alone" instruction is consistent with that of the majority of the federal circuits. See United States v. Pujana-Mena, 60 U.S.L.W. 2343, for a summary of how this issue is currently treated in the circuits and a complete discussion of the issue.

The general rules relating to the admissibility and method of proof of character are set forth in §§ 904.04 and 904.05. The general rule is that "evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." Section 904.04(1). The rationale behind the rule has been described as follows:

> The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of the issues, unfair surprise and undue prejudice.

Michelson v. United States, 335 U.S. 469, 475-76 (1948).

In criminal cases, the rule of nonadmissibility applies to the prosecution's case-in-chief: the prosecution may not introduce evidence of the defendant's bad character for the purpose of showing that the defendant acted in conformity with that character in committing the crime charged. However, the defendant may introduce evidence of good character in any case. When this occurs, the prosecution may respond with evidence tending to rebut the defendant's evidence.

When evidence of character is admitted, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Section 904.05(1). Affirmative proof of character by reference to specific instances of conduct is allowed only where character is an essential element of a charge, claim, or defense. Section 904.05(2). Few, if any, crimes presently exist in Wisconsin where the character of the defendant is an essential element.

Evidence of other crimes or wrongs is not admissible to show the defendant's bad character but may be admissible for certain other purposes specified in § 904.04(2). See also Wis JI-Criminal 275.

Evidence of the character of the victim of a crime is admissible in the following situations: when offered by the defendant; when offered by the prosecution in rebuttal of character evidence offered by the defendant; and when offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor and the evidence is of a character trait of peacefulness. Section 904.04(1)(c). There is no standard instruction relating to evidence of the victim's character.

With respect to evidence as to a witness' character, such evidence is limited to character for truth and veracity and may be introduced only after the witness' character for truthfulness has been attacked. See § 906.08 and Wis JI-Criminal 330.

In State v. Bedker, 148 Wis.2d 257, 410 N.W.2d 802 (1989), the court held that evidence that the defendant had never been convicted of a crime was not admissible to prove she was of law-abiding character. It is not reputation testimony or opinion. Further, "it does not follow from the fact that the person has never been convicted of a crime that the person is law-abiding. Lawless persons may avoid convictions." 149 Wis.2d 257, 269.

The admissibility of expert opinion testimony on a defendant's character trait of nonhostility and nonaggressiveness is discussed in State v. King, 75 Wis.2d 76, 248 N.W.2d 458 (1977).

275 CAUTIONARY INSTRUCTION: EVIDENCE OF OTHER CONDUCT [REQUIRED IF REQUESTED][1] — § 904.04(2)(a)

Evidence Presented

Evidence has been presented regarding other conduct of the defendant for which the defendant is not on trial.

Specifically, evidence has been presented that the defendant (describe conduct) . If you find that this conduct did occur, you should consider it only on the issue(s) of [CHOOSE ONLY THOSE THAT APPLY][2] (motive) (opportunity) (intent) (preparation or plan) (knowledge) (identity) (absence of mistake or accident) (context or background) (identify other issue) .[3]

You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.

Definitions

The evidence was received on the issue(s) of [CHOOSE ONLY THOSE THAT APPLY][4]

[motive, that is, whether the defendant has a reason to desire the result of the offense charged.][5]

[opportunity, that is, whether the defendant had the opportunity to commit the offense charged.]

[Intent,[6] that is, whether the defendant acted with the state of mind that is required for the offense charged.]

[preparation or plan,[7] that is, whether the other conduct of the defendant was part of a design or scheme that led to the commission of the offense charged.]

[knowledge,[8] that is, whether the defendant was aware of facts that are required to make criminal the offense charged.]

[identity,[9] that is, whether the prior conduct of the defendant is so similar to the offense charged that it tends to identify the defendant as the one who committed the offense charged.]

[absence of mistake or accident,[10] that is, whether the defendant acted with the state of mind required for the offense charged.]

[context or background, that is, to provide a more complete presentation of the evidence relating to the offense charged.][11]

[describe other issue][12]

CONTINUE WITH THE FOLLOWING IN ALL CASES

You may consider this evidence only for the purpose(s) I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged.

COMMENT

Wis JI-Criminal 275 was originally published in 1978 and revised in 1983, 1989, 1991, 2003, and 2016. The 2016 revision reorganized and updated the Comment, incorporating material that previously appeared in 275.1 which has been withdrawn. This revision was approved by the Committee in April 2018; it updated the Comment.

This instruction is for use where evidence of other crimes or other acts committed by the defendant is admitted for an acceptable purpose under § 904.04(2)(a). An instruction for use where prior convictions are admissible to prove character under § 904.04(2)(b)2. is provided in Wis JI-Criminal 276. A cautionary instruction for evidence of prior convictions admitted to impeach a defendant is provided in Wis JI-Criminal 327.

Section 904.04(2) was amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014] to create subd. (2)(b)1. which sets forth an exception to the general rule in § 904.04(2)(a) for specified offenses. See the discussion below at the "Greater Latitude" caption.

The rules relating to admissibility of "other acts" evidence do not apply to offenses offered as predicates for a Chapter 980 commitment. State v. Kaminski, 2009 WI App 175, 322 Wis.2d 653, 777 N.W.2d 654. Evidence offered to prove the "course of conduct" element of the crime of stalking is not subject to analysis as "other acts" evidence under § 904.04(2) because it is not offered to prove character. State v. Conner, 2009 WI App 143, ¶24, 321 Wis.2d 449, 775 N.W.2d 105. Affirmed on other grounds, State v. Conner, 2011 WI 8, 331 Wis.2d 352, 795 N.W.2d 750.

The admission of other acts evidence is one of the most commonly litigated issues in criminal cases. The decisions cited here, while numerous, are not intended to be a complete catalog of all cases dealing with other acts evidence.

Case Law Origins – Whitty v. State

The general prohibition on proving character is now found in a rule of evidence – § 904.04(2). But that rule had its origin in a decision of the Wisconsin Supreme Court: Whitty v. State, 34 Wis.2d 278, 149 N.W.2d 557 (1967), cert. denied, 390 U.S. 959 (1968) that was based on due process principles:

> ". . . the rule we adopt . . . is based upon the premise that the accused is entitled to a procedurally and evidentially fair trial . . ." 34 Wis.2d at 295.

> ". . . [when other acts evidence is admitted] it runs the danger . . . of violating the defendant's right to a fair trial because of its needless prejudicial effect on the issue of guilt or innocence." 34 Wis.2d at 297.

The references to "fair trial" seem clearly to invoke a due process basis for the rule – it is the Due Process Clause that insures the right to a fair trial.

The general rule that other-crimes evidence is not admissible is based on an appreciation of the prejudicial impact that the evidence may have. The dangers were concisely summarized in Whitty v. State, 34 Wis.2d 278, 292:

The character rule excluding prior-crimes evidence as it relates to the guilty issue rests on four bases: (1) The over-strong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

Despite these possibilities for prejudice, other-crimes evidence may be admissible if it is offered for an acceptable purpose under § 904.04(2)(a) and (b)1.

Section 904.04(2)(a)

The rule that originated in Whitty is codified in § 904.04(2)(a) of the Wisconsin Rules of Evidence:

(2) OTHER CRIMES, WRONGS, OR ACTS. (a) *General admissibility.* Except as provided in par. (b)2. evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The exception referred to – par. (b)2. – was created as § 904.04(2)(b) by 2005 Wisconsin Act 310. [Effective date: April 21, 2006. Section 3 of the act provides: "This act first applies to criminal actions commenced on the effective date of this subsection."] It was renumbered § 904.04(2)(b)2. by 2013 Wisconsin Act 362. It provides that in cases involving specified sex offenses, evidence of similar prior convictions is admissible to prove character. This exception is addressed by Wis JI-Criminal 276.

The Three-Step Analytical Framework

Before evidence of other acts is admitted, the trial court must apply a three-step test to determine that: 1) it is offered for an acceptable purpose under § 904.04(2)(a); 2) it is relevant; and, 3) its probative value is not outweighed by danger of unfair prejudice. State v. Sullivan, 216 Wis.2d 768, 576 N.W.2d 30 (1998). The Sullivan decision noted: "This analytical framework (or one substantially similar) has been spelled out in prior cases, in Wis JI-Criminal 275 [8 1991] and in Wis JI-Criminal 275.1 [8 1990]." 216 Wis.2d 768, 771. [Note: JI 275.1 was withdrawn in 2015; much of its content was incorporated into this Comment.]

The first requirement – that the evidence is offered for an acceptable purpose under § 904.04(2)(a) – recognizes that Wisconsin appellate courts have held that the exceptions listed in § 904.04(2)(a) are "merely illustrative and not exclusive." See, for example, State v. Alsteen, 108 Wis.2d 723, 324 N.W.2d 426 (1982); State v. Spraggin, 77 Wis.2d 89, 100, 252 N.W.2d 94 (1977); State v. Kaster, 148 Wis.2d 789, 797, 436 N.W.2d 891 (Ct. App. 1989); State v. Bedker, 149 Wis.2d 257, 440 N.W.2d 802 (Ct. App. 1989). Examples of acceptable purposes not named in § 904.04(2)(a) are found in footnote 12, below.

Even where a listed exception does apply, it may be difficult to determine which one does, because "[t]he exceptions listed in the statute are not mutually exclusive. The exceptions slide into each other; they are impossible to state with categorical precision and the same evidence may fall into more than one exception." State v. Tarrell,74 Wis.2d 647, 662, 247 N.W.2d 696 (1976) (Abrahamson J., dissenting). However, it is important to be sure either that a named exception applies, or that the evidence is admissible for another

legitimate purpose so that the reason for the rule – to exclude evidence which is relevant only for showing a general disposition to commit a crime – is not violated. See State v. Spraggin, 77 Wis.2d 89, 100, 252 N.W.2d 94 (1977). For an example of evidence found to be admissible for multiple purposes, see State v. Marinez, 2011 WI 12, 331 Wis.2d 568, 797 N.W.2d 399, where other acts evidence was determined to be relevant to several proper purposes – identification, context, credibility, and time and location; it also provided a "complete story" to the jury.

The second requirement is that the evidence be "relevant," defined in Sullivan as having "two facets": whether it relates to a fact or proposition that is of consequence to the determination of the action; and, whether it has probative value – a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. 216 Wis.2d 768, 772. The relevancy requirement is not met if the issue on which the evidence is offered (e.g., identity) is not in dispute in the case (e.g., the defendant admits the act but claims there was consent). See Alsteen, supra. Or, to look at it another way, in such a case the probative value of the evidence would be minimal and would be outweighed by its prejudicial effect. See Judicial Council Committee's Note to § 904.04(2), 59 Wis.2d R79 (1973). While the defendant is under no general obligation to divulge trial strategy, some type of notice must be given to the trial judge to bring the "not in dispute" rule into play. State v. Bedker, 149 Wis.2d 257, 440 N.W.2d 802 (Ct. App. 1989).

To be relevant, the other acts must be similar to those at issue in the case. In State v. McGowan, 2006 WI App 80, 291 Wis.2d 212, 715 N.W.2d 631, a conviction for first degree sexual assault of a child was reversed because evidence of other acts was improperly admitted. The trial took place in 2003 based on conduct alleged to have occurred in 1993. The other acts evidence was of an alleged assault in 1985 when the defendant was 10 years old. The court concluded that the acts were not "sufficiently factually similar" to justify their admission. 291 Wis.2d 212, ¶20.

Another important part of the relevancy inquiry is determining that the other act is not too remote in time. State v. Friedrich, 135 Wis.2d 1, 25, 398 N.W.2d 763 (1987). "Remoteness in time does not necessarily render the evidence irrelevant, but it may do so when the elapsed time is so great as to negate all rational or logical connections between the fact to be proven and the other acts evidence." State v. Mink, 146 Wis.2d 1, 16-17, 429 N.W.2d 99 (Ct. App. 1988), citing State v. Sanford, 76 Wis.2d 72, 81, 250 N.W.2d 348 (1977). But see State v. Hurley, 2015 WI 35, ¶57, 361 Wis.2d 529, 861 N.W.2d 174, where testimony that Hurley sexually assaulted his younger sister 25 years before trial was found to be admissible.

The relevancy requirement may be satisfied by evidence of other crimes that occurred after the crime charged. Barrera v. State, 99 Wis.2d 269, 298 N.W.2d 820 (1980); State v. Pharr, 115 Wis.2d 334, 340 N.W.2d 498 (1983).

The third requirement provides that even if the evidence is admissible for an acceptable purpose and is relevant, the evidence must be excluded if its prejudicial impact exceeds its probative value and the necessity for its use. This balancing is of the type provided for in § 904.03, Wisconsin Rules of Evidence.
State v. Sullivan, 216 Wis.2d 768, 773, 789, and State v. Spraggin, 77 Wis.2d 89, 95.

The "Greater Latitude" Rule

Case Law

A "greater latitude" rule applies to making decisions on other acts evidence in sex crime cases, especially those involving child victims. State v. Davidson, 2000 WI 91, ¶51, 236 Wis.2d 537, 613 N.W.2d 606. "Greater latitude" applies to each step of the admissibility determination: identifying an acceptable purpose; determining relevance; and, balancing probative value against danger of unfair prejudice. State v. Hammer, 2000 WI 92, ¶23, 236 Wis.2d 686, 613 N.W.2d 629. Other acts evidence is not automatically admissible in child sex crimes cases; the three-step analysis must be applied, using the "greater latitude" rule. Davidson, supra, ¶52; courts must determine that the evidence is offered for a proper purpose. State v. Hunt, 2003 WI 81, ¶87, 263 Wis.2d 1, 666 N.W.2d 771.

The Wisconsin Supreme Court discussed the rationale for the "greater latitude" rule in State v. Friedrich, 135 Wis.2d 1, 398 N.W.2d 763 (1987). The court held that the rule is justified by the need to get evidence before the jury that shows the past history of a defendant's plans, schemes, and motives so that the jury can understand how someone could commit such a reprehensible act.

> [O]ur statute makes admissible evidence of those past acts of sexual exploitation of children which demonstrate a scheme or plan. That scheme is to take advantage of the trust children show toward adults. Child exploiters take advantage of a child's physical and emotional vulnerability in order to give gratification to their warped and perverted "propensities" and "leanings." It is this scheme or plan to achieve sexual stimulation or gratification from the young, the most sexually vulnerable in our society, that allows trial courts in the exercise of discretion to admit evidence of past similar acts to show scheme or plan to exploit children. 135 Wis.2d 1, 29.

"An additional rationale for the greater latitude rule 'is the need to corroborate the victim's testimony against credibility challenges.'" State v. Hurley, 2015 WI 35, ¶57, 361 Wis.2d 529, 861 N.W.2d 174, citing State v. Davidson, supra, ¶42.

State v. Hurley, supra, employed the Sullivan analysis using the greater latitude rule to affirm the admission of other acts evidence that involved testimony that Hurley sexually assaulted his younger sister 25 years before the current trial when he was 12 to 14 and she was 8 to 10. The court found the evidence was relevant to method of operation and motive, specifically the desire to achieve sexual arousal or gratification. The 25-year time gap was not significant given the similarity of the incidents and the fact that proper cautionary instructions were given. The instructions were given before and after the testimony and generally followed Wis JI-Criminal 275.

Section 904.04(2)(b)

Section 904.04(2)(b), as amended by 2013 Wisconsin Act 362, is titled "Greater latitude." However, the rules articulated in the subdivisions of that section differ from those established in the case law cited above.

The Wisconsin Supreme Court addressed this issue in State v. Dorsey, 2018 WI 10, 379 Wis.2d 386, 906 N.W.2d 158, a case involving domestic abuse. The court held that greater latitude applies to domestic abuse cases [and the other crimes specified] even though the statute doesn't expressly say so in the text:

> ¶26: "We conclude that the recently amended language allows for the admission of other, similar acts of domestic abuse with greater latitude under a Sullivan analysis."
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> . . .
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> ¶35: "In sum, we conclude that § 904.04(2)(b)1. permits circuit courts to admit evidence of other, similar acts of domestic abuse with greater latitude, as that standard has been defined in the common law, under Sullivan, because it is the most reasonable interpretation in light of the context and purpose of the statute."

Subdivision 1. of § 904.04(2)(b) provides that in prosecutions for violations of specified statutes, "evidence of similar acts is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act." The specified statutes are: § 940.302(2) – human trafficking; Chapter 948; a serious sex offense, as defined in § 939.615 (1)(b) – these are the offenses subjecting a person to lifetime sex offender supervision; domestic abuse, as defined in § 968.075(1)(a); and, an offense subject to the domestic abuse surcharge in § 973.055.

The Committee considered two issues in connection with interpreting § 904.04(2)(b)1. First, the Committee concluded that the similar acts must still be offered for an acceptable purpose as set forth in sub. (2)(a) and as required by the first step of the Sullivan analysis. This is because sub. (2)(a) begins by stating: "Except as provided in par. (b)2." There is no exception for par. (b) 1., leading the Committee to conclude that the standard analysis applies. The only apparent effect of sub. (2)(b)1. is to make clear that the victim of the current crime need not be the same as the victim of other act. In State v. Dorsey, supra, the Wisconsin Supreme Court confirmed that the Sullivan analysis still applied, albeit with greater latitude applied at each stage: "Thus, for the types of cases enumerated under § 904.04(2)(b)1., circuit courts should admit evidence of other acts with greater latitude under a Sullivan analysis to facilitate its use for a permissible purpose." ¶33.

Second, the Committee concluded that all chapter 948 offenses are covered. This is based on reading the statute as applying in a criminal proceeding "alleging a violation s. 940.302(2) or of ch. 948," "alleging the commission of serious sex offense, as defined in s. 939.615(1)(b), or of domestic abuse, as defined in s. 968.075(1)(a)," or "alleging an offense that, following a conviction is subject to the surcharge in s. 973.055."

Subdivision 2. of § 904.04(2)(b) provides that in prosecutions "alleging violations of s. 940.225(1) or 948.02(1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order show that the person acted in conformity therewith." This is tied to the exception provided in sub. (2)(a): "Except as provided in par. (b)2. . . ." The exception is to the general rule in sub. (2)(a) that other acts evidence is not admissible to prove character. An instruction for use where prior convictions are admissible to prove character under § 904.04(2)(b)2. is provided in Wis JI-Criminal 276.

Who Decides; Burden Of Proof

The determination of relevance, step two of the three-step Sullivan analysis, involves an important issue: Who decides whether the defendant committed the "other crime, wrong, or act" and by what standard of proof? The Wisconsin Court of Appeals resolved these questions in State v. Schindler, 146 Wis.2d 47, 429 N.W.2d 110 (Ct. App. 1988). The court adopted the rule set forth in Huddleston v. United States, 485 U.S. 681 (1988), where the U.S. Supreme Court was urged to require a trial judge to make a formal preliminary finding, by clear and convincing evidence, that the defendant committed the other acts. The court declined, holding that a formal preliminary finding is not required. The evidence is admissible if it is relevant, and it is relevant only if the jury can reasonably conclude that the defendant committed the act. The same general standards apply to the relevancy determination for other acts evidence that apply to any other relevancy determination. But no formal finding that the act occurred is required.

Therefore, under Schindler and Huddleston, a trial court must determine whether the evidence of the other acts was sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant committed the other acts. In the Committee's judgment, the jury is not to be instructed as to any burden of persuasion on this issue. The "by a preponderance" standard is used only by the trial court in determining admissibility. It is not to be passed on to the jury. Accord, United States v. Hudson, 884 F.2d 1016, 1021 (7th Cir. 1989).

"Conduct"; Acquittal Conduct

The "other acts" analysis can apply to what might technically not be considered "conduct." "Verbal statements may be admissible as other-acts evidence even when not acted upon." State v. Jeske, 197 Wis.2d 905, 914, 541 N.W.2d 225 (Ct. App. 1995) (citing three cases where statements were properly admitted, but affirming a trial court decision excluding the evidence). Admissibility of evidence that the defendant used an alias was treated as other acts evidence in State v. Bergeron, 162 Wis.2d 521, 470 N.W.2d 322 (Ct. App. 1991), and was found to be relevant to show the defendant's intent to cover up his participation in the sexual assault and as part of the background facts of the case. Also see, State v. Normington, 2008 WI App 8, 306 Wis.2d 727, 744 N.W.2d 867 where evidence of pornographic images on the defendant's computer was properly admitted as "other acts" evidence tending to show motive.

In Dowling v. United States, 493 U.S. 342 (1990), the United States Supreme Court held that evidence of a prior offense for which the defendant was acquitted could be admitted as other acts evidence under Federal Rule of Evidence 404(b). The Court concluded that there was not a constitutional bar on the use of the evidence under either the collateral estoppel doctrine of the Double Jeopardy Clause or the due process requirement of fundamental fairness. The evidence could be excluded on nonconstitutional grounds that probative value is outweighed by the risk of unfair prejudice. The Wisconsin Court of Appeals followed Dowling in State v. Landrum, 191 Wis.2d 107, 528 N.W.2d 36 (Ct. App. 1995).

Other Acts By Third Parties

Evidence of other crimes or other acts committed by a third party may be admissible when offered by the defendant to show, for example, the identity of the person who committed the crime. State v. Scheidell, 227 Wis.2d 285, 595 N.W.2d 661 (1999). Admissibility is to be determined by using the same test that is used for other crimes or other acts committed by the defendant. But see, State v. Muckerheide, 2007 WI 5, 298 Wis.2d 553, 725 N.W.2d 930, where the defendant, charged with homicide by intoxicated use of a vehicle, was not entitled to introduce "other acts" evidence of the victim [his passenger] in support of the affirmative defense

recognized by § 940.09(2). The evidence was that the victim/passenger had grabbed the steering wheel of a car on prior occasions and was offered in support of the defendant's contention that the victim/passenger grabbed the steering wheel of his car during the incident that caused the death.

In State v. Missouri, 2006 WI App 74, 291 Wis.2d 466, 714 N.W.2d 595, convictions for possession with intent to deliver and resisting arrest were reversed because the defendant was improperly denied the right to present "other acts" evidence showing misconduct by the police officer who arrested him. The evidence was relevant to show a motive to lie, to show that the officer intended to frame the defendant, and to show that the officer's prejudice toward black people causes him to commit physical assaults and use excessive force.

1. Whenever evidence has been admitted for a limited purpose, § 901.06 provides that a cautionary instruction must be given upon request.

The Wisconsin Supreme Court has held that the trial judge is under no obligation to give a cautionary instruction in the absence of a request by the defendant. Hough v. State, 70 Wis.2d 807, 817, 235 N.W.2d 534 (1975). The basis for the decision in Hough was a recognition that it may have been a tactical decision by the defense not to request an instruction, out of a desire not to call further attention to the prior act. However, the absence of a curative or limiting instruction has been considered by the court in finding that admission of other acts evidence constituted reversible error. State v. Spraggin, 77 Wis.2d 89, 101, 252 N.W.2d 94 (1977). It may be desirable, therefore, for the trial judge to inquire of the defense whether a cautionary instruction is requested and, if the defendant's tactical decision is not to request the instruction, to make a record of that decision. The trial judge may also wish to consider giving the instruction, or a variation thereof, at the time the other acts evidence is admitted in addition to the instruction given at the close of the case.

2. Evidence of other crimes or conduct may be admissible under more than one of the exceptions to the general rule that the evidence is not admissible to prove that the defendant acted in conformity with his generally bad character. Section 904.04(2)(a) and Whitty v. State, 34 Wis.2d 278, 149 N.W.2d 557 (1967). Care must be taken to assure that the evidence does in fact fit one of the recognized exceptions, State v. Spraggin, 77 Wis.2d 89, 252 N.W.2d 94 (1977), or that it is admissible for some other acceptable purpose. See note 3, below. A discussion of the individual issues on which other-crimes evidence is admissible is found in Slough and Knightly, "Other Vices, Other Crimes," 41 Iowa L. Rev. 325 (1956).

A common situation where more than one exception applies occurs in sexual assault cases involving sexual contact. Other acts evidence is often relevant to intent, motive, and absence of mistake. See, for example, State v. Veach, 2002 WI 110, 255 Wis.2d 390, 468 N.W.2d 447; and, State v. Opalewski, 2002 WI App 145, 256 Wis.2d 110, 647 N.W.2d 331.

3. In this blank, name the purpose for which the evidence was admitted, if one of the named exceptions does not apply. The exceptions listed in § 904.04(2) are "merely illustrative and not exclusive." State v. Kaster, 148 Wis.2d 789, 797, 436 N.W.2d 891 (Ct. App. 1989). See the cases listed in footnote 12, below.

4. See note 2, supra, regarding the applicability of more than one exception. See note 3, supra, regarding admissibility for a purpose not covered by a named exception.

5. Wis JI-Criminal 175 provides an instruction on motive and may be included here. Or, if there is other evidence of motive, it may be preferable to give Wis JI-Criminal 175 at a different place. For cases where evidence of other acts was admitted to show motive, see State v. Tarrell, 74 Wis.2d 647, 247 N.W.2d 696 (1976), Holmes v. State, 76 Wis.2d 259, 251 N.W.2d 56 (1977), Hendrickson v. State, 61 Wis.2d 275, 212 N.W.2d 481 (1973), and Kelly v. State, 75 Wis.2d 303, 249 N.W.2d 800 (1977).

"Motive has been defined as the reason which leads the mind to desire the result of an act. In other words, a defendant's motive may show the reason why a defendant desired the result of the crime charged." State v. Gray, 225 Wis.2d 39, 54-55, 590 N.W.2d 918 (1998), quoting State v. Fishnick, 127 Wis.2d 247, 260, 378 N.W.2d 272 (1985). Also see State v. Plymesser, 172 Wis.2d 583, 594, 493 N.W.2d 367 (1992). Decisions dealing with motive exception include:

- State v. Hurley, 2015 WI 35, ¶74, 361 Wis.2d 529, 861 N.W.2d 174 [evidence of acts with a younger female family member was admissible to show motive – the desire to achieve sexual arousal or gratification].

- State v. Jensen, 2011 WI App 3, ¶¶83, 84, 331 Wis.2d 440, 794 N.W.2d 482 [evidence of pornographic photos the defendant left around the home was admissible to show motive – deep-seated and obsessive bitterness regarding his wife's prior affair gave him a motive to kill her].

- State v. Normington, 2008 WI App 8, 306 Wis.2d 727, 744 N.W.2d 867 [evidence of pornographic images on the defendant's computer (showing insertion of objects into persons' anuses) was properly admitted as "other acts" evidence tending to show motive].

- State v. Veach, 2002 WI 110, 255 Wis.2d 390, 468 N.W.2d 447 [evidence of past sexual touchings by the defendant was admissible to show motive – the purpose of sexual contact].

- State v. Opalewski, 2002 WI App 145, 256 Wis.2d 110, 647 N.W.2d 331 [evidence of past sexual assaults by the defendant of his daughters was admissible to show motive – the purpose of sexual contact].

- State v. Meehan, 2001 WI App 119, 244 Wis.2d 121, 630 N.W.2d 722 [evidence of the defendant's prior conviction for sexual assault of an adult was not admissible at trial on a charge of sexual assault of a child; slim probative value as to intent and motive was outweighed by the danger of unfair prejudice].

- State v. Davidson, 2000 WI 91, 236 Wis.2d 537, 613 N.W.2d 606 [prior conviction for sexual contact with young girl is admissible to show motive – the purpose of sexual contact].

- State v. Cofield, 2000 WI App 196, 238 Wis.2d 467, 618 N.W.2d 214 [evidence of prior convictions was not admissible to show motive because there was no evidence that the prior offense provided a reason for committing the charge offense].

- State v. Anderson, 230 Wis.2d 121, 600 N.W.2d 913 (Ct. App. 1999) [other acts tended to show a motive to prevent victim from testifying against him].

- State v. Ingram, 204 Wis.2d 177, 554 N.W.2d 833 (Ct. App. 1996) [parole agent's testimony about defendant's high risk parole status was admissible to show motive to flee from an officer].

- State v. Kourtidias, 206 Wis.2d 574, 585, 557 N.W.2d 858 (Ct. App. 1996): ". . . evidence of a

defendant's probation or parole status and relevant conditions thereof are admissible in the proper exercise of judicial discretion if such evidence demonstrates the motive for, or otherwise explains, the defendant's alleged criminal conduct. Absent that scenario, such evidence is inadmissible because the nexus between the conduct and the potential penalty is too tenuous."

- State v. Tabor, 191 Wis.2d 483, 529 N.W.2d 915 (Ct. App. 1995) [evidence of prior sexual assaults of a child admissible to prove motive – the desire to obtain sexual gratification from children].

- State v. Plymesser, 172 Wis.2d 583, 493 N.W.2d 367 (1992) [evidence of prior sexual assaults of a child admissible to prove motive – the purpose of the sexual contact, which is an element of the crime].

6. Intent may be at issue, despite the defendant's claim that the act with which he or she is charged never occurred, and thus may be a permissible purpose for the introduction of other acts evidence. State v. Clark, 179 Wis.2d 484, 507 N.W.2d 172 (Ct. App. 1993), resolving possible conflict among decisions on this issue.

For cases where the admission of other acts evidence on the issue of intent is discussed, see Vanlue v. State, 96 Wis.2d 81, 291 N.W.2d 467 (1980), State v. Spraggin, State v. Tarrell, and Hendrickson v. State, supra. Evidence of crimes committed after the charged crime may be relevant to show intent. Barrera v. State, 99 Wis.2d 269, 298 N.W.2d 820 (1980). State v. Pharr, 115 Wis.2d 334, 340 N.W.2d 498 (1983). However, intent must be an issue in the case for this exception to apply. State v. Danforth, 129 Wis.2d 187, 385 N.W.2d 125 (1986).

Decisions addressing the intent exception include:

- State v. Veach, 2002 WI 110, 246 Wis.2d 395, 630 N.W.2d 256 [evidence of past sexual touchings by the defendant was admissible to show that the touching was intentional].

- State v. Opalewski, 2002 WI App 145, 256 Wis.2d 110, 647 N.W.2d 348 [evidence of past sexual assaults by the defendant of his daughters was admissible to show that the touching was intentional].

- State v. Meehan, 2001 WI App 119, 244 Wis.2d 121, 630 N.W.2d 722 [evidence of the defendant's prior conviction for sexual assault of an adult was not admissible at trial on a charge of sexual assault of a child; slim probative value as to intent and motive was outweighed by the danger of unfair prejudice].

- State v. Derango, 2000 WI 89, 236 Wis.2d 721, 613 N.W.2d 833 [evidence of possession of sexually explicit videotapes admissible to show intent and motive as to a charge of enticing a child].

- State v. Cofield, 2000 WI App 196, 238 Wis.2d 467, 618 N.W.2d 214 [evidence of prior convictions was not admissible to show intent because intent was not an element of the offense charged].

- State v. Anderson, 230 Wis.2d 121, 600 N.W.2d 913 (Ct. App. 1999) [evidence of prior convictions was relevant to put a statement into context, where that statement showed intent to kill a witness to prevent her from testifying against him].

- State v. Ingram, 204 Wis.2d 177, 554 N.W.2d 833 (Ct. App. 1996) [parole agent's testimony about defendant's high risk parole status was admissible to show intent to flee from an officer].

- State v. Rushing, 197 Wis.2d 631, 541 N.W.2d 155 (Ct. App. 1995) [evidence of prior consensual homosexual act is not admissible in a trial for sexual assault of a child based on sexual intercourse (fellatio) because intent is not an element of that crime].

- State v. Hereford, 195 Wis.2d 1054, 537 N.W.2d 62 (Ct. App. 1995) [evidence that defendant had possessed a gun three weeks earlier similar to the one used in the crime is admissible to show intent even though the defense theory was that the defendant did not shoot the victim].

- State v. Parr, 182 Wis.2d 349, 513 N.W.2d 647 (Ct. App. 1994) [evidence of prior similar sexual assault admissible to show intent and motive for the current charge].

- State v. Clark, 179 Wis.2d 484, 507 N.W.2d 172 (Ct. App. 1993) [evidence of a prior battery is admissible to show intent even where the defendant's theory of defense is that the injuries in the present case were caused by a fall rather than by the defendant].

- State v. Roberson, 157 Wis.2d 447, 459 N.W.2d 611 (Ct. App. 1990) [evidence of **later** possession of a stolen vehicle was admissible as relevant to intent because it tended to undermine the defendant's innocent explanation for his act].

7. For cases where the admission of other acts evidence on the issue of preparation or plan is discussed, see Haskins v. State, 97 Wis.2d 408, 294 N.W.2d 25 (1980), Spraggin, Tarrell, and Hendrickson, at note 6, supra.

"The word 'plan' in sec. 904.04(2) means a design or scheme formed to accomplish some particular purpose. . . . Evidence showing a plan establishes a definite prior design, plan, or scheme which includes the doing of the act charged. . . . [T]here must be 'such a concurrence of common features that the various acts are materially to be explained as caused by a general plan of which they are the individual manifestations." State v. Gray, 225 Wis.2d 39, 53, 590 N.W.2d 918 (1999), quoting State v. Spraggin, 77 Wis.2d 89, 99, 252 N.W.2d 94 (1977). Also see:

- State v. Davidson, 2000 WI 91, 236 Wis.2d 537, 613 N.W.2d 606 [prior conviction for sexual contact with young girl is admissible to show plan or scheme because it was sufficiently similar].

- State v. Cofield, 2000 WI App 196, 238 Wis.2d 467, 618 N.W.2d 214 [evidence of prior convictions was not admissible to show common scheme or plan because there is no evidence that the priors were a step in a plan leading to the charged offense].

8. See State v. Johnson, 74 Wis.2d 26, 245 N.W.2d 687 (1976).

9. Other acts evidence is admissible to show identity if it has "such a concurrence of common features and so many points of similarity with the crime charged that it 'can reasonably be said that the other acts and the present act constitute the imprint of the defendant.'" State v. Gray, 225 Wis.2d 39, 51, 590 N.W.2d 918 (1999), quoting State v. Kuntz, 160 Wis.2d 722, 746, 467 N.W.2d 531 (1991) and State v. Fishnick, 127 Wis.2d 247, 263-64, 378 N.W.2d 272 (1985).

The classic case where other acts evidence was admitted to show identity is Whitty v. State, 34 Wis.2d 278, 149 N.W.2d 557 (1967). Also see Sanford v. State, 76 Wis.2d 72, 250 N.W.2d 348 (1976), and Hough v.

State, 70 Wis.2d 807, 235 N.W.2d 534 (1975).

Decisions addressing the identity exception include:

- State v. Hammer, 2000 WI 92, 236 Wis.2d 686, 613 N.W.2d 629 [evidence of previous sexual touching admissible to show identity by showing a mode or method of operation].

- State v. Rushing, 197 Wis.2d 631, 541 N.W.2d 155 (Ct. App. 1995) [evidence of prior consensual homosexual act is not admissible in a trial for sexual assault of a child because the two incidents were too dissimilar].

- State v. Wagner, 191 Wis.2d 322, 528 N.W.2d 85 (Ct. App. 1995) [evidence of prior assault was sufficiently similar to the charged crime to be admissible to show identity].

- State v. Murphy, 188 Wis.2d 508, 524 N.W.2d 924 (Ct. App. 1994) [evidence of ten prior robbery offenses were sufficiently similar to the charged crime to be admissible to show identity].

- State v. Speer, 176 Wis.2d 1101, 501 N.W.2d 429 (1993) [evidence that the defendant previously burglarized homes with "For Sale" signs in front during daylight hours showed identity].

- State v. Rutchik, 116 Wis.2d 61, 341 N.W.2d 639 (1984) [evidence that the defendant previously burglarized homes while the occupants were attending a funeral shows identity].

Related to, or overlapping with, the purpose to show "identity" is evidence relating to "method of operation." See, for example, State v. Hurley, 2015 WI 35, ¶¶63-69, 361 Wis.2d 529, 861 N.W.2d 174.

10. "Other acts evidence is properly admitted to show absence of mistake if it tends to undermine a defendant's innocent explanation for his or her behavior." State v. Evers, 139 Wis.2d 424, 437, 407 N.W.2d 256 (1987). "If a like occurrence takes place enough times, it can no longer be attributed to mere coincidence. Innocent intent will become improbable." Id. at 443. Cited with approval in State v. Gray, 225 Wis.2d 39, 56, 590 N.W.2d 918 (1999).

In State v. Sullivan, 216 Wis.2d 768, 576 N.W.2d 30 (1998), the court found that the other acts evidence offered – verbal threats and abuse – was not probative of the defendant's intent or absence of accident with respect to a battery charge based on events two years later.

Evidence of the defendant's prior acts of hostility and aggressiveness was admitted as relevant to absence of mistake in King v. State, 75 Wis.2d 26, 248 N.W.2d 458 (1977). Decisions addressing this exception include:

- State v. Veach, 2002 WI 110, 255 Wis.2d 390, 468 N.W.2d 447 [evidence of past sexual touchings by the defendant was admissible to show that the touching was not a mistake or accident].

- State v. Opalewski, 2002 WI App 145, 256 Wis.2d 110, 647 N.W.2d 331 [evidence of past sexual assaults by the defendant of his daughters was admissible to show that the touching was not a mistake or accident].

- State v. LaBine, 198 Wis.2d 291, 542 N.W.2d 797 (Ct. App. 1995) [evidence of prior thefts of a truck

admissible to show absence of accidental shooting in connection with a later taking of the truck].

- State v. Bustamonte, 201 Wis.2d 562, 549 N.W.2d 746 (Ct. App. 1996) [evidence of prior acts of child abuse admissible to negate defendant's claim that death of child was accidental].

- State v. Roberson, 157 Wis.2d 447, 459 N.W.2d 611 (Ct. App. 1990) [evidence of **later** possession of a stolen vehicle was admissible as relevant to intent because it tended to undermine the defendant's innocent explanation for his act].

11. The Committee decided to add this alternative to the instruction because several cases have approved evidence admitted to show "context or background." In State v. Seibert, 141 Wis.2d 753, 761, 416 N.W.2d 900 (Ct. App. 1987), the court held that evidence of a pending sexual assault charge and violation of a no-contact order was properly admitted "to furnish part of the context of the alleged crime and a full presentation of the case." In State v. Shillcutt, 116 Wis.2d 227, 236-237, 341 N.W.2d 716 (Ct. App. 1983), the court held that evidence of the defendant's earlier solicitation of a prosecution witness to practice prostitution and of his physical abuse of her was properly admitted "to establish the background relationship between the witness and the defendant [and] was necessary to fully understand the context of the case."

Shillcutt quotes from United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980): an "accepted basis for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case."

For other decisions applying this purpose, see:

- State v. Marinez, 2011 WI 12, 331 Wis.2d 568, 797 N.W.2d 399 [other acts evidence was relevant to proper purposes – identification, context, credibility, and time and location; it also provided a "complete story" to the jury and was highly probative because it was "intertwined" with the sexual assault allegations].

- State v. Jensen, 2011 WI App 3, ¶84, 331 Wis.2d 440. 794 N.W.2d 482 [evidence of pornographic photos the defendant left around the home was admissible to show context and a full presentation of the case – his hostility and desire to seek revenge against wife for her affair].

- State v. Payano, 2009 WI 86, 320 Wis.2d 348. 768 N.W.2d 832 [testimony of a confidential informant about his observations of the defendant's possession of drugs and a handgun in the defendant's apartment on the day before the police executed a no-knock search warrant at the apartment provided context for an incident in which a police officer was shot by the defendant].

- State v. Bergeron, 162 Wis.2d 521, 470 N.W.2d 322 (Ct. App. 1991) [evidence that the defendant used an alias was treated as other acts evidence and found to be relevant as part of the background facts of the case].

- State v. Anderson, 230 Wis.2d 121, 130, 600 N.W.2d 913 (Ct. App. 1999) [evidence of prior convictions was admissible to show the context of a statement constituting a threat against a witness].

- State v. Hereford, 195 Wis.2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995) [evidence that the defendant had possessed a gun three weeks earlier was admissible to show context and background for the statement, "I'm going to get my shit"].

- State v. Rundle, 166 Wis.2d 715, 731, 480 N.W.2d 518 (Ct. App. 1992) [evidence of other incidents of abuse of the same victim is admissible "to permit the jury to fully understand the context of the charges" against the defendant].

12. Decisions recognizing other valid purposes that do not fit in the specified categories include the following:

- State v. Parr, 182 Wis.2d 349, 513 N.W.2d 647 (Ct. App. 1994) [suggesting that evidence of a prior similar sexual assault was admissible because it "bore directly on the truthfulness" of the defendant's and the victim's "competing and conflicting versions of the event"].

- State v. Anderson, 176 Wis.2d 196, 500 N.W.2d 328 (Ct. App. 1993) [evidence of defendant's in-custody statement showing familiarity with marijuana was admissible to show elements of the crime of delivery of marijuana].

- State v. Patricia A. M., 176 Wis.2d 542, 553, 500 N.W.2d 289 (1993) [evidence of prior instances of sexual assault admissible to support the credibility of the victim and to help "explain to the jury how the charged acts could have occurred in the manner" the victim described].

- State v. Clemons, 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991) [evidence that the defendant stole the controlled substance that caused the death of the victim is admissible because it provides an aspect of the crime charge and gave "a complete presentation" of the case at trial].

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275.1 COMMENT: OTHER ACTS EVIDENCE

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 275.1 was originally published in 1990. It was withdrawn in 2015 when its content was revised and incorporated into the Comment to Wis JI-Criminal 275 CAUTIONARY INSTRUCTION: EVIDENCE OF OTHER CONDUCT [REQUIRED IF REQUESTED] – § 904.04(2)(a).

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276 PRIOR CONVICTIONS ADMISSIBLE TO PROVE CHARACTER — § 904.04(2)(b)2.

CAUTION: THIS INSTRUCTION APPLIES ONLY TO CASES ALLEGING A VIOLATION OF § 940.225(1) OR § 948.02(1)

Evidence has been received that (name of defendant) has been convicted of (first degree sexual assault) (first degree sexual assault of a child).

You may, but you are not required to, conclude from that evidence that the defendant has a certain character. You may also conclude, but you are not required to, that the defendant acted in conformity with that character with respect to the offense charged.

You should give this evidence the weight you believe it is entitled to receive. Before you may find the defendant guilty of the offense charged in this case, the State must satisfy you beyond a reasonable doubt that the defendant is guilty, based on all the evidence.

COMMENT

Wis JI-Criminal 276 was originally published in 2007. This revision was approved by the Committee in October 2015.

This instruction addresses § 904.04(2)(b)2., created as § 904.04(2)(b) by 2005 Wisconsin Act 310. [Effective date: April 21, 2006. Section 3 of the act provides: This act first applies to criminal actions commenced on the effective date of this subsection.] It was renumbered § 904.04(2)(b)2. by 2013 Wisconsin Act 362.

§ 904.04(2)(b)2. reads as follows:

> In a criminal proceeding alleging a violation of s. 940.225(1) or 948.02(1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order show that the person acted in conformity therewith.

The reference to "sub. (1) and par. (a)" are to the general rules relating to evidence of character and of other crimes or acts.

There are several limitations on the application of the new rule provided in § 904.04(2)(b):

1) it applies only in prosecutions for

- 1st degree sexual assault under § 940.225(1) and
- 1st degree sexual assault of a child under § 948.02(1);

2) it applies only to evidence of prior **convictions** for

- 1st degree sexual assault under § 940.225(1) and
- 1st degree sexual assault of a child under § 948.02(1);

- NOTE: it includes convictions "of a comparable offense in another jurisdiction"

3) the prior conviction must be similar to the alleged violation in the current trial.

- the Committee concluded that the "similar to" requirement applies not only to prior convictions in Wisconsin but also to prior convictions of a comparable offense in another jurisdiction.

When the requirements are met, the prior conviction is admissible "as evidence of the person's character in order to show that the person acted in conformity therewith." There is no express authority requiring an instruction in this situation. The Committee concluded that providing a suggested model instruction was advisable for use when the trial court decides that one should be given. This is not the typical situation where evidence is admitted for a limited purpose and a cautionary instruction is required if requested. See § 901.06. Rather, it is a situation where a usual limit is not applicable, so the instruction is actually describing the unlimited use authorized in a specific situation. The instruction reads the way it does because it states the opposite of the general rule that excludes priors to prove character.

The instruction is drafted for cases that clearly fit the situation addressed by the statute. There are possible difficulties with other situations that are likely to arise. For example, what if there are lesser included offenses or multiple charges that are not § 940.225(1) or § 948.02 violations? What if evidence of prior convictions is offered under the new rule and also under one of the traditional "other acts " exceptions? Further, the statute does not address whether details of the other crimes are admissible, whether offered by prosecution or by the defense.

The general prohibition on proving character is now found in a rule of evidence C § 904.04. But that rule had its origin in a decision of the Wisconsin Supreme Court, Whitty v. State, 34 Wis.2d 278, 148 N.W.2d 557 (1967), that was based on due process principles:

> ". . . the rule we adopt . . . is based upon the premise that the accused is entitled to a procedurally and evidentially fair trial . . ." 34 Wis.2d at 295.
>
> ". . . [when other acts evidence is admitted] it runs the danger . . . of violating the defendant's right to a fair trial because of its needless prejudicial effect on the issue of guilt or innocence." 34 Wis.2d at 297.

The references to "fair trial" seem clearly to invoke a due process basis for the rule – it is the Due Process Clause that insures the right to a fair trial.

The Committee recommends a careful evaluation of the admissibility of evidence offered under the new rule to assure that it is relevant under § 904.01 and that its probative value is not substantially outweighed under § 904.03: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The Federal Rules of Evidence include two provisions that are similar to, but not the same as, the new Wisconsin rule.

Rule 413. Similar Crimes in Sexual Assault Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

Rule 414. Similar Crimes in Child Molestation Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

The primary difference between the federal and the Wisconsin rule is that the federal rule allows consideration of the evidence "on any matter to which it is relevant " while the Wisconsin rule specifies that it may be admitted "as evidence of the person's character in order show that the person acted in conformity therewith."

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300 CREDIBILITY OF WITNESSES

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In your determination of credibility, you must avoid bias, conscious, or unconscious based on the witness's race, national origin, religion, age, ability, gender identity, sexual orientation, education, income level, or any other personal characteristic.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to

discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

[GIVE THE FOLLOWING PARAGRAPH ONLY WHEN THE DEFENDANT TESTIFIES.][1]

[The defendant has testified in this case, and you should not discredit the testimony just because the defendant is charged with a crime. Use the same factors to determine the credibility and weight of the defendant's testimony that you use to evaluate the testimony of any other witness.]

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

COMMENT

Wis JI Criminal-300 was originally published in 1962 and revised in 1979, 1989, 1990, 1991, 2000, and 2022. The 2022 revision amended the body of the instruction to mirror Wis JI-Criminal 50. This revision was approved by the Committee in December 2022; it moved language concerning bias from the end of the instruction to the beginning.

The 1999 revision involved a substantial rewriting of the former instruction and was intended to make it more understandable without changing the meaning.

In Wilson v. State, 184 Wis. 636, 200 N.W. 369 (1924), the court approved the general instruction that as to each witness, the jury should take into consideration the appearance and manner of testifying, the apparent interest in the result of the trial, if any, the degree of intelligence of the witness, the reasonableness of the testimony given, and every other circumstance bearing upon credibility and weight.

The supreme court has allowed the trial court considerable latitude in instructions dealing with the

credibility of witnesses. A few cases are illustrative. In Emery v. State, 101 Wis. 627, 78 N.W. 145 (1899), the court approved the following part of the instruction:

> You are cautioned, however, that interest in the result of the trial creates no presumption that such witnesses will swear falsely.

The trial court was criticized, on the other hand, in Lee v. State, 74 Wis. 45, 41 N.W. 960 (1889), for instructing that:

> When the witnesses appear to be equally credible in every other respect, the one who appears to have the greater interest in the result of the case is to have the less weight of the two.

The court remarked that this "trenches too closely . . . upon the legitimate function of the jury."

The question has been raised with the Committee whether a special instruction should be given for police officer witnesses. One theory is that the instruction should advise that the testimony of the police officer witness is to be weighed by the same standards applied to other witnesses. In the Committee's judgment, no separate instruction is necessary; Wis JI-Criminal 300 would apply to all witnesses, including the police officer. A different theory is that an instruction should advise the jury that greater care should be taken in weighing the testimony of a police officer because of the officer's greater interest in gaining a conviction. The Wisconsin Supreme Court addressed that argument in State v. Melvin, 49 Wis.2d 246, 181 N.W.2d 490 (1970), and concluded that on the facts of that case, the general credibility instruction was sufficient.

1. The Committee recommends that instructing the jury on the credibility of the defendant be included in the general credibility instruction as indicated, rather than dealing with the credibility of the defendant separately.

Wis JI-Criminal 310 formerly dealt with the credibility of the defendant but was withdrawn by the Committee in 1979. However, the use of Wis JI-Criminal 310 was approved by the Wisconsin Supreme Court in Thompson v. State, 83 Wis.2d 134, 265 N.W.2d 467 (1978).

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305 FALSUS IN UNO

[USE OF THIS INSTRUCTION IS NOT FAVORED.]

If you become satisfied from the evidence that any witness has willfully testified falsely as to any material fact, you may disregard all the testimony of the witness which is not supported by other credible evidence in the case.

COMMENT

Wis JI-Criminal 305 was originally published in 1962 and revised in 1979. It was republished without change in Release No. 28C12/91 and the comment was updated in 1994 and 1995. This revision involved nonsubstantive editorial changes and was approved by the Committee in April 2000.

In Ollman v. Health Care Liability Ins., 178 Wis.2d 648, 658-59, 505 N.W.2d 399 (Ct. App. 1993), the court made the following observations about the **falsus in uno** instruction:

> Wisconsin's **falsus in uno** instruction is a derivative of the old maxim, **falsus in uno, falsus in omnibus**, or translated, "false as to one thing, false as to all things." . . . In general, the falsus in uno instruction has fallen into disfavor among the courts of this country. The now prevailing attitude . . . is one of tolerance and sufferance. The instructions labor under faint praise, and are generally regarded as of little assistance to juries. [Citations omitted.]

In State v. Lagar, 190 Wis.2d 424, 434, 526 N.W.2d 836 (Ct. App. 1994), the court flatly stated that "[t]he **falsus in uno** instruction is not favored." The court also emphasized that the decision to give the instruction is within the wide discretion of the trial court: "The impeachment of a witness with prior statements does not necessarily mean that a **falsus in uno** instruction is appropriate. The testimony must be shown to be willful and intentional. The trial court was in the best position to make this call." Id. at 435.

The Committee recommends that the instruction not be routinely given.

In State v. Williamson, 84 Wis.2d 370, 267 N.W.2d 337 (1978), the refusal to give the falsus in uno instruction was upheld where the witness maintained that her prior testimony was inconsistent because she was confused. The court noted that "[t]he falsus in uno instruction is not favored in the law," citing: Annot. 4 A.L.R.2d 1077 (1949), and emphasized the evidentiary basis required for giving the instruction:

> In order for the falsus in uno instruction to be appropriate, the false testimony must be on a material point and must be willful and intentional. Mere discrepancies in the testimony that are most likely attributed to defects of memory or mistake are no basis for rejecting a witness's testimony entirely. 84 Wis.2d 370, 394.

Williamson was cited with approval in State v. Robinson, 145 Wis.2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988). See also State v. Lombardi, 8 Wis.2d 421, 99 N.W.2d 829 (1959).

The text of the instruction is supported by the older criminal cases dealing with this issue. See Spick v. State, 140 Wis. 104, 121 N.W. 664 (1909). In Miller v. State, 139 Wis. 57, 119 N.W. 850 (1909), the court approved the following language:

> If a witness testifies wilfully falsely as to any material matter in the trial of a case, the jury may, if they see fit, but are not bound to, reject all of such witness's evidence not corroborated by some other credible evidence. (pp. 82-83)

This instruction ought to be given only where the judge has some reason to believe a witness has testified falsely. In Pumorlo v. City of Merrill, 125 Wis. 102, 110, 103 N.W. 464 (1905), the supreme court referred to the falsus in uno instruction and said:

> To warrant the giving of such an instruction there must be a sufficient basis in the evidentiary facts and circumstances adduced as tends to show that there was wilfully false swearing. Whether such a rule applies to the consideration of the evidence of a case is primarily a question for the trial court and not for the jury.

310 DEFENDANT AS WITNESS IN OWN BEHALF

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 310 was originally published in 1966. It was withdrawn by the Committee in 1979. This version was republished without change in 1991 and 2000.

The instruction was withdrawn because the Committee concluded that it is preferable to include reference to the credibility of the defendant in the instruction on credibility of all witnesses. An optional paragraph for use when the defendant testifies is included in the general credibility instruction. See Wis JI-Criminal 300.

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312 PRISONER AS WITNESS OR DEFENDANT: PRISONER STATUS AN ISSUE

Statutory Definition of the Crime

Evidence has been received that (the defendant) (witness (name of witness)) was a prisoner at (name of institution) . This evidence was received because the (defendant's) (witness') status as a prisoner is an issue in this case. It must not be used for any other purpose.

COMMENT

Wis JI-Criminal 312 was originally published in 1979 and revised in 1991 and 2001. This revision was approved by the Committee in October 2016.

This instruction is to be used when the offense charged requires proof that the defendant or a witness was a prisoner. Common examples would be cases involving escape under § 946.42 (Wis JI-Criminal 1770-1774), assaults by prisoners under § 946.43 (Wis JI-Criminal 1778 and 1779), or battery by prisoner under § 940.20(1) (Wis JI-Criminal 1222).

These cases differ from the usual situation where the defendant or a witness has a prior conviction (see Wis JI-Criminal 325 and 327) because the prior goes not only to credibility but also is a required element of the crime – the person's status of prisoner at the time of the offense.

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313 EVIDENCE THAT THE DEFENDANT WORE A GPS OR OTHER MONITORING DEVICE

Evidence has been presented regarding the fact that the defendant was wearing a (identify the monitoring device). Do not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case. Do not speculate on the reasons for which the defendant was required to wear a (identify the monitoring device).

COMMENT

Wis JI-Criminal 313 was approved by the Committee in December 2016.

This instruction is intended for use when the evidence has shown that the defendant was wearing a monitoring device at the time of the offense. This may arise due to the nature of the crime – for example, tampering with a GPS tracking device in violation of § 946.465. Or, reference to a device may have been made in a description of the arrest or interrogation of a suspect. For an example of a case where this was an issue, see State v. Romanelli, an unpublished decision of the Wisconsin Court of Appeals, decided December 17, 2015 [Appeal No. 2014AP874].

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314 DEFENDANT WEARING A VISIBLE RESTRAINING DEVICE IN THE PRESENCE OF JURORS

The defendant has appeared in court wearing a restraining device. This must not be considered by you in any way and must not influence your verdict in any manner.

COMMENT

Wis JI-Criminal 314 was originally published in 2009. This revision added to the Comment and was approved by the Committee in June 2011; it added "visible" to the title and updated the Comment.

This instruction is intended to implement the requirement identified in State v. Champlain, 2008 WI App 5, 307 Wis.2d 232, 744 N.W.2d 889. Champlain held that "whenever a defendant wears a restraint in the presence of jurors trying the case, the court should instruct that the restraint is not to be considered in assessing the proof and determining guilt." 2008 WI App 5, ¶33.

Champlain also held that "under the circumstances of this case, the trial court had an affirmative, sua sponte duty to inquire into the necessity for the [security] device once the court became aware of the situation." 2008 WI App 5, ¶32. A general reference to "custom and practice" or to the policy of the sheriff's department is not sufficient. State v. Miller, 2011 WI App 34, 331 Wis.2d 732, 797 N.W.2d 528, at footnote 2, citing State v. Grinder, 190 Wis.2d 541, 552, 527 N.W.2d 326 (1995).

Neither the duty to make an inquiry nor the duty to instruct arises in a case where the restraints are not visible to the jury. State v. Miller, supra, ¶11.

Wisconsin case law has recognized that, generally, a criminal defendant should not be restrained during the trial. Sparkman v. State, 27 Wis.2d 92, 133 N.W.2d 776 (1965). However, physical restraint may be imposed if the trial finds restraint reasonably necessary to maintain order. State v. Cassel, 48 Wis.2d 619, 180 N.W.2d 607 (1970).

State v. Cassel, supra, cited with approval the then-current ABA Standard for criminal justice that addressed the restraint issue. The current version of that standard provides in part as follows:

> Standard 15-3.2. Control, restraint or removal of defendants and witnesses
>
> . . . .
>
> (c) No defendant should be removed from the courtroom, nor should defendants and witnesses be subjected to physical restraint while in court unless the court has found such restraint necessary to maintain order. Removing a defendant from the courtroom or subjecting an individual to physical restraint in the courtroom should be done only after all other reasonable steps have been taken to insure order. In ordering remedial measures, the court must take all reasonable steps to preserve the defendant's right to confrontation of witnesses and consultation with counsel.

(d) If the court orders physical restraint or removal of a defendant from the courtroom, the court should enter into the record of the case the reasons therefor. Whenever physical restraint or removal of a defendant or witness occurs in the presence of jurors trying the case, the court should instruct those jurors that such restraint or removal is not to be considered in assessing the proof and determining guilt.

ABA Standards For Criminal Justice, Trial By Jury (3rd Ed. 1994).

315 DEFENDANT ELECTS NOT TO TESTIFY

[TO BE GIVEN ONLY IF REQUESTED BY DEFENDANT.][1]

A defendant in a criminal case has the absolute constitutional right not to testify.

The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

COMMENT

Wis JI-Criminal 315 and comment were originally published in 1962 and revised in 1979, 1981, and 1985. Wis JI-Criminal 315 was republished without change in 1991. The 2001 revision updated the comment.

Wis JI-Criminal 315 is to be used in cases where there have been no unusual circumstances calling attention to the accused's failure to testify. For example, where the prosecutor makes improper comments about the defendant's failure to take the witness stand, a more detailed instruction may be required which directs the jury to disregard the comment. See State v. Jackson, 219 Wis. 13, 261 N.W. 732 (1935). Wis JI-Criminal 315 is also not appropriate where reference has been made to the accused's silence at the time of arrest; such situations, to the extent they are curable by jury instructions, will require a different type of admonition.

Wis JI-Criminal 315 also does not deal with the unique issues presented in the rare case where a defendant elects not to testify but makes an opening statement or a closing argument to the jury. See State v. Johnson, 121 Wis.2d 237, 258 N.W.2d 824 (Ct. App. 1984).

An instruction like Wis JI-Criminal 315 must be given when requested by the defendant. Carter v. Kentucky, 450 U.S. 288 (1981). However, the trial court does not have the obligation to give the instruction sua sponte in the absence of a request by the defendant. The Committee recommends that the instruction not be given unless requested, see discussion in note 1, below.

Subsection 905.13(1) provides that a claim of privilege is not a proper subject for comment by judge or counsel. Subsection 905.13(3) provides that upon request, a party against whom the jury might draw an adverse inference from a claim of privilege is entitled to a jury instruction that no such inference is to be drawn. In criminal cases, these sections apply to the privilege against self-incrimination. Wis JI-Criminal 315 does not use the precise statutory language: ". . . draw no inference therefrom." The Committee concluded that the direction that the exercise of the privilege "must not be considered by you in any way and must not influence your verdict" is a more understandable equivalent of "draw no inference."

Evidence providing an explanation for a defendant=s failure to take the stand is not relevant. State v. Heuer, 212 Wis.2d 58, 61, 567 N.W.2d 638 (Ct. App. 1990).

1. The Committee recommends that Wis JI-Criminal 315 be given only when requested by the defendant. In Champlain v. State, 53 Wis.2d 751, 193 N.W.2d 868 (1972), the Wisconsin Supreme Court held

that giving the instruction in the absence of defense request or objection was not reversible error. But the court noted that the giving of such an instruction is a matter of trial strategy and that ". . . the better practice is for the trial judge to give the instruction only if it is requested by the defendant. . . . In a case where the trial court might feel because of the facts and the lack of skill of counsel for the defense such an instruction might well be given, the trial judge might properly offer such instruction for defense counsel's consideration." 53 Wis.2d 751, 758. But see Price v. State, 37 Wis.2d 117, 130, 154 N.W.2d 222 (1967), which suggests that this should be done only in the case where there is unusual disparity in the skill of counsel.

The giving of the instruction over the defendant's objection was reviewed and upheld by the U.S. Supreme Court in Lakeside v. Oregon, 435 U.S. 333 (1978). The defendant argued that giving the instruction, even though the instruction was intended to be neutral, constituted an impermissible comment on his constitutional right not to testify. The Court held that the Constitution forbids only adverse comment on the failure to testify. Correctly instructing the jury in the meaning of the privilege against self-incrimination is not an adverse comment; it is more like an instruction on basic concepts like burden of proof and reasonable doubt. The Court also rejected the defendant's claim that the giving of the instruction violated his right to counsel by interfering with the planned trial strategy. The Court noted, however:

> It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each State is, of course, free to forbid its trial judges from doing so as a matter of state law. We hold only that the giving of such an instruction over the defendant's objection does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments.

435 U.S. 333, 340-41.

The Committee recommends that Wis JI-Criminal 315 be given only when requested by the defendant. It must be given if there is a proper request. Carter v. Kentucky, 450 U.S. 288 (1981).

317 WITNESS EXERCISING PRIVILEGE AGAINST SELF-INCRIMINATION

A witness, (name of witness), exercised the constitutional right not to answer (a question) (questions) on the ground that the answer(s) might tend to incriminate the witness.

(Name of witness)'s decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

COMMENT

Wis JI-Criminal 317 was originally published in 1981 and revised in 1991 and 1994. The 2001 revision adopted a new format without substantive change.

This instruction must be given if properly requested (§ 905.13(3)). It should not be given unless it is requested.

Generally, a claim of privilege should be made outside the presence of the jury. Section 905.13(2) provides:

> Claiming Privilege Without Knowledge Of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

For a discussion of recommended procedures, see **SM-55, INQUIRY WHEN A WITNESS CLAIMS THE PRIVILEGE AGAINST SELF-INCRIMINATION.**

Refusing to allow a defendant to call a witness and require that witness to claim the privilege in front of the jury does not deprive the defendant of the due process right to present a defense. State v. Heft, 178 Wis.2d 823, 505 N.W.2d 437 (1994). Heft also held that § 905.13(3) does not violate equal protection in prohibiting comment on the exercise of the privilege in criminal cases but allowing it in civil cases.

Also see ABA Standards Relating To Criminal Justice 3-5.7(c) and 4-7.6(c) relating to the duty of counsel where a witness is expected to claim a valid privilege not to testify.

When a witness refuses to answer a question or questions on the basis of the privilege against self-incrimination, the trial court has discretion to strike the entire testimony of the witness, providing the claim of privilege does not go to collateral matters only. Ryan v. State, 95 Wis.2d 83, 90, 289 N.W.2d 349 (Ct. App. 1979); State v. Monsoor, 56 N.W.2d 689, 203 N.W.2d 20 (1973) [but see State ex rel. Monsoor v. Cady, 497 F.2d 1126 (7th Cir. 1974)]; Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975).

Whether or not striking the witness' testimony is appropriate, an instruction like Wis JI-Criminal 317 may be helpful, either by itself or in addition to Wis JI-Criminal 150, Stricken Testimony. Subsection 905.13(1) provides that a claim of privilege is in general not a proper subject for comment by judge or counsel, but § 905.13(3) provides that "[u]pon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom." In criminal cases, these sections apply to the privilege against self-incrimination. Wis JI-Criminal 317 does not use the precise statutory language: ". . . draw no inference therefrom." The Committee concluded that the direction that the exercise of the privilege "must not be considered by you in any way and must not influence your verdict in any manner" is a more understandable equivalent of "draw no inference."

When a witness makes a valid claim of the privilege against self-incrimination, it is within the sole discretion of the district attorney to request that the court order the witness to testify. If the court grants the motion and orders a witness to testify notwithstanding a valid claim of privilege, the witness enjoys immunity concerning matters related to the subject of his testimony. See section 972.08. The Wisconsin Supreme Court has on several occasions rejected the argument that defendants should have a reciprocal power to compel the testimony of witnesses. Peters v. State, supra; Sanders v. State, 69 Wis.2d 242, 230 N.W.2d 845 (1975); Elam v. State, 50 Wis.2d 383, 184 N.W.2d 176 (1971). The court has also made it clear that trial courts have no authority to sua sponte compel testimony, in the absence of a request by the prosecutor. Hebel v. State, 60 Wis.2d 325, 210 N.W.2d 695 (1973); Shelley v. State, 89 Wis.2d 263, 278 N.W.2d 251 (Ct. App. 1979).

320 IMPEACHMENT OF THE DEFENDANT BY PRIOR INCONSISTENT STATEMENTS WHICH ARE INADMISSIBLE IN THE STATE'S CASE-IN-CHIEF

[MUST BE GIVEN UPON REQUEST.][1]

Evidence has been received that the defendant made a statement[2] before trial which is inconsistent with the defendant's testimony in court.

This evidence may be taken into consideration only to help you decide if what the defendant said in court was true.

It must not be considered as proof of the facts contained in the statement.

COMMENT

Wis JI-Criminal 320 was originally published in 1971 and was revised in 1976, 1981, 1985, 1986, and 1991. The 2001 revision adopted a new format without substantive change.

Wis JI-Criminal 320 is to be given upon request where a defendant's prior inconsistent statement, inadmissible during the state's case-in-chief because it was unconstitutionally obtained, is admitted for impeachment purposes. Such statements are limited to impeachment use, provided they were voluntarily made and are inconsistent with the defendant's testimony.

A brief summary of the history of JI-320 may avoid confusion. In its original form, copyright 1971, Wis JI-Criminal JI-320 cautioned that all prior inconsistent statements were limited to impeachment use. Such was the law of Wisconsin until the adoption of the Rules of Evidence in 1974. Under subsec. 908.01(4)(a)1 of the new Rules, prior inconsistent statements could be used as substantive evidence – they were no longer limited to impeachment use. See Wis JI-Criminal 320A, where the history of the Wisconsin rules relating to impeachment by and substantive use of prior inconsistent statements is summarized.

Wis JI-Criminal 320 (© 1971) was withdrawn in 1976 and replaced with an instruction that applied only to statements of the defendant obtained in violation of Miranda. Such statements continue to be admissible only for impeachment purposes (provided they are voluntary). This is the situation addressed by the current version of Wis JI-Criminal JI-320, though it can also be used where impeachment use is allowed of statements obtained in violation of the 4th or 6th amendment.

The law relating to the impeachment use of statements obtained in violation of Miranda and other constitutional guarantees is summarized below, immediately following footnote 2.

1. When evidence is admitted for a limited purpose, an instruction restricting the evidence to its proper scope shall be given upon request. Section 901.06.

2. The Committee decided not to include any characterization of the statement in terms of why it is admissible for impeachment purposes only. Referring to the statement as "obtained in violation of his constitutional rights" or "obtained before he was advised of his rights" may be distracting or confusing and was therefore not included in the instruction. Further, there can be a number of reasons why a statement may have been obtained in violation of Miranda: no advice at all; advice given too late; advice incorrect; proper advice followed by illegal interrogation; and others. Thus, it would be difficult to include a description of the statement in a model instruction that would be correct in all cases.

However, sometimes it may be helpful to further identify a statement, as, for example, where there are several statements, some admissible for substantive purposes and some limited to impeachment use. In such cases, it may be useful to refer to a statement by the date it was made, by referring to the person to whom it was made, or in some other way.

IMPEACHMENT USE OF OTHERWISE INADMISSIBLE STATEMENTS

The primary issue being considered here is the impeachment use of statements made in violation of the 5th amendment, as protected by the rules announced in Miranda. But three other constitutional principles also restrict the admissibility of out-of-court statements made by criminal defendants:

- Due process, based on the 14th amendment, precludes the use of statements that are not "voluntary." As noted above, involuntary statements are not admissible as direct evidence or for impeachment purposes.

- The 6th amendment excludes statements obtained in violation of the right to counsel afforded by that amendment. In Michigan v. Harvey, 494 U.S. 344 (1990), the Court upheld the impeachment use of statements obtained in violation of rule that any waiver of 6th amendment rights following discussions initiated by police is invalid per se. [This case is the so-called prophylactic rule of Edwards v. Arizona, 451 U.S. 477 (1981), applied to 6th amendment cases by Michigan v. Jackson, 475 U.S. 625 (1986).]

- The 4th amendment exclusionary rule forbids the direct use of statements resulting from illegal arrest or detention. Such statements appear to be admissible for impeachment, but the United States Supreme Court decisions on the subject are not completely consistent. See Agnello v. United States, 269 U.S. 20 (1925); Walder v. United States, 347 U.S. 62 (1954); and United States v. Havens, 446 U.S. 620 (1980). The decisions are discussed in LaFave, Search and Seizure, § 11.6(a) (West 1987).

The rule allowing impeachment use of statements obtained in violation of Miranda is summarized in State v. Mendoza, 96 Wis.2d 106, 118-19, 291 N.W.2d 478 (1980):

> A statement of the defendant made without the appropriate Miranda warnings, although inadmissible in the prosecution's case-in-chief, may be used to impeach the defendant's credibility if the defendant testifies to matters contrary to what is in the excluded statement. Harris v. New York, 401 U.S. 222 (1971); State v. Oliver, 84 Wis.2d 316, 320, 321, 267 N.W.2d 333 (1978); Upchurch v. State, 64 Wis.2d 553, 562, 563, 219 N.W.2d 363 (1974); Wold v. State, 57 Wis.2d 344, 353-356, 204

N.W.2d 482 (1973). It is only if the statements are also found to be involuntary that their use for impeachment purposes is precluded. Upchurch v. State, supra, at 353-56.

The Wisconsin Supreme Court has recommended that a finding on a statement's usability for impeachment purposes be made as part of the Miranda-Goodchild inquiry:

> When a court conducts a hearing to determine the admissibility of evidence in chief, it should make a determination for the use of such evidence, both in chief and for impeachment, and expressly make a finding concerning the trustworthiness as well as such other grounds for admission or exclusion as the evidence permits. However, evidence excluded on direct should not be used for impeachment unless the accused takes the stand and testifies to matters directly contrary to what is in the excluded statement. The foundation for the use of the impeaching statements must be found in prior testimony. Wold v. State, 57 Wis.2d 344, 355-56, 204 N.W.2d 482 (1973).

To be used for impeachment, the statement must be voluntary. A statement found to be "involuntary" on due process grounds may not be used in chief or for impeachment. "Voluntariness" for these purposes requires that the statement must "represent the uncoerced free will of the defendant" and not be "the result of conditions in which the defendant had been deprived of the ability to make a rational choice." Upchurch v. State, 64 Wis.2d 553, 563, 219 N.W.2d 363 (1974). A statement is not "involuntary" unless "improper police practices [were] deliberately used to procure a confession." State v. Clappes, 136 Wis.2d 222, 239, 401 N.W.2d 759 (1987). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" Colorado v. Connelly, 479 U.S. 157, 167, (1986).

It appears to the Committee that a question exists about the admissibility, as direct evidence or for impeachment, of statements that qualify as "voluntary" under the test requiring government coercion but which might not be trustworthy. For example, what about statements which result from threats from a private party or from fear of mob violence? Unreversed decisions of both the United States and Wisconsin Supreme Courts indicate that a showing of trustworthiness is required: ". . . [the court should] . . . expressly make a finding concerning trustworthiness as well as such other grounds for exclusion as the evidence permits." Wold v. State, 57 Wis.2d 344, 355-56; "It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." Harris v. New York, 401 U.S. 222, 224 (1971). However, Colorado v. Connelly, supra, indicates that voluntariness is the only constitutional concern and that other questions relating to admissibility are to be resolved under state rules of evidence. While the constitutional issue may not be completely resolved, the Committee believes that before an allegedly untrustworthy statement is admitted, its relevance should be evaluated carefully and its probative value weighed against any danger of unfair prejudice, confusion of the issues, or misleading the jury. See §§ 904.01 and 904.03.

If the statement used to impeach was admissible under Miranda so that it could have been used in the state's case-in-chief, this instruction should not be given. See Ameen v. State, 51 Wis.2d 175, 186 N.W.2d 206 (1971).

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320A LAW NOTE: SUBSTANTIVE USE OF PRIOR INCONSISTENT STATEMENTS

[THE COMMITTEE HAS CONCLUDED THAT AN INSTRUCTION ON THIS TOPIC IS NOT NECESSARY.][1]

COMMENT

Wis JI-Criminal 320A was originally published in 1989 and republished as a law note without substantive change in 2001.

Prior to the adoption of the Rules of Evidence in 1974, all prior inconsistent statements were limited to impeachment use. Wis JI-Criminal 320 (© 1971) was the cautionary instruction for use in such situations. However, under § 908.01(4)(a)1, prior inconsistent statements can be used as substantive evidence. Wis JI-Criminal 320 was amended in 1976 to apply only to prior inconsistent statements obtained in violation of Miranda. Such statements continue to be admissible only for impeachment purposes (provided they are voluntary and trustworthy).

Wis JI-Criminal 320A was created in 1989 to provide a more accessible place for a discussion of the substantive use of prior inconsistent statements. The history of the Wisconsin rule is set forth in the Comment to Wis JI-Civil 420, which is included below, following note 1.

1. The Committee concluded that a separate instruction on the substantive use of prior inconsistent statements is not necessary. Under the current rules, such statements are to be treated the same as any other evidence.

In State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (1980), the defendant claimed it was error for the trial court to refuse to give a special instruction on prior inconsistent statements. He specifically requested Wis JI-Criminal 320 (© 1971), which limited the consideration of such statements to impeachment use. The trial court refused, giving general instructions on credibility (Wis JI-Criminal 300 and 305) instead. The court of appeals upheld the trial court, noting that the evidentiary rule had changed and that the prior inconsistent statements could be considered as substantive evidence. "Although no special attention was drawn to the prior inconsistent statements, . . . no such treatment was needed. The jury was entitled under the instructions given to determine the weight to be accorded the victim's statements." 99 Wis.2d 430 at 442.

In State v. Lenarchik, 74 Wis.2d 425, 247 N.W.2d 80 (1976), the Wisconsin Supreme Court held that "where a witness denies recollection of a prior statement, and where the trial judge has reason to doubt the good faith of such denial, he may in his discretion declare such testimony inconsistent and permit the prior statement's admission into evidence." 74 Wis.2d at 436.

The Comment to Wis JI-Civil 420 offers the following summary of the development of the rule allowing substantive use of prior inconsistent statements.

SUBSTANTIVE USE OF PRIOR INCONSISTENT STATEMENTS

In the past edition, Wis JI-Civil 420 instructed that prior inconsistent statements of a witness could not be considered by the jury as substantive evidence. The Committee withdrew this instruction in 1980 due to changes in statutory and case law as explained below.

Based on Wis. Stat. § 908.01(4)(a)1 and the decision of the Wisconsin Supreme Court in Vogel v. State, 96 Wis.2d 372, 291 N.W.2d 838 (1980), a prior inconsistent statement may be considered by the jury as substantive evidence when:

1. the statement in question is inconsistent with the declarant's testimony at trial, and

2. the declarant is available for cross-examination concerning the statement.

The evidentiary rule governing the use of prior inconsistent statements at trial has undergone a marked change since the court's 1956 decision in State v. Major, 274 Wis. 110, 79 N.W.2d 75 (1956). In Major, the court adhered to the long-standing rule that previous inconsistent statements of a witness could not be accorded any value as substantive evidence. Instead, such statements could only be used at trial for the limited purpose of impeachment.

In 1969, the court modified this general rule by holding that under certain conditions, a witness' prior inconsistent statement could be regarded as substantive evidence. Gelhaar v. State, 41 Wis.2d 230, 163 N.W.2d 609 (1969). Following the Gelhaar decision, the Committee's comment to Wis JI-Civil 420 set forth the following conditions under which prior statements could be considered by the jury as substantive evidence:

(1) When the witness acknowledges making the statement, or the statement is proved to have been written or signed by him, or given by him as testimony in a former judicial or official hearing, and

(2) When the witness has testified to the same events in a contrary manner at the present proceedings, and

(3) When the party against whom the statement is offered is afforded an opportunity to cross-examine the witness.

The modified rule in Gelhaar admitting certain extrajudicial statements as substantive evidence did not, however, include prior consistent statements, nor did it apply to the prior inconsistent statements of a party's own witness, even if hostile. The limitations on the use of prior inconsistent statements which were retained in Gelhaar were reaffirmed in Irby v. State, 60 Wis.2d 311, 315, 210 N.W.2d 755 (1973).

Under the Wisconsin Rules of Evidence, adopted after the Irby decision, inconsistent statements are not hearsay when the declarant testifies at trial and is subject to cross-examination concerning the statement. Wis. Stat. § 908.01(4)(a)1 states in pertinent part:

> 908.01 Definitions. The following definitions apply under this chapter: . . .

> (4) Statements which are not hearsay. A statement is not hearsay if: (a) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> 1. Inconsistent with his testimony, ...

In Vogel v. State, supra, the supreme court concluded that this new rule of evidence eliminated all impediments to the substantive use of the prior inconsistent statements of a witness:

> We therefore conclude that the court of appeals was correct in its holding that Lindsey's prior inconsistent statement was properly admissible under the Wisconsin Rules of Evidence as substantive evidence against the defendant. The statement in question was inconsistent with Lindsey's testimony at trial and he was available for cross-examination concerning it. Under Sec. 908.01(4)(a)1, no more is required. 96 Wis.2d at 386.

See also State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980), in which the court of appeals cited State v. Vogel to support the use of prior inconsistent statements as substantive evidence.

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325 IMPEACHMENT OF WITNESS: PRIOR CONVICTION OR JUVENILE ADJUDICATION

Evidence has been received that (one) (some) of the witnesses in this trial (has) (have) been [convicted of crime(s)] [adjudicated delinquent]. This evidence was received solely because it bears upon the witness's character for truthfulness. It must not be used for any other purpose.

COMMENT

Wis JI-Criminal 325 was originally published in 1962 and revised in 1979, 1991, 1996, and 2001. This revision was approved by the Committee in June 2018.

This instruction is to be given upon request when evidence of prior convictions is admitted to impeach a witness other than the defendant. See Wis JI-Criminal 327 for an instruction on impeachment of a defendant who has testified. Evidence of prior crimes admitted as "other acts" evidence under § 904.04(2) is addressed by Wis JI-Criminal 275.

The 2018 revision changed the second sentence of the instruction to refer to "character for truthfulness" in place of "credibility." This conforms the instruction to the text of § 906.09 as amended by order of the Wisconsin Supreme Court, effective January 1, 2018. See 2017 WI 92. The first two subsections of the amended statute read as follows:

> **906.09 Impeachment by evidence of conviction of crime or adjudication of delinquency**.
> (1) GENERAL RULE. For the purpose of attacking character for truthfulness, a witness may be asked whether the witness has ever been convicted of a crime or adjudicated delinquent and the number of such convictions or adjudications. If the witness's answers are consistent with the previous determination of the court under sub. (3), then no further inquiry may be made unless it is for the purpose of rehabilitating the witness's character for truthfulness.
>
> (2) EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Factors for a court to consider in evaluating whether to admit evidence of prior convictions for the purpose of attacking a witness's truthful character include:
> (a) The lapse of time since the conviction.
> (b) The rehabilitation or pardon of the person convicted.
> (c) The gravity of the crime.
> (d) The involvement of dishonesty or false statement in the crime.
> (e) The frequency of the convictions.
> (f) Any other relevant factors.

A comprehensive Judicial Council Note explains the change and is published in the Wisconsin Statutes.

The 1996 revision added "adjudicated delinquent" to the instruction. Section 906.09 was amended by 1995 Wisconsin Act 77 to allow impeachment by evidence of juvenile adjudication.

The rationale for allowing the proof of prior convictions to impeach is that one who has been convicted of a crime is less likely to be a truthful witness. See State v. Kruzycki, 192 Wis.2d 509, 531 N.W.2d 429 (Ct. App. 1995); State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991); Liphford v. State, 43 Wis.2d 367, 168 N.W.2d 549 (1969). But the admissibility is supposed to be limited to this purpose – the effect on credibility. Whenever evidence is admitted for a limited purpose, a jury instruction describing the limits must be given on request. See Wis. Stat. § 901.06.

Section 906.09 as amended codifies the common law rule addressed in Nicholas v. State, 49 Wis.2d 683, 183 N.W.2d 11 (1971). A testifying defendant, or any other witness, can be asked two questions: (1) "Have you ever been convicted of a crime?" and (2) "How many times?" If the witness answers truthfully, that ends it. If the witness is not truthful, questions can be asked about each conviction, referring to them by the name of the offense. But the questioner may not go into the facts relating to the underlying crimes. Also see State v. Sohn, 193 Wis.2d 346, 535 N.W.2d 1 (Ct. App. 1995); and State v. Midell, 39 Wis.2d 733, 159 N.W.2d 614 (1968).

A trial court considering whether to admit evidence of prior convictions for impeachment purposes should consider the following factors: (1) the lapse of time since the conviction; (2) the rehabilitation or pardon of the person convicted; (3) the gravity of the crime; and (4) the involvement of dishonesty or false statement in the crime. State v. Smith, 203 Wis.2d 288, 295-96, N.W.2d (Ct. App. 1996), citing State v. Kruzycki, supra, at 525. These factors are now codified in § 906.09(2). The court must also determine that the probative value of the evidence is not outweighed by the danger of unfair prejudice. See §§ 906.09(3) and 901.04.

1. It is within the trial judge's discretion to refer to the witness by name. See Koss v. State, 217 Wis. 325, 258 N.W. 860 (1935).

327 IMPEACHMENT OF DEFENDANT AS A WITNESS: PRIOR CONVICTION OR JUVENILE ADJUDICATION

Evidence has been received that the defendant (name) has been [convicted of crime(s)] [adjudicated delinquent]. This evidence was received solely because it bears upon the defendant's character for truthfulness as a witness. It must not be used for any other purpose, and, particularly, you should bear in mind that a [criminal conviction] [juvenile adjudication] at some previous time is not proof of guilt of the offense now charged.

COMMENT

Wis JI-Criminal 327 was originally published in 1962 and revised in 1979, 1991, 1996, and 2001. This revision was approved by the Committee in June 2018.

This instruction is to be given upon request when evidence of prior convictions is admitted to impeach a defendant who has testified. See Wis JI-Criminal 325 for an instruction on impeachment of a witness other than the defendant. Evidence of prior crimes admitted as "other acts" evidence under § 904.04(2) is addressed by Wis JI-Criminal 275.

The 2018 revision changed the second sentence of the instruction to refer to "character for truthfulness" in place of "credibility." This conforms the instruction to the text of § 906.09 as amended by order of the Wisconsin Supreme Court, effective January 1, 2018. See 2017 WI 92. The first two subsections of the amended statute read as follows:

> **906.09 Impeachment by evidence of conviction of crime or adjudication of delinquency.** (1) GENERAL RULE. For the purpose of attacking character for truthfulness, a witness may be asked whether the witness has ever been convicted of a crime or adjudicated delinquent and the number of such convictions or adjudications. If the witness's answers are consistent with the previous determination of the court under sub. (3), then no further inquiry may be made unless it is for the purpose of rehabilitating the witness's character for truthfulness.
>
> (2) EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Factors for a court to consider in evaluating whether to admit evidence of prior convictions for the purpose of attacking a witness's truthful character include:
>
> (a) The lapse of time since the conviction.
> (b) The rehabilitation or pardon of the person convicted.
> (c) The gravity of the crime.
> (d) The involvement of dishonesty or false statement in the crime.

(e) The frequency of the convictions.
(f) Any other relevant factors.

A comprehensive Judicial Council Note explains the change and is published in the Wisconsin Statutes.

The 1996 revision added "adjudicated delinquent" to the instruction. Section 906.09 was amended by 1995 Wisconsin Act 77 to allow impeachment by evidence of juvenile adjudication.

The rationale for allowing the proof of prior convictions to impeach is that one who has been convicted of a crime is less likely to be a truthful witness. See State v. Kruzycki, 192 Wis.2d 509, 531 N.W.2d 429 (Ct. App. 1995); State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991); Liphford v. State, 43 Wis.2d 367, 168 N.W.2d 549 (1969). But the admissibility is supposed to be limited to this purpose – the effect on credibility. Whenever evidence is admitted for a limited purpose, a jury instruction describing the limits must be given on request. See Wis. Stat. § 901.06.

Section 906.09 as amended codifies the common law rule addressed in Nicholas v. State, 49 Wis.2d 683, 183 N.W.2d 11 (1971), the court addressed the common law rule in existence in Wisconsin before the adoption of the Rules of Evidence. The present rule under § 906.09 is the same. A testifying defendant, or any other witness, can be asked two questions: 1) "Have you ever been convicted of a crime?" and, 2) "How many times?" If the witness answers truthfully, that ends it. If witness is not truthful, questions can be asked about each conviction, referring to them by the name of the offense. But the questioner may not go into the facts relating to the underlying crimes. Also see State v. Sohn, 193 Wis.2d 346, 535 N.W.2d 1 (Ct. App. 1995); and State v. Midell, 39 Wis.2d 733, 159 N.W.2d 614 (1968).

A trial court considering whether to admit evidence of prior convictions for impeachment purposes should consider the following factors: (1) the lapse of time since the conviction; (2) the rehabilitation or pardon of the person convicted; (3) the gravity of the crime; and (4) the involvement of dishonesty or false statement in the crime. State v. Smith, 203 Wis.2d 288, 295-96, 553 N.W.2d 824 (Ct. App. 1996), citing State v. Kruzycki, supra at 525. The court must also determine that the probative value of the evidence is not outweighed by the danger of unfair prejudice. See §§ 906.09(3) and 901.04.

330 IMPEACHMENT OF WITNESS: CHARACTER FOR TRUTHFULNESS

Evidence has been received regarding a witness's character for truthfulness. You may consider this evidence in weighing the testimony and determining credibility.

COMMENT

Wis JI-Criminal 330 was originally published in 1962 and revised in 1979, 1991, and 2001. This revision was approved by the Committee in June 2018; it added to the Comment.

The admissibility of evidence of a witness' character for truthfulness or untruthfulness is dealt with by Wis. Stat. § 906.08. A defendant who testifies may introduce evidence of character for truthfulness in all cases. See Wis JI-Criminal 270 and comment. With other witnesses, no such evidence may be introduced until the witness' character for truthfulness has been attacked.

Section 906.08 was amended by order of the Wisconsin Supreme Court, effective January 1, 2018. See 2017 WI 92. The general rule in sub. (1) addressed by this instruction was not affected. A comprehensive Judicial Council Note explains the change and is published in the Wisconsin Statutes.

In Spencer v. State, 132 Wis. 509, 112 N.W. 462 (1907), the Wisconsin Supreme Court held that evidence that a witness' reputation for truth and veracity has not been discussed in the community may be considered as evidence of good reputation in that respect. The Committee felt that this rule goes primarily to the admissibility of the evidence and was not an essential part of this jury instruction.

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340 CREDIBILITY OF CHILD WITNESS

The testimony of a child should be weighed in the same manner as testimony of any other witness. Considerations of age, intelligence, ability to observe and report correctly, ability to understand the questions and to answer them, sense of duty to speak the truth, conduct on the witness stand, interest, appearance, and other matters bearing on credibility apply to a child witness in common with all witnesses.

COMMENT

Wis JI-Criminal 340 was originally published in 1962 and revised in 1979 and 1991. The 2001 revision adopted a new format without substantive change.

Whether this instruction should be added to Wis JI-Criminal 300 is a matter of discretion with the trial judge. The age at which a minor is to have his testimony evaluated as that of a mature person has never been determined by the Wisconsin Supreme Court.

There has never been an absolute rule that a special instruction on the credibility of a child witness is necessary, especially where the court has instructed the jury on the credibility of witnesses generally with Wis JI-Criminal 300. In Collier v. State, 30 Wis.2d 101, 140 N.W.2d 252 (1966), it was held that a special instruction on the credibility of a seven-year-old boy was not necessary, where Wis JI-Criminal 300 was given. The same conclusion was reached in Marks v. State, 63 Wis.2d 769, 218 N.W.2d 328 (1974), concerning a twelve-year-old boy.

Under Wis. Stat. § 906.01, all persons are deemed competent witnesses (except in certain situations described in Wis. Stat. §§ 885.16 and 885.17, the so-called Dead Man's Statutes). Thus, the weight and credibility of the child witness' testimony becomes the only issue, a question solely for the jury. This rule was reaffirmed in State v. Hanson, 149 Wis.2d 474, 439 N.W.2d 133 (1989), and State v. Dwyer, 149 Wis.2d 850, 440 N.W.2d 344 (1989).

Under Wis. Stat. § 906.03(1), all persons are required to take an oath before testifying. However, the child witness need not take a formal oath, provided there is at least a solemn promise to tell the truth or the equivalent. See Judicial Council Committee Note to § 906.03, 59 Wis.2d R162. It has been held that where an eight-year-old child was extensively questioned by the court, and by counsel for both parties, as to her telling the truth, that there was no error in admitting her testimony without an oath or solemn promise. State v. Davis, 66 Wis.2d 636, 225 N.W.2d 505 (1975). "How an oath or affirmation directed by the statute is modified or dispensed with when testimony is elicited from young children lies within the sound discretion of the circuit court. Each case must be decided on its own merits." State v. Hanson, supra at 482. Also see State v. Dwyer, supra.

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345 MISSING WITNESS

[THE COMMITTEE RECOMMENDS THAT A MISSING WITNESS INSTRUCTION NOT BE GIVEN IN CRIMINAL CASES.]

COMMENT

Wis JI-Criminal 345 was originally published in 1979 and revised in 1985 and 1991. The 2001 revision adopted a new format without substantive change.

The previous versions of this instruction did not include a separate criminal jury instruction on the missing witness issue. Rather, the counterpart civil instruction, Wis JI-Civil 410 Witness: Absence, was incorporated by reference.

The Committee had previously concluded that such an instruction should never be given against the defendant in a criminal case and that it would rarely be appropriate for use against the state. The Committee has now concluded that the situations where the instruction is called for are so rare that it is best to recommend that it not be given. The conditions for giving the instruction, discussed below, are so strict that they could rarely be fulfilled under modern rules of discovery and disclosure.

The Wisconsin Supreme Court has said that the absent witness instruction should be "narrowly construed to be applicable only to those cases where the failure to call a witness leads to a reasonable conclusion that the party is unwilling to allow the jury to have the full truth." Ballard v. Lumbermens Mut. Casualty Co., 33 Wis.2d 601, 615, 616, 148 N.W.2d 65 (1967). The giving of the instruction is proper only if it is reasonable to infer, under the circumstances of the case, that the missing testimony would have been unfavorable to the party failing to call the witness. A party need not call every possible witness lest his failure to do so will result in an inference against him. State v. Sarinske, 91 Wis.2d 14, 280 N.W.2d 725 (1979), citing Valiga v. National Food Co., 58 Wis.2d 232, 206 N.W.2d 377 (1973). The witness must in fact have been more accessible to one side than to another, there must be no other reasonable explanation for not calling the witness (absolute physical unavailability, for example, should not weigh against either party), and the witness' testimony must be relevant and noncumulative. Further, a party may have many reasons for not calling a witness which are unrelated to that witness' testimony being unfavorable: the witness may not be convincing on the stand; he or she may have a criminal record that would be exposed on cross-examination; or the witness may be unwilling to testify and therefore not be cooperative or helpful to the party's case. Before a missing witness instruction is given, all these factors, and others, need to be explored. Given the time-consuming nature of such exploration and the risk of jury confusion on the collateral issue of what an absent witness would have said, the Committee feels it is better practice not to give the instruction unless a case presents itself where the issue is especially important.

Where the prosecution requests the instruction be given against the defendant, even greater problems are present. Great care must be taken to make it clear that the defendant need not testify and need not present evidence in his own behalf. It is very difficult to square these principles with a jury instruction telling the jury they may draw an adverse inference from the failure to call a witness. Given this difficulty, the Committee recommends that the missing witness instruction not be given against the defendant.

It should also be noted that § 971.23(8) prevents any comment on the withdrawal of an alibi defense or on the failure to call an alibi witness.

Whether or not the parties are free to raise the missing witness issue in argument is a related question. The Committee feels that such argument is proper provided that the facts support the inference that the missing testimony would be unfavorable. Extreme care is required where the prosecutor seeks to raise the argument, however.

375 NEGLIGENCE DEFINED

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 375 was originally published in 1962. It was withdrawn by the Committee in 1995. The 2001 revision adopted a new format without substantive change.

This instruction provided a definition of ordinary negligence. Crimes involving negligence require "criminal negligence," a term defined in each instruction for offenses which require it. Wis JI-Criminal 925 also provides a definition of "criminal negligence" and a Comment collecting relevant case law.

If a definition of ordinary negligence is required, one is included as part of the definition of "criminal negligence" in Wis JI-Criminal 925. Also see Wis JI-Civil 1005, Negligence: Defined.

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400 PARTY TO CRIME: AIDING AND ABETTING: DEFENDANT EITHER DIRECTLY COMMITTED OR INTENTIONALLY AIDED THE CRIME CHARGED

Party to a Crime

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

Two Ways in Which Defendant Can Be a Party to a Crime

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name crime charge), the defendant must know that another person is committing or intends to commit the crime of (name crime charged) and have the purpose to assist the commission of that crime.[2]

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

State's Burden of Proof B Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant directly committed the crime of (name crime charged) or intentionally aided and abetted the commission of that crime.

Unanimous Agreement Not Required Regarding Theory Of Party To A Crime

All twelve jurors do not have to agree whether the defendant directly committed the crime or aided and abetted the commission of the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those ways.[3]

Statutory Definition of the Crime

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

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "THE DEFENDANT OR (NAME OF OTHER PERSON)" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE DEFENDANT OR ANOTHER PERSON."[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant directly committed all _____[7] elements of (name crime charged) or that the defendant intentionally aided and abetted the commission of that crime, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 400 was originally published in 1962 and revised in 1994. This revision was approved by the Committee in April 2005 and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

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

In addition to providing separate instructions, the 1994 revision provided more specifically for integrating the elements of the underlying crime with the facts required for party to crime liability. This structure is believed to be more effective in emphasizing that someone, if not the defendant charged in the instant case, directly committed the crime. Instructions illustrating how several of the models would be implemented are also provided, titled "EXAMPLE."

This instruction is one of three in the series that provides for submitting more than one theory of liability to the jury: directly committing the crime; and aiding and abetting the person who directly committed the crime. Wis JI-Criminal 401 is drafted for the case where aiding and abetting and being a member of a conspiracy are submitted. Wis JI-Criminal 402 is drafted for the case where all three alternatives are submitted.

For an illustration of how this instruction would be applied in a burglary case, see Wis JI-Criminal 400 EXAMPLE.

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

2. The definition of "intentionally" deals with the clear-cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis JI-Criminal 923A. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

3. The jurors need not be instructed that they must unanimously agree on the basis of liability, that is, whether the defendant directly committed the crime or aided and abetted its commission. Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

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

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

6. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of either the defendant or another person committing the crime rather than by using only "the defendant."

In the type of party to crime case covered by this instruction, either the defendant or the other person may have directly committed the crime.

Wis JI-Criminal 400 EXAMPLE illustrates the integration of the instructions for a burglary case.

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

400 EXAMPLE PARTY TO CRIME: AIDING AND ABETTING: DEFENDANT EITHER DIRECTLY COMMITTED OR INTENTIONALLY AIDED A BURGLARY

Party to a Crime

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

Two Ways in Which Defendant Can Be a Party to a Crime

The State contends that the defendant was concerned in the commission of the crime of burglary by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet a burglary, the defendant must know that another person is committing or intends to commit the crime of burglary and have the purpose to assist the commission of that crime.

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant directly committed the crime of burglary or intentionally aided and abetted the commission of that crime.

Unanimous Agreement Not Required Regarding Theory Of Party To A Crime

All twelve jurors do not have to agree whether the defendant directly committed the crime or aided and abetted the commission of the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those ways.

Statutory Definition of the Crime

Burglary, as defined in § 943.10 of the Criminal Code of Wisconsin, is committed by one who intentionally enters the building of another without the consent of the person in lawful possession and with intent to steal.[1]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements of burglary were present.

Elements of the Crime That the State Must Prove

1. The defendant or _____[2] intentionally entered a building.
2. The defendant or _____ entered the building without the consent of the person in lawful possession.
3. The defendant or _____ knew that the entry was without consent.
4. The defendant or _____ entered the building with intent to steal.

   "Intent to steal" requires the mental purpose to take and carry away movable property of another without consent and the intent to deprive the owner permanently of possession of the property. It requires knowledge that the property belonged to another person and that the person did not consent to the taking of the property.

When Must Intent Exist?

The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is no more or less than the mental purpose to steal formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

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

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant directly committed all four elements of burglary or that the defendant intentionally aided and abetted the commission of that crime, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 400 EXAMPLE was originally published in 1994. This revision was approved the Committee in April 2005 and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

This instruction illustrates the application of Wis JI-Criminal 400 to a case involving burglary. Wis JI-Criminal 400 applies when two theories of party to crime liability are submitted: directly committing the crime; and, aiding and abetting the person who directly committed the crime.

1. See Wis JI-Criminal 1421 for the complete instruction on burglary with intent to steal.

2. If the name of the person who directly committed the crime is known, it should be inserted in the blank and used throughout the instruction. If the case presents the unusual situation where the name of that person is not known, use "another person" in the first blank and "the person" or "that person" in the other blanks.

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401 PARTY TO CRIME: DEFENDANT EITHER INTENTIONALLY AIDED THE CRIME CHARGED OR WAS A MEMBER OF A CONSPIRACY TO COMMIT THE CRIME CHARGED

Party to a Crime

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

Two Ways in Which Defendant Can Be a Party to a Crime

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) by either intentionally aiding and abetting the person who directly committed it or by being a member of a conspiracy to commit the crime.

If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it. And if a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name crime charged), the defendant must know that another person is committing or intends to commit the crime of (name crime charged) and have the purpose to assist the commission of that crime.[2]

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

Definition of Being A Member of a Conspiracy

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

If a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime.[4]

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

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of (name crime charged) or was a member of a conspiracy to commit that crime.

Unanimous Agreement Not Required Regarding Theory Of Party To A Crime

All twelve jurors do not have to agree whether the defendant aided and abetted or was a member of a conspiracy to commit the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of the two ways I have defined for you.[5]

Statutory Definition of the Crime

(Name crime charged), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the crime).[6]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[7] elements of (name crime charged) were present.

Elements of the Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "THE DEFENDANT OR (NAME OF OTHER PERSON)" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE DEFENDANT OR ANOTHER PERSON."[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of (name crime charged) or that the defendant was a member of a conspiracy to commit that crime and the crime was committed by a member of the conspiracy [and that the defendant did not withdraw before the crime was committed],[9] you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 401 was originally published in 1995. This revision was approved by the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

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

In addition to providing separate instructions, the 1994 revision provided more specifically for integrating the elements of the underlying crime with facts required for party to crime liability. This structure is believe to be more effective in emphasizing that someone, if not the defendant charged in the instant case, directly

committed the crime. Instructions illustrating how several of the models would be implemented are also provided, titled "EXAMPLE."

This instruction is one of three in the series that provide for submitting more than one theory of liability to the jury. Wis JI-Criminal 400 is drafted for a case where directly committing the crime and intentionally aiding and abetting are submitted. Wis JI-Criminal 402 is drafted for the case where directly committing, aiding and abetting, and being a member of a conspiracy are submitted. This instruction is drafted for the case where aiding and abetting and conspiracy are supported by the evidence.

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

2. The definition of "intentionally" deals with the clear-cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis JI-Criminal 923A. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

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

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

4. There is a question in the law of conspiracy whether a person must have sufficient interest in the outcome to amount to a "stake in the venture." There is an extensive discussion of this issue in note 3, Wis JI-Criminal 410.

5. The jurors need not be instructed that they must unanimously agree on the basis of liability, that is, whether the defendant directly committed the crime or aided and abetted its commission. Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

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

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

8. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of either the defendant or another person committing the crime rather than by using only "the defendant." In the type of party to crime case covered by this instruction, either the defendant or the other person may have directly committed the crime.

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

402 PARTY TO CRIME: DEFENDANT EITHER DIRECTLY COMMITTED, INTENTIONALLY AIDED, OR WAS A MEMBER OF A CONSPIRACY TO COMMIT THE CRIME CHARGED

Party to a Crime

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

Three Ways in Which Defendant Can Be a Party to a Crime

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) in one of the following three ways:

1) by directly committing it;

2) by intentionally aiding and abetting the person who directly committed it; or,

3) by being a member of a conspiracy to commit the crime.

If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it. And if a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name crime charged), the defendant must know that another person is committing or intends to commit the crime of (name crime charged) and have the purpose to assist the commission of that crime.[2]

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

Definition of Being A Member of a Conspiracy

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

If a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime.[4]

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

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant directly committed the crime of (name crime charged), intentionally aided and abetted the commission of that crime, or was a member of a conspiracy to commit that crime.

Unanimous Agreement Not Required Regarding Theory Of Party To A Crime

All twelve jurors do not have to agree whether the defendant directly committed, intentionally aided and abetted, or was a member of a conspiracy to commit the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those three ways.[5]

Statutory Definition of the Crime

(Name crime charged) , as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the crime) .[6]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[7] elements of (name crime charged) were present.

Elements of the Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "THE DEFENDANT OR (NAME OF OTHER PERSON) " IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE DEFENDANT OR ANOTHER PERSON."[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant directly committed all _____[9] elements of (name crime charged) , or that the defendant intentionally aided and abetted the commission of that crime, or that the defendant was a member of a conspiracy to commit that crime and the crime was committed by a member of the conspiracy [and that the defendant did not withdraw before the crime was committed],[10] you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 402 was approved by the Committee in April 2005.

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

In addition to providing separate instructions, the 1994 revision provided more specifically for integrating the elements of the underlying crime with facts required for party to crime liability. This structure is believe to be more effective in emphasizing that someone, if not the defendant charged in the instant case, directly committed the crime. Instructions illustrating how several of the models would be implemented are also provided, titled "EXAMPLE."

This instruction is one of three in the series that provide for submitting more than one theory of liability to the jury. Wis JI-Criminal 400 is drafted for a case where directly committing the crime and intentionally aiding and abetting are submitted. Wis JI-Criminal 401 is drafted for the case where aiding and abetting and being a member of a conspiracy are submitted. This instruction is drafted for the case where all three theories are supported by the evidence.

For an illustration of how this instruction would be applied in a burglary case, see Wis JI-Criminal 402 EXAMPLE.

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

2. The definition of "intentionally" deals with the clear-cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis JI-Criminal 923A. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

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

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

4. There is a question in the law of conspiracy whether a person must have sufficient interest in the outcome to amount to a "stake in the venture." There is an extensive discussion of this issue in note 3, Wis JI-Criminal 410.

5. The jurors need not be instructed that they must unanimously agree on the basis of liability, that is, whether the defendant directly committed the crime or aided and abetted its commission. Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

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

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

8. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of either the defendant or another person committing the crime rather than by using only "the defendant." In the type of party to crime case covered by this instruction, either the defendant or the other person may have directly committed the crime.

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

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

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405 PARTY TO CRIME: AIDING AND ABETTING: DEFENDANT INTENTIONALLY AIDED THE CRIME CHARGED

Party to a Crime

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

The State contends that[1] the defendant was concerned in the commission of the crime of (name crime charged) by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name crime charged), the defendant must know that another person is committing or intends to commit the crime of (name crime charged) and have the purpose to assist the commission of that crime.[2]

USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

State's Burden of Proof

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the crime of (name crime charged) was committed and that the defendant intentionally aided and abetted the commission of that crime.

Statutory Definition of the Crime

(Name crime charged), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the crime).[3]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[4] elements of (name crime charged) were present.

Elements of the Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME; USE THE APPROPRIATE UNIFORM INSTRUCTION, OMITTING THE LAST TWO PARAGRAPHS. USE THE NAME OF THE PERSON WHO DIRECTLY COMMITTED THE CRIME IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE PERSON" OR "THE OTHER PERSON."[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that (name of principal)[6] committed all _____ elements of (name crime charged) and that the defendant intentionally aided and abetted the commission of that crime, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 405 was originally published in 1994. The 2001 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment. This revision was approved by the Committee in April 2005 and involved nonsubstantive editorial changes.

[An instruction previously identified as Wis JI-Criminal 405 (c. 1992) has been withdrawn. See Wis JI-Criminal 418.]

The substance of this instruction was formerly contained in Wis JI-Criminal 400 (c. 1962). The 1994 revision of Wis JI-Criminal 400 provided separate instructions for the different bases of party to crime liability. See the Comment to Wis JI-Criminal 400.

This instruction is for the case which is submitted to the jury solely on the theory that the defendant aided and abetted the person who directly committed the crime. For an illustration of how the model would be applied in a burglary case, see Wis JI-Criminal 405 EXAMPLE.

For a case involving the "natural and probable consequences" variety of aiding and abetting, see Wis JI-Criminal 406.

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

2. The definition of "intentionally" deals with the clear-cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis JI-Criminal 923A. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

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

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

5. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of another person directly committing the crime rather than to use only "the defendant." In the party to crime case, it is the other person who directly commits the crime; Athe defendant@ is the person whose liability depends on being a party to that crime.

If the name of the principal is known, it should be used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" the first time reference is made and "the person" or "that person" for the other references.

6. If the name of the principal is known, it should be inserted in the blank. If the case presents the unusual situation where the name of the principal is not known, use "another person."

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405 EXAMPLE PARTY TO CRIME: AIDING AND ABETTING: DEFENDANT INTENTIONALLY AIDED A BURGLARY

Party to a Crime

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

The State contends that the defendant was concerned in the commission of the crime of burglary by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet burglary, the defendant must know that another person is committing or intends to commit the crime of burglary and have the purpose to assist the commission of that crime.

USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

State's Burden of Proof

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the crime of burglary was committed and that the defendant intentionally aided and abetted the commission of that crime.

Statutory Definition of the Crime

Burglary, as defined in § 943.10 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building without the consent of the person in lawful possession and with intent to steal.

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements of burglary were present.

Elements of the Crime That the State Must Prove

1. _____[1] intentionally entered a building.
2. _____ entered the building without the consent of the person in lawful possession.
3. _____ knew that the entry was without consent.
4. _____ entered the building with intent to steal.

"Intent to steal" requires the mental purpose to take and carry away movable property of another without consent and intent to deprive the owner permanently of possession of the property. It requires knowledge that the property belonged to another person and that the person did not consent to the taking of the property.

When Must Intent Exist?

The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is no more or less than the mental purpose to steal formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

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

Jury's Decision

If you are satisfied beyond a reasonable doubt that _____ committed all four elements of burglary and that the defendant intentionally aided and abetted the commission of that crime, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 405 EXAMPLE was originally published in 1996. The 2001 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment. This revision was approved by the Committee in April 2005 and involved nonsubstantive editorial changes.

This instruction illustrates the application of Wis JI-Criminal 405 to a case involving burglary.

1. If the name of the principal is known, it should be inserted in the blank and used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" in the first blank and "the person" or "that person" in the other blanks.

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406 PARTY TO CRIME: AIDING AND ABETTING: THE CRIME CHARGED IS THE NATURAL AND PROBABLE CONSEQUENCE OF THE INTENDED CRIME

Party to a Crime

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

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it. A person who intentionally aids and abets the commission of one crime is also guilty of any other crime which is committed as a natural and probable consequence of the intended crime.

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of the crime of (name intended crime), that (name charged crime) was committed, and that under the circumstances, (name charged crime) was a natural and probable consequence of the (name intended crime).

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

First consider whether the defendant intentionally aided and abetted the crime of (name intended crime).

Statutory Definition of the Intended Crime

(Name intended crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the intended crime).[2]

State's Burden of Proof – Intended Crime

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[3] elements of (name intended crime) were present.

Elements of the Intended Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE INTENDED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE THE NAME OF THE PERSON WHO DIRECTLY COMMITTED THE CRIME IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE PERSON" OR "THE OTHER PERSON."[4]

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

Statutory Definition of the Charged Crime

(Name charged crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the charged crime).[5]

State's Burden of Proof – Charged Crime

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[6] elements of (name charged crime) were present.

Elements of the Charged Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "THE DEFENDANT OR (NAME OF OTHER PERSON)" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE DEFENDANT OR ANOTHER PERSON."[7]

Natural and Probable Consequences

Finally, consider whether under the circumstances (name charged crime) was a natural and probable consequence of (name intended crime).[8]

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

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of the crime of (name intended crime), that (name charged crime) was committed, and that under the circumstances, (name charged crime) was a natural and probable consequence of the (name intended crime), you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 406 was originally published in 1994. This revision was approved the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

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

This instruction is intended for the case where the defendant is alleged to be guilty as a party to a crime on the theory that he or she intentionally aided and abetted a crime, of which the charged crime is a natural and probable consequence. For an example of such a case, see State v. Ivy, 119 Wis.2d 591, 350 N.W.2d 622 (1984). Other cases recognizing this theory are State v. Cydzik, 60 Wis.2d 683, 211 N.W.2d 421 (1973), and State v. Asfoor, 75 Wis.2d 411, 249 N.W.2d 529 (1977).

For an illustration of how this model would be applied to a case with first degree intentional homicide as a natural and probable consequence of armed robbery, see Wis JI-Criminal 406 EXAMPLE.

In State v. Hoover, 2003 WI App 117, 265 Wis.2d 607, 666 N.W.2d 74, the court found an instruction to be adequate even though it did not define the intended crime. The court noted that "it would be advisable" to give a brief summary of the intended crime. Id. at ¶33. The instruction goes farther, in that it calls for including complete definitions of the intended crime and the charged crime.

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

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

3. Insert the appropriate number of elements from the uniform instruction for the intended crime.

4. The primary change required in integrating the instruction for the intended crime is to phrase it in terms of another person committing the crime rather than to use "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime.

If the name of the principal is known, it should be used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" the first time reference is made and "the person" or "that person" for the other references.

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

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

7. The primary change required in integrating the instruction for the charged crime is to phrase it in terms of another person committing the crime rather than to use "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime.

If the name of the principal is known, it should be used throughout the instruction. If the case presents the unusual situation where the name of the principal is now known, use "another person" the first time reference is made and "the person" or "that person" for the other references.

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

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

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

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

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406 EXAMPLE PARTY TO CRIME: AIDING AND ABETTING: FIRST DEGREE INTENTIONAL HOMICIDE AS THE NATURAL AND PROBABLE CONSEQUENCE OF ARMED ROBBERY

Party to a Crime

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

The State contends that the defendant was concerned in the commission of the crime of first degree intentional homicide by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it. A person who intentionally aids and abets the commission of one crime is also guilty of any other crime which is committed as a natural and probable consequence of the intended crime.

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of the crime of armed robbery, that first degree intentional homicide was committed, and that under the circumstances, first degree intentional homicide was a natural and probable consequence of armed robbery.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

First consider whether the defendant intentionally aided and abetted the crime of armed robbery.

Statutory Definition of the Intended Crime

Armed robbery, as defined in § 943.32 of the Criminal Code of Wisconsin, is committed by one who, with the intent to steal and by use or threat of use of a dangerous weapon, takes property from the person or presence of the owner by [using force against the person of the owner with intent to overcome physical resistance or physical power of resistance to the taking or carrying away of the property] [or] [by threatening the imminent use of force against the person of the owner with intent to compel the owner to submit to the taking or carrying away of the property].

State's Burden of Proof – Intended Crime

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements of armed robbery were present.

Elements of the Intended Crime That the State Must Prove

1. (Name) was the owner of property.
2. _____ took and carried away property from the person or from the presence of (name).
3. _____ took the property with the intent to steal.
4. _____ acted forcibly.
5. At the time of the taking or carrying away, _____ used or threatened to use a dangerous weapon.

ADD THE FOLLOWING IF THE CASE INVOLVES A THREAT TO USE A WEAPON AND NO WEAPON OR OTHER ARTICLE IS ACTUALLY DISPLAYED:

[This element does not require that _____ actually display or possess a dangerous weapon. It is sufficient if the victim reasonably believed defendant had a dangerous weapon at the time of the threat. Whether the victim reasonably believed that _____ was armed with a dangerous weapon is to be determined from the standpoint of the victim at the time of the alleged offense. The standard is what a person of ordinary intelligence and prudence would have believed under the circumstances that existed at that time.]

Meaning of Owner

"Owner" means a person who has possession of property.

Meaning of Intent to Steal

"Intent to steal" means that _____ had the mental purpose to take and carry away property of another without consent and that _____ intended to deprive the owner permanently of possession of the property. [It further requires that _____ knew that the property belonged to another and knew that the person did not consent to the taking of the property.]

Deciding About Intent

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

Meaning of Forcibly

"Forcibly" means that _____ [used force against (name) with the intent to overcome or prevent physical resistance or physical power of resistance to the taking or carrying away of the property] [or] [threatened the imminent use of force against (name) with the intent to compel (name) to submit to the taking or carrying away of the property].

Meaning of Imminent

"Imminent" means "near at hand" or "on the point of happening."

Meaning of Dangerous Weapon

A "dangerous weapon" is (any firearm, whether loaded or not) (any device designed as a weapon and capable of producing death or great bodily harm) (any device or instrumentality which in the manner it is used or intended to be used is calculated or likely to produce death or great bodily harm).

Next consider whether the crime of first degree intentional homicide was committed.

Statutory Definition of the Charged Crime

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with intent to kill that person or another.

State's Burden of Proof – Charged Crime

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements of first degree intentional homicide were present.

Elements of the Charged Crime That the State Must Prove

1. _____ caused the death of (name of victim) .

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

2. _____ acted with the intent to kill ((name of victim)) (another human being).

   "Intent to kill" means that _____ had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

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

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Natural and Probable Consequences

Finally, consider whether under the circumstances first degree intentional homicide was a natural and probable consequence of armed robbery.

A crime is a natural and probable consequence of another crime if, in the light of ordinary experience, it was a result to be expected, not an extraordinary or surprising result. The probability that one crime would result from another should be judged by the facts and circumstances known to the defendant at the time the events occurred. If the defendant knew, or if a reasonable person in the defendant's position would have known, that the crime of first degree intentional homicide was likely to result from the commission of armed

robbery, then you may find that under the circumstances first degree intentional homicide was a natural and probable consequence of armed robbery.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of the crime of armed robbery, that first degree intentional homicide was committed, and that under the circumstances, first degree intentional homicide was a natural and probable consequence of armed robbery, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 406 EXAMPLE was originally published in 1994. This revision was approved the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

This instruction illustrates the application of Wis JI-Criminal 406 to a case where the defendant is alleged to be guilty of first degree intentional homicide as a natural and probable consequence of aiding and abetting an armed robbery. It incorporates parts of the uniform instructions for armed robbery [Wis JI-Criminal 1480] and first degree intentional homicide [Wis JI-Criminal 1010]. The footnotes to those instructions should be consulted for information on substantive issues.

The primary change required in integrating the instruction for the underlying crime with the party to crime instruction is to phrase it in terms of another person directly committing the crime rather than referring to "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime. The draft provides a blank where the reference to "the defendant" would typically appear. If the name of the principal is known, it should be inserted in each blank. If the case presents the unusual situation where the name of the principal is not known, use "another person" in the first blank and "the person" or "that person" in the others.

407 PARTY TO CRIME: AIDING AND ABETTING: MULTIPLE COUNTS

Party to a Crime

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

The State contends[1] that the defendant was concerned in the commission of the following crimes by intentionally aiding and abetting the person who directly committed them: (name each crime charged) .

If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

X assists the person who commits the crime; or

X is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name crime charged) , the defendant must know that another person is committing or intends to commit the crime of (name crime charged) and have the purpose to assist the commission of that crime.[2]

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

State's Burden of Proof

Before you may find the defendant guilty of any of the crimes charged, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of that crime.

The crime charged in Count One is (name crime charged) .

Statutory Definition of (Name Crime Charged)

(Name crime charged in Count One) , as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the crime) .[3]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[4] elements of (name crime charged in count One) were present.

Elements of (Name Crime Charged) That the State Must Prove

DEFINE THE ELEMENTS OF THE CRIME CHARGED IN COUNT ONE. USE THE APPROPRIATE UNIFORM INSTRUCTION, OMITTING THE LAST TWO PARAGRAPHS. USE THE NAME OF THE PERSON WHO DIRECTLY COMMITTED THE CRIME IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE PERSON" OR "THE OTHER PERSON."[5]

Jury's Decision – Party to the Crime of (Name Crime Charged in Count One)

If you are satisfied beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of (name crime charged in Count One) , you should find the defendant guilty.

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

The crime charged in Count Two is (name crime charged) .

Statutory Definition of (Name Crime Charged)

(Name crime charged in Count Two) , as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the crime) .[6]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[7] elements of (name crime charged in Count Two) were present.

Elements of (Name Crime Charged) That the State Must Prove

DEFINE THE ELEMENTS OF THE CRIME CHARGED IN COUNT TWO. USE THE APPROPRIATE UNIFORM INSTRUCTION, OMITTING THE LAST TWO PARAGRAPHS. USE THE NAME OF THE PERSON WHO DIRECTLY COMMITTED THE CRIME IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE PERSON" OR "THE OTHER PERSON."[8]

Jury's Decision – Party to the Crime of (Name Crime Charged in Count Two)

If you are satisfied beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of (name crime charged in Count Two), you should find the defendant guilty.

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

REPEAT THE ABOVE FOR EACH ADDITIONAL COUNT.

COMMENT

Wis JI-Criminal 407 was originally published in 1995. This revision was approved by the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

This instruction adapts the standard instruction for aiding and abetting for use in multiple count cases. The assumption is that two or more counts are charged, each based on the defendant being concerned in the commission of the crime by aiding and abetting the person who directly committed it. The Committee concluded that it will avoid repetition and aid clarity to read the aiding and abetting definition once and then relate that definition to each count. If the counts charge additional violation of the same criminal statute, further consolidation is possible by not repeating the elements of the crime. See Wis JI-Criminal 116 and 116 EXAMPLE.

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

2. The definition of "intentionally" deals with the clear-cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis JI-Criminal 923A. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

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

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

5. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of another person directly committing the crime rather than to use only "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime.

If the name of the principal is known, it should be used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" the first time reference is made and "the person" or "that person" for the other references.

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

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

8. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of another person directly committing the crime rather than to use only "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime.

If the name of the principal is known, it should be used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" the first time reference is made and "the person" or "that person" for the other references.

410 PARTY TO CRIME: CONSPIRACY TO COMMIT THE CRIME CHARGED

Party to a Crime

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

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

If a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime.

Definition of Being A Member of a Conspiracy

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

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

State's Burden of Proof – Party To A Crime

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

Statutory Definition of the Crime

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

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

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

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant was a member of a conspiracy to commit (name crime charged) and the crime was committed by a member of the conspiracy [and that the defendant did not withdraw before the crime was committed],[7] you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 410 was originally published in 1994. This revision was approved by the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

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

This instruction is for the case which is submitted to the jury solely on the theory that the defendant was a member of a conspiracy to commit the crime. For an illustration of how the model would be applied in a burglary case, see Wis JI-Criminal 410 EXAMPLE.

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

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

distinction is whether the crime is actually committed.

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

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

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

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

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

> This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further, promote, and cooperate in it. This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist.
>
> When the evidence discloses such a system, . . . there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a 'stake in the venture' which, even if it may not be essential, is not irrelevant to the question of conspiracy.

319 U.S. 703, 713.

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

(1) An agreement among two or more persons to direct their conduct toward the realization of a criminal objective.

(2) Each member of the conspiracy must individually consciously intend the realization of the particular criminal objective. Each must have an individual 'stake in the venture.'

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

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

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

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

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

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

410 EXAMPLE PARTY TO CRIME: CONSPIRACY TO COMMIT BURGLARY

Party to a Crime

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

The State contends that the defendant was concerned in the commission of the crime of burglary as a member of a conspiracy to commit that crime.

If a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime.

Definition of Being A Member of a Conspiracy

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

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

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the crime of burglary was committed and that the defendant was a member of a conspiracy to commit that crime.

Statutory Definition of the Crime

Burglary, as defined in § 943.01 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building without the consent of the person in lawful possession and with intent to steal.

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements of burglary were present.

Elements of the Crime That the State Must Prove

1. A member of the conspiracy intentionally entered a building.
2. A member of the conspiracy entered the building without the consent of the person in lawful possession.
3. A member of the conspiracy knew that the entry was without consent.
4. A member of the conspiracy entered the building with intent to steal.

"Intent to steal" requires the mental purpose to take and carry away movable property of another without consent and intent to deprive the owner permanently of possession of the property. [It requires knowledge that the property belonged to another and knowledge that the person did not consent to the taking of the property.]

When Must Intent Exist?

The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is no more or less than the mental purpose to steal formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

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

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant was a member of a conspiracy to commit burglary and the crime was committed by a member of the conspiracy [and that the defendant did not withdraw before the crime was committed], you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 410 EXAMPLE was originally published in 1994. This revision was approved by the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

This instruction illustrates the application of Wis JI-Criminal 410 to a case involving a conspiracy to commit burglary.

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

Party to a Crime

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

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

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

State's Burden of Proof – Party To A Crime

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

Definition of Being A Member of a Conspiracy

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

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

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

Statutory Definition of the Intended Crime

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

State's Burden of Proof – Intended Crime

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

Elements of the Intended Crime That the State Must Prove

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

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

Statutory Definition of the Charged Crime

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

State's Burden of Proof – Charged Crime

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

Elements of the Charged Crime That the State Must Prove

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

Natural and Probable Consequences

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

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

Jury's Decision

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

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

COMMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

319 U.S. 703, 713.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

412 PARTY TO CRIME: WITHDRAWAL FROM A CONSPIRACY

WHERE THERE IS EVIDENCE OF WITHDRAWAL, ADD THE FOLLOWING

You must also consider whether the defendant withdrew from the conspiracy before the crime was committed.

A person withdraws if (he) (she) voluntarily changes (his) (her) mind, no longer desires that the crime be committed, and notifies the other parties concerned of the withdrawal within a reasonable period of time before the commission of the crime so as to allow the others also to withdraw.

A person who withdraws from a conspiracy is not held accountable for the acts of the others and cannot be convicted of any crime committed by the others after timely notice of withdrawal.

COMMENT

Wis JI-Criminal 412 was originally published in 1994 and revised in 2005. This revision involved an addition to the Comment. It was approved by the Committee in October 2007.

The substance of this instruction is based on § 939.05(2)(c), which applies where a person is charged as a party to a completed crime committed by a member of a conspiracy of which the defendant is also a member. Subsection (2)(c) provides in part:

> This paragraph does not apply to a person who voluntarily changes his or her mind and no longer desires that the crime be committed and notifies the other parties concerned of his or her withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

This withdrawal rule applies only to cases under § 939.05. Withdrawal is not a defense to the inchoate crime of conspiracy as defined in § 939.31. See Wis JI-Criminal 570, Comment.

The instruction on withdrawal should be added to the appropriate instruction at the point indicated in the text of that instruction. It is also recommended that there be an addition to the concluding paragraph summarizing the findings required for a guilty verdict to the effect that the defendant did not withdraw. The latter is also provided in the text of the appropriate instructions.

The Committee concluded that withdrawal should be handled in the same manner as other affirmative defenses under Wisconsin law. The burden of production is on the defendant to introduce or point to "some evidence" tending to show withdrawal. If that showing is made, the burden of persuasion is on the State to prove beyond a reasonable doubt that withdrawal did not occur. As to the general rules in Wisconsin relating to "affirmative defenses," see Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979) and State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983).

415 PARTY TO CRIME: SOLICITATION TO COMMIT THE CRIME CHARGED

Party to a Crime

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

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) by soliciting another to commit that crime. If a person solicits another to commit a crime and that crime is committed, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Solicitation

A person solicits the commission of a crime when that person advises, hires, counsels, or otherwise procures another to commit that crime.[2]

[IF WITHDRAWAL IS AN ISSUE, INSERT WIS JI-CRIMINAL 412.][3]

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the crime of (name crime charged) was committed and that the defendant solicited another to commit that crime.

Statutory Definition of the Crime

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

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE THE NAME OF THE PERSON WHO DIRECTLY COMMITTED THE CRIME" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE PERSON" OR "THE OTHER PERSON."[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that (name of principal) [7] committed all _____[8] elements of (name crime charged) and that the defendant solicited (name of principal) to commit that crime [and did not withdraw before the crime was committed], you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 415 was originally published in 1994. This revision was approved by the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

The originally published version of Wis JI-Criminal 400, 8 1962, provided a single model that included all the alternative theories of party to crime liability in § 939.05. The 1994 revision provided a series of separate instructions, based on the Committee's conclusion that the basis for liability is more clearly set forth where the instruction addresses only the theories supported by the evidence.

This instruction is for the case which is submitted to the jury solely on the theory that the defendant another person to commit the crime.

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

2. "Solicitation" is used as the general term describing the conduct. It is defined by reference to ways "soliciting" may be accomplished set forth in § 939.05(2)(c).

3. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of another person committing the crime rather than by using "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on

being a party to that crime.

If the name of the principal is known, it should be inserted in the blank and used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" in the first blank and "the person" or "that person" in the other blanks.

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

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

6. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of another person directly committing the crime rather than to use only "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime.

If the name of the principal is known, it should be used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" the first time reference is made and "the person" or "that person" for the other references.

7. If the name of the principal is known, it should be inserted in the blank. If the case presents the unusual situation where the name of the principal is not known, use "another person."

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

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418 [NOTE ON INSTRUCTIONS WITHDRAWN]

405 STATEMENT OF CO-CONSPIRATOR
410 STATEMENT OF CO-CONSPIRATOR; EVIDENCE PRESENTED THAT CONSPIRACY TERMINATED BEFORE STATEMENT WAS MADE
415 STATEMENT OF CO-CONSPIRATOR; EVIDENCE PRESENTED THAT CONSPIRACY TERMINATED BY WITHDRAWAL BEFORE STATEMENT WAS MADE

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 418, a withdrawal note, was approved by the Committee in October 1994 to record the withdrawal of three instructions, Wis JI-Criminal 405, 410, and 415.

Wis JI-Criminal 405 was originally published in 1962 and was revised in 1986 and 1987. The withdrawal of the instruction was approved by the Committee in June 1992.

Wis JI-Criminal 410 and 415 were originally published in 1962 and revised in 1986. Their withdrawal was approved by the Committee in October 1994. Because they existed only as add-ons to Wis JI-Criminal 405, they should have been withdrawn along with Wis JI-Criminal 405 in 1992.

Wis JI-Criminal 405 was intended to be used when a statement of a co-conspirator was introduced under § 908.01(4)(b)5., which provides that a statement is not hearsay if offered against a party and is a statement by a co-conspirator of the party made during the course and in furtherance of the conspiracy.

Wis JI-Criminal 405 implemented three rules:

(1) the decision whether the statement was made during a conspiracy is for the jury;
(2) the burden of proof is beyond a reasonable doubt; and
(3) the jury is not to consider the statement itself in trying to decide whether a conspiracy existed.

The Committee had been aware that the viability of these rules was open to serious question. Despite these questions, the Committee concluded that it did not have the authority to change the rule until the Wisconsin appellate courts explicitly did so in a published opinion. (The reasons for this conclusion were described in the Comment to Wis JI-Criminal 405, © 1987, and are reproduced below.)

The Wisconsin Court of Appeals has now made it clear that some, if not all, of the Wisconsin rule reflected in Wis JI-Criminal 405 is discarded. In State v. Whitaker, 167 N.W.2d 247, 481 N.W.2d 649 (Ct.

App. 1992), the court held that § 901.04(1) of the Wisconsin Rules of Evidence "permits an out-of-court declaration by a party's alleged coconspirator to be considered by the trial court in determining whether there was a conspiracy." 167 Wis.2d at 263.

Whitaker did not specifically address the question whether the jury has any function to perform. But the Committee concluded that the proper procedure in Wisconsin now follows that approved by the United States Supreme Court under the Federal Rules of Evidence. In Bourjaily v. United States, 483 U.S. 171 (1987), the Court held that the admissibility of a co-conspirator's statement is for the trial court to decide, using a preponderance of the evidence standard, and considering the statement itself in determining whether a conspiracy existed at the time the statement was made. The trial court must be satisfied that the statement was made "in the course of and in furtherance of the conspiracy." § 908.01(4)(b)5.

The Confrontation Clause of the Sixth Amendment does not require a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying co-conspirator, if those statements otherwise satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E). United States v. Inadi, 475 U.S. 387 (1986). Wisconsin's § 908.01(4)(b)5 is identical to Federal Rule of Evidence 801(d)(2)(E). The Inadi rule was adopted for Wisconsin by State v. Webster, 156 Wis.2d 510, 485 N.W.2d 373 (Ct. App. 1990).

Nor does the Confrontation Clause require an additional showing of "independent indicia of reliability." No such inquiry is required when the evidence falls within a "firmly rooted hearsay exception." The co-conspirator exception is such an exception. Bourjaily v. United States, 483 U.S. 171 (1987); State v. Webster, 156 Wis.2d 510, 522, 485 N.W.2d 373 (Ct. App. 1990).

What follows is from the Comment to Wis JI-Criminal 405, © 1987, explaining the Committee's decision not to withdraw the instruction in the absence of an explicit appellate court decision.

The basis for giving an instruction like Wis JI-Criminal 405 is found in Schultz v. State, 133 Wis. 215, 225, 113 N.W. 428 (1907):

> In order that the statements and acts of alleged conspirators in the execution of the common purpose can be properly considered on the question of the guilt or innocence of the accused, it is not enough that the court has determined that a prima facie case of conspiracy has been made, but the jury must first be satisfied by the evidence that the conspiracy in fact existed. They cannot use the statements or acts for any purpose until they have determined this fact. They should have been so instructed in unmistakable language.

Schultz was cited with approval in State v. Meating, 202 Wis. 47, 53, 231 N.W. 263 (1930).

More recent cases discussing the issue have not reviewed jury instructions or discussed the necessity of giving an instruction like Wis JI-Criminal 405. See, for example, State v. Dorcey, 103 Wis.2d 152, 307 N.W.2d 612 (1981); Bergeron v. State, 85 Wis.2d 595, 271 N.W.2d 386 (1978). There is some question about the continued validity of the rule calling for a jury finding on the existence of the conspiracy. In an unpublished decision, the Wisconsin Court of Appeals held that the procedure on which Wis JI-Criminal 405 is based is no longer the correct practice in Wisconsin. Rather, the existence of the conspiracy was held to be solely a question for the court. The decision (State v. Kmecik, District III, May 27, 1986), though recommended for publication, was not published and, therefore, cannot be cited as authority. Further, the decision did not review the

applicable Wisconsin case law in detail or explicitly state that the case law was overruled. Instead, the decision appeared to rest on the proposition that under the new rules of evidence, specifically § 901.04(1), the existence of the conspiracy is a "preliminary question concerning the admissibility of evidence [that] shall be determined by the judge" and that this superseded the case law.

The United States Supreme Court recently addressed these questions in a case interpreting the Federal Rules of Evidence. In Bourjaily v. United States, 483 U.S. 171 (1987), the Court found no constitutional problems with a procedure under the Federal Rules that differs from the current Wisconsin practice in three important respects:

(1) Whether a statement was made during the course of and in furtherance of a conspiracy is a "preliminary question of fact" for the court to decide;

(2) in making this determination, the court may employ the "preponderance of the evidence" standard; and

(3) the court may consider the statement itself in deciding whether the conspiracy existed.

The Bourjaily decision interpreted Federal Rules of Evidence which are essentially the same as their Wisconsin counterparts. So Wisconsin appellate courts are free from federal constitutional constraints if they choose to reconsider the Wisconsin rule. While making the existence of the conspiracy solely a question for the judge may be a better rule on the merits, and one that would avoid the necessity for a possibly hard-to-follow instruction like Wis JI-Criminal 405, the Committee did not believe that the prior rule, embodied in decisions of the Wisconsin Supreme Court, could be abandoned without explicit judicial or statutory authority. The Committee further concluded that § 901.04(1) was not sufficient authority by itself in the absence of construction by an appellate court. [This conclusion is supported by the fact that, prior to Bourjaily, supra, the federal courts were not in agreement on whether this factual issue is to be decided by the judge or the jury. Practice under Federal Rule 801(d)(2)(E) is extensively discussed in Federal Rules of Evidence Manual, by Saltzburg and Redden. The specific issue of how much evidence of a conspiracy is required to justify submitting the statement to the jury is covered at pages 462-68 of that text.]

[The 1987 Comment concluded that given the absence of clear authority to remove Wis JI-Criminal 405, it was retained, based on the assumption that a preliminary finding of sufficient evidence to establish a conspiracy must be made by the trial court, with the ultimate finding of the existence of a conspiracy being for the jury.]

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420 CRIMINAL LIABILITY OF A CORPORATION

[The defendant] [One of the defendants] in this case is a Wisconsin corporation. A corporation is a legal entity that can act only through its agents.

(Name of defendant) is charged with committing the crime of (charged crime), on the basis that the crime was directly committed by (name of agent),[1] an agent of (name of defendant).

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

1. (Name of agent) committed the crime of (name charged crime).

2. (Name of agent) was an agent of (name of defendant).

3. (Name of agent) was acting within the scope of employment.

Statutory Definition of the Crime

The crime of (charged crime), as defined in § _____ [of the Criminal Code of Wisconsin],[2] is committed by one who

[LIST THE ELEMENTS OF THE CHARGED CRIME AS IDENTIFIED IN THE APPLICABLE UNIFORM INSTRUCTION. USE THE NAME OF THE ALLEGED AGENT IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.]

Next consider whether (name of agent) was an agent of (name of defendant) and committed (charged crime) while acting within the scope of employment.

Meaning of "Agent"

Agents are officers, directors, employees, or other people who are authorized by a corporation to act for it.

Meaning of "Scope of Employment"

Agents are within the scope of employment when they perform acts they have the express or implied authority to perform and their actions benefit or are intended to benefit the interest of the corporation. When agents step aside from acts they are hired to perform and do something for their own reasons or for reasons not related to the business of the employer, their acts are outside the scope of employment.

[ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[A corporation may be responsible for the actions of its agent done within the scope of employment and to benefit the corporation, even though the conduct of the agent may be contrary to the corporation's actual instructions or stated policies. The existence of such instructions and policies, however, if any exist, may be considered by you in determining if the agent was acting within the scope of employment or to benefit the corporation.][3]

[ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[If you find that an act of an agent was not committed within the scope of the agent's employment or with intent to benefit the corporation, then you must consider whether the

corporation later approved the act. An act is approved if, after it is performed, another agent of the corporation, having full knowledge of the act and acting within the scope of employment and with intent to benefit the corporation, approved the act by words or conduct. A corporation is responsible for any act or omission approved by its agents.][4]

Jury's Decision

If you are satisfied beyond a reasonable doubt that (name of agent) committed all the elements of the crime of (name charged crime), that (name of agent) was an agent of (name of defendant), and that (name of agent) was acting within the scope of employment, you should find (name of defendant) guilty.

If you are not so satisfied, you must find (name of defendant) not guilty.

COMMENT

Wis JI-Criminal 420 was originally published in 1962 and revised in 1987, 1995, and 1999. This revision was approved by the Committee in February 2005.

The 1995 revision of this instruction replaced three instructions: Wis JI-Criminal 420 CORPORATE LIABILITY: ACTS OF MANAGEMENT; Wis JI-Criminal 425 CORPORATE LIABILITY: ACTS OF LESSER EMPLOYEES: STRICT LIABILITY CASES; Wis JI-Criminal 430 CORPORATE LIABILITY: ACTS OF LESSER EMPLOYEES: OTHER THAN STRICT LIABILITY CASES. The text of each of those instructions was essentially the same, reflecting only that a different type of officer or employee was involved. The revised instruction is based on the premise that a corporation acts through its agents and that agents may be officers, directors, employees, and others who are authorized to act on its behalf. It will be a factual question in each case whether a particular person who directly committed the crime was an agent of the defendant corporation, but once that question is settled, the other requirements are the same regardless of the type of agent involved: the agent must have been acting within the scope of employment and with the effect or intent of benefitting the corporation.

The Committee recommends specifically identifying the culpable agent in the instruction. See footnote 1. The reported appellate decisions, in reviewing the sufficiency of the evidence, sometimes address two different theories of culpability. See the Knutson and Steenberg Homes decisions, summarized below, which discuss actions by employees that are directly connected with the harm caused and actions by higher-ranking corporate officials that failed to prevent the harm from taking place. A corporation may be criminally liable under either approach, but the instruction should clearly describe the conduct that is alleged to be the basis for

the criminal charge. This instruction is drafted for the first situation: an identified agent of the corporation commits a crime while acting within the scope of employment.

The instruction is set up in a way that parallels the approach used for party to crime cases: the jury must determine whether someone directly committed the crime charged and then determine whether that person had a sufficient connection with the defendant corporation to extend liability to that corporation. See Wis JI-Criminal 400.

Until 1995, Wisconsin case law addressing the standard for criminal liability of a corporation was limited to a single case, though there were several reported decisions dealing with other legal issues in the context of a prosecution of a corporation. [See, for example, State v. Fettig, 172 Wis.2d 428, 493 N.W.2d 254 (Ct. App. 1992), a consolidated appeal with State v. Tankcraft, Inc.] Vulcan Last Co. v. State, 194 Wis. 636, 217 N.W. 412 (1928), was, for many years, the only Wisconsin decision directly stating the standard. More recently, its continued validity was confirmed in State v. Richard Knutson, Inc., 196 Wis.2d 86, 537 N.W.2d 420 (Ct. App. 1995), and State v. Steenberg Homes, Inc., 223 Wis.2d 511, 589 N.W.2d 668 (Ct. App. 1998). This instruction is believed to be consistent with the principles established by these cases. The decisions are summarized below.

Vulcan Last: The Vulcan Last Company wanted the city of Crandon to extend city water service to its plant. A Vulcan employee who sat on the city council voted against the bond issue that would finance the water service extension. The day after the council vote, the employee was fired by a supervisor who assembled all the employees and told them that any man who voted against the interests of the company would be discharged.

The corporation was charged with violating a statute that prohibited employers from attempting "to influence a qualified voter to give or withhold his vote at an election." [The statute still exists; see, § 103.18.] The Wisconsin Supreme Court affirmed the conviction, using the case to adopt the then-modern view that corporations could be convicted of a crime. The relevant legal rule was stated concisely:

> Corporations must of necessity act through their agents. When these agents act within the scope of their authority their acts are the acts of the corporation, for which the corporation is liable both civilly and criminally. If the acts are within the scope of the authority of the agent, the corporation is liable criminally for the act although the act may not have been expressly authorized by the corporation, even if the corporation has expressly forbidden its agent to act in the manner that made it answerable to punishment under the criminal law.

194 Wis. 636, 643.

Vulcan Last indicates that the crux of the matter is whether the agent was acting within "the scope of employment." That is the issue emphasized in the revised instruction.

Until 1995, the part of the Vulcan Last decision quoted above had been cited in only two cases: one a civil case on an unrelated point; and, the other a criminal case where a corporation was held responsible for a fine imposed on an overweight truck. State v. Dried Milk Products Cooperative, 16 Wis.2d 357, 114 N.W.2d 412 (1962).

Knutson: Richard Knutson, Inc., undertook the construction of a sanitary sewer line for the city of Oconomowoc. A backhoe operator employed by the company struck a power line with the boom of the backhoe. Another member of the work crew who was trying to attach a chain to the backhoe's bucket was instantly electrocuted. The corporation was charged with negligent homicide in violation of § 940.10.

In affirming the conviction, the court of appeals confirmed that the standard set forth in Vulcan Last continues to be valid. The court's consideration of the issue was tied in with the question whether a corporation was covered by § 940.10 which defines the crime in terms of "whoever causes the death of another human being . . ." [Emphasis added.] The defendant argued that in the context of this phrase, "whoever" necessarily refers to a human being. The court of appeals rejected this argument, relying in part on the fact that prior to the adoption of the 1955 Criminal Code, a corporation could be held criminally liable, citing Vulcan Last. The court reiterated the general rule that "[a] corporation acts of necessity through its agents . . . ; therefore, the only way a corporation can negligently cause the death of a human is by the act of its agent – another human." 196 Wis.2d 86, 105. One of the citations offered as support for this proposition was Wis JI-Criminal 430 [copyright 1987], which was based on Vulcan Last, and which is now replaced by Wis JI-Criminal 420.

Steenberg Homes: An employee of Steenberg Homes, Inc., was driving a Steenberg tractor-trailer when the trailer disengaged and struck three bicyclists, killing two of them. Neither the driver nor his supervisor/trainer had attached the safety chains between the tractor and the trailer, allowing the trailer to disengage. The corporation was convicted of two counts of homicide by negligent operation of a vehicle in violation of § 940.10.

In affirming the convictions, the court relied on several substantive rules, all derived from Vulcan Last:

> A corporation can be held liable for the acts of its employees committed within the scope of employment. . . . Employees act within the scope of employment when they perform acts which they have express or implied authority to perform and their actions benefit or are intended to benefit the employer. An employer can be held responsible for the acts of an employee performed within the scope of employment, even though the conduct of the employee is contrary to the employer's instructions or stated policies.

223 Wis.2d 511, 520.

1. The Committee recommends specifically identifying the culpable agent in the instruction. The reported appellate decisions, in reviewing the sufficiency of the evidence, have addressed two different theories of culpability. See the Knutson and Steenberg Homes decisions, summarized above, which discuss actions by employees that are directly connected with the harm caused and actions by higher-ranking corporate officials that failed to prevent the harm from taking place.

For example, in Knutson, a death was caused when the operator of a backhoe struck a power line with the backhoe's boom. The corporation's liability could be based on two theories:

> (1) the backhoe operator was the agent, the operator was criminally negligent, that criminal negligence caused the victim's death, and the corporation is responsible for the criminal act of its agent, who was acting within the scope of employment; or,

(2) the corporation, acting through its officers, was criminally negligent in failing to have in place safety precautions that would have prevented the death.

In Steenberg Homes, two deaths were caused when a semitrailer detached and struck bicyclists. Again, two theories could support the corporation's liability:

(1) the truck driver, an agent of the corporation, was criminally negligent in failing to double check the proper attachment of the safety chains; or,

(2) the corporation, acting through its officers, was criminally negligent in failing to have in place safety procedures that would have assured proper attachment and checking of the safety chains.

A corporation may be criminally liable under either approach, but the instruction should clearly describe the conduct that is alleged to be the basis for the criminal charge. This instruction is drafted for the first situation: an identified agent is charged with committing a crime while acting within the scope of employment. If the charge is based on the failure to have proper safety procedures in place, an instruction on omission liability may be required. On omission liability generally, see State v. Williquette, 129 Wis.2d 239, 385 N.W.2d 145 (1986), and State ex rel. Cornellier v. Black, 144 Wis.2d 745, 425 Wis.2d 21 (1988).

2. Use the phrase in brackets only if the charge is for a crime defined in the Criminal Code (Chapters 939 - 950, Wis. Stats.) With crimes allegedly committed by corporations, it may be common for charges to be based on offenses defined outside the Criminal Code, such as environmental regulations, hazardous waste regulations, etc.

3. United States v. Basic, 711 F.2d 570, 572-73 (4th Cir. 1983); United States v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979).

4. See Wis JI-Civil 4015, Agency: Ratification. Also see Jury Instructions of the Seventh Circuit, No. 5.04 (West, 1980).

425 CORPORATE LIABILITY: ACTS OF EMPLOYEES: STRICT LIABILITY

430 CORPORATE LIABILITY: ACTS OF LESSER EMPLOYEES

INSTRUCTIONS WITHDRAWN

COMMENT

Wis JI-Criminal 425 and 430 were originally published in 1966 and revised in 1987. They were withdrawn in 1995 when Wis JI-Criminal 420 was revised to be usable for the situations formerly covered by these instructions. See the Comment to Wis JI-Criminal 420.

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435 LIABILITY FOR THE ACTS OF ANOTHER; AUTHORIZATION OR ACQUIESCENCE

The defendant is charged with committing the crime of (charged crime) by authorizing or acquiescing in the commission of that crime by another person, whose activities the defendant had a duty to direct or supervise.

Before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the crime of (charged crime) was committed by a person whose activities the defendant had a duty to direct or supervise and that the defendant authorized or acquiesced in such acts.

(Charged crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (summarize the elements of the charged crime).[1] The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[2] elements of (charged crime) were present.

[CONTINUE WITH EACH OF THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTION, OMITTING THE LAST TWO PARAGRAPHS. USE THE NAME OF THE PERSON WHO DIRECTLY COMMITTED THE CRIME IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE PERSON" OR "THE OTHER PERSON."][3]

Next consider whether (name of person) was a person whose activities the defendant had a duty to direct or supervise.

Finally, consider whether the defendant (authorized) (acquiesced in) the acts allegedly committed by (name of person). This requires that (charged crime) was committed by (name of person) with the knowledge of the defendant and either with the defendant's consent or without the defendant's objection and efforts to prevent the acts.

If you are satisfied beyond a reasonable doubt from the evidence in this case that (name of person) (summarize the elements of the charged crime), that the defendant had a duty to direct or supervise (name of person), and that the defendant knew (name of person) committed the acts and (authorized) (acquiesced in) the acts allegedly committed by (name of person), you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 435 was originally published in 1966 and reviewed and republished without change in 1987. This revision was approved by the Committee in May 1995.

This instruction deals with the individual liability of a person for crimes committed by one whom the person has a duty to direct or supervise. Though such situations will commonly arise in the corporate setting, this instruction deals with the criminal liability of individuals, not the liability of corporations. Regarding the latter, see Wis JI-Criminal 420.

There have been no Wisconsin appellate cases dealing with the substance of the type of liability addressed by this instruction from the time of its original publication. It was revised in 1995 in an attempt to explain the basis of liability more clearly and to integrate the elements of the underlying crime. The revised instruction is set up in a way that parallels the approach used for party to crime cases: the jury must determine whether someone directly committed the crime charged and then determine whether that person had a sufficient connection with the defendant to extend liability to the defendant. See Wis JI-Criminal 400.

The rule of liability in the above instruction is illustrated by the case of State ex rel. Kropf v. Gilbert, 213 Wis. 196, 251 N.W. 478 (1933). The question in that case concerned the liability of certain corporate officers for embezzlement. There was no evidence that the officers in question expressly authorized the embezzlement, but there was evidence that they knew what was going on and made no effort to stop it. The court said that cases dealing with liability on account of aiding and abetting are not on point. Those cases generally hold that failure to take affirmative action to prevent a crime even though one could easily do so does not constitute

aiding and abetting. See Connaughty v. State, 1 Wis. 143 (1853). Furthermore, the court distinguished cases which dealt with employees who carried out orders of superior officers. Those cases generally hold that the employee is not liable, various reasons being given for that conclusion, such as the fact that they have no power to control the affairs of the corporation or that they were in no sense advancing their own personal interests. See Weber v. State, 190 Wis. 257, 208 N.W. 923 (1926), and Kralovetz v. State, 191 Wis. 374, 211 N.W. 277 (1926). While the results reached in the various cases discussed above are correct, the analysis should proceed on the basis of whether there is a legal duty to act under the circumstances of the particular case. A person ordinarily does not have a legal duty to interfere to prevent a crime of violence from being committed [but see § 940.34, Duty To Aid Victim or Report Crime], and, therefore, he may stand by and acquiesce in the commission of the crime without being guilty as an aider and abetter on account of his mere presence and failure to take affirmative action. An employee of a corporation does not have a duty to manage the affairs of the corporation, and, therefore, he does not incur criminal liability simply because he fails to take affirmative action to prevent improper things from being done. Managerial officers, however, have such a duty and, therefore, guilt may be posited on mere acquiescence in the acts of another. See Carolene Products Co. et al. v. United States, 140 F.2d 61 (4th Cir. 1944).

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

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

3. The primary change required in integrating the instruction for the charged crime is to phrase it in terms of another person committing the crime rather than by using "the defendant." In this case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a person with a duty to supervise the person who directly commits the crime.

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440 LIABILITY FOR ACTS OF ANOTHER: ACTS OF AGENT OR SERVANT: STRICT LIABILITY CASES

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 440 was originally published in 1966 and reviewed and republished with an updated comment in 1987. The withdrawal of the instruction was approved by the Committee in May 1995.

This instruction dealt with the individual liability of a person for crimes committed by the person's employee when the crime is committed within the scope of employment. Though such situations will commonly arise in the corporate setting, the instruction dealt with the criminal liability of individuals, not the liability of corporations. Regarding the latter, see Wis JI-Criminal 420.

A footnote to the 1966 version of the instruction indicated that the "instruction is intended for those cases where, by statutory language or by judicial interpretation thereof, an employer is held strictly liable for the acts of an agent or servant." Because it is not clear when such strict liability situations exist, the Committee decided the instruction should be withdrawn.

The original instruction was based on an old line of cases that had recognized this type of liability in liquor regulation cases. See Olson v. State, 143 Wis. 413, 127 N.W. 975 (1910); Scott v. State, 171 Wis. 487, 177 N.W. 615 (1920); and State v. Grams, 241 Wis. 493, 6 N.W.2d 191 (1942). The rule in these cases was reaffirmed in State v. Beaudry, 123 Wis.2d 40, 365 NW.2d 593 (1985). Beaudry affirmed the conviction of the agent of a corporation for a liquor law violation committed by a bartender without the defendant's knowledge and directly contrary to the defendant's instructions.

As the court noted in Beaudry, it was approving a standard for both "vicarious" and "strict" liability: liability is "vicarious" in that it is derived from a violation directly committed by someone else; it is "strict" in the sense that no mental state is required. The court cited several factors in support of its conclusion:

1) the sale of alcohol beverages is highly regulated by statutes creating a strict liability "public welfare" offense;

2) the offense is a misdemeanor, punished by a fine and relatively short period of imprisonment;

3) it will often be difficult to prove that the agent was negligent in hiring or supervising the employee, or knew about or authorized the employee's violation of the law; and,

4) the number of prosecutions may be large so that the legislature would want to relieve the prosecution of the task of proving the employer knew of or authorized the violation or was negligent.

[Beaudry also referred to JI 440, apparently with approval, as to the definition of "scope of employment."]

Shortly after the Beaudry case was decided, § 125.115 was created. [See 1985 Wisconsin Act 47, effective date: November 5, 1985.] It provides as follows:

125.115 Responsibility for commission of a crime.

(1) A person may be convicted of the commission of a crime under this chapter only if the criteria specified in s. 939.05 exist.

(2) This section does not apply to civil forfeiture actions for violation of any provision of this chapter or any local ordinance in conformity with any provision of this chapter.

It is believed that the enactment of this statute was intended to "overrule" the Beaudry decision, as far as criminal violations of the alcohol beverage laws are concerned.

Because the creation of § 125.115 eliminated strict liability for actions of an agent in the single situation where it had clearly been recognized, the Committee concluded that the instruction should be withdrawn.

460 CLOSING INSTRUCTION

Now, members of the jury, the duties of counsel and the court have been performed. The case has been argued by counsel. The court has instructed you regarding the rules of law which should govern you in your deliberations. The time has now come when the great burden of reaching a just, fair, and conscientious decision of this case is to be thrown wholly upon you, the jurors, selected for this important duty. You will not be swayed by sympathy, prejudice, or passion. You will be very careful and deliberate in weighing the evidence. I charge you to keep your duty steadfastly in mind and, as upright citizens, to render a just and true verdict.

You are to decide only whether the defendant is guilty or not guilty of the offense[s] charged. Any consequences of your verdict are matters for the court alone to decide and must not affect your deliberations.

[Give instructions on the verdicts submitted.]

COMMENT

Wis JI-Criminal 460 was originally published in 1962 and republished without change in 1994 and 2000. This revision was approved by the Committee in July 2009; it added the last two sentences regarding consequences of the verdict.

See Wis JI-Criminal 465 for a shorter, less formal closing.

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465 CLOSING INSTRUCTION: OPTIONAL SHORT FORM

You are to decide this case fairly and impartially, without fear or favor, and without passion or prejudice.

You are to decide only whether the defendant is guilty or not guilty of the offense[s] charged. Any consequences of your verdict are matters for the court alone to decide and must not affect your deliberations.

[Give instructions on the verdicts submitted.]

COMMENT

Wis JI-Criminal 465 was originally published in 1962. It was republished without change in 1994 and 2000. This revision was approved by the Committee in July 2009; it added the last two sentences regarding consequences of the verdict.

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480 VERDICTS SUBMITTED FOR ONE DEFENDANT: SINGLE COUNT

The following two[1] forms of verdict will be submitted to you for your consideration concerning the charges against the defendant, (name of defendant) .

One reading: "We, the jury, find the defendant, (name of defendant) , guilty of (offense charged) ,[2] as charged in the (information) (complaint)."[3]

And the other reading: "We, the jury, find the defendant, (name of defendant) , not guilty."

It is for you to determine which one of the forms of verdict submitted you will bring in as your verdict.

COMMENT

Wis JI-Criminal 480 was originally published in 1962 and revised in 1979 and 1990. It was republished without change in 2000.

1. Additions to the verdict are required in several situations. In theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. Wis JI-Criminal 1441A provides a recommended instruction for these findings. There are also several so-called "penalty enhancers" that provide for an increased penalty if specified facts are found. See, for example, Wis JI-Criminal 990, **USING A DANGEROUS WEAPON**; Wis JI-Criminal 994, **CONCEALING IDENTITY**; and Wis JI-Criminal 996 and 996.1, **SELECTING THE PERSON AGAINST WHOM A CRIME IS COMMITTED** (or, **THE PROPERTY DAMAGED) BECAUSE OF RACE, RELIGION, ETC**. See the cited instructions for suggested additions to the verdict.

2. Here should be inserted the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

3. It is important that the reference, "as charged in the (information) (complaint)," appear in the verdict. The Committee feels that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

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482 VERDICTS SUBMITTED FOR ONE DEFENDANT: SINGLE COUNT: LESSER INCLUDED OFFENSE

The following three forms of verdict[1] will be submitted to you concerning the charges against the defendant, (name of defendant) .

One reading: "We, the jury, find the defendant, (name of defendant) , guilty of (offense charged) ,[2] as charged in the information."[3]

Another reading: "We, the jury, find the defendant, (name of defendant) , guilty of (included offense) ,[4] in violation of § ____ of the Criminal Code of Wisconsin, at the time and place charged in the information."[5]

And the third reading: "We, the jury, find the defendant, (name of defendant) , not guilty."

It is for you to determine which one of the forms of verdict submitted you will bring in as your verdict.

COMMENT

Wis JI-Criminal 482 was originally published in 1962 and revised in 1979 and 1990. It was republished without change in 2000. This revision was approved by the Committee in February 2012; it involved updating the Comment.

This instruction calls for submitting three verdicts in the single count, single lesser included offense, case: guilty of the charged crime, guilty of the lesser included crime, and not guilty. See Wis JI-Criminal 485 for a case involving two counts and lesser included offenses.

In State v. Hansbrough, 2011 WI App 79, 334 Wis.2d 237, 797 N.W.2d 887, the defendant was found guilty of felony murder as a lesser included offense in a case where he was charged with first degree intentional homicide. He contended that he should receive a new trial because the trial court did not include a "not guilty" verdict form for felony murder. The court of appeals held that this was error, but harmless, "not structural," error. The offense instruction for felony murder did include the usual statement that "if you are not so satisfied, you must find the defendant not guilty." The problem would have been avoided if the procedure recommended in Wis JI-Criminal 482 had been followed.

1. Additions to the verdict are required in several situations. For example, in theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. The instructions for those offenses include recommended additional questions for these findings. A number of other criminal offenses also call for additional findings relating to facts that increase the penalty. Again, individual offense instructions will provide recommended questions. Finally, there are several generally applicable "penalty enhancers" that provide for increased penalties if specified facts are found. See Wis JI-Criminal 980 through 999A for suggested additions to the verdict.

2. Here insert the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

3. This instruction refers only to the charge "in the information" rather than to the charge "in the (information) (complaint)" because the Committee concluded that lesser included offenses are submitted almost exclusively where the charged crime is a felony. There may be cases, however, where a misdemeanor offense is charged and a lesser included offense is submitted. For example, an attempt could be submitted as a lesser included offense to a charge of misdemeanor theft or battery. See §§ 939.32(1) and 939.66(4). In those cases, the reference to "information" should be changed to "complaint."

It is important that the reference, "as charged in the information," appear in the verdict. The Committee believes that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

4. Here insert the short title of the included offense. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

5. See note 3, supra.

484 VERDICTS SUBMITTED FOR ONE DEFENDANT: TWO COUNTS: SEPARATE VERDICT ON EACH COUNT REQUIRED

The following four forms of verdict[1] will be submitted to you concerning the charges against the defendant, (name of defendant) .

Count One

One reading: "We, the jury, find the defendant, (name of defendant) , guilty of (offense charged) ,[2] as charged in Count One of the (information) (complaint)."[3]

Another reading: "We, the jury, find the defendant, (name of defendant) , not guilty of (offense charged) ,[4] as charged in the Count One of the (information) (complaint)."

Count Two

Another reading: "We, the jury, find the defendant, (name of defendant) , guilty of (offense charged) ,[5] as charged in Count Two of the (information) (complaint)."[6]

Another reading: "We, the jury, find the defendant, (name of defendant) , not guilty of (offense charged) ,[7] as charged in Count Two of the (information) (complaint)."

It is for you to determine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the (information) (complaint). Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.[8]

COMMENT

Wis JI-Criminal 484 was originally published in 1962 and revised in 1979, 1990, 1991, and 1992. It was republished without change in 2000. This revision was approved by the Committee in February 2012; it made nonsubstantive changes in the text and updated footnote 1.

If there are numerous counts alleged to have been committed on different dates, it is best to specify the alleged offenses and the dates of the alleged commission in the verdicts to keep the jury from becoming confused, especially since the state need not prove the exact time of the commission, and the jury is so instructed.

This instruction calls for submitting four verdicts in the two count case: guilty and not guilty for each count. See Wis JI-Criminal 485 for a case involving two counts and lesser included offenses.

1. Additions to the verdict are required in several situations. For example, in theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. The instructions for those offenses include recommended additional questions for these findings. A number of other criminal offenses also call for additional findings relating to facts that increase the penalty. Again, individual offense instructions will provide recommended questions. Finally, there are several generally applicable "penalty enhancers" that provide for increased penalties if specified facts are found. See Wis JI-Criminal 980 through 999A for suggested additions to the verdict.

2. Here should be inserted the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

3. It is important that the reference, "as charged in the (information) (complaint)," appear in the verdict. The Committee believes that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

4. See note 2, supra.

5. See note 2, supra.

6. See note 3, supra.

7. See note 2, supra.

8. The last two sentences have been added for the situation where joinder of charges, while proper, exposes the defendant to considerable prejudice in that the jury may use the fact of being charged with one offense as proof that the other offense was committed.

In Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975), the defendant was charged with burglary and obstructing an officer. The offenses were joined in a single information and were tried at the same time. The supreme court held that the failure to deliver a proper cautionary instruction on the prejudicial effect of such joinder caused a miscarriage of justice requiring a new trial.

The trial judge in Peters gave Instruction No. 145, Information Not Evidence. This did not go far enough. An instruction was needed that advised the jury that it could not use evidence relating to making false statements to an officer to find the defendant guilty of the crime of burglary. "Such a cautionary instruction must be given in clear and certain terms, because otherwise there is a strong likelihood that the jury will regard the evidence on the obstructing an officer count as sufficient in itself to find the defendant guilty of burglary." Peters, supra at 32.

The decision also recommends an instruction in a case from the 7th Circuit: United States v. Pacente, 503 F.2d 543 (7th Cir. 1974). It reads as follows:

> Now, there are two counts in this indictment, and, as I have told you, each one charges a separate crime. You should consider each one separately. The defendant's guilt or innocence of the crime charged in one count should not affect your verdict on the other count. . . .

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485 VERDICTS SUBMITTED FOR ONE DEFENDANT: TWO COUNTS: LESSER INCLUDED OFFENSE ON EACH COUNT

Six forms of verdict[1] will be submitted to you concerning the charges against the defendant, (name of defendant) .

Count One

As to Count One, three forms of verdict will be submitted, one reading: "We, the jury find the defendant, (name of defendant) , guilty of (offense charged) ,[2] as charged in Count One of the information."[3]

Another reading: "We, the jury find the defendant, (name of defendant) , guilty of (included offense) ,[4] in violation of § _____ of the Criminal Code of Wisconsin, at the time and place charged in Count One of the information."[5]

And a third reading: "We, the jury, find the defendant, (name of defendant) , not guilty as to Count One."

Count Two

As to Count Two, three forms of verdict will be submitted, one reading: "We, the jury find the defendant, (name of defendant) , guilty of (offense charged) ,[6] as charged in Count Two of the information."[7]

Another reading: "We, the jury find the defendant, (name of defendant) , guilty of (included offense) ,[8] in violation of § _____ of the Criminal Code of Wisconsin, at the time and place charged in Count Two of the information."[9]

And a third reading: "We, the jury, find the defendant, (name of defendant) , not guilty as to Count Two."

It is for you to determine whether the defendant is guilty or not guilty of each of the offenses submitted to you. You must make a finding as to each count of the (information) (complaint). Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.[10]

COMMENT

Wis JI-Criminal 485 was approved by the Committee in February 2012.

This instruction is drafted for the case involving two counts, with a lesser included offense for each count. It calls for submitting three verdicts for each count: guilty of the charged crime; guilty of the lesser included crime; and, not guilty as to that count.

1. Additions to the verdict are required in several situations. For example, in theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. The instructions for those offenses include recommended additional questions for these findings. A number of other criminal offenses also call for additional findings relating to facts that increase the penalty. Again, individual offense instructions will provide recommended questions. Finally, there are several generally applicable "penalty enhancers" that provide for increased penalties if specified facts are found. See Wis JI-Criminal 980 through 999A for suggested additions to the verdict.

2. Here insert the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

3. This instruction refers only to the charge "in the information" rather than to the charge "in the (information) (complaint)" because the Committee concluded that lesser included offenses are submitted almost exclusively where the charged crime is a felony. There may be cases, however, where a misdemeanor offense is charged and a lesser included offense is submitted. For example, an attempt could be submitted as a lesser included offense to a charge of misdemeanor theft or battery. See §§ 939.32(1) and 939.66(4). In those cases, the reference to "information" should be changed to "complaint."

It is important that the reference, "as charged in the information," appear in the verdict. The Committee believes that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142

N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

4. See note 2, supra.

5. See note 3, supra.

6. See note 2, supra.

7. See note 3, supra.

8. See note 2, supra.

9. See note 3, supra.

10. The last two sentences have been added for the situation where joinder of charges, while proper, exposes the defendant to considerable prejudice in that the jury may use the fact of being charged with one offense as proof that the other offense was committed.

In Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975), the defendant was charged with burglary and obstructing an officer. The offenses were joined in a single information and were tried at the same time. The supreme court held that the failure to deliver a proper cautionary instruction on the prejudicial effect of such joinder caused a miscarriage of justice requiring a new trial.

The trial judge in Peters gave Instruction No. 145, Information Not Evidence. This did not go far enough. An instruction was needed that advised the jury that it could not use evidence relating to making false statements to an officer to find the defendant guilty of the crime of burglary. "Such a cautionary instruction must be given in clear and certain terms, because otherwise there is a strong likelihood that the jury will regard the evidence on the obstructing an officer count as sufficient in itself to find the defendant guilty of burglary." Peters, supra at 32.

The decision also recommends an instruction in a case from the 7th Circuit: United States v. Pacente, 503 F.2d 543 (7th Cir. 1974). It reads as follows:

> Now, there are two counts in this indictment, and, as I have told you, each one charges a separate crime. You should consider each one separately. The defendant's guilt or innocence of the crime charged in one count should not affect your verdict on the other count. . . .

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486 VERDICTS SUBMITTED FOR ONE DEFENDANT: TWO COUNTS: CONVICTION FOR ONLY ONE PROPER

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 486 was originally published in 1962 and revised in 1979. It was withdrawn in 1990.

This instruction dealt with a case where two charges were submitted to the jury but conviction for only one was proper. Because such cases seldom, if ever, come up in practice, the Committee concluded that the instruction was no longer necessary and should be withdrawn.

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490 VERDICTS SUBMITTED FOR MULTIPLE DEFENDANTS: SINGLE COUNT

The following two[1] forms of verdict will be submitted to you concerning the charges against each of the defendants.

[IN LIEU OF THE PROCEDURE FOLLOWED BELOW, THE COURT MAY READ EACH SET OF VERDICTS FOR EACH DEFENDANT.]

One reading: "We, the jury, find the defendant," as named in the verdict,[2] "guilty of (offense charged) ,[3] as charged in the (information) (complaint)."[4]

The other reading: "We, the jury, find the defendant," as named in the verdict,[5] "not guilty."

It is for you to determine which one of the forms of verdict submitted for each defendant you will bring in as your verdict regarding that defendant.

COMMENT

Wis JI-Criminal 490 was originally published in 1962 and revised in 1979 and 1990. It was republished without change in 2000.

1. Additions to the verdict are required in several situations. In theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. Wis JI-Criminal 1441A provides a recommended instruction for these findings. There are also several so-called "penalty enhancers" that provide for an increased penalty if specified facts are found. See, for example, Wis JI-Criminal 990, **USING A DANGEROUS WEAPON**; Wis JI-Criminal 994, Concealing Identity; and Wis JI-Criminal 996 and 996.1, **SELECTING THE PERSON AGAINST WHOM A CRIME IS COMMITTED** (or, **THE PROPERTY DAMAGED) BECAUSE OF RACE, RELIGION, ETC.** See the cited instructions for suggested additions to the verdict.

2. The words "as named in the verdict" should be read to the jury in lieu of the defendant's name and only one set of verdicts need be read. This procedure eliminates repetition, which is not of too much concern where there are only two defendants and a single offense charged. But where there are more than two defendants or more than one or two counts, this procedure will save time.

3. Here should be inserted the short title of the offense charged. Refer to the Criminal Code titles, but in

some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

4. It is important that the reference, "as charged in the (information) (complaint)," appear in the verdict. The Committee feels that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

5. See note 2, supra.

492 VERDICTS SUBMITTED FOR MULTIPLE DEFENDANTS: SINGLE COUNT: INCLUDED OFFENSE

The following three[1] forms of verdict will be submitted to you concerning the charges against each of the defendants.

[IN LIEU OF THE PROCEDURE FOLLOWED BELOW, THE COURT MAY READ EACH SET OF VERDICTS FOR EACH DEFENDANT.]

One reading: "We, the jury, find the defendant," as named in the verdict,[2] "guilty of (offense charged) ,[3] as charged in the information."[4]

Another reading: "We, the jury, find the defendant," as named in the verdict,[5] "guilty of (included offense) ,[6] in violation of § ____ of the Criminal Code of Wisconsin, at the time and place charged in the information."[7]

And a third reading: "We, the jury, find the defendant," as named in the verdict,[8] "not guilty."

It is for you to determine which one of the forms of verdict submitted for each defendant you will bring in as your verdict regarding that defendant.

COMMENT

Wis JI-Criminal 492 was originally published in 1962 and revised in 1979 and 1990. It was republished without change in 2000.

1. Additions to the verdict are required in several situations. In theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. Wis JI-Criminal 1441A provides a recommended instruction for these findings. There are also several so-called "penalty enhancers" that provide for an increased penalty if specified facts are found. See, for example, Wis JI-Criminal 990, **USING A DANGEROUS WEAPON**; Wis JI-Criminal 994, **CONCEALING IDENTITY**; and Wis JI-Criminal 996 and 996.1, **SELECTING THE PERSON AGAINST WHOM A CRIME IS**

COMMITTED (or, **THE PROPERTY DAMAGED) BECAUSE OF RACE, RELIGION, ETC.** See the cited instructions for suggested additions to the verdict.

2. The words "as named in the verdict" should be read to the jury in lieu of the defendant's name and only one set of verdicts need be read. This procedure eliminates repetition, which is not of too much concern where there are only two defendants and a single offense charged. But where there are more than two defendants or more than one or two counts, this procedure will save time.

3. Here insert the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

4. This instruction refers only to the charge "in the information" rather than to the charge "in the (information) (complaint)" because the Committee concluded that lesser included offenses are submitted almost exclusively where the charged crime is a felony. There may be cases, however, where a misdemeanor offense is charged and a lesser included offense is submitted. For example, an attempt could be submitted as a lesser included offense to a charge of misdemeanor theft or battery. See §' 939.32(1) and 939.66(4). In such cases, the reference to "information" should be changed to "complaint."

It is important that the reference, "as charged in the information," appear in the verdict. The Committee feels that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

5. See note 2, supra.

6. Here insert the short title of the included offense. See note 3, supra.

7. See note 4, supra.

8. See note 2, supra.

494 VERDICTS SUBMITTED FOR MULTIPLE DEFENDANTS: TWO COUNTS: SEPARATE VERDICT ON EACH COUNT REQUIRED

The following four[1] forms of verdict will be submitted to you concerning the charges against each of the defendants.

[IN LIEU OF THE PROCEDURE FOLLOWED BELOW, THE COURT MAY READ EACH SET OF VERDICTS FOR EACH DEFENDANT.]

One reading: "We, the jury, find the defendant," as named in the verdict,[2] "guilty of (offense charged) ,[3] as charged in the first count of the (information) (complaint)."[4]

Another reading: "We, the jury, find the defendant," as named in the verdict,[5] "guilty of (offense charged) ,[6] as charged in the second count of the (information) (complaint)."[7]

A third reading: "We, the jury, find the defendant," as named in the verdict,[8] "not guilty of the crime charged in the first count of the (information) (complaint)."

And a fourth reading: "We, the jury, find the defendant," as named in the verdict,[9] "not guilty of the crime charged in the second count of the (information) (complaint)."

It is for you to determine whether each of the defendants is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the (information) (complaint). Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.[10]

COMMENT

Wis JI-Criminal 494 was originally published in 1962 and revised in 1979, 1990, 1991, and 1992. It was republished without change in 2000.

If there are numerous counts alleged to have been committed on different dates, it is best to specify the alleged offenses and the dates of the alleged commission in the verdicts to keep the jury from becoming confused, especially since the state need not prove the exact time of the commission, and the jury is so instructed.

1. Additions to the verdict are required in several situations. In theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. Wis JI-Criminal 1441A provides a recommended instruction for these findings. There are also several so-called penalty enhancers that provide for an increased penalty if specified facts are found. See, for example, Wis JI-Criminal 990, **USING A DANGEROUS WEAPON**, and Wis JI-Criminal 994, **CONCEALING IDENTITY**. See the cited instructions for suggested additions to the verdict.

2. The words "as named in the verdict" should be read to the jury in lieu of the defendant's name and only one set of verdicts need be read. This procedure eliminates repetition, which is not of too much concern where there are only two defendants and a single offense charged. But where there are more than two defendants or more than one or two counts, this procedure will save time.

3. Here should be inserted the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

In some cases, a more specific reference to the facts of the crime may be necessary. Such a case may be illustrated by the facts in State v. Marcum, 166 Wis.2d 908, 480 N.W.2d 545 (Ct. App. 1992). The information involved multiple counts, each generally charging "having sexual contact in September 1989." Evidence was presented at trial that was inconsistent with regard to the number of occasions on which crimes were allegedly committed and with regard to the nature of the acts that took place on each occasion. The verdicts submitted were also general and failed to specify the acts that were the basis for each charge.

The court in Marcum held that "the jury must be presented with verdict forms that adequately distinguish each separately charged crime." 166 Wis.2d 908, 923. The failure to do so creates a problem of jury unanimity under the sixth amendment and a problem of due process under the fifth amendment. The problem in Marcum could have been cured by referring in the verdict to the facts alleged to constitute each crime.

4. It is important that the reference, "as charged in the (information) (complaint)," appear in the verdict. The Committee feels that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

5. See note 2, supra.

6. See note 3, supra.

7. See note 4, supra.

8. See note 2, supra.

9. See note 2, supra.

10. The last two sentences have been added for the situation where joinder of charges, while proper, exposes the defendant to considerable prejudice in that the jury may use the fact of being charged with one offense as proof that the other offense was committed.

In Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975), the defendant was charged with burglary and obstructing an officer. The offenses were joined in a single information and were tried at the same time. The supreme court held that the failure to deliver a proper cautionary instruction on the prejudicial effect of such joinder caused a miscarriage of justice requiring a new trial.

The trial judge in Peters gave Instruction No. 145, Information Not Evidence. This did not go far enough. An instruction was needed that advised the jury that it could not use evidence relating to making false statements to an officer to find the defendant guilty of the crime of burglary. "Such a cautionary instruction must be given in clear and certain terms, because otherwise there is a strong likelihood that the jury will regard the evidence on the obstructing an officer count as sufficient in itself to find the defendant guilty of burglary." Peters, supra at 32.

The decision also recommends an instruction in a case from the 7th Circuit: United States v. Pacente, 503 F.2d 543 (7th Cir. 1974). It reads as follows:

> Now, there are two counts in this indictment, and, as I have told you, each one charges a separate crime. You should consider each one separately. The defendant's guilt or innocence of the crime charged in one count should not affect your verdict on the other count. . . .

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496 VERDICTS SUBMITTED FOR TWO DEFENDANTS: TWO COUNTS: CONVICTION FOR ONLY ONE PROPER

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 496 was originally published in 1962 and revised in 1979. It was withdrawn in 1990.

This instruction dealt with a case where two charges were submitted to the jury but conviction for only one was proper. Because such cases seldom, if ever, come up in practice, the Committee concluded that the instruction was no longer necessary and should be withdrawn.

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515 UNANIMOUS VERDICT AND SELECTION OF PRESIDING JUROR

This is a criminal, not a civil, case; therefore, before the jury may return a verdict which may legally be received, the verdict must be reached unanimously. In a criminal case, all 12 jurors must agree in order to arrive at a verdict.

When you retire to the jury room, select one of your members to preside over your deliberations. The presiding juror's vote is entitled to no greater weight than the vote of any other juror.

If you need to communicate with the court while you are deliberating, send a note through the bailiff, signed by the presiding juror. To have a complete record of this trial, it is important that you communicate with the court only by a written note. If you have questions, the court will talk with the attorneys before answering so it may take some time. You should continue your deliberations while you wait for an answer. The court will answer any questions in writing or orally here in open court.[1]

When you have agreed upon your verdict, have it signed and dated by the person you have selected to preside.

After you have reached a verdict:

- The presiding juror will notify the bailiff that a verdict has been reached.
- Everyone will return to the courtroom.
- The verdict will be read into the record in open court.
- The court may ask each of you if you agree with the verdict.[2]

Swear the officer.

COMMENT

Wis JI-Criminal 515 was originally published in 1962 and revised in 1983, 2001 and 2011. The 2011 revision added paragraphs relating to getting assistance from the court and information about returning the verdict. This revision was approved by the Committee in October 2022; it added to the comment.

The material added to the text in 2011 was originally published as part of Wis JI-Criminal 521, which has been withdrawn.

For a supplementary instruction advising of the need to be unanimous with regard to a particular criminal act, see Wis JI-Criminal 517.

The jury unanimity instruction should always be given. However, the failure to do so can be cured by polling the jury, thereby assuring that the verdict was, in fact, unanimous. State v. Kircher, 189 Wis.2d 392, 398-401, 525 N.W.2d 788 (Ct. App. 1994).

1. See State v. Anderson, 2006 WI 77, 291 Wis.2d 673, 717 N.W.2d 74 (overruled in part on other grounds. See State v. Alexander, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126). The decision reversed a conviction for first degree sexual assault of a child based on several prejudicial errors made by the trial judge in connection with jury deliberations:

   - allowing the jury to play a videotape of a pretrial interview of the victim in the jury room rather than on the record in open court;
   - communicating with the jury during deliberations outside the presence of the defendant and without notice to or consultation with the defendant;
   - communicating with the jury outside the presence of defense counsel and without notice to or consultation with defense counsel;
   - failing to preserve a record of those communications; and,
   - refusing the jury's requests to have portions of the testimony read.

   291 Wis.2d 673, ¶126.

2. Also see, Wis JI-Criminal 522, Polling The Jury.

515A FIVE-SIXTHS VERDICT AND SELECTION OF PRESIDING JUROR: FORFEITURE ACTIONS

In this case, the law provides that the verdict must be agreed to by five-sixths or more of the jury. Any verdict returned by the jury shall be agreed to by at least (five) (ten) of the jurors. I ask you to try to be unanimous if you can.

When you retire to the jury room, select one of your members to preside over your deliberations. That person's vote is entitled to no greater weight than the vote of any other juror.

When you have agreed upon your verdict, have it signed and dated by the person you have selected to preside. At the foot of the verdict, you will find a place provided where dissenting jurors, if there be any, will sign their names. Either the blank lines or the space below them may be used for that purpose.

Swear the officer.

COMMENT

This instruction was originally published as Wis JI-Criminal 515.1 in 1993, replacing Wis JI-Criminal 2055, which was originally published in 1962. This revision was approved by the Committee in December 2000 and involved adoption of a new format and nonsubstantive changes to the text. It renumbered the instruction Wis JI-Criminal 515A.

For discussion of the five-sixths verdict in civil cases, see Wis JI-Civil 180.

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517 JURY AGREEMENT: EVIDENCE OF MORE THAN ONE ACT INTRODUCED TO PROVE ONE CHARGE

[USE IN APPROPRIATE CASES.][1]

The defendant is charged with one count[2] of _____. However, evidence has been introduced of more than one act, any one of which may constitute _____.

Before you may return a verdict of guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed the same act and that the act constituted the crime charged.

COMMENT

Wis JI-Criminal 517 was originally published in 1985 and revised in 1992, 1993, and 2001. This revision was approved by the Committee in June 2009 and involved adding the final paragraph to the comment.

1. This instruction should be considered for use when a defendant is charged with multiple counts and evidence of more than one act is offered as proof of one or more of those counts. Wisconsin courts have been reluctant to require that an instruction on jury agreement be given in these cases. But there clearly are situations where the giving of an instruction like Wis JI-Criminal 517 will cure what may otherwise be reversible error. Two examples are State v. Marcum, 166 Wis.2d 908, 480 N.W.2d 545 (Ct. App. 1992), and State v. Chambers, 173 Wis.2d 237, 496 N.W.2d 191 (Ct. App. 1992), discussed in detail at the end of the material following note 2, below.

2. The word "count" was used in the instruction even though it is a word with which a juror may be unfamiliar. Other approaches that did not use "count" were either awkward or inaccurate. "Count" is the word that most accurately describes the situation with which the instruction is concerned, so the Committee concluded that it should be used despite the possibility that it may be unfamiliar to a juror. If the trial judge believes that the risk of confusion is substantial, explanation of what "count" means may be appropriate.

The premise behind this instruction is that there are cases where the jury must unanimously agree on the particular act the defendant committed before he may be found guilty of a crime.

There are a number of situations where jury agreement is not required:

- "use of force" as distinguished from "threat of force," Manson v. State, 101 Wis.2d 413, 304 N.W.2d 729 (1981), Baldwin v. State, 101 Wis.2d 441, 304 N.W.2d 742 (1981);

- liability as a principal distinguished from liability as an aider and abetter, Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979), May v. State, 97 Wis.2d 175, 293 N.W.2d 478 (1980).

- "mental purpose" as distinguished from "aware that conduct is practically certain . . ." in the definition of criminal intent. State v. Smith, 170 Wis.2d 701, 713, 490 N.W.2d 40 (1992).

- the manner in which each component of a charge under § 946.415 is satisfied [the refusal component, the physical manifestation of refusal with threat component, and the dangerous weapon component]. State v. Koeppen, 195 Wis.2d 117, 536 N.W.2d 386 (Ct. App. 1995).

- whether bodily harm was caused by the slap of a hand or a hit with a board. State v. Heitkemper, 196 Wis.2d 218, 538 N.W.2d 561 (Ct. App. 1995).

- which part of an insurance claim was false in a prosecution under § 943.395. State v. Briggs, 214 Wis.2d 281, 571 N.W.2d 881 (Ct. App. 1997).

- which felony was intended in a prosecution for burglary with intent to commit a felony. State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997).

- the specific act of the defendant that was criminally negligent in a prosecution for negligent homicide. State v. Johannes, 229 Wis.2d 215, 598 N.W.2d 299 (Ct. App. 1999).

- the act intended by a defendant charged with violating § 948.07, Child Enticement. State v. Derango, 2000 WI 89, 236 Wis.2d 721, 613 N.W.2d 833.

- the specific mental disorder that predisposes a person to sexual violence for Chapter 980 commitments. State v. Pletz, 2000 WI APP 221, 239 Wis.2d 49, 619 N.W.2d 97.

Jury agreement is required:

- whether the defendant "used, transferred, concealed, or retained possession of . . ." in prosecutions for theft by employee or bailee under 943.20(1)(b). State v. Seymour, 183 Wis.2d 683, 515 N.W.2d 874 (1994).

- when a statute provides alternative methods of committing a crime, evidence is introduced relating to two or more of those methods, and the methods are "conceptually distinct" – United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

- when evidence of two acts is admitted in support of a single charge, and the defendant has a defense to one of the acts but not to the other – State v. Giwosky, 109 Wis.2d 446, 326 N.W.2d 232 (1982) (Beilfuss, concurring).

A more difficult question is presented when a single count is charged, and evidence of two or more acts, each of which could be the basis of a separate charge, is offered in support of the single count charged. The Wisconsin Supreme Court directly confronted this issue in State v. Lomagro, 113 Wis.2d 583, 335 N.W.2d 583 (1983). In Lomagro, evidence of six separately chargeable sexual assaults was introduced in support of

one charge. A 4-3 majority held it was not error to fail to instruct the jury that they must unanimously agree on the same act as constituting the charge. The justification was that the six different acts were just alternative ways of committing the crime and that they were not "conceptually distinct." Therefore, jury agreement is not required.

Chief Justice Beilfuss wrote the dissent which concluded that the jury should have been instructed that they must agree on one act that constituted the crime. The dissent would apply the "conceptually distinct" analysis only where a single crime could have been committed in alternative ways (e.g., armed robbery by use of force or threat of force; theft by taking and carrying away or concealing property of another). This analysis should not apply in Lomagro, says the dissent, because each of the acts was separately chargeable. If acts are separately chargeable, the "conceptually distinct" issue does not even arise. Whenever evidence of acts that could be separately charged is introduced in support of a single charge, the Lomagro dissent would require a special instruction on jury agreement.

The Lomagro holding was reevaluated in State v. Gustafson, 119 Wis.2d 676, 351 N.W.2d 653 (1984). Again by a 4-3 decision, the court declined to overrule Lomagro, holding that it was not error for the trial court to fail to give an instruction requiring that the jury agree on which of several acts constituted the single count of sexual assault at issue. The court of appeals decision in Gustafson had found error in the failure to give an instruction on jury agreement and even suggested an instruction for use in such cases (see 112 Wis.2d 369, 379, 332 N.W.2d 860 (Ct. App. 1983)). Also see State v. McMahon, 186 Wis.2d 68, 519 N.W.2d 621 (1994).

While the Wisconsin Supreme Court has made it clear in Lomagro and Gustafson that failing to give an instruction like JI-517 is not reversible error, the Committee concluded that publishing an instruction for optional use was worthwhile. Giving this kind of supplemental instruction on jury agreement when requested in cases like Lomagro and Gustafson should help to assure that the defendant's right to a unanimous jury is honored and that needless litigation is avoided. The disadvantage is that it may require jury unanimity where it is not absolutely required and thus risk prolonging or complicating jury deliberations.

The problems that use of Wis JI-Criminal 517 may avoid are illustrated by the facts in State v. Marcum, 166 Wis.2d 908, 480 N.W.2d 545 (Ct. App. 1992). The information involved multiple counts, each generally charging "having sexual contact in September 1989." Evidence was presented at trial that was inconsistent with regard to the number of occasions on which crimes were allegedly committed and with regard to the nature of the acts that took place on each occasion. Only the general unanimity instruction (Wis JI-Criminal 515) was given. The verdicts submitted were also general and failed to specify the acts that were the basis for each charge.

The court in Marcum reversed the conviction on the ground of ineffective assistance of counsel. Counsel was ineffective for failing to request a unanimity instruction and for failing to pursue more specific verdicts. The court held that "the jury must be presented with verdict forms that adequately distinguish each separately charged crime." 166 Wis.2d 908, 923. The failure to do so creates a problem of jury unanimity under the sixth amendment and a problem of due process under the fifth amendment. [See Wis JI-Criminal 484, note 2, for a discussion of addressing this problem by being more specific in the verdicts.]

The problem in Marcum could have been cured by giving an instruction like Wis JI-Criminal 517 that would have required the jury to be unanimous about the specific act that formed the basis for each count. However, the failure to give Wis JI-Criminal 517 was not directly reviewed because it was not requested. Further, since it was labelled as an "optional" instruction, the court noted that failure to give it could not be

considered error. [See the discussion of Gustafson and Lomagro, supra.] The Marcum court also relied on the title to the former version of Wis JI-Criminal 517, which referred to "One Charge, Evidence of More Than One Act." The court interpreted this title as limiting the instruction to cases where only one charge was present. That had not been the Committee's intent; the instruction was meant to apply to any case where evidence of more than one act was admitted in support of a single charge. The 1992 revision changed the title to cure this problem.

In State v. Chambers, 173 Wis.2d 237, 496 N.W.2d 191 (Ct. App. 1992), the defendant was charged with six counts of sexual assault and testimony was admitted as to more than six acts that would constitute sexual assault. The court noted that because of the evidence of multiple acts and the fact that a party to crime situation was involved, the jury could have assigned guilt to the defendant under several different theories. The court further noted that this could have presented the problem that required reversal of the convictions in Marcum (supra) but held that the unanimity problem was solved in this case by the giving of an instruction that told the jury that they must be unanimous about the specific act that formed the basis for each count. The instruction given by the trial court in Chambers, though not cited as such, was essentially the same as Wis JI-Criminal 517. (Compare the trial court's instruction at 173 Wis.2d 237, 258, with the text of Wis JI-Criminal 517.)

In State v. Becker, 2009 WI App 59, 318 Wis.2d 97, 767 N.W.2d 585, the court of appeals rejected a challenge based on Marcum (supra). The defendant was charged with two counts of sexual assault of a child based on two acts. Neither the information nor the jury instructions tied a particular act to a particular count. The court of appeals held that the defendant waived his right to challenge jury instructions that were unclear regarding jury unanimity and waived his argument that the trial court erroneously answered the jury's question about unanimity in the way it did. However, the court also offered "the following edifying clarifications":

> ¶10 . . . . This entire issue could have been avoided if the State had not put it in play with its sloppy draftsmanship. In the complaint and information, the district attorney did not tie the specific act of Becker touching the victim's vaginal area to a specific count; nor did he tie the specific act of Becker allowing or causing the victim to touch his penis to a separate, specific count. Where a defendant, such as Becker, is charged with multiple acts violating a criminal statute, the district attorney should tie a specific act to each count in the case. The complaint and/or information should then specify in each count the specific act to which it applies. This should also be done if there are multiple acts occurring at different times or on different days. If the district attorney fails to charge with particularity, defense counsel should bring a motion to make the complaint and/or information more definite and certain. Finally, the trial court is not a lemming and should not overlook sloppy charging by the State. Rather, regardless of the State's lack of care, the trial court should take great care to not give generic, nonspecific instructions or verdict forms to the jury. Having conveyed, with particularity, how to avoid this problem in the future, we continue with our analysis.

520 SUPPLEMENTAL INSTRUCTION ON AGREEMENT

You jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues.

You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate; they should be open-minded; they should listen to the arguments of others, and talk matters over freely and fairly, and make an honest effort to come to a conclusion on all of the issues presented to them.

You will please retire again to the jury room.

COMMENT

Wis JI-Criminal 520 was originally published in 1962 and revised in 1985 and 1993. This revision was approved by the Committee in October 2000 and involved adoption of a new format and updating the comment.

Subsection 805.13(5) provides the general rule relating to reinstruction of the jury and applies to criminal cases (See § 972.11(1)).

> 805.13(5) Reinstruction. After the jury retires, the court may reinstruct the jury as to all or any part of the instructions previously given, or may give supplementary instructions as it deems appropriate.

This subsection replaced former § 270.23, which allowed reinstruction to take place only once, unless the jury consented to further reinstruction. (Cf. § 270.23, 1975 Wis. Stat.)

Wis JI-Criminal 520 goes beyond simple reinstruction, of course, as it speaks to the continuation of deliberations by a jury that has expressed its inability to reach agreement. Care must be taken to assure that the instruction is given only if the jury actually is unable to reach agreement, Quarles v. State, 70 Wis.2d 87, 233 N.W.2d 401 (1975).

Wis JI-Criminal 520 (© 1962) had been approved by the Wisconsin Supreme Court on several occasions: Ziegler v. State, 65 Wis.2d 703, 223 N.W.2d 442 (1974); Madison v. State, 61 Wis.2d 333, 212 N.W.2d 150 (1973); and Kelly v. State, 51 Wis.2d 641, 187 N.W.2d 810 (1971). Only minor changes were made in the 1985 revision.

One issue commonly raised in connection with instructions like Wis JI-Criminal 520 is the reference to "the next jury" that may be called upon to decide the same case. The objection is to the implication that another trial will be necessary. In Kelly, supra, the court held that this reference is not prejudicial error. The present version of the instruction partially addresses this objection by referring to the next jury that "may" be called upon.

Another objection raised has related to the claim of undue pressure on minority jurors. Wis JI-Criminal 520 has been distinguished from those used elsewhere on the ground that it makes no reference to minority or majority jurors but rather urges all jurors to make an honest effort to agree, see Kelly, supra. Minority jurors should not be urged to change their views, but all jurors may be asked to make a reasonable effort to reach agreement. Meade v. Richland Center, 237 Wis. 537, 297 N.W. 419 (1941).

The other major criticism of this type of instruction is that some refer to the expense and effort already expended in the trial or the duplication of that expense and effort that a deadlocked jury would require. Such references should be avoided. See Secor v. State, 118 Wis. 621, 95 N.W. 942 (1903); Hodges v. O'Brien, 113 Wis. 97, 99 N.W. 901 (102); and McDonald v. State, 193 Wis. 204, 212 N.W. 635 (1927).

The text of Wis JI-Criminal 520 is believed to be consistent with § 15-4.4 of the ABA Standards for Criminal Justice (Trial by Jury) (2d ed. 1978). This standard is emerging as a preferred response to the "deadlocked jury" problem. See, for example, State v. Weidul, 628 A.2d 135 (Maine Supreme Court, July 13, 1993). Standard 15-4.4 provides as follows:

15-4.4. Length of deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto:

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and

(v) that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

521 INSTRUCTION ON JURY DELIBERATIONS

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 521 was originally published in 2008. It was withdrawn in 2011.

This instruction was withdrawn when the parts of it the Committee concluded should be preserved were incorporated into Wis JI-Criminal 515.

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522 POLLING THE JURY [SUGGESTED FORM][1]

ASK THE PRESIDING JUROR:

Has the jury reached a verdict?

IF THE ANSWER IS YES, READ THE VERDICT OR VERDICTS. AFTER EACH VERDICT, ASK THE JURY:[2]

Members of the jury, [as to this count] is this your verdict?

If it is, say yes. If it is not, say no.

IF ALL JURORS ANSWER YES,[3] ASK THE [DEFENDANT] [DEFENSE COUNSEL]:[4]

Would you like me to poll the jury?

IF THE ANSWER IS YES, ADDRESS THE JURY AS FOLLOWS:[5]

Members of the jury, I ask each one of you individually. Is this your verdict? If it is, say yes. If it is not, say no. Please begin with juror in seat number one.[6]

IF A JUROR ANSWERS NO, DO NOT INQUIRE FURTHER AND INSTRUCT THE JURY AS FOLLOWS:[7]

In a criminal case, the verdict must be reached unanimously. Please retire again to the jury room and continue with your deliberations.

IF ALL JURORS AGREE ON THE VERDICT, ASK THE [DEFENDANT] [DEFENSE COUNSEL]:

Are you satisfied with the poll?

ACCEPT THE VERDICT AND DISCHARGE THE JURORS.

COMMENT

Wis JI-Criminal 522 was originally published in 1995 and revised in 2000. This revision was approved by the Committee in February 2007 and involved adding the material at footnote 7.

The defendant's right to poll the jury is closely related to the right to have counsel present at the time the verdict is received. The receipt of the verdict is a "critical stage" of the proceedings to which the right to counsel applies. This stage is "critical" in part because the defendant has the right to request a poll of the jury. See State v. Behnke, 155 Wis.2d 796, 801, 456 N.W.2d 610 (1990). This principle goes back to Smith v. State, 51 Wis. 615, 8 N.W. 410 (1881), which "despite its age, . . . remains the law today." State v. Wojtalewicz, 127 Wis.2d 344, 347-48, 379 N.W.2d 338 (Ct. App. 1985).

Polling the jury can be viewed as having two stages. A question to the jury as a whole, asking whether all agree on the verdict, has been referred to as "collective" polling. State v. Wojtalewicz, supra at 348-49. See note 2, below. "Individual" polling requires each juror to answer. See note 5, below.

"A defendant has the right, when timely asserted, to have the jurors individually polled on their verdict." State v. Coulthard, 171 Wis.2d 573, 581, 492 N.W.2d 329 (Ct. App. 1992). In Coulthard, the trial court reconvened the jury 50 days after the trial had concluded to conduct the individual poll. The court of appeals held this was an effective remedy.

"The right to poll the jury at the return of the verdict is a corollary to the defendant's right to a unanimous verdict. Polling is a means by which the uncoerced unanimity of the verdict can be tested. Each juror must take individual responsibility and state publicly that he or she agrees with the announced verdict." State v. Behnke, supra at 801. Also see State v. Wiese, 162 Wis.2d 507, 469 N.W.2d 908 (Ct. App. 1991); State v. Wojtalewicz, supra. A juror may dissent at any time before a verdict is received and properly recorded. State v. Cartagena, 140 Wis.2d 59, 409 N.W.2d 386 (Ct. App. 1987). Polling the jury can cure what would otherwise be error in failing to give an instruction requiring unanimity. State v. Kircher, 189 Wis.2d 392, 525 N.W.2d 788 (Ct. App. 1994).

In State v. Wiese, supra, the court held that the "American Bar Association Standards are consistent with Wisconsin law." 162 W.2d 507, 518. The decision referred to sec. 15-4.5 of the second edition of the ABA Standards (1980).

1. The procedure and statements suggested here are intended to illustrate a complete jury polling procedure. It is expected that it will be used only as a general guide, with selection of those parts that seem helpful and modification of others as appropriate to local practice and the case at hand.

2. This question to the entire jury has been referred to as "collective" polling. State v. Wojtalewicz, supra at 348-49. Each juror has the opportunity to indicate that he or she does not agree with the verdict. Where an individual polling of the jury is requested, this "collective" poll is not sufficient.

3. If the poll indicates that jurors do not unanimously agree on a verdict, they should be asked to continue deliberations. See note 7, below.

4. In State v. Jackson, 188 Wis.2d 537, 525 N.W.2d 165 (Ct. App. 1994), the court held that an indication by defense counsel that an individual poll is not requested is sufficient – obtaining an individual waiver from the defendant is not required. The concurring opinion recommended conducting an individual

poll in every case, to "forestall a claim of ineffective assistance of counsel."

The decision whether to request an individual polling is one delegated to counsel. State v. Yang, 201 Wis.2d 721, 740, 549 N.W.2d 769 (Ct. App. 1996). Whether failure to request an individual poll constitutes deficient performance by counsel depends on all the circumstances. Id. at 741. Cited in State v. Eckert, 203 Wis.2d 497, 553 N.W.2d 539 (Ct. App. 1996). Also see State v. Brunton, 203 Wis.2d 195, 552 N.W.2d 452 (Ct. App. 1995).

Compare State v. Behnke, supra, where a conviction was reversed because the trial court failed to poll the jury in a case where counsel was absent at the time the verdict was returned. The court held that in those circumstances, it was error to fail to obtain the defendant's "knowing, voluntary, and unequivocal waiver" of both the right to poll the jury and the right to counsel.

5. This question pursues the "individual" polling of the jurors. "The practice requires each juror to answer for himself. . . . The 'confrontational' element is important. A defendant in a criminal case has the right to require each member of the jury when face to face with the accused to state whether or not the verdict is his verdict." State v. Wojtalewicz, supra at 349 (citations omitted).

6. The Committee recommends identifying the jurors by their seat number. It is also common practice to identify the jurors by name. See, for example, State v. Wiese, supra.

7. When a juror responds with an unambiguous "no," the trial court has two options: grant a mistrial or return the jury for further deliberations. The court should not continue to question the individual juror. State v. Raye, 2005 WI 68, 281 Wis.2d 339, 697 N.W.2d 407, ¶38.

"If there is a dissent, or if it is stated by the juror that the assent is merely an accommodation and against the juror's conscience, it is the duty of the court, upon its own motion, to direct the jury to retire and reconsider its verdict." State v. Wiese, supra at 518.

If the court decides to send the jury back for further deliberation, the Committee recommends a simple statement directing them to do so, as provided in the instruction. If additional instruction is believed to be necessary, see Wis JI-Criminal 520, Supplemental Instruction On Agreement.

While a clear statement that a juror does not agree on the verdict requires that the jury be asked to resume deliberations, the court should be alert for less unequivocal indications of lack of agreement. "[T]he court should interrogate a juror who, during the poll, creates some doubt as to his vote. . . . Doubt may result from the juror's demeanor or tone of voice as well as the language he uses. Prior to further questioning, however, the court should make a determination that the juror's answer was ambiguous or ambivalent." State v. Cartagena, 140 Wis.2d 59, 62, 409 N.W.2d 386 (Ct. App. 1987). However, there is no right to "cross-examine the jurors on their verdict." Ibid., citing State v. Ritchie, 46 Wis.2d 47, 56, 174 N.W.2d 504 (1970).

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525 INSTRUCTION AFTER VERDICT RECEIVED

Your service in this case is completed.

You do not have to answer questions about the case from anyone other than the court. There is no requirement that you maintain secrecy concerning what happened in the jury room, but you do not have to discuss the case with anyone or answer any questions about it.

COMMENT

Wis JI-Criminal 525 was originally published in 1984 and revised in 1994. This revision was approved by the Committee in December 2000 and involved adoption of a new format.

This instruction, adapted from Wis JI-Civil 197, is considered optional. It may be appropriate in those cases where the jurors might find it helpful to be advised by the court that it is solely their decision whether or not to talk to others about their jury service.

The present Rules of Professional Conduct do not explicitly address posttrial contact between lawyer and jurors. The only applicable rule is SCR 20:3.5, which provides as follows:

> **SCR 20:3.5 Impartiality and decorum of the tribunal**
> A lawyer shall not:
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
> (b) communicate ex parte with such a person except as permitted by law or for scheduling purposes if permitted by the court. If communication between a lawyer and judge has occurred in order to schedule a matter, the lawyer involved shall promptly notify the lawyer for the other party or the other party, if unrepresented, of such communication; or
> (c) engage in conduct intended to disrupt a tribunal.

Former Supreme Court Rule 20.42 imposed the following restrictions on lawyers' communications with jurors:

> (4) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer may not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service.
>
> (5) A lawyer may not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

(6) All restrictions imposed by this section upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

The ABA Standards for Criminal Justice (3rd ed.) also address the issue of posttrial contact with jurors.

Standard 3-5.4, The Prosecution Function, treats the prosecutor's responsibilities as follows:

(c) After discharge of the jury from further consideration of a case, a prosecutor should not intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service. If the prosecutor believes that the verdict may be subject to legal challenge, he or she may properly, if no statute or rule prohibits such course, communicate with jurors to determine whether such challenge may be available.

Standard 4-7.3, The Defense Function, provides the same standard for defense counsel.

525A INSTRUCTION AFTER VERDICT RECEIVED — ALTERNATIVE FORM

[THIS INSTRUCTION IS SUGGESTED FOR USE IN CASES WHERE THE COMMITMENT, INCONVENIENCE, ETC., REQUIRED OF JURORS WAS WELL BEYOND THAT OF A TYPICAL CASE.]

Now that your service in this case is completed, some of you may have questions about the confidentiality of the proceedings. You are free to discuss the case with any person you choose. However, you do not have to discuss the case with anyone or answer any questions about it from anyone other than the court.

If you do decide to discuss the case with anyone, including the media, keep in mind that your fellow jurors fully and freely stated their opinions and may not want their opinions made public. Please respect the privacy of the views of your fellow jurors.

If any of you have questions for the court before leaving today, please let the bailiff know before you leave the jury room.

Members of the jury, on behalf of _____ County the court would like to express its sincerest gratitude and appreciation for your service in this case. The court recognizes that you have devoted significant time and tolerated restrictions on your normal activities during this trial. Your service is a necessary and essential part of the justice system guaranteed by the Constitution of the United States. I hope you found the experience a rewarding one.

COMMENT

Wis JI-Criminal 525A was approved by the Committee February 2010.

This instruction is a longer version of Wis JI Criminal 525 and is recommended for consideration for the extraordinary or "notorious" case. "Extraordinary" is used in the sense of requiring commitment,

inconvenience, etc., well beyond that which attends jury service in a typical case. "Notorious" is used in the sense of "generally known and talked of."

This instruction is based on one recommended at pp. 94-95 in Managing Notorious Trials, National Center For State Courts, 1998.

550 SOLICITATION AS A CRIME — § 939.30

Statutory Definition of the Crime

The crime of solicitation, as defined in § 939.30 of the Criminal Code of Wisconsin, is committed by one who, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has that intent.

The defendant in this case is charged with advising that the crime of (name of felony) be committed. (Name of felony) is a felony.

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

1. The defendant intended that the crime of (name of felony) be committed.

   The crime of (name of felony) is committed by one who

   > [DEFINE THE CRIME INVOLVED, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE][1]

2. The defendant advised another person, by the use of words or other expressions, to commit the crime of (name of felony) and did so under circumstances that indicate, unequivocally, that the defendant intended that (name of felony) be committed.

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts.[2]

Deciding About Intent

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

Jury's Decision

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

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

COMMENT

Wis JI-Criminal 550 was originally published in 1962 and revised in 1994 and 2000. The 2000 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment. The Comment was revised in April 2019. A "Reporter's Note" was removed in 2020.

This instruction is for the inchoate crime of solicitation, as defined in § 939.30. Liability as a party to crime under § 939.05, based on "soliciting" another to commit a crime, is addressed by Wis JI Criminal 415.

Solicitation under § 939.30 is a Class D felony, with two exceptions: solicitation to commit a crime punishable by life imprisonment is a Class C felony; solicitation to commit a Class E felony is punished as a Class E felony. See § 939.30(2).

In State v. Yee, 160 Wis.2d 15, 465 N.W.2d 260 (Ct. App., 1990), Yee asked Dino Corti to find someone who would break the arms and legs of Mr. Li and later kill him. Corti informed the police and Yee was arrested. The court of appeals reversed the trial court's dismissal of solicitation charges, holding: "if A, with intent that a felony be committed, advises B to procure C to commit the felony under circumstances which indicate unequivocally that A has such intent, A is guilty of the crime of solicitation, contrary to sec. 939.30. . . ." 160 Wis.2d 15, 16.

In State v. Manthey, 169 Wis.2d 673, 487 N.W.2d 44 (Ct. App. 1992), Manthey, a potential witness in a malpractice action, indicated to the plaintiff's husband that she would testify favorably only if paid by the plaintiff. The court of appeals applied the Yee rationale to this case, which did not involve a "C":

". . . Manthey advised Otis to engage in the commission of the crime of perjury when she offered to commit perjury if he paid her. The Yee rationale, therefore, does not require the existence of 'C'." The court referred to this type of case as one involving a "double inchoate crime." 169 Wis.2d 673, 687.

In State v. Boehm, 127 Wis.2d 351, 379 N.W.2d 874 (Ct. App. 1985), Boehm solicited Larry Poor to murder Ron Hitchler. Before anything was done, she told Poor that she was "done with" the killing and called the whole thing off. The court of appeals held that a defense of renunciation or withdrawal does not apply to the crime of solicitation under § 939.30:

> Renunciation or withdrawal cannot undo that which has been done and therefore has no effect on the elements of solicitation, once completed. Renunciation or withdrawal therefore cannot be a defense to the completed crime of solicitation, in the absence of statute.

In State v. Kloss, 2019 WI App 13, 386 Wis.2d 314, 925 N.W.2d 563, Kloss solicited his wife to shoot a gun through the front door if any police officers returned to their house. The State charged Kloss with one count of solicitation of first-degree reckless injury, Wis. Stat. § 940.23(1)(a). Kloss was convicted and appealed, arguing in part that it is not possible for a person to intend that another person succeed in causing great bodily harm by reckless conduct because whether harm will result from the other person's reckless conduct is entirely unpredictable. The court of appeals held that a solicitor can intend at the time of the solicitation, that great bodily harm result from the solicitee's reckless conduct. While the uncertainty of whether an injury will in fact result from the solicitee's conduct at the time of the solicitation is "inescapable in an inchoate crime such as solicitation," no level of certainty is required to form a purpose to cause a particular result. Kloss, 386 Wis.2d 314, 322 (2019).

1. If the instruction on the intended crime involves considerable elaboration, it may aid jury understanding to move this description to the end of the instruction, immediately preceding the "Jury's Decision" paragraphs.

2. This is the definition of "unequivocally" used in Wis JI-Criminal 580, Attempt.

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570 CONSPIRACY AS A CRIME — § 939.31

Statutory Definition of the Crime

The crime of conspiracy, as defined in § 939.31 of the Criminal Code of Wisconsin, is committed by one who, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime, if one or more of the parties to the conspiracy does an act to effect its object.

The defendant in this case is charged with having conspired to commit the crime of (name of crime) .

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

1. The defendant intended that the crime of (name of crime) be committed.

   The crime of (name of crime) is committed by one who

   > [DEFINE THE CRIME INVOLVED, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE.][1]

2. The defendant was a member of a conspiracy to commit the crime of (name of crime) .

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

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE:

[As long as the parties agreed or combined by their words or actions, and the defendant intended that the agreement be carried out, it is not necessary that the other person intended to carry out the agreement.][2]

3. One or more of the conspirators performed an act toward the commission of the intended crime that went beyond mere planning and agreement.

However, the act need not, by itself, be an unlawful act or an attempt to commit the crime. If there was an act which was a step toward accomplishing the criminal objective, that is sufficient.

Deciding About Intent

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

Jury's Decision

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

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

COMMENT

Wis JI-Criminal 570 was originally published in 1962 and revised in 1994, 1998, and 2001. This revision was approved by the Committee in October 2007 and involved a minor correction in the text and additions to the Comment.

This instruction is for the inchoate crime of conspiracy, as defined in § 939.31. Liability as a party to crime under § 939.05, based on conspiring to commit a crime, is addressed by Wis JI-Criminal 410 - 412.

Conspiracy under § 939.31 carries the same penalty as that for the completed crime, except that conspiracy to commit a crime punishable by life imprisonment is a Class B felony.

In a case dealing with a charge of conspiracy to deliver a controlled substance under § 961.41(1x), the Wisconsin Supreme Court held that a conspiracy is not established by proof only of an agreement between a buyer and a seller for a delivery of a small amount of controlled substance for personal use by the buyer. State v. Smith, 189 Wis.2d 496, 498, 525 N.W.2d 264 (1995). In Smith, there was no claim that the buyer intended to deliver the cocaine to third party. The court concluded that "the legislature did not intend a buyer-seller relationship for a small amount of cocaine for the buyer's personal use to be a conspiracy. . . ." 189 Wis.2d 496, 501. For a case where there was sufficient evidence of an agreement to furnish drugs to a third party, see State v. Cavallari, 214 Wis.2d 42, 571 N.W.2d 176 (Ct. App. 1997). Also see State v. Ray, 166 Wis.2d 855, 481 N.W.2d 855 (Ct. App. 1992), and State v. Blalock, 150 Wis.2d 688, 442 N.W.2d 514 (Ct. App. 1989).

In another case involving a charge of conspiracy under § 961.41(1x) [which incorporates § 939.31 by reference], the court found the evidence sufficient to support a finding of conspiracy to manufacture psilocybin/psilocin based on the sale of a single "grow kit." State v. Routon, 2007 WI App 178, 304 Wis.2d 480, 736 N.W.2d 530. Routon also discussed the Wisconsin rule that a "stake in the venture" is not a necessary element of a conspiracy. See Wis JI-Criminal 410, footnote 3, which discusses the leading cases referred to in Routon: United States v. Falcone, 109 F.2d 579 (CCA 2d, 1940); and, Direct Sales Co. v. United States, 319 U.S. 703 (1943).

For a decision ordering withdrawal of a guilty plea because a factual basis for conspiracy was lacking, see State v. West, 214 Wis.2d 467, 571 N.W.2d 196 (Ct. App. 1997).

Venue in a conspiracy case is established under § 971.19(2) in any county where an act to effect the object of the conspiracy took place. State v. Cavallari, supra at 55.

Withdrawal Is Not A Defense

Though there is not direct authority on point, the Committee has concluded that withdrawal or renunciation is not a defense to the inchoate crime of conspiracy as defined in § 939.31. In closely related situations, Wisconsin appellate courts have held that extending a defense of withdrawal to inchoate crimes requires specific statutory authority. State v. Boehm, 127 Wis.2d 351, 354, 379 N.W.2d 874 (Ct. App. 1985) addressed solicitation under § 939.30: "Renunciation or withdrawal cannot undo that which has been done and therefore has no effect on the elements of solicitation, once completed. Renunciation or withdrawal therefore cannot be a defense to the completed crime of solicitation, in the absence of a statute."

State v. Stewart, 143 Wis.2d 28, 45-46, 420 N.W.2d 44 (1988) addressed attempt under § 939.32: "We conclude that if the legislature had intended voluntary abandonment to be a defense, it would have expressly said so. We do not believe this court should distort the statutory language to incorporate the defense. The public policy arguments in favor of the defense are better addressed to the legislature than to the court."

Drafts of the Wisconsin criminal code revisions of 1950 and 1953 contained a separate provision that would have reduced the penalty for conspiracy, solicitation, and attempt for defendants who voluntarily changed their minds and took steps which prevented the completion of the crime. Those provisions were not part of the revised criminal code adopted in 1956. See § 339.20, 1950 Report of the Wisconsin Legislative Council; § 339.33, 1953 Report of the Wisconsin Legislative Council.

Section 939.05, which addresses liability as a party to a crime, does have a provision relating to withdrawal from conspiracy or solicitation. Section 939.05(2)(c) provides that withdrawal can excuse a defendant from liability for completed crimes committed by other parties after the withdrawal. Section 939.05 was part of the criminal code revision enacted in 1956. Comments to the drafts stated that "a co-conspirator or solicitor who withdraws is responsible only for the crimes of conspiracy or solicitation." See, § 339.33, 1953 Report of the Wisconsin Legislative Council.

Professor LaFave addresses the issue as follows:

> The traditional rule here "is strict and inflexible: since the crime is complete with the agreement, no subsequent action can exonerate the conspirator of that crime." [Citing Model Penal Code § 5.03, Comment at 457 (1985).] In those jurisdictions which have added by statute an overt act requirement, the defendant is not punishable as a member of the conspiracy only if he withdraws before the overt act has been committed, but this is not significantly different from the common law rule.

LaFave, Substantive Criminal Law 2nd Ed., §12.4(b) (West 2003).

The Committee concluded that the rule articulated above applies in Wisconsin. Once the inchoate crime of conspiracy is completed – which in Wisconsin requires an agreement and an "act toward the commission of the intended crime" – withdrawal is not a defense. Evidence relating to withdrawal, however, may be relevant to the elements of the inchoate crime: whether the defendant was a member of the conspiracy when the "act toward the commission of the intended crime" was committed; and, whether the defendant intended that the crime be committed.

1. If the instruction on the intended crime involves considerable elaboration, it may aid jury understanding to move this description to the end of the instruction, immediately preceding the "Jury's Decision" paragraphs.

2. This is intended for the type of case considered in State v. Sample, 215 Wis.2d 487, 573 N.W.2d 187 (1998), where the conspiracy involved a feigned agreement by an undercover police officer, who furnished drugs that the defendant planned to deliver to a jail inmate. The Sample decision held that hte "unilateral" approach to conspiracy applies under § 939.31 of the Wisconsin Statutes. Under that approach, "criminal conspiracy will lie even where one of the alleged 'co-conspirators' is, unknown to the defendant, an undercover police agent or a police informant who merely feigns participation in the conspiracy." Sample, 215 Wis.2d 486, 495-96. Put another way, § 939.31 adopts a subjective approach focusing on the criminal intent of the defendant.

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580 ATTEMPT — § 939.32

The defendant is charged with attempted (name intended crime) .

Statutory Definition of the Crime

The crime of attempted (name intended crime) , as defined in § 939.32 and § _____[1] of the Criminal Code of Wisconsin, is committed by one who, with intent to commit (name intended crime) , does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements[2] were present.

Elements of the Crime That the State Must Prove

1. The first element of attempted (name intended crime) requires that the defendant intended[3] to commit the crime of (name intended crime) .

The crime of (name intended crime) is committed by one who

LIST THE ELEMENTS OF THE INTENDED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[4]

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

2. The second element of attempted (name intended crime) requires that the defendant did acts toward the commission of the crime of (name intended crime) which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have committed the crime of (name intended crime) except for the intervention of another person or some other extraneous factor.[5]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.[6]

Meaning of "Another Person"

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

Meaning of "Extraneous Factor"

An "extraneous factor"[7] is something outside the knowledge of the defendant or outside the defendant's control.[8]

Deciding About Intent

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

Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of attempted (name intended crime) have been proved, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 580 was originally published in 1967 and revised in 1979, 1988, 1995, 2001, and 2002. The 2002 revision involved nonsubstantive changes to the text and revision of the directions in the text at footnote 4. This revision was approved by the Committee in December 2012; it updated the Comment.

Subsection (1) of § 939.32 states the general rule that attempt liability applies only to felonies, plus four specified misdemeanors: § 940.19 Battery; § 940.195 Battery to an unborn child; § 943.20 Theft; and, § 943.74 Theft of farm-raised fish. These subsections enumerate all the offenses which may be prosecuted as 'attempts'." State v. Cvorovic, 158 Wis.2d 630, 634, 462 N.W.2d 897 (Ct. App. 1990). Thus, "attempted fourth degree sexual assault" is not a prosecutable offense. Ibid.

Several offenses are defined to include attempts as violations of the statute involved. These are included in the list found at subsections (1)(c) through (g) of § 939.32. Uniform instructions for these offenses suggest building in the substance of Wis JI-Criminal 580 in summary form. See, for example, Wis JI-Criminal 1290-1296, Intimidation of Victims and Witnesses under §§ 940.42-.46; Wis JI-Criminal 2134, Child Enticement under § 948.07; and Wis JI-Criminal 6030, Possession of a Controlled Substance under § 961.41.

The general rule is that the maximum fine and maximum term of imprisonment for an attempt is half that for the completed crime. § 939.32(1g)(a) and (b)1. The maximum penalty for attempts to commit Class A felonies is that for a Class B felony. Subsections (1g)(b)2. specifies how penalty enhancement provisions affect the penalties. Subsection (1m) specifies how bifurcated sentences are to be structured for attempts.

An issue that has received extensive attention in connection with attempt is commonly discussed in terms of "impossibility": Is a person guilty of an attempt if it was "impossible" for the crime to be committed under the circumstances? This issue was addressed in State v. Kordas, 191 Wis.2d 124, 528 N.W.2d 483 (Ct. App. 1993), where the defendant was charged with an attempt to receive stolen property based on his buying a motorcycle from an undercover police officer. The police had made representations to Kordas that the cycle was stolen when, in fact, it had been provided to the Milwaukee Police Department for educational purposes. The trial court dismissed the charge, holding that it was "legally impossible" to attempt to receive stolen property where, in fact, the property is not stolen. The court of appeals reversed:

> . . . Kordas did in fact possess the necessary criminal intent to commit the crime of receiving stolen property. The extraneous factor C that the motorcycle was not stolen C was unknown to him and had no impact on his intent. Thus the legal impossibility not apparent to Kordas should not absolve him from the offense of attempt to commit the crime he intended. 191 Wis.2d 124, 130 (citations omitted).

On the crime of attempt generally, see State v. Damms, 9 Wis.2d 183, 100 N.W.2d 592 (1960), and Oakley v. State, 22 Wis.2d 298, 125 N.W.2d 657 (1964). Also see: State v. Henthorn, 218 Wis.2d 526, 581 N.W.2d 544 (Ct. App. 1998), finding the evidence insufficient to support a charge of attempt to obtain a controlled substance by fraud; and State v. Briggs, 218 Wis.2d 61, 579 N.W.2d 783 (Ct. App. 1998), holding that the crime of attempted felony murder does not exist.

1. For example, if the crime charged is attempted burglary, the first part of this sentence would read: "The crime of attempted burglary, as defined in § 939.32 and § 943.10 of the Criminal Code of Wisconsin . . ."

2. The instruction identifies two elements for this offense: (1) intent to commit the crime; and (2) acts which demonstrate unequivocally that the defendant intended to commit and would have committed the crime except for the intervention of another person or some other extraneous factor.

In Berry v. State, 90 Wis.2d 316, 280 N.W.2d 204 (1979), the Wisconsin Supreme Court agreed with this analysis by reversing a decision of the Wisconsin Court of Appeals (see Berry v. State, 87 Wis.2d 85, 273 N.W.2d 376 (Ct. App. 1978)), which had concluded that proof of failure to complete the crime was an essential element of attempt. The supreme court held that "[f]ailure, if and by whatever means the actor's efforts are frustrated, is relevant only insofar as it may negate any inference that the actor did in fact possess the necessary criminal intent to commit the crime in question." 90 Wis.2d 316, 327. This conclusion is consistent with this instruction.

3. See State v. Weeks, 165 Wis.2d 200, 477 N.W.2d 642 (Ct. App. 1991), which discusses the meaning of the intent required for attempts after the 1989 revision of the statute defining "intent." (See § 939.23, discussed in Wis JI-Criminal 923A and 923B.)

4. List the elements set forth in the uniform instruction for the intended crime. Elements beginning with "the defendant" should be modified by deleting those words. Other minor modifications may also be required. The defendant charged with an attempt will not have completed the crime and therefore will not have committed each of the elements. However, the defendant must have intended that all elements of the crime be completed and must have acted with the intent and knowledge required for the completed crime. The Committee recommends including definitions from the uniform instructions when requested or when the evidence has focused on an issue addressed by a definition. Note that some definitions include requirements that are of equal importance to elements of crimes. See, for example, the definitions of "sexual contact" provided in Wis JI-Criminal 1200A and 2101A.

See Wis JI-Criminal 581 EXAMPLE and 582 EXAMPLE for illustrations of how the elements of burglary and armed robbery would be integrated with the general pattern instruction for attempt cases involving attempted burglary and attempted armed robbery. Wis JI-Criminal 1070 provides a model for attempted first degree intentional homicide.

5. The presence of an "extraneous factor" is not a fact which must be separately proved by the state. Rather, it helps define the intent which the defendant must have. See State v. Stewart, 143 Wis.2d 28, 420 N.W.2d 44 (1988), discussed in note 8, below.

"Extraneous factor" is retained in the instruction for several reasons: it is part of the statutory definition; it does help the jury understand the intent required; and, as a practical matter, most attempt cases do involve an "extraneous factor" that has interrupted the defendant's activities.

The "extraneous factor" issue is discussed in State v. Damms, supra, and Adams v. State, 57 Wis.2d 515, 204 N.W.2d 657 (1973).

6. The "unequivocal act" requirement is discussed in State v. Damms, 9 Wis.2d 183, 100 N.W.2d 592 (1960), and Bethards v. State, 45 Wis.2d 606, 173 N.W.2d 634 (1970).

7. See note 5, supra.

8. The version of Wis JI Criminal 580 in effect from 1967 to the time of the 1988 revision included a footnote on "voluntary desistance" at this point in the text. The note suggested that:

> [w]here there is evidence that the defendant voluntarily desisted, or there is evidence that because of facts that were known to the defendant, it was impossible for him to commit the crime, insert the following paragraph in the instruction:
>
> If the defendant did not commit the crime of ____ (because he voluntarily desisted) or (because of facts, known to the defendant, which made it impossible for him to commit the crime), he is not guilty of attempted _____.

Wis JI-Criminal 580 © 1980.

This reference was deleted in 1988 because of the decision of the Wisconsin Supreme Court in State v. Stewart, 143 Wis.2d 28, 420 N.W.2d 44 (1988). In Stewart, the defendant and Moore confronted a person in a semi-enclosed bus stop shelter. They demanded that the person "give us some change" three or four times in an increasingly loud voice. At one point, Stewart reached into his coat, whereupon Moore told him to "put that gun away." Then a third associate, Levy, stepped into the bus shelter and said to Stewart and Moore: "Come on, let's go." The three men left, though Moore later returned and made small talk with the person from whom money had been requested.

The Wisconsin Supreme Court affirmed Stewart's conviction for attempted robbery. The court did not decide the case on the more narrow grounds of sufficiency of the evidence or whether the victim's resistance and Levy's intervention constituted an "extraneous factor." Rather, the court stated a broader rationale, interpreting § 939.32(3) as follows:

> [T]o prove attempt, the state must prove an intent to commit a specific crime accompanied by sufficient acts to demonstrate unequivocally that it was improbable the accused would desist of his or her own free will. The intervention of another person or some other extraneous factor that prevents the accused from completing the crime is not an element of the crime of attempt. If the individual, acting with the requisite intent, commits sufficient acts to constitute an attempt, voluntary abandonment of the crime after that point is not a defense.

143 Wis.2d, 28, 31.

The court dealt with three issues raised by the defendant. First, the court found the evidence was sufficient to support "the first element of attempted robbery – intent to commit robbery." 143 Wis.2d 28, 37.

Second, the court found that Stewart "went far enough" in pursuance of this intent to constitute an attempt. The court rejected Stewart's contention that:

> . . . sufficient acts are not committed until the intervention of another person or extraneous factor prevents completion of the crime. If there is no such intervention, the defendant argues, the acts taken toward the criminal end are too few to constitute an attempt. In effect the defendant argues that § 939.32(3) requires the state to prove that "the intervention of another person or some other extraneous factor" impeded the defendant's completion of the crime.

143 Wis.2d 28, 38.

Rather, the court concluded that the statute does not require that the defendant's conduct be interrupted by another person or some other extraneous factor:

> When the accused's acts demonstrate unequivocally that the accused will continue unless interrupted, that is, when the acts demonstrate that the accused will probably not desist from the criminal course, then the accused's dangerousness is manifest. Accordingly we reject defendant's assertion that § 939.32(3) requires the state to prove the intervention of another person or an extraneous factor.
>
> The purpose of the language in § 939.32(3) relating to intervention of another person and extraneous factor is to denote that the actor must have gone far enough toward completion of the crime to make it improbable that he would change his mind and desist. The conduct element of § 939.32(3) is satisfied when the accused engages in conduct which demonstrates that only a circumstance beyond the accused's control would prevent the crime, whether or not such a circumstance actually occurs. An attempt occurs when the accused's acts move beyond the incubation period for the crime, that is, the time during which the accused has formed an intent to commit the crime but has not committed enough acts and may still change his mind and desist. In other words the statute requires a judgment in each case that the accused has committed sufficient acts that it is unlikely that he would have voluntarily desisted from commission of the crime.

143 Wis.2d 28, 41-42.

The third issue considered was Stewart's claim that the "voluntary abandonment of criminal conduct after the attempt was complete but before the crime of robbery was consummated excuses him from criminal liability." 143 Wis.2d 28, 44. The court held that § 939.32(3) does not expressly recognize voluntary abandonment as a defense and further held that State v. Hamiel, 92 Wis.2d 656, 285 N.W.2d 639 (1979), did not embrace such a defense either. In the absence of express legislative recognition of the voluntary abandonment (or "voluntary desistance") defense, the court held it was not proper for the court to create it.

Therefore, after Stewart, it is clear that once the defendant "has gone far enough" to constitute an attempt, a decision to end the conduct will not relieve the person of criminal liability for an attempt to commit a crime. Deciding when the attempt has really occurred will continue to be a potentially difficult factual question after Stewart, which the jury will have to resolve by reference to the legal standard provided by § 939.32: Do the defendant's acts demonstrate unequivocally that he intended to commit a crime?

581 EXAMPLE ATTEMPTED BURGLARY — § 939.32 and 943.10

The defendant is charged with attempted burglary.

Statutory Definition of the Crime

The crime of attempted burglary, as defined in § 939.32 and § 943.10 of the Criminal Code of Wisconsin, is committed by one who, with intent to commit burglary, does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements[1] were present.

Elements of the Crime That the State Must Prove

1. The first element of attempted burglary requires that the defendant intended[2] to commit the crime of burglary.

   The crime of burglary is committed by one who[3]

   - intentionally enters a building; and
   - enters a building without the consent of the person in lawful possession; and
   - knows that the entry was without consent; and
   - enters the building with intent to steal.

"Intent to steal" requires the mental purpose to take and carry away movable property of another without consent and the intent to deprive the owner permanently of possession of the property.

ADD OTHER DEFINITIONS FROM WIS JI-CRIMINAL 1421 AS NECESSARY[4]

The crime charged against the defendant in this case, however, is not burglary as defined, but an attempt to commit the crime of burglary.

2. The second element of attempted burglary requires that the defendant did acts toward the commission of the crime of burglary which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have committed the crime of burglary except for the intervention of another person or some other extraneous factor.[5]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.[6]

Meaning of "Another Person"

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

Meaning of "Extraneous Factor"

An "extraneous factor"[7] is something outside the knowledge of the defendant or outside the defendant's control.[8]

Deciding About Intent

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

Jury's Decision

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

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

COMMENT

Wis JI-Criminal 581 EXAMPLE was approved by the Committee in March 2002.

This instruction uses burglary as an example to illustrate how the elements of the crime attempted would be integrated with the general pattern instruction for attempts. The elements of the crime of burglary are listed under the first element of attempt. Definition of one key term, "intent to steal," is included.

1. See note 2, Wis JI-Criminal 580.

2. See note 3, Wis JI-Criminal 580.

3. These are the elements set forth in Wis JI-Criminal 1421, Burglary With Intent To Steal. In that instruction, each element begins with "the defendant." Those words were removed when the elements were integrated into the general attempt model because the defendant charged with attempt will not have completed the crime and therefore will not have directly committed each of the elements. However, the defendant charged with attempt must have intended that all elements of the crime be completed and must have acted with the intent and knowledge required for the completed crime.

4. Two definitional paragraphs of Wis JI-Criminal 1421 are not included in this example: one dealing with "when must intent exist" and one dealing with "deciding about intent and knowledge." Upon request, or when the evidence has focused on either or both of those issues, the Committee recommends that those paragraphs be included in the attempt instruction.

5. See note 5, Wis JI-Criminal 580.

6. See note 6, Wis JI-Criminal 580.

7. See note 5, Wis JI-Criminal 580.

8. See note 8, Wis JI-Criminal 580.

582 EXAMPLE ATTEMPTED ARMED ROBBERY — § 939.32 and 943.32(2)

The defendant is charged with attempted armed robbery.

Statutory Definition of the Crime

The crime of attempted armed robbery, as defined in § 939.32 and § 943.32 of the Criminal Code of Wisconsin, is committed by one who, with intent to commit armed robbery, does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements[1] were present.

Elements of the Crime That the State Must Prove

1. The first element of attempted armed robbery requires that the defendant intended[2] to commit the crime armed robbery.

   The crime of armed robbery is committed by one who[3]

   - takes and carries away property from the person or from the presence of the owner of the property; and
   - takes the property with the intent to steal; and
   - acts forcibly; and
   - uses or threatens to use a dangerous weapon.

"Intent to steal" requires the mental purpose to take and carry away movable property of another without consent and the intent to deprive the owner permanently of possession of the property.

ADD OTHER DEFINITIONS FROM WIS JI-CRIMINAL 1480 AS NECESSARY.[4]

The crime charged against the defendant in this case, however, is not armed robbery as defined, but an attempt to commit the crime of armed robbery.

2. The second element of attempted armed robbery requires that the defendant did acts toward the commission of the crime of armed robbery which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have committed the crime of armed robbery except for the intervention of another person or some other extraneous factor.[5]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.[6]

Meaning of "Another Person"

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

Meaning of "Extraneous Factor"

An "extraneous factor"[7] is something outside the knowledge of the defendant or outside the defendant's control.[8]

Deciding About Intent

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

Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of attempted armed robbery have been proved, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 582 EXAMPLE was approved by the Committee in March 2002.

This instruction uses armed robbery as an example to illustrate how the elements of the crime attempted would be integrated with the general pattern instruction for attempts. The elements of the crime of armed robbery are listed under the first element of attempt. Definition of one key term, "intent to steal," is included.

1. See note 2, Wis JI-Criminal 580.

2. See note 3, Wis JI-Criminal 580.

3. These are the elements set forth in Wis JI-Criminal 1480, Armed Robbery, with one change identified below. In that instruction, four elements begin with "the defendant." Those words were removed when the elements were integrated into the general attempt model because the defendant charged with attempt will not have completed the crime and therefore will not have directly committed each of the elements. However, the defendant charged with attempt must have intended that all elements of the crime be completed and must have acted with the intent and knowledge required for the completed crime.

The first element of armed robbery is stated in Wis JI-Criminal 1480 as: "(Name) was the owner of property." An element stated that way is not easily accommodated in the format used by JI 580, which states: "The crime of _____ is committed by one who . . ." This instruction addresses that by combining the first two elements of armed robbery into one element.

4. Several definitions provided in Wis JI-Criminal 1480 are not included in this example: dealing with "owner," "forcibly," "imminent," and "dangerous weapon." Upon request, or when the evidence has focused on any of those issues, the Committee recommends that the definitions be included in the attempt instruction.

5. See note 5, Wis JI-Criminal 580.

6. See note 6, Wis JI-Criminal 580.

7. See note 5, Wis JI-Criminal 580.

8. See note 8, Wis JI-Criminal 580.

600 INTRODUCTORY COMMENT: NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT: INSTRUCTIONS FOR THE "BIFURCATED" TRIAL AND REEXAMINATION

CONTENTS

Scope

Wis JI-Criminal 601-662 provide a series of recommended instructions for use in the "bifurcated" trial, which is held when a criminal defendant enters pleas of not guilty and not guilty by reason of mental disease or defect. Section 971.165 requires that the issues of guilt and responsibility be heard separately "with a sequential order of proof in a continuous trial."

This Introductory Comment outlines the phases of the trial and reexamination by identifying the issue to be determined and the burden of proof at each phase and by briefly summarizing the suggested instructions. There is a "preliminary" and a "final" instruction for each stage. The "preliminary" instruction is to be read to the jury before evidence is received. The "final" instruction is to be used after the evidence has been received, along with any other general instructions that may be appropriate. This Comment also outlines the court's authority and responsibility with respect to commitment, conditional release, and termination of the commitment.

I. First Phase

A. Issue To Be Determined

The issue at the first phase is "guilt": Did the defendant commit all the required elements of the offense charged? Expert opinion testimony on the defendant's capacity to form a mental element required as an element of the crime (e.g., intent to kill) is not admissible at the first phase of the trial. Steele v. State, 97 Wis.2d 72, 97 98, 294 N.W.2d 2 (1980). Caution should be exercised in trying to apply a flat rule of exclusion to evidence that is offered by a criminal defendant. Cases decided after Steele have made it clear that the rule excluding expert testimony on intent is limited to expert opinion testimony on the capacity to form intent based on mental health history. See State v. Flattum, 122 Wis.2d 282, 361 N.W.2d 705 (1985), and State v. Repp, 122 Wis.2d 246, 362 N.W.2d 415 (1985). For a helpful description of what the current rule is and how it developed, see Haas v. Abrahamson, 910 F.2d 384 (7th Cir. 1990).

A defendant may join a plea of guilty with a plea of not guilty by reason of mental disease or defect, see § 971.06(1)(d). The first phase is not necessary in these cases, but the

usual guilty plea acceptance procedures must be followed to establish that the plea is voluntarily entered and that a factual basis for the plea exists. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986). It is not error to allow a defendant to combine a no contest plea with a plea of not guilty by reason of mental disease or defect. State v. VanderLinden, 141 Wis.2d 155, 414 N.W.2d 72 (Ct. App. 1987).

B. Burden Of Proof

The burden of proof at the first phase is on the State to prove all elements of the offense beyond a reasonable doubt. The first phase of the "bifurcated" trial is essentially the same as a regular criminal trial held where no special plea is entered.

C. Jury Instructions

1. JI-Criminal 601

JI-601 is the preliminary instruction to be read to the jury before the beginning of the trial where the defendant has entered pleas of not guilty and not guilty by reason of mental disease or defect. It tells the jury that there will be two phases to the trial: the first dealing with "guilt"; the second dealing with "responsibility."

2. JI-Criminal 602

JI-602 provides a paragraph that is to be added to the general instructions which follow the first phase of the trial. It emphasizes that a second phase of the trial will follow a finding that the defendant is guilty. It should be followed by the standard instruction for the offense charged.

II. Second Phase

A. Issue To Be Determined

The issue at the second phase of the trial is whether the defendant is to be relieved of responsibility for his criminal act because he suffered from mental disease or defect at the time of the offense. The standard is identified in § 971.15(1) as follows:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he or she lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.

The instructions split this standard into two questions, one asking if the mental disease or defect was present and the other asking if it had the required effect on the defendant.

A defendant's proffered jury waiver at the second phase is subject to the usual requirement that the jury may only be waived with the consent of the state, per § 972.02(1). State v. Murdock, 2000 WI App 170, 238 Wis.2d 301, 617 N.W.2d 175.

B. Burden Of Proof

The burden of proof is established by § 971.15(3): The defendant must establish the presence of the mental disease or defect "defense" "to a reasonable certainty by the greater weight of the credible evidence."

1987 Wisconsin Act 86 (effective date: November 28, 1987) created § 971.165(2) which provides that a five-sixths verdict applies at the second phase. State v. Koput, 142 Wis.2d 370, 418 N.W.2d 804 (1988), held that a five-sixths verdict applied even before the statute was changed.

C. Jury Instructions

1. JI-Criminal 603

JI-603 is the preliminary instruction to be read to the jury before the second phase of the trial begins. It can be used if the first phase was tried to a jury, or if the first phase was tried to the court, or if the defendant entered a guilty plea and joined it with a plea of not guilty by reason of mental disease or defect. If a guilty plea is entered at the guilt phase, the usual plea acceptance procedures must be followed to assure that the plea was voluntarily entered and to establish that there is a factual basis for it. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986).

JI-603 explains that the second phase will be concerned with whether the defendant is "responsible" or "not responsible" for his criminal conduct. The Committee determined that phrasing the issue in terms of "responsibility" was preferable to the statutory terms "guilty but not guilty by reason of . . . ." The instruction emphasizes that the second phase is concerned with the defendant's mental condition at the time of the offense and informs the jury that if the defendant is found to be "not responsible," he or she will be committed to the custody of the Department of Health Services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to himself or herself or to others if released under conditions ordered by the court.

2. JI-Criminal 605

JI-605 is the final instruction for the second phase of the trial. It is drafted for use where the plea is based on the presence of a mental disease or mental defect. Former Wis JI-Criminal 605A which provided a separate instruction for cases involving "mental defect" was withdrawn in 2003 and combined with this instruction. If a case involves a claim that the combined effect of a "mental disease," and a "mental defect" is involved, the term "mental disease and defect" should be used throughout. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986), dealt with that situation. The court held that it was not error to phrase the jury instructions in the conjunctive – mental disease and defect – since the theory of defense was that the defendant suffered from both a disease and a defect, the combined effect of which was the lack of substantial capacity to appreciate the wrongfulness of his conduct. The court noted that to use "or" would have frustrated the proffered defense. And to use "and/or" would not have been desirable.

JI-605 divides the responsibility issue into two questions. The first question asks if the defendant had a "mental disease or defect" at the time the offense was committed. "Mental disease or defect" is broadly defined but is limited by the second question which asks if the mental disease or defect had the required effect on the defendant: As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law?

In State v. Leach, 124 Wis.2d 648, 370 N.W.2d 240 (1985), reversing (as to this issue) 122 Wis.2d 339, 363 N.W.2d 234 (Ct. App. 1984), the Wisconsin Supreme Court held that the defendant may be held to a burden of producing sufficient evidence on the responsibility issue before it need be submitted to the jury:

> The constitution does not require that a defendant be allowed to present the affirmative defense of not guilty by reason of mental disease or defect to the jury when he has failed to produce sufficient evidence to raise a jury question . . . . A criminally charged defendant has no entitlement to the luck of a lawless decision maker . . . . He has no right to insist that the jury be given a special opportunity to acquit him on the basis of nothing more than speculation, conjecture or compromise concerning a defense to the crime with which he is charged . . . . The trial court should be permitted to withhold defense of not guilty by reason of mental disease or defect, like other defenses, from the consideration of the jury when there is no evidence presented or there is insufficient evidence to present a jury question on the defense. It should be permitted to direct a verdict against the defendant if the judge finds there is no credible probative evidence toward meeting the burden of establishing the defense of not guilty by reason of mental disease or

defect by a preponderance of the evidence after giving the evidence the most favorable interpretation in favor of the accused asserting the defense.

124 Wis.2d 648, 662 63.

III. Abolition Of The Third Phase; Automatic Commitment To The Department of Health Services

A. Overruling Of Kovach

Until 1984, the instructions included a preliminary and a final instruction for the third phase of the so called "trifurcated trial." The third phase dealt with the present mental condition and the need for institutionalized care of a person who had been found not responsible by reason of mental disease or defect. The third phase was abolished by State v. Field, 118 Wis.2d 269, 347 N.W.2d 365 (1984). Field overruled State ex rel. Kovach v. Schubert, 64 Wis.2d 612, 219 N.W.2d 341 (1974), by holding that automatic commitment following a finding of not guilty by reason of mental disease or defect does not violate constitutional principles of due process or equal protection. The commitment is "to the department of health services for a specified period not exceeding the maximum term of confinement in prison that could be imposed on an offender convicted of the same felony . . ." § 971.17(1)(b).

B. Commitment To An Institution Or Release On Conditions

1989 Wisconsin Act 334, made further changes in the procedures relating to commitment. For offenses committed after January 1, 1991, commitment to an institution is no longer automatic. Rather, § 971.17(3) provides that the court must determine whether there shall be institutional care or conditional release. Conditional release shall be ordered unless the court "finds by clear and convincing evidence that conditional release of the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage." A series of factors are listed that the court may consider "without limitation because of enumeration":

- the nature and circumstances of the crime;
- the person's mental history and present mental condition;
- where the person will live;
- how the person will support himself or herself;
- what arrangements are available to ensure that the person has access to and will take necessary medication; and
- what arrangements are possible for treatment beyond medication.

The meaning of "serious property damage" was discussed in State v. Brown, 2010 WI App 113, 328 Wis.2d 241, 789 N.W.2d 102. Pursuant to a plea agreement, Brown was found not guilty by reason of mental disease or defect on one charge of identity theft. She appealed her commitment for institutional care on the ground that "a significant risk of serious property damage" under § 971.17(3)(a) requires physical harm to an object. The court of appeals disagreed, holding that "property damage" is not limited to physical property damage:

> We discern no reason why the statute would seek to protect the public from physical injury or destruction of property, while subjecting it to the risk of the complete loss of goods, cash, or other assets. The injury suffered by a loss of property may be equal to or greater than that incurred from physical property damage, which may not completely devalue an item. ¶15.

The court agreed with the trial court's conclusion that Brown's extensive history of property crimes posed a significant risk of serious property damage if she would be conditionally released.

The commitment decision is to be made "pursuant to a hearing held as soon as practicable" after the second phase verdict is received. § 971.17(2)(a). If the court "lacks sufficient information to make the determination," a presentence report under § 972.15 or a supplementary mental examination, or both, may be ordered. § 971.17 (2)(a). Subsections (b) through (g) of § 971.17(2) outline the procedure for the supplementary mental examination.

If institutional care is ordered, the department places the person in either the Mendota or Winnebago Mental Health Institute.

C. Duration Of The Commitment

Whether the disposition is institutional care or conditional release, the commitment is to the Department of Health Services for "a specified period." Wis. Stat. § 971,17(1)(a), (b), and (d). The reference to "a specified period," added by 1989 Wisconsin Act 334 [applicable to offenses committed after January 1, 1991] was a significant change from prior law. It allows the court to set a maximum period for the commitment that is less than the statutory maximum prison sentence for the offense. Further, it allows the court to exercise discretion in the multiple-count case or multiple cases. Under prior law, multiple counts automatically resulted in consecutive commitments for the maximum term authorized for each count. State v. C.A.J., 148 Wis.2d 137, 434 N.W.2d 800 (Ct. App. 1988) (interpreting Wis. Stat. § 971.17 (1987-88)).

When specifying the commitment period under current law, the court may exercise its discretion and impose concurrent or consecutive commitment periods on multiple counts and cases. State v. Yakich, 2022 WI 8, ¶¶17-22, 400 Wis.2d 549, 970 N.W.2d 12. If the crime involved carries a life term, the commitment period may be life, subject to the person's right to petition for release on conditions. Wis. Stat. § 971.17(1)(c).

The maximum commitment period varies depending on the time the offense was committed. For crimes committed before July 30, 2002, the specified period of the commitment shall not exceed two-thirds of the sentence that could have been imposed for the crime committed. § 971.17(1)(a). For crimes committed on or after July 30, 2002, the specified period of the commitment shall not exceed the maximum term of confinement of a bifurcated sentence that could be imposed for the crime committed. § 971.17(1)(b). Both maximum terms are subject to increases under applicable penalty enhancement statutes and reduction for sentence credit under § 973.155.

D. Commitment And Criminal Sentences

What to do when a person committed under § 971.17 is convicted for a new crime was addressed in State v. Szulczewski, 216 Wis.2d 494, 574 N.W. 660 (1998). The supreme court held that the § 971.17 commitment provides "legal cause" for possible stay of execution of sentence under § 973.15(8)(a). The sentencing court may exercise discretion in determining whether to stay execution of the new prison sentence, balancing the purposes of the commitment with the traditional purposes of criminal sentencing: deterrence, rehabilitation, retribution, and segregation.

A criminal sentence for a defendant in this situation cannot be ordered to run consecutively to the Chapter 971 commitment, because the commitment is not a "sentence." State v. Harr, 211 Wis.2d 584, 568 N.W.2d 307 (Ct. App. 1997). Thus, the judge sentencing in the new criminal case apparently has two options: impose sentence that will begin immediately, requiring that the defendant be transferred from the mental hospital to prison; or, stay the execution of the new criminal sentence in the exercise of discretion as suggested in Szulczewski.

IV. The Right Of A Committed Person To Refuse Medication

The Wisconsin Supreme Court has held that all involuntarily committed persons have the right to refuse psychotropic medication. State ex rel. Jones v. Gerhardstein, 141 Wis.2d 710, 416 N.W.2d 883 (1987). This includes persons committed under § 971.17 as not guilty by reason of mental disease or defect. Persons can be compelled to submit to medication if the committing court issues an order which specifically permits it.

1989 Wisconsin Act 31 revised §§ 971.16 and 971.17 to provide for the findings required by the Jones decision. (See sections 2854d, 2854h, and 2856 of 1989 Wisconsin Act 31, effective date: August 9, 1989.) These revisions were reenacted by 1989 Wisconsin Act 334. The other changes require the examiners to include findings regarding the medication issue in their reports, require the court to make a determination on the issue at the time of commitment, and establish a procedure for returning to court after commitment for a determination of competence to refuse medication.

The standard for evaluating competence to refuse medication is set forth in § 971.16(3):

> . . . The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the defendant, one of the following is true:
>
> (a) The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> (b) The defendant is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

In State v. Wood, 2010 WI 17, 323 Wis.2d 321, 780 N.W.2d 63, the Wisconsin Supreme Court rejected due process based challenges to the involuntary medication procedures in § 971.17 and an administrative directive (AD-11-97) the Department of Health Services had adopted relating to seeking involuntary medication orders:

> ¶4 We are satisfied that Wis. Stat. § 971.17(3)(c) and AD-11-97 comport with the due process provisions of the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution for two reasons. First, we conclude that due process does not require a finding of dangerousness to issue an order compelling involuntary medication of a person committed under Wis. Stat. Ch. 971. Even if due process required such a finding, there would be no violation because the statutory language of Wis. Stat. § 971.17(3)(c), along with AD-11-97, effectively provide for such a finding. Second, we conclude that due process requires periodic review of the compelled

involuntary medication order, and that Wis. Stat. § 971.17(3)(c) and AD-11-97 satisfy that requirement as well.

Findings regarding refusal of medication may be necessary at the time the commitment decision is made (§ 971.17(3)(b)) or upon petition by the department regarding persons placed in institutional care who are not subject to an order relating to refusal of medication (§ 971.17(3)(c)).

However, the relevant statutory provisions (§ 971.17(3)(e) and (4)) do not authorize the department to petition for a medication order regarding persons placed in conditional release who are not subject to a medication order issued under § 971.17(3)(b) when the commitment decision was made.

The committee believes the statute does not authorize the department to seek medication orders for persons on conditional release because such persons will be required to comply with recommended medication and treatment as a condition of release, and their failure to do so would result in revocation of conditional release and placement in institutional care, at which point the department could petition under § 971.17(3)(c).

V. Reexamination; Petition For Conditional Release

A. Crimes Committed Before January 1, 1991: Reexamination

A person committed as not guilty by reason of mental disease or defect for an offense occurring before January 1, 1991, may petition the committing court for reexamination of his "mental condition," § 971.17(2), 1987 88 Wis. Stats. There is a right to a jury at the reexamination hearing. State ex rel. Gebarski v. Milwaukee County Circuit Court, 80 Wis.2d 489, 256 N.W.2d 531 (1977).

Reexamination hearings held for persons committed as not guilty by reason of mental disease or defect are not to be closed to the public and press without proper findings. Section 51.20(12) does not require such closure upon a simple request; it requires the same exercise of discretion as in other cases where closing the courtroom is an issue. State ex rel. Wisconsin State Journal v. Circuit Court, 131 Wis.2d 515, 389 N.W.2d 73 (Ct. App. 1986).

Section 971.17(2) was amended by supreme court order to allow the receipt of testimony over the telephone at the reexamination hearing: "Upon consent of all parties and approval by the court for good cause shown, testimony may be received into the record of the hearing by telephone or live audiovisual means." Order of the Wisconsin Supreme

Court dated October 29, 1987. 141 Wis.2d xxi xli. Also see Fullin and Williams, "Teleconferencing Comes To Wisconsin Courts," Wisconsin Bar Bulletin, January 1988.

1. Issue To Be Determined

The sole issue upon reexamination is the defendant's dangerousness; mental illness need not be established. State v. Gebarski, 90 Wis.2d 754, 280 N.W.2d 672 (1979).

2. Burden Of Proof

The burden of proof at the reexamination hearing is on the State to prove that the defendant cannot be safely discharged or released. State v. Gebarski, supra. The standard of proof is "to a reasonable certainty by evidence that is clear, satisfactory, and convincing." State v. Gladney, 120 Wis.2d 486, 355 N.W.2d 547 (Ct. App. 1984).

3. Jury Instructions

a. JI-Criminal 660

JI-660 is the preliminary instruction to be used at the beginning of the reexamination hearing. It advises the jury of the petitioner's status and identifies the issue the jury will be asked to decide.

b. JI-Criminal 661

JI-661 is the instruction to be used after evidence has been received at the reexamination hearing. It identifies the dangerousness of the petitioner as the sole issue for the jury to decide. The continued validity of dangerousness as the only criterion is discussed in note 2, JI-661. JI-661 identifies the three possible verdicts that may be returned: one providing that the petitioner be recommitted to the department; one providing for release on conditions to be determined by the court; and one providing for discharge. These three questions were identified as the ones to be submitted to the jury in State ex rel. Gebarski v. Milwaukee County Circuit Court, 80 Wis.2d 489, 502, 256 N.W.2d 531 (1977).

c. JI-Criminal 662

JI-662 provides the actual verdict forms for use on reexamination. It assumes that a six person jury will be used and that a five-sixths verdict is acceptable, both by analogy to reexamination procedures in civil commitment cases.

B. Crimes Committed On Or After January 1, 1991: Petition for Conditional Release

For persons found not guilty by reason of mental disease or defect for offenses committed after January 1, 1991, the right to reexamination is replaced by the right to petition for conditional release. Procedures are set forth in § 971.17(4) in great detail. There is no longer a general cross reference to procedures in Chapter 51.

A petition for conditional release may be filed if at least six months have elapsed since the initial commitment order, the denial of the previous conditional release petition, or the revocation of conditional release. However, the director of the institution where the person is placed may file a petition on the person's behalf at any time.

A series of time limits apply once a timely petition is filed: within 20 days, one or more examiners shall be appointed; within 30 days of their appointment, the examiners shall file a written report; and within 30 days of the filing of the report, a hearing on the petition shall be held (unless the person waives the time limits). Testimony may be received at the hearing by telephone or live audio-visual means "upon a showing by the proponent of good cause under s. 807.13(2)(c)." Section 971.17(7)(d), created by Order of the Wisconsin Supreme Court, October 31, 1990.

After the hearing, "the court shall grant the petition unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or others or of serious property damage if conditionally released." § 971.17(4)(d) The same list of factors applicable to the commitment decision are specified for consideration, "without limitation by enumeration," for application to the conditional release decision. In State v. Wenk, 2001 WI App 268, 248 Wis.2d 714, the court of appeals affirmed the denial of conditional release where the trial court found that the individual remained dangerous because he had a significant substance abuse problem which triggered previous bouts of mental illness and criminal conduct and that he had relapsed when previously released.

If the court grants conditional release, § 971.17(4)(e) provides that "the department of health services and the county department under § 51.42 in the county of residence of the person shall prepare a plan that identifies the treatment and services, if any, that the person will receive in the community." The statute specifies the topics that shall be addressed in the plan.

The statutory changes made by 1989 Wisconsin Act, also provided for a petition for termination of the commitment by a person who is on conditional release. The procedures

and standards are spelled out in § 971.17(5) and parallel those that apply to the commitment and conditional release decisions. Section 971.17(6) provides for proceeding against the person under Chapter 51 at the expiration of the commitment.

C. Mental Illness And Dangerousness

The sole issue for reexaminations for pre-1991 cases and for petitions for conditional release for post-January 1, 1991, cases is the continued dangerousness of the committed person. The viability of this standard was in question following the decision of the United States Supreme Court in Foucha v. Louisiana, 504 U.S. 71 (1992). The uncertainty was resolved in favor of the standard in State v. Randall, 192 Wis.2d 800, 532 N.W.2d 94 (1995).

Foucha was found not guilty by reason of insanity under Louisiana statutes that are the rough equivalent of the procedures in place in Wisconsin. Both are based on the ALI Model Penal Code. He was committed to a mental institution. He could gain release by proving that he was no longer dangerous. In Louisiana, commitment is "indefinite" in the sense that the duration of mental commitment is not limited by the maximum prison sentence the defendant would have faced if convicted. Foucha, however, had been detained for 8 years at the time this litigation began; his maximum prison sentence if convicted would have been 32 years.

Foucha petitioned for release. Doctors indicated that he was not suffering from mental illness, but they could not "certify that he would not constitute a menace to himself or others if released." Based on this record, the trial court ruled that Foucha was "dangerous" and ordered him returned to the mental institution. The United States Supreme Court held that this statutory scheme was unconstitutional:

> In this case, Louisiana does not contend that Foucha was mentally ill at the time of the trial court's hearing. Thus, the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis. 504 U.S. 71, 78.

The Court reaffirmed that automatic commitment continues to be permissible after the finding of not guilty by reason of insanity: ". . . it could be properly inferred that at the time of the verdict, the defendant was still mentally ill and dangerous and hence could be committed." 504 U.S. 71, 76. But that commitment apparently can continue only "until such time as he has regained his sanity or is no longer a danger to himself or society." 504 U.S. 71, 78.

Wisconsin's procedure is the same as Louisiana's in one respect: automatic commitment with release only if the state fails to prove that the defendant remains dangerous. Lack of mental illness is not grounds for release if dangerousness continues. The latter was established in the Gebarski litigation. But Wisconsin limits the mental commitment to the maximum prison sentence that could have followed conviction, while Louisiana allows indefinite commitment.

In State v. Randall, the Wisconsin Supreme Court addressed the impact of Foucha on Wisconsin's commitment and release procedures. The court held that allowing the continued confinement of an insanity acquittee who is no longer mentally ill, solely on the grounds that the individual is a danger to himself, herself, or others, does not deny the individual due process:

> We hold that it is not a denial of due process for an insanity acquittee who has committed a criminal act to be confined in a state mental health facility for so long as he or she is considered dangerous, provided that the commitment does not exceed the maximum term of imprisonment which could have been imposed for the offense charged. We think the fact that an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act justifies the disposition set forth by the legislature in sec. 971.17(2), Stats. Furthermore, we believe that our decision here is not inconsistent with . . . Foucha v. Louisiana. . . . [W]e read Foucha to permit the continued confinement of dangerous but sane acquittees in a mental health facility, so long as they are treated in a manner consistent with the purposes of their commitment, e.g., there must be a medical justification to continue holding a sane but dangerous insanity acquittee in a mental health facility.
>
> . . . .
>
> . . . . Under Wisconsin's statutory scheme, the acquittee, once committed, is subject to treatment programs specifically designed to treat both mental and behavioral disorders. Treatment designed to reduce those behavioral disorders which render the individual dangerous may continue even after clinical signs of mental illness are no longer apparent. Such treatment is necessary to realize the ultimate goal of safely returning the acquittee into the community. Because this state's mental health facilities provide such comprehensive treatment we cannot conclude that it is punitive to continue an acquittee's confinement based on dangerousness alone. Rather, we conclude that there is a reasonable relationship between the commitment and the purposes for which the individual is committed and, therefore, that insanity acquittees are treated in manner consistent with the purposes of their commitment. 192 Wis.2d 800, 806 808.

Thus, the court emphasized two aspects of the Wisconsin commitment scheme to distinguish it from the system reviewed in Foucha. First, the Wisconsin commitment is limited to the maximum term of criminal punishment that would have resulted if the offender had been convicted. Second, the acquittee continues to receive treatment appropriate to the purpose of the commitment, treatment which must go to the "behavioral disorder" or "behavioral disability" that makes the individual dangerous if the person is no longer clinically mentally ill. Under these circumstances, a single standard for continued commitment – based on dangerousness alone – is permissible.

The result of the Wisconsin Supreme Court decision in Randall was a remand to the circuit court where Randall requested another reexamination in light of the standard the court established. He was denied release and appealed. The court of appeals found the jury instructions used on the second reexamination complied with due process. State v. Randall, 222 Wis.2d 53, 586 N.W.2d 318 (Ct. App. 1998).

COMMENT

This Introductory Comment was originally published in 1980 with the number 601-662. It was revised in 1982, 1984, 1988, 1989, 1990, 1992, 1995, 2003, 2010, and 2022. This revision was approved by the Committee in February 2023.

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601 INSTRUCTION PRIOR TO TRIAL UPON A PLEA OF NOT GUILTY JOINED WITH A PLEA OF NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT

The Defendant's Two Pleas

The defendant, (name of defendant) , has entered two pleas to the charge of (charge) : not guilty and not guilty by reason of mental disease or defect.[1]

Two Phase Trial

The law requires that the issues raised by the two pleas be decided in a continuous trial that is separated into two phases.[2] Your verdict will be taken at the end of each phase. You are to consider only the issues presented to you during each phase. You are not to consider any issues other than those presented to you for each verdict.

CONTINUE WITH THE FOLLOWING IF A COMPLETE DESCRIPTION OF THE TWO PHASES IS DESIRED:[3]

The First Phase

In the first phase of this trial, you will be asked to determine whether the defendant is guilty of the charge of (charge) . You will make this determination solely upon the facts which deal with the actual incident alleged in the information. During this first phase, you will not be asked to determine whether at the time of the incident the defendant was suffering from mental disease or defect.

If, after the first phase of the trial, you find the defendant not guilty, the trial will be over. If you find the defendant guilty, the trial will move to a second phase.

The Second Phase

During the second phase, you will be asked to determine whether the defendant is responsible for criminal conduct. Wisconsin law provides that a person is not responsible for criminal conduct if, at the time it was committed, the person had a mental disease or defect and as a result lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform the conduct to the requirements of law. If the trial proceeds into this second phase, you will be instructed more fully as to your duties at that time.

We will now begin the first phase of the trial. I again caution you that this first phase is concerned solely with the question of whether the defendant committed the crime of (charge) as set forth in the information.

EVIDENCE TAKEN ON THE ISSUE OF GUILT.

COMMENT

Wis JI-Criminal 601 is part of a series of instructions which replaces the instructions formerly numbered 600-CPC through 655-CPC. Wis JI-Criminal 601 and comment were originally published in 1980, revised in 1984, and republished without change in 1988 and 1990. The 2003 revision involved adoption of the new format and changes in the text. It was republished without change in 2011.

1. This instruction is drafted for use where the plea is based on the presence of a mental disease or mental defect. If a case involves a claim that the combined effect of a "mental disease" and a "mental defect" is involved, the term "mental disease and defect" should be used throughout. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986), dealt with that situation. The court held that it was not error to phrase the jury instructions in the conjunctive – mental disease and defect – since the theory of defense was that the defendant suffered from both a disease and a defect, the combined effect of which was the lack of substantial capacity to appreciate the wrongfulness of his conduct. The court noted that to use "or" would have frustrated the proffered defense; and to use "and/or" would not have been desirable.

2. Informing the jury of the two phases of the trial is required by § 971.165(1)(b).

3. In the Committee's judgment, the first two paragraphs of the instruction are sufficient to advise the jury of the nature of the two phases of the bifurcated trial. The rest of the instruction is considered to be optional, for use where the judge wishes to give a more complete description.

602 INSTRUCTION AFTER EVIDENCE HAS BEEN RECEIVED ON ISSUE OF GUILT WHERE A PLEA OF NOT GUILTY HAS BEEN JOINED WITH A PLEA OF NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT

THE FOLLOWING MAY BE ADDED TO WIS JI-CRIMINAL 100 – OPENING INSTRUCTION – OR GIVEN FOLLOWING THE INSTRUCTION ON THE OFFENSE CHARGED

In this first phase of the trial, you have heard evidence that dealt solely with the defendant's conduct during the alleged incident. You are to determine only whether the defendant is guilty of the charge of (charge) . If you find the defendant not guilty, the trial will be over. If you find the defendant guilty, the trial will proceed to the second phase, where you will determine whether the defendant was not responsible by reason of mental disease or defect.

COMMENT

Wis JI-Criminal 602 is part of a series of instructions which replaced the instructions formerly numbered 600-CPC through 655-CPC. Wis JI-Criminal 602 was originally published in 1980. The Comment was revised in 1982 and 1984, and republished without change in 1988, 1990, and 2003. The 2003 revision involved adoption of the new format and changes in the text. It was republished without change in 2011.

This instruction is intended to be used at the end of the first phase of the trial, either as part of the opening instruction (Wis JI-Criminal 100) or as an introductory paragraph to the instruction for the offense charged.

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603 PRELIMINARY INSTRUCTION AFTER FINDING OF GUILT AND BEFORE CONSIDERATION OF WHETHER THE DEFENDANT SUFFERED FROM A MENTAL DISEASE OR DEFECT AT THE TIME OF THE OFFENSE

The defendant has been found guilty[1] of (offense) .

IF THE FIRST PHASE WAS RESOLVED WITH A PLEA OF GUILTY OR NO CONTEST, ADD THE FOLLOWING:

[The elements of (offense) are:

SPECIFY THE ELEMENTS OF THE CRIME BY REFERRING TO THOSE LISTED IN THE APPLICABLE JURY INSTRUCTION.[2]]

We will now proceed with the second phase of this trial. During the second phase, you will be asked to determine whether the defendant is not responsible by reason of mental disease or defect.[3]

The Defendant's Burden of Proof

Before you may find that the defendant is not responsible for the criminal conduct, the defendant must satisfy you to a reasonable certainty by the greater weight of the credible evidence[4] that at the time the crime was committed, the defendant had a mental disease or defect and as a result lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law.

Two Questions

This issue will be presented to you in the form of two questions.[5]

1. At the time the crime was committed, did the defendant have a mental disease or defect?

2. As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law?

You will be asked to answer the second question only if you answer the first question "yes."

If you find that the defendant is not responsible for the criminal conduct, the defendant will be committed to the custody of the Department of Health Services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to (himself) (herself) or to others if released under conditions ordered by the court.[6] The only issue at this second phase of the trial is the defendant's mental condition at the time of the offense.

PROCEED WITH EVIDENCE ON THE DEFENDANT'S MENTAL CONDITION AT THE TIME OF THE OFFENSE.

COMMENT

Wis JI-Criminal 603 is part of a series of instructions which replaces the instructions formerly numbered 600-CPC through 655-CPC. Wis JI-Criminal 603 and comment were originally published in 1980 and revised in 1982, 1984, 1988, 1990, 2002, and 2005. This revision was approved by the Committee in December 2010 and involved minor editorial changes.

This instruction is for the second stage of the trial held upon the defendant's special plea of not guilty by reason of mental disease or defect. The second stage is to be held before the same jury that found that the defendant committed the crime, except that a new jury may be drawn if the jury has been discharged before reaching a verdict on the second plea or if an appellate court has reversed the judgment as to the second plea but not the first. § 971.165(1)(c)2. and 3. Also see State v. Sarinske, 91 Wis.2d 14, 280 N.W.2d 725 (1979); State v. Grennier, 70 Wis.2d 204, 234 N.W.2d 316 (1975). If the defendant coupled a guilty plea with the special plea, a jury would have to be convened if one is requested on the issue of criminal responsibility. The usual procedures for accepting a guilty plea should have been followed to assure that the plea was voluntarily entered and that a factual basis for the plea exists. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986).

Appropriate general instructions, such as those on credibility of witnesses, expert testimony, arguments and objections of counsel, etc., should also be given as required.

The Wisconsin statutes relating to mental responsibility were modeled after Section 4.01 of the ALI Model Penal Code. The Commentary to Section 4.01 is found in Tentative Draft No. 4, beginning at page 156.

1. This instruction is drafted for use before the second phase of the trial begins. It may be used not only where the first phase was tried to the jury but also where the judge sitting without a jury heard the first phase and where the defendant coupled a plea of guilty or no contest with the plea of not guilty by reason of mental disease or defect. See note 2, below.

2. The committee recommends advising the jury of the elements of the crime that were established at the first phase by a plea of guilty or no contest. This will put the jury in a position similar to that of a jury that made the decision in a case where the first phase was tried to a jury. Just listing the elements as they appear in the applicable instruction is sufficient.

3. If a case involves a claim that the combined effect of a "mental disease" and a "mental defect" is involved, the term "mental disease and defect" should be used throughout. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986), dealt with that situation. The court held that it was not error to phrase the jury instructions in the conjunctive – mental disease and defect – since the theory of defense was that the defendant suffered from both a disease and a defect, the combined effect of which was the lack of substantial capacity to appreciate the wrongfulness of his conduct. The court noted that to use "or" would have frustrated the proffered defense. And to use "and/or" would not have been desirable.

4. This burden of proof is required by § 971.15(3).

5. The Committee determined that separating the issue into two questions would make the requirements clearer for the jury. Presenting the issue in the form of two questions is intended to make clear that not only must a mental disease or defect be present at the time of the offense but also that the mental disease or defect must have had the required effect on the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

6. The instruction's description of what will happen to the defendant if found not responsible is based on § 971.165(2) which directs that the result be described to the jury and reads as follows:

> (2) If the plea of not guilty by reason of mental disease or defect is tried to a jury, the court shall inform the jury that the effect of a verdict of not guilty by reason of mental disease or defect is that, in lieu of criminal sentence or probation, the defendant will be committed to the custody of the department of health services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to himself or herself or to others if released under conditions ordered by the court.

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605 INSTRUCTION ON THE ISSUE OF THE DEFENDANT'S CRIMINAL RESPONSIBILITY — MENTAL DISEASE OR DEFECT[1]

You have just heard testimony about the defendant's mental condition at the time of the offense. You will now be asked to determine whether the defendant is not responsible by reason of mental disease or defect.[2]

Two Questions

This issue will be presented to you in the form of two questions.[3]

1. At the time the crime was committed, did the defendant have a mental disease or defect?
2. As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law?

You will be asked to answer the second question only if you answer the first question "yes."

The Defendant's Burden of Proof

Before you may answer a question "yes," the defendant must satisfy you to a reasonable certainty by the greater weight of the credible evidence[4] that the answer to that question should be "yes."

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.[5]

The First Question

The first question is: At the time the crime was committed, did the defendant have a mental disease or defect?

Meaning of "Mental Disease or Defect"

Mental disease or defect is an abnormal condition of the mind which substantially affects mental or emotional processes.[6]

The term "mental disease or defect" identifies a legal standard that may not exactly match the medical terms used by mental health professionals. You are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect to which the witnesses may have referred.[7]

You should not find that a person is suffering from a mental disease or defect merely because the person committed a criminal act, or because of the unnaturalness or enormity of the act, or because a motive for the act may be lacking.[8]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE

[Temporary passion or frenzy prompted by revenge, hatred, jealousy, envy, or the like does not constitute a mental disease or defect.][9]

[An abnormality manifested only by repeated criminal or otherwise antisocial conduct does not constitute a mental disease or defect.][10]

[A voluntarily induced state of intoxication by drugs or alcohol or both does not constitute a mental disease or defect.][11]

[A temporary mental state which is brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental disease or defect.][12]

[Chronic use of drugs or alcohol may produce a condition that can constitute a mental disease or defect if the condition has become permanent.][13]

Jury Decision on the First Question

If you answer the first question "yes," you must go on to answer the second question. If you answer the first question "no," you should not consider the second question.

The Second Question

The second question is: As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law?[14]

If You Answer Both Questions "Yes"

If you answer both of these questions "yes," the defendant will be found to be not responsible for the offense, and will be committed to the Department of Health Services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to (himself) (herself) or to others if released under conditions ordered by the court.[15] In deciding whether the defendant is responsible for the criminal conduct, you are to consider only the issue of the defendant's mental condition at the time the offense was committed.

Verdict

Agreement by ten or more jurors is sufficient to become the verdict of the jury.[16] Jurors have a duty to consult with one another and to deliberate for the purpose of reaching agreement. At least the same ten jurors should agree in all the answers made. I ask you to be unanimous if you can.

At the bottom of the verdict, you will find a place provided where dissenting jurors, if any, will sign their names and state the answer or answers with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

COMMENT

Wis JI-Criminal 605 is part of a series of instructions which replaces the instructions formerly numbered 600-CPC through 655-CPC. Wis JI-Criminal 605 and comment were originally published in 1980 and revised in 1982, 1984, 1988, 1990, and 2003. The 2003 revision involved combining both mental disease and mental defect in a single instruction, adoption of the new format and changes to the text. This revision was approved by the Committee in December 2010 and involved minor editorial changes.

This instruction is for the second stage of the trial held upon the defendant's special plea of not guilty by reason of mental disease or defect. The second stage is to be held before the same jury that found that the defendant committed the crime, except that a new jury may be drawn if the jury has been discharged before reaching a verdict on the second plea or if an appellate court has reversed the judgment as to the second plea but not the first. § 971.165(1)(c)2. and 3. Also see State v. Sarinske, 91 Wis.2d 14, 280 N.W.2d 725 (1979); State v. Grennier, 70 Wis.2d 204, 234 N.W.2d 316 (1975). If the defendant coupled a guilty plea with the special plea, a jury would have to be convened if one is requested on the issue of criminal responsibility. The usual procedures for accepting a guilty plea must have been followed to assure that the plea was voluntarily entered and that a factual basis for the plea exists. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986).

In State v. Leach, 124 Wis.2d 648, 370 N.W.2d 240 (1985), reversing (as to this issue) 122 Wis.2d 339, 363 N.W.2d 234 (Ct. App. 1984), the Wisconsin Supreme Court held that the defendant may be held to a burden of producing sufficient evidence on the responsibility issue before it need be submitted to the jury. See page 5 of the Introductory Comment that precedes Wis JI-Criminal 601.

1987 Wisconsin Act 86 (effective date: November 28, 1987) created § 971.165(2) which provides that a five-sixths verdict applies at the second phase.

Appropriate general instructions, such as those on credibility of witnesses, expert testimony, arguments and objections of counsel, etc., should also be given as required.

See Wis JI-Criminal 605B for a suggested verdict form.

In State v. Wery, 2007 WI App 169, 304 Wis.2d 355, 737 N.W.2d 66, the court of appeals held that the regular rule against impeaching a jury=s verdict applies to the verdict returned after the first phase of the trial. After the first phase, the jury was polled and each juror indicated that "guilty" was his or her verdict. After deliberations for the second phase had begun, the foreperson informed the court that one of the jurors disagreed with the guilty verdict. The court of appeals held that the defendant "fails to persuade us that the traditional rules barring impeachment of a jury verdict in instances of juror remorse do not apply in a bifurcated setting." Wery, ¶18.

The Wisconsin statutes relating to mental responsibility were modeled after section 4.01 of the ALI Model Penal Code. The Commentary to section 4.01 is found in Tentative Draft No. 4, beginning at page 156.

1. This instruction is drafted for use where the plea is based on the presence of a mental disease or mental defect. Former Wis JI-Criminal 605A, which provided a separate instruction for cases involving "mental defect" has been withdrawn and combined with this instruction. If a case involves a claim that the combined effect of a "mental disease" and a "mental defect" is involved, the term "mental disease and defect" should be used throughout. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986), dealt with that situation. The court held that it was not error to phrase the jury instructions in the conjunctive – mental disease and defect – since the theory of defense was that the defendant suffered from both a disease and a defect, the combined effect of which was the lack of substantial capacity to appreciate the wrongfulness of his conduct. The court noted that to use "or" would have frustrated the proffered defense. And to use "and/or" would not have been desirable.

2. The Committee determined that phrasing the issue in terms "responsible or not responsible" is preferable to "guilty but not guilty by reason of mental disease or defect."

3. The Committee determined that separating the issue into two questions would make the requirements clearer for the jury. Presenting the issue in the form of two questions is intended to make clear that not only must a mental disease or defect be present at the time of the offense but also that the mental disease or defect must have had the required effect on the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

4. This burden of proof is required by § 971.15(3).

5. This is a slight revision of the standard description of the civil burden of proof, intended to improve its understandability. No change in meaning is intended.

6. This definition of was arrived at after considerable discussion. The previous Wisconsin instructions had no definition of "mental disease or defect" nor does the section of the ALI Model Penal Code after which the Wisconsin statute was modeled have a definition. (See Comment to § 4.01, ALI Model Penal Code, Tent. Draft No. 4.) The 2002 revision changed the former instruction to refer to "mental disease or defect."

The definition in the instruction was adapted from the one proposed by the court in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). The Brawner case is the leading attempt to define "mental disease or defect" and has been the model for most other attempts to do so although relatively few states or federal courts have developed a definition.

The Committee determined that a positive definition should be attempted, in addition to the negative statements that have been retained from the prior instructions. (For example, "Temporary passion . . . does not constitute a mental disease or defect.") The only indication in Wisconsin law of what is a mental disease or defect is a decision of the Wisconsin Supreme Court holding that psychomotor epilepsy may be legally classified as a mental disease or defect. Sprague v. State, 52 Wis.2d 89, 187 N.W.2d 784 (1971).

The Committee did consider the definition of "mental illness" provided in Wis. Stat. § 51.01(13)(b) but concluded it was not well-suited for the purposes of this instruction. However, in a proper case, there may be merit in including the references to "thought, mood, perception, orientation, or memory" that are found in § 51.01(13)(b). Psychiatrists rely on symptoms affecting these mental functions to determine whether or not mental illness is present. If expert testimony is linked directly to such functions, it may be helpful to the jury to tailor an instruction to coincide with the testimony.

The "mental disease or defect" definition is intentionally broad. Disabilities may qualify under this definition that are not sufficient to relieve the defendant of responsibility. The limits are furnished by the second question in the instruction, which requires that the mental disease or defect have the effect of substantially impairing the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

The Committee reviewed the definition in 1984 and reaffirmed it with the exception of deleting the following phrase which formerly concluded the definition: "and can impair behavioral controls." The deleted phrase was found to serve no useful purpose. As revised, the definition closely resembles the definition set forth in the ABA Criminal Justice Mental Health Standards. Approved by the ABA in August 1984, standard 7.6.1 provides:

> (b) When used as a legal term in this standard "mental disease or defect" refers to:
> (i) impairments of mind, whether enduring or transitory; or,
> (ii) mental retardation,
> either of which substantially affected the mental or emotional processes of the defendant at the time of the alleged offense.

The definition adopted in the instruction has been criticized as too "wide-open." However, the Committee concluded that using the definition to limit the admissibility of evidence was inappropriate, especially in the absence of legislative action. Long-established Wisconsin case law holds: ". . . no evidence should be excluded which reasonably tends to show the mental condition of the defendant at the time of the offense." State v. Carlson, 5 Wis.2d 595, 607, 93 N.W.2d 354 (1958); cited with approval in Esser v. State, 16 Wis.2d 567, 593-94, 115 N.W.2d 505 (1962). These cases preceded the adoption of the ALI tests in Wisconsin but were cited in support of that adoption: Since any evidence of mental disease or defect, regardless of medical label, was admissible, it was fair to impose the burden of persuasion on the defendant. Consistent with this principle, the Committee concludes that the proper way to limit inappropriate evidence is to apply the standards for relevancy used in all other situations: Is the proffered testimony relevant to the issue of the defendant's ability to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law? A

recent federal case has emphasized this as the proper approach, United States v. Gould, 741 F.2d 45 (4th Cir. 1984).

The Committee continues to place great importance on the concept that medical terms and labels are not the central issue, it is the legal conclusion that is significant: Regardless of the medical label, did the mental disease or defect have the required effect on the accused person's behavior? It is this aspect that is emphasized in the second question in the instruction.

7. This is adapted from United States v. Brawner, cited above, note 6. The intent of this sentence is to emphasize that the jury is not bound by what is considered "mental disease or defect" for medical purposes. The jury is bound by the legal definition of mental disease or defect as explained in this instruction. In a proper case, the judge may wish to emphasize this distinction.

8. This paragraph, or at least a modified version, is probably appropriate for almost all cases. The paragraphs which follow, identifying conditions which do not constitute mental disease for the purpose of determining criminal responsibility, may be read in all cases or just in those cases where the condition discussed is raised by the evidence. The reason for reading each paragraph in all cases is that a complete picture of what is not considered a mental disease may help the jury to better understand what is included in that concept.

9. Duthey v. State, 131 Wis. 178, 111 N.W. 222 (1907).

10. See § 971.15(2) and Simpson v. State, 62 Wis.2d 605, 215 N.W.2d 435 (1974). The instruction follows the words of § 971.15(2) in referring to "an abnormality manifested only by repeated criminal or otherwise antisocial conduct." (Emphasis added.) In State v. Werlein, 136 Wis.2d 445, 401 N.W.2d 848 (Ct. App. 1986), the court of appeals held that a trial judge improperly invoked the statute in excluding evidence offered by the defendant. The decision hinged on the word "only." Because the proffered testimony was based on organic brain dysfunction and delusions in addition to antisocial conduct, the court held the § 971.15(2) exception did not apply. A case-by-case analysis is required (even where, as in Werlein, the expert witness characterized the mental disease as "antisocial personality disorder").

Like the Wisconsin mental responsibility test in general, the exclusion of the "antisocial personality" from the mental disease definition is modeled after section 4.01 of the ALI Model Penal Code. The Commentary to the Model Penal Code explains this exclusion as follows:

> Paragraph (2) of section 4.01 is designed to exclude from the concept of "mental disease or defect" the case of so-called "psychopathic personality." The reason for the exclusion is that, as the Royal Commission put it, psychopathy "is a statistical abnormality; that is to say, the psychopath differs from a normal person only quantitatively or in degree, not qualitatively; and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality." While it may not be feasible to formulate a definition of "disease," there is much to be said for excluding a condition that is manifested only by the behavior phenomena that must, by hypothesis, be the result of disease for irresponsibility to be established. Although British psychiatrists have agreed, on the whole, that psychopathy should not be called "disease," there is considerable difference of opinion on the point in the United States. Yet it does not seem useful to contemplate the litigation of what is essentially a matter of terminology; nor is it right to have the legal result rest upon the resolution of a dispute of this kind.

Commentary to section 4.01, ALI Model Penal Code (Tentative Draft No. 4, page 160).

11. Gibson v. State, 55 Wis.2d 110, 197 N.W.2d 813 (1972).

12. State v. Kolisnitschenko, 84 Wis.2d 492, 267 N.W.2d 321 (1978): a temporary psychotic state brought about by the interaction of a "stormy personality" and voluntary intoxication and which lasts only for the period of intoxication does not constitute a mental disease or defect.

13. State v. Kolisnitschenko, see note 12, supra.

14. It is sufficient that the mental disease or defect had either of the two specified effects on the defendant: impairment of capacity to appreciate the wrongfulness of the conduct or impairment of capacity to conform his conduct to the requirements of law.

15. The instruction's description of what will happen to the defendant if found not responsible is based on § 971.165(2) which directs that the result be described to the jury and reads as follows:

> (2) If the plea of not guilty by reason of mental disease or defect is tried to a jury, the court shall inform the jury that the effect of a verdict of not guilty by reason of mental disease or defect is that, in lieu of criminal sentence or probation, the defendant will be committed to the custody of the department and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to himself or herself or to others if released under conditions ordered by the court.

16. Section 971.165 (created by 1987 Wisconsin Act 86 – effective date: November 28, 1987) provides that a five-sixths verdict applies. State v. Koput, 142 Wis.2d 370, 418 N.W.2d 804 (1988), held that a five-sixths verdict applied even before the statute was changed.

605A INSTRUCTION ON THE ISSUE OF THE DEFENDANT'S CRIMINAL RESPONSIBILITY (Mental Defect)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 605A was originally published in 1980 and revised in 1984, 1988, 1990 and 1992. It was withdrawn by the Committee in October 2002.

This instruction was withdrawn because the Committee concluded that it was not necessary to have a separate instruction for "mental defect." Rather, "mental defect" has been included in Wis JI-Criminal 605, where the term "mental disease or defect" is used throughout.

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605B VERDICT: NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT

Question 1: At the time the crime was committed, did the defendant have a mental disease or defect?

Answer: _____
Yes or No

If you answer "yes" to question 1, answer question 2.

Question 2: As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law?

Answer: _____
Yes or No

Dissenting Juror(s): _____ as to Question(s) _____

_____ as to Question(s) _____

COMMENT

Wis JI-Criminal 605B was originally approved by the Committee in October 2002. It was republished without change in 2011.

This provides a suggested verdict for the jury's finding at the second stage of the bifurcated trial.

The verdict should be changed to refer to "mental disease and defect" if the plea is based on the combined effect of a mental disease and a mental defect. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986), dealt with that situation. The court held that it was not error to phrase the jury instructions in the conjunctive – mental disease and defect – since the theory of defense was that the defendant suffered from both a disease and a defect, the combined effect of which was the lack of substantial capacity to appreciate the wrongfulness of his conduct. The court noted that to use "or" would have frustrated the proffered defense; and to use "and/or" would not have been desirable.

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606 PRELIMINARY INSTRUCTION UPON A FINDING OF NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT

607 INSTRUCTION ON COMMITMENT FOLLOWING A FINDING OF NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 606 and 607 were published in 1980. They were withdrawn by the Committee in 1984. This withdrawal note was republished without change in 1988. The second paragraph below was added in 1990. The note was republished without change in 2011.

These instructions were a preliminary and a final instruction for the third phase of the so-called "trifurcated" trial, held upon a plea of not guilty by reason of mental disease or defect. The third phase dealt with the issue of the present mental illness and need for institutionalized care of a person who had been found not responsible by reason of mental disease or defect. The third phase was abolished by State v. Field, 118 Wis.2d 269, 347 N.W.2d 365 (1984). Field overruled State ex rel. Kovach v. Schubert, 64 Wis.2d 612, 219 N.W.2d 341 (1974), by holding that automatic commitment following a finding of not guilty by reason of mental disease or defect does not violate constitutional principles of due process or equal protection.

Chapter 334, Laws of 1989, made further changes in the procedures relating to commitment. For offenses committed after January 1, 1991, commitment to an institution is no longer automatic. Rather, § 971.17(3) provides that the court must determine whether there shall be institutional care or conditional release. Conditional release shall be ordered unless the court "finds by clear and convincing evidence that conditional release of the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage." See the discussion in the Introductory Comment, Wis JI-Criminal 600.

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

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

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

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

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

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

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

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

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

COMMENT

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

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

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

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

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

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

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

650 ADVICE TO A PERSON FOUND NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT

THE FOLLOWING SHOULD BE READ TO A PERSON WHO IS FOUND NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT AND COMMITTED TO THE DEPARTMENT OF HEALTH SERVICES

"The court is required to inform you that Section 941.29 of the Wisconsin Statutes provides that if you possess a firearm at any time after being found not guilty of a felony by reason of mental disease or defect you may be sentenced to a term of imprisonment not to exceed 10 years or to pay a fine not to exceed $25,000, or both.[1]

INCLUDE THE FOLLOWING IF THE PERSON HAS BEEN FOUND NOT GUILTY OF A VIOLENT FELONY BY REASON OF MENTAL DISEASE OR DEFECT[2]

["The court is required to inform you that Section 941.291 of the Wisconsin Statutes provides that if you possess a body armor at any time after being found not guilty of a violent felony by reason of mental disease or defect you may be sentenced to a term of imprisonment not to exceed 15 years or to pay a fine not to exceed $50,000, or both.]

"The court has ordered that you be committed to the Department of Health Services and placed in an institution for the reason that you have been found not guilty of (name of crime) by reason of mental disease or defect. You have the right to appeal the finding that you committed (name of crime).[3] You also have the right to appeal this court's decision to place you in an institution.[4] And you have the right to ask the court to order that you be released from the institution on conditions after you have been there for at least six months.[5]

"You should discuss all of these matters with your attorney. Your attorney is directed to explain these rights to you and to take all necessary actions on your behalf to assure that any rights you wish to pursue are preserved."

COMMENT

This was originally published as SM-50A in 1974 and was revised in 1980 and 1990. It was revised and renumbered as JI 650 in 2004. This revision was approved by the Committee in December 2010 and involved minor editorial changes.

With the exception of the advice regarding possession of a firearm and body armor (see notes 1 and 2, below), the advice provided here is not explicitly required by statute or case law. However, the Committee recommends that it be given, since similar advice is required for all defendants convicted of criminal offenses. See § 973.18(2) and SM-33, INFORMATION ON POSTCONVICTION RELIEF.

1. Section 971.17(1g) requires that "the court shall inform the defendant of the requirements and penalties under s. 941.29." Section 941.29(1) and (2) provide that it is a Class G felony for a person "found not guilty of a felony in this state by reason of mental disease or defect" to possess a firearm. Subsection (7) of that statute provides that the section does not apply if a court subsequently determines that the person is no longer insane or no longer has a mental disease, defect, or illness and is not likely to act in a manner dangerous to public safety. The recommended advice in this instruction does not include the exception described in subsection (7).

2. Section 971.17(1h) requires that "[if] the defendant . . . is found not guilty of a violent felony, as defined in s. 941.291(1)(b), by reason of mental disease or defect, the court shall inform the defendant of the requirements and penalties under s. 941.291." Section 941.291 provides that it is a Class E felony for a person to possess body armor if the person "has been found not guilty of a violent felony in this state by reason of mental disease or defect." § 941.291(2)(d) and (3).

3. Section 971.165(3)(b) provides that a judgment of not guilty by reason of mental disease or defect "is interlocutory to the commitment order under s. 971.17 and reviewable upon appeal therefrom."

4. The standards for commitment to an institution are found in § 971.17(3)(a). If there is a claim that the standards were not met, it is assumed that the claim would be raised in an appeal from the commitment order. Section 971.165(3)(b) refers to appeal from that order. See note 3, supra.

5. The standards and procedures for a petition for conditional release are set forth in § 971.17(4)(a). Conditional release replaces reexamination under the former statutes. See Wis JI-Criminal 660-662.

655-CPC EFFECT OF FINDING OF NOT GUILTY BECAUSE OF MENTAL DISEASE OR DEFECT

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 655-CPC was originally published in 1971. It was withdrawn in 1983. Its substance has been incorporated into Wis JI-Criminal 603 and 605. This note was republished without change in 1988, 1990, and 2011.

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THIS INSTRUCTION APPLIES ONLY TO REEXAMINATIONS CONDUCTED FOR PERSONS ADJUDICATED NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT FOR OFFENSES COMMITTED PRIOR TO JANUARY 1, 1991.[1]

660 PRELIMINARY INSTRUCTION: REEXAMINATION OF PERSON COMMITTED AS NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT [§ 971.17(2)]

[THIS INSTRUCTION IS TO BE GIVEN TO THE JURY AT THE BEGINNING OF THE HEARING HELD TO REEXAMINE A PERSON COMMITTED AS NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT.]

The petitioner, (name), has requested a reexamination of his mental condition as provided by Wisconsin law. The petitioner was found to have committed a criminal offense but was found to be not responsible because he suffered from a mental disease or defect at the time of the offense. Following his trial, he was committed to the custody of the Wisconsin Department of Health Services.

The purpose of this hearing is to determine whether the petitioner, (name), may be safely discharged or released on conditions without danger to himself or to others, or whether he should be recommitted to the Wisconsin Department of Health Services to be placed in an appropriate institution for continued custody, care, and treatment.[2] After hearing the testimony, you will be asked to make this determination.

COMMENT

Wis JI-Criminal 660 was originally published in 1980 and revised in 1984. It was republished without change in 1988 and revised in 1990 and 1992. This revision was approved by the Committee in December 2010 and involved minor editorial changes.

1. Chapter 334, Laws of 1989, changed reexamination procedures for persons found not guilty by reason of mental disease or defect for offenses committed after January 1, 1991. The right to reexamination is

replaced by the right to petition for conditional release. See the discussion at Wis JI-Criminal 600, Introductory Comment. Reexamination procedures addressed by Wis JI-Criminal 660-662 continue to apply to persons committed for offenses occurring before January 1, 1991. § 971.17(8).

2. State ex rel. Gebarski v. Milwaukee County Circuit Court, 80 Wis.2d 489, 259 N.W.2d 531 (1977). The continued viability of the Gebarski dangerousness standard is open to question. See the discussion of Foucha v. Louisiana, United States Supreme Court, May 18, 1992, in Wis JI-Criminal 600, Introductory Comment, at V.,C., and in the comment to Wis JI-Criminal 661.

THIS INSTRUCTION APPLIES ONLY TO REEXAMINATIONS CONDUCTED FOR PERSONS ADJUDICATED NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT FOR OFFENSES COMMITTED PRIOR TO JANUARY 1, 1991.[1]

661 REEXAMINATION UNDER § 971.17(2)[2]

In this proceeding, (name of petitioner) has petitioned this court for reexamination of his mental condition[3] as he has a right to do under the law.

The issue raised by his petition is whether he may be safely discharged or released without danger to himself or others.[4]

The burden is on the State[5] to prove that (name of petitioner) cannot be safely discharged or released without danger to himself or others.

(Name of petitioner) need not prove that he can be safely discharged or released without danger to himself or others, and you are not to assume merely from the fact that he is confined at (name of institution) that he is presently a danger to himself or others. The State must convince you to a reasonable certainty by evidence which is clear, satisfactory, and convincing[6] that (name of petitioner) cannot be safely discharged or released without danger to himself or others.

The following three forms of verdict[7] will be submitted to you for your consideration:

One reading: "We, the jury, find (name of petitioner) should be recommitted to the custody of the department at an appropriate institution."

If you decide on this verdict, (name of petitioner) will be returned to an appropriate institution under his present status.

Another verdict reading: "We, the jury, find (name of petitioner) may be safely released upon such conditions as the court deems necessary."[8]

If you decide on this verdict, (name of petitioner) will remain in the legal custody of the department but will be released from the (name of institution) under such conditions deemed appropriate by this court.

Another verdict reading: "We, the jury, find (name of petitioner) may be safely discharged from the custody of the department."

If you decide on this verdict, (name of petitioner) will be released without restriction and will have his complete freedom as far as this case is concerned.

It is for you to determine which one of the forms of verdicts submitted you will bring in as your verdict.

The law provides that, in this case, the verdict is valid only if at least five (5)[9] members of the jury have agreed to it.

COMMENT

Wis JI-Criminal 661 was originally published in 1980 and revised in 1984, 1988, 1990, and 1992. It was republished without substantive change in 2011.

1. Chapter 334, Laws of 1989, changed reexamination procedures for persons found not guilty by reason of mental disease or defect for offenses committed after January 1, 1991. The right to reexamination is replaced by the right to petition for conditional release. See the discussion at Wis JI-Criminal 600, Introductory Comment. Reexamination procedures addressed by Wis JI-Criminal 660-662 continue to apply to persons committed for offenses occurring before January 1, 1991. § 971.17(8).

2. This instruction is recommended for use when a person committed as not guilty by reason of mental disease or defect receives a hearing on his petition of reexamination under § 971.17(2). The petitioner has the right to a jury at such a hearing, State ex rel. Gebarski v. Milwaukee County Circuit Court, 80 Wis.2d 489, 259 N.W.2d 531 (1977); at the hearing, the state has the burden of going forward with the evidence and the burden of proof. The only issue at the hearing is the defendant's dangerousness, see note 4 below.

Section 971.17(2) was amended by supreme court order to allow the receipt of testimony over the telephone at the reexamination hearing: "Upon consent of all parties and approval by the court for good cause shown, testimony may be received by telephone or live audiovisual means." Order of the Wisconsin Supreme Court dated October 29, 1987. 141 Wis.2d xxi-xli. Also see Fullin and Williams, "Teleconferencing Comes To Wisconsin Courts," Wisconsin Bar Bulletin, January 1988.

Appropriate general instructions, such as those on credibility of witnesses, expert testimony, arguments and objections of counsel, etc., should also be given as required.

The instruction assumes that the petition is filed by one who is confined in an institution and is seeking discharge or release on conditions. However, a person already released on conditions may also file a petition to seek outright release. In such a case, this instruction would have to be modified to accurately reflect the petitioner's status.

If the department wishes to transfer a person committed under § 971.17 to the care of a community board established under § 51.42 or § 51.437, the approval of the committing court must be obtained. See § 51.37(4).

3. Section 971.17(2) refers to this proceeding as a "reexamination of a defendant's mental condition." (Emphasis added.) Therefore, this phrase has been retained in the instruction even though the sole issue at the reexamination is dangerousness, and present mental illness need not be established. See State v. Gebarski, 90 Wis.2d 754, 280 N.W.2d 672 (1979).

4. In the second Gebarski decision, cited above, note 3, the Wisconsin Supreme Court held that dangerousness was the only issue on reexamination; the establishment of mental illness is required neither by statute (90 Wis.2d 754 at 761-68) nor by principles of equal protection and due process (90 Wis.2d 754 at 769-73).

Gebarski was decided at a time when Wisconsin law required that a finding of present mental illness and dangerousness be made before a defendant could be committed after being found not responsible by reason of mental disease or defect. This third phase of the "trifurcated" trial was abolished by the Wisconsin Supreme Court in State v. Field, 118 Wis.2d 269, 347 N.W.2d 365 (1984). Because the procedures for commitment have changed, it is possible that the continued validity of the Gebarski standards for reexamination is open to question.

The Field decision upheld the automatic commitment of one found not guilty by reason of mental disease. In doing so, it relied heavily on a decision of the U.S. Supreme Court, Jones v. United States, 463 U.S. 354 (1983). Jones upheld the automatic commitment procedure of the District of Columbia, justifying the result at least in part by pointing to the standard applied to the review of the commitment: The defendant is to be released if he establishes either that he is no longer mentally ill or that he is no longer dangerous to himself or others. This standard differs from the one established by Gebarski because the latter standard looks only to

dangerousness. The Field opinion itself seems to emphasize this difference when, in quoting the Jones release standard, it added emphasis to the disjunctive nature of that standard by underlining the word "or":

> In addition, in Jones the court recognized that a committed acquittee ". . . is entitled to release when he has recovered his sanity or is no longer dangerous." 103 S. Ct. at 3051. (Emphasis added.) 118 Wis. 2d 269, 279-80.

Despite appearing to point out this disparity between the Jones and the Gebarski release standards, the Field opinion went on to review the Wisconsin reexamination procedures with apparent approval, suggesting that they were like those approved in Jones in affording the committed person a chance for prompt review of his commitment and possible release. 118 Wis.2d 269, 280.

Thus, Field is ambiguous about the continued viability of the Gebarski release standard. Despite the indirect references discussed above, the opinion did explicitly state that it was not addressing the reexamination question:

> . . . any issues concerning the constitutionality of the reexamination and release procedures under sec. 971.17(2) . . . are not raised in this case and we do not decide them.

118 Wis.2d 265, 281.

The Gebarski standard is more directly challenged by the decision in Foucha v. Louisiana, United States Supreme Court, May 18, 1992. Foucha held that Louisiana statutes similar, but not identical, to Wisconsin's, were unconstitutional because they allowed continued commitment of dangerous offenders who were no longer mentally ill. The Foucha decision is discussed in more detail in Wis JI-Criminal 600, Introductory Comment, at Section V.,C. Trial courts should carefully review the Foucha decision before using Wis JI-Criminal 661.

5. The allocation of the burden is clear: ". . . the burden of showing dangerousness is on the state." State v. Gebarski, 90 Wis.2d 754, 770, 280 N.W.2d 672 (1979).

6. This burden of proof was approved in State v. Gladney, 120 Wis.2d 486, 355 N.W.2d 547 (Ct. App. 1984).

7. The three verdict questions are those recommended by the Wisconsin Supreme Court in the first Gebarski decision, 80 Wis.2d 489, 502. The use of the questions was implicitly approved in the second Gebarski decision, 90 Wis.2d 754, 760. See Wis JI-Criminal 662 for a sample verdict form.

8. If the jury determines that release on conditions is appropriate, it is the duty of the judge to establish those conditions. The Committee recommends that the judge contact the department to assure that the conditions imposed can be fulfilled.

9. The suggested instruction assumes that the reexamination jury will be composed of six members and that agreement by five-sixths is sufficient (see § 51.20(11)(a) and (b)).

THIS INSTRUCTION APPLIES ONLY TO REEXAMINATIONS CONDUCTED FOR PERSONS ADJUDICATED NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT FOR OFFENSES COMMITTED PRIOR TO JANUARY 1, 1991.[1]

662 VERDICTS SUBMITTED FOR REEXAMINATION UNDER § 971.17(2)

The following three forms of verdict[2] will be submitted to you for your consideration concerning the reexamination of (name of petitioner).

One reading: "We, the jury, find (name of petitioner) should be recommitted to the custody of the department at an appropriate institution."

One reading: "We, the jury, find (name of petitioner) may be safely released from (name of institution) upon such conditions as the court deems necessary."[3]

And the other reading: "We, the jury, find (name of petitioner) may be safely discharged from the custody of the department."

It is for you to determine which one of the forms of verdicts submitted you will bring in as your verdict.

COMMENT

Wis JI-Criminal 662 was originally published in 1980 and republished without change in 1984, 1988, 1990, and 1992. The 1992 revision added to footnote two. Wis JI-Criminal 662 was republished without change in 2011.

1. Chapter 334, Laws of 1989, changed reexamination procedures for persons found not guilty by reason of mental disease or defect for offenses committed after January 1, 1991. The right to reexamination is replaced by the right to petition for conditional release. See the discussion at Wis JI-Criminal 600, Introductory Comment. Reexamination procedures addressed by Wis JI-Criminal 660-662 continue to apply to persons committed for offenses occurring before January 1, 1991. § 971.17(8).

2. The questions in the suggested verdict are those identified by the Wisconsin Supreme Court in State ex rel. Gebarski v. Milwaukee County Circuit Court, 80 Wis.2d 489, 502, 259 N.W.2d 531 (1977). The continued viability of the Gebarski dangerousness standard is open to question. See the discussion of Foucha

v. Louisiana, United States Supreme Court, May 18, 1992, in Wis JI-Criminal 600, Introductory Comment, at V.,C., and in the comment to Wis JI-Criminal 661.

3. If the jury determines that release on conditions is appropriate, it is the duty of the judge to establish those conditions. The Committee recommends that the judge contact the department to assure that the conditions imposed can be fulfilled.

700 Law Note: Theory Of Defense Instructions; Instructing The Jury On Defensive Matters

Contents

Scope

This Law Note outlines the legal standards for submitting a "theory of defense instruction" and discusses issues relating to instructing on "defensive matters."

Conceptually, there are two types of "defenses":

- an "affirmative defense" recognizes a basis for avoiding criminal liability based on facts that are not inconsistent with – that is, can be present at the same time as – the elements required by the offense definition.[1]

- a "negative defense" [preferably "failure of proof" defense] is based on facts that are inconsistent with an element required by the offense definition and therefore prevent that element from being proved.[2]

This Law Note discusses the procedures for making these defenses an issue in the case, the constitutional and state law principles that apply, and the methods of presenting the defenses to the jury.

I. Theory Of Defense Instructions

A. The Standard

A request for an instruction on the "theory of defense" must be granted when: it relates to the legal theory of a defense as opposed to the interpretation of the evidence urged by the defense, and it is supported by the evidence, and, it is not adequately covered by the other instructions in the case.

These principles were originally discussed in State v. Davidson, 44 Wis.2d 177, 170 N.W.2d 755 (1969). The Davidson statement has been cited often in later cases,[3] but it has not been substantially improved upon. The Davidson court stated:

Defendant next claims as error the failure of the trial court to give a proposed

> instruction, the so-called "theory of the defense" instruction. On this point it is important to distinguish between the legal theory on which prosecution or defense relies and the factual evidence adduced in support of such theory. In the case before us, the proposed "theory of defense" instruction submitted by the defense appears to be a summarization of the evidence as the defense sees it. In fact, the defendant's counsel in their brief define a "theory of defense" instruction as ". . . the defendant's theory of the case is a recitation of the facts upon which he relies and the inferences which can reasonably be drawn from these facts." This commingles an explanation as to legal theory with comments on the evidence by the trial judge. The majority of cases cited by defendant on this point are from the federal system, where comments on the evidence may be made by the trial judge. In Wisconsin, trial judges are not to thus comment on the evidence. Such comment even in the form of a statement that these are the assertions of the defense, is not allowed in Wisconsin.
>
> It is true that the legal theory of prosecution and defense is presented to juries in this state in general instructions, in the reading of the information, and in special defensive instructions such as those relating to self-defense, insanity, etc. It can be prejudicial error for a trial judge to fail to instruct on a special defense if the evidence raises that issue. This relates to the legal theory, not a factual summary. In the instant case, the legal theory of the defense was adequately covered by the instructions. The defendant entered a general plea of not guilty, putting the state to its proof. The trial judge instructed the jury on the fact of such not guilty plea having been entered, the burden of proof resting upon the state, the presumption of innocence, the necessity of the state proving each element of the crime charged, and the duty of the jury to acquit if they did not believe and find him guilty beyond a reasonable doubt. This was adequate coverage of the legal theory of the case of the defendant.
>
> 44 Wis.2d 177, 191-92

B. It Must Be A "Legal" Theory of Defense

The right to an instruction on the theory of defense is a right to have the jury instructed on the law. Thus, the Davidson case refers to the "legal" theory of defense. Examples that clearly fit this category are the defenses recognized by the Wisconsin statutes or by case law.

The requested instruction must correctly state a principle that is recognized as a defense to the crime charged. For example, a requested instruction on the defective condition of an

automobile was properly refused as not stating a defense to the charge of operating under the influence. State v. Gaudesi, 112 Wis.2d 213, 332 N.W.2d 302 (Ct. App. 1983).

The distinction the Davidson case tries to make is between a "legal theory" and the "factual evidence adduced in support of such a theory." The court held that parties are not entitled to instructions that provide a factual summary of the evidence relied on. For example, the following constitute factual summaries[4] rather than statements of a legal theory:

- "The defendant's theory of defense is that while he acknowledges the fact that he did enter Sanders Collision Service and that he did not have the permission of the owner or occupant, he had no intent to steal before or at the time of entry. He has contended that he entered the building because of the weather and his sleepiness or drunkenness; that he only decided to take liquor after seeing it while he was lying down on the floor. Thus, he says that a necessary element of the crime of burglary does not exist in this case."

- "The defendant's theory of defense is that he was neither involved in the burglary nor took any movable property from Ken-Crete Products, was neither a passenger in nor the owner of the vehicle stopped by the Kenosha County sheriff's deputy, and that his mere presence near the scene of the crime, without more, was not sufficient for conviction."

- "The defendant's theory of defense is that he did not commit the act charged and that the victim is lying."

1. Defenses recognized in statutes

The following generally applicable defenses are recognized in the Wisconsin Statutes.

• intoxication	§ 939.42	[Wis JI-Criminal 755A and 755B]
• mistake	§ 939.43	[Wis JI-Criminal 770]
• coercion	§ 939.46(1)	[Wis JI-Criminal 790]
• defense for a victim of trafficking[5]	§ 939.46(1m)	[Wis JI-Criminal 791]
• necessity	§ 939.47	[Wis JI-Criminal 792]
• self-defense	§ 939.48	[Wis JI-Criminal 800-820]
• defense of others	§ 939.48(4)	[Wis JI-Criminal 830 and 835]
• defense of property	§ 939.49	[Wis JI-Criminal 855 and 860]

Three other defenses, characterized as "privileges," are recognized in § 939.45:

- conduct in good faith and in an apparently authorized and reasonable fulfillment of any duties of a public office – § 939.45(3) [Wis JI-Criminal 870]
- conduct in reasonable accomplishment of a lawful arrest – § 939.45(4) [Wis JI-Criminal 880 and 885]
- conduct in reasonable discipline of child – § 939.45(5) [Wis JI-Criminal 950]

Some statutes recognize defenses specific to a single offense. [Listed at page 10.]

2. Defenses Recognized In Case Law

In addition to the specific privileges listed in subsections (1) through (5) of § 939.45, subsection (6) provides for other, unspecified privileges: "When for any other reason the actor's conduct is privileged by the statutory or common law of this state." This rule fits with § 939.10, which provides in part: "The common-law rules of criminal law not in conflict with chs. 939 to 951 are preserved." Wisconsin courts have recognized the following "common law" defenses.

- entrapment [Wis JI-Criminal 780]
- alibi [Wis JI-Criminal 775]
- accident [Wis JI-Criminal 772]
- the "legal justification" defense to speeding [State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982); Wis JI-Criminal 2676]
- the special privilege allowing a felon to possess a firearm under certain limited circumstances [State v. Coleman, 206 Wis.2d 198, 556 N.W.2d 701 (1996); Wis JI-Criminal 1343A]

C. The Legal Theory of Defense Must be Supported by Some Evidence

Assuming that the theory of defense upon which an instruction is requested is one recognized by law, the evidence must support the instruction. This is the standard rule that applies to the giving of an instruction on any topic. Turner v. State, 64 Wis.2d 45, 51, 218 N.W.2d 502 (1974). The simplest statement of the standard is that there must be "some evidence" on a matter before it becomes an issue on which an instruction must be given.[6] Although more complicated descriptions of the standard are possible, they are beyond the scope of this discussion. The "some evidence" standard is a low bar as it only requires the defendant to produce some evidence to support the instruction. This standard is satisfied even if the evidence is "weak, inconsistent, or of doubtful credibility or slight." State v.

Stietz, 2017 WI 58, ¶17, 375 Wis. 2d 572, 895 N.W.2d 796. The trial court must not assess the weight of the evidence, but instead must view it in the light most favorable to the defendant. Id., ¶18. The instruction should be given based on this low modicum of evidence "unless the evidence is rebutted by the prosecution to the extent that 'no rational jury could entertain a reasonable doubt.'" State v. Johnson, 2021 WI 61, ¶17, 397 Wis. 2d 633, 961 N.W.2d 18, citing State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). The most useful test may be to ask whether there is enough evidence of a defense to generate a jury issue on its existence or nonexistence. The question is "whether a reasonable construction of the evidence will support the defendant's theory 'viewed in the most favorable light it will reasonably admit of from the standpoint of the accused.'"[7]

Though the burden of producing "some evidence" of a defense is commonly referred to as the defendant's burden, that is not literally correct. "The evidence may be facts affirmatively presented by the state, facts elicited from the state's witnesses through cross-examination, or evidence affirmatively presented by the defense. State v. Coleman, 206 Wis.2d 199, 214, 556 N.W.2d 701 (1996), citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

D. The Theory Is Not Adequately Covered by Other Instructions

Even if a requested theory of defense instruction correctly states the law and is supported by the evidence, it need not be given "[i]f the instructions of the court adequately cover the law applicable to the facts." State v. Pruitt, 95 Wis.2d 69, 80, 289 N.W.2d 343 (Ct. App. 1980).

Appellate courts have invoked this rule in upholding the refusal to give the following requested instructions:

•A requested instruction that the defendant's "theory of defense" is that he lacked the intent to kill was adequately explained through the general instructions given on intent. State v. Pruitt, 95 Wis.2d 69, 80, 289 N.W.2d 343 (Ct. App. 1980).

•A requested instruction that the witness did not really see the defendant at the crime scene is adequately covered by the general instruction on credibility. Johnson v. State, 75 Wis.2d 344, 307, 249 N.W.2d 593 (1977).

• "[The defendant's] legal theory of defense was simply that he had not committed the crime. The general instructions given by the court were completely adequate for that situation." State v. Lenarchick, 74 Wis.2d 425, 456, 247 N.W.2d 80 (1976).

• ". . . [T]he defendant's 'theory' was simply that she did not participate in the drug deal . . . this theory was adequately explained to the jury through the instruction defining the substantive offense. . ." State v. Roubik, 137 Wis.2d 301, 309, 404 N.W.2d 105 (Ct. App. 1987).

The Committee recommends that this line of reasoning not be applied in an overly strict manner in certain situations. Many well-recognized defenses negative a required element of the crime. For example, involuntary intoxication and mistake are defenses only when they negative the existence of a state of mind essential to the crime. See §§ 939.42(2) and 939.43(1). One could argue that a separate instruction on such matters is never required because the existence of the mental state is always covered by the instructions defining the substantive offense.[8] An overly literal application of the rule being discussed here obviously would run counter to long-standing practice. The jury ought to be told that the law of the state recognizes that involuntary intoxication or mistake may result in the nonexistence of criminal intent. The recommended practice is to relate the explanation of the defense directly to the element to which it relates.[9]

E. Procedural Considerations

As with any other requested instruction, a proposed "theory of defense" instruction should be submitted to the trial court in writing. See § 972.10(5). The court may reject it if it does not meet the standards discussed here, may use it if it correctly states the law, or may modify it.

The burdens of production and persuasion are discussed below.

F. Conclusion

The Davidson decision offers a framework for evaluating the necessity for instructing on the theory of the defense. The cases interpreting the Davidson rule give considerable leeway in refusing a requested instruction. But the rigid application of the rule may be counterproductive in some cases because the instructions may be helpful in making the jury instructions more understandable.

One of the recommended techniques for improving the understandability of jury instructions is to make them more concrete and less abstract.[10] Emphasizing the facts that relate to a required element is one way to help the jury make the connection between an abstract definition and the case to be decided. Referring to facts can also help to focus the jury's attention on the important issues in the case. For example, if the statutory definition of a crime is complicated and the defense is one of alibi, jurors will be greatly aided by an

instruction that helps focus their attention on the alibi issue, rather than on parts of a complicated offense definition that are not in dispute.[11]

II. Affirmative Defenses

A. In General

An "affirmative defense" recognizes a basis for avoiding criminal liability based on facts that are not inconsistent with, and can be present at the same time as, the elements required by the offense definition. That is, all the elements of the crime may be present, but the law recognizes a basis for a finding of not guilty based on facts that are not found in the offense definition.[12] These can properly be called "affirmative defenses" because something affirmative must be done to make them an issue in the case. Sometimes these are further characterized as "privileges," "justifications," or "excuses," but the label is not significant in the context of presenting them to the jury.

An example is self defense in a battery case. All the elements of the crime defined in § 940.19(1) may be present – causing bodily harm, with intent to cause bodily harm, and without the consent of the victim – but the defendant will not be guilty if he or she acted lawfully in self defense as defined in § 939.48.

Affirmative defenses are generally set forth in the statutes, and whether or not to recognize an affirmative defense is generally for the legislature to decide. That said, the Wisconsin Supreme Court has recognized affirmative defenses derived from common law.

1. Recognized by statute

Most statutorily recognized affirmative defenses apply generally to all crimes. Section 939.45 recognizes the defense of "privilege" and specifies several:

- coercion under § 939.46 and necessity under § 939.47 [§939.45(1)]
- defense for a victim of trafficking under § 939.46(1m) [§939.45(6)]
- defense of persons or property under § 939.48 and § 939.49 [§ 939.45(2)]
- good faith actions in fulfillment of duties of public office [§ 939.45(3)]
- conduct is in reasonable accomplishment of a lawful arrest [§ 939.45(4)]
- conduct is reasonable discipline of a child by a person responsible for the child's welfare [§ 939.45(5)(b)]

There are also affirmative defenses applicable to specific offenses. [Listed on page 12.]

2. Recognized By Court Decision/Common Law

Affirmative defenses not addressed in statutes but recognized in case law include:

- entrapment [Wis JI-Criminal 780]
- the "legal justification" defense to speeding [State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982); Wis JI-Criminal 2676]
- the special privilege allowing a felon to possess a firearm under certain limited circumstances [State v. Coleman, 206 Wis.2d 199, 556 N.W.2d 701 (1996); Wis JI-Criminal 1343A]

3. Statutory Exceptions; Statements That An Offense "Does Not Apply"

A significant number of criminal provisions contain lists of statutory exceptions. For example, § 941.29, prohibiting possession of a firearm by a felon, includes six subsections listing exceptions [subs. (5) through (10)]. The jury instructions typically treat these exceptions like an affirmative defense: the state need not anticipate them in the charging document and they are not issues in the case until supported by "some evidence." If so supported, the state must prove the inapplicability of the exception beyond a reasonable doubt.

Other statutes take a similar approach, but instead of identifying an "exception," they provide that the criminal prohibition "does not apply" to certain situations. For example, § 940.32, prohibiting stalking, includes a provision stating that the offense does not apply to conduct protected by the right to freedom of speech or the right to freedom to assemble [sub. (4)(a)] or to conduct connected to a labor dispute [sub. (4)(a)]. The jury instructions treat these in the same matter as exceptions: if raised, the state must prove beyond a reasonable doubt that the facts recognized by the "does not apply" provision are not present.

The jury instructions assume that these matters will rarely come up at trial. Rather, they would more likely be addressed at the charging/pretrial stage. If they would be raised at trial, they should be treated like affirmative defenses.

4. Intentional Homicide: Affirmative Defenses/Mitigating Circumstances

Matters that can be considered affirmative defenses are addressed by the intentional homicide statutes – § 940.01 and § 940.05 – where they are called mitigating circumstances. These matters – adequate provocation, unnecessary defensive force,

coercion, etc. – can be considered affirmative defenses to 1st degree intentional homicide because they can prevent a conviction for that offense. However, they are not defenses to 2nd degree intentional homicide. § 940.05(3). Thus, their effect is to reduce culpability for – that is, to "mitigate" responsibility for – an intentional killing. The policy behind this approach is that the defensive matter reduces the actor's culpability for an intentional killing but does not eliminate it.

The statutes specify the procedure for cases involving a mitigating circumstance: when it is "raised by the trial evidence," the prosecution must prove the absence of that circumstance beyond a reasonable doubt. § 940.01(3). This is consistent with the approach that the decision in State v. Moes [discussed below] identified as the default rule in Wisconsin when the statutes do not expressly provide to the contrary.

In State v. Kizer, 2022 WI 58, 403 Wis.2d 142, 976 N.W.2d 356, the Wisconsin Supreme Court distinguished the coercion defense under § 939.46(1) from the specific affirmative defense for victims of human or child trafficking in § 939.46(1m). The Court ruled that the affirmative defense in § 939.46(1m) serves as an absolute defense to a charge of 1st-degree intentional homicide rather than simply mitigating the charge to 2nd-degree intentional homicide.

B. Constitutional And State Law Requirements

1. United States Constitution

Case law interpreting the U.S. Constitution provides that the prosecution must prove all elements of the crime beyond a reasonable doubt and cannot be relieved of this burden by switching it, or any part of it, to the defendant. Mullaney v. Wilbur, 421 U.S. 684 (1975). A burden of production can be imposed on the defendant to point to sufficient facts to raise a defense that challenges proof of an element, but the burden of persuasion remains on the prosecution to prove that element, notwithstanding the evidence challenging it.

However, for true affirmative defenses – those that are not inconsistent with elements of the crime – the burden of persuasion can be placed on the defendant to prove the defense. Patterson v. New York, 432 U.S. 197 (1977); Martin v. Ohio, 480 U.S. 228 (1987).

There can be very close distinctions between an element and facts recognized as an affirmative defense. An example is homicide by intoxicated use of a vehicle under § 940.09. In State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985), the Wisconsin Supreme Court identified the elements of the crime as causing death while operating under the influence. Proving a causal connection between under-the-influence-operation and the

death is not required. Thus, the affirmative defense recognized in § 940.09(2) – that the death would have resulted even if the actor was not under the influence – was not inconsistent with the elements, and the burden of persuasion could be imposed on the defendant. The court found that this satisfies the rule of Patterson v. New York.

Evidence may relate both to a challenge to the proof of an element and the establishment of a defense. An example is a charge of 1st degree intentional homicide where the evidence tends to show that the defendant was extremely frightened and upset at the time he or she fired a pistol toward the victim. This evidence could support a challenge to the intent to kill element: I was so upset/frightened I shot toward the victim without aiming and without intent to cause death. The state must prove intent to kill notwithstanding this evidence. The evidence could also support an affirmative defense/mitigating circumstance like adequate provocation: I reasonably believed the victim had done something that caused me to lack self-control completely and which would have caused complete lack of self-control in an ordinary person. See §§ 939.44 and 940.01(2)(a). The defendant should be allowed to present both the failure of proof defense – there is insufficient evidence of intent to kill – and the affirmative defense – adequate provocation was present. It is not proper to require a defendant to elect between the defenses. See Martin v. Ohio, supra, which discusses this issue in connection with the Ohio statutes defining murder and self defense.

2. Wisconsin State Law

Wisconsin recognizes two approaches to the burden of persuasion on affirmative defenses. The general rule provides that if the defense shows "some evidence" of an affirmative defense, the burden of persuasion is on the state to disprove it. This is not required by the U.S. Constitution [see Patterson v. New York, supra]; it is based on state law. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979).

However, where a statutorily recognized affirmative defense satisfies the Patterson test, some statutes specifically place the burden of persuasion on the defendant.

a. The General Rule –Moes v. State

Moes was charged with 1st degree murder [now termed 1st degree intentional homicide] and raised the defense/mitigating circumstance of coercion under § 939.46. On appeal, he claimed the jury instructions did not clearly impose the burden on the state to disprove coercion, denying him due process. The Wisconsin Supreme Court undertook the analysis that Patterson requires, first identifying the elements of the crime: cause death, with intent to kill. Then the court identified the facts constituting the defense of coercion: a threat by other than a coconspirator, that causes the actor to reasonably believe that

committing the crime is the only means of preventing death or great bodily harm to the actor or another. The court found that the facts constituting the defense are not inconsistent with the elements of the crime: one can cause death with the intent to kill and still satisfy the requirements for coercion. Thus, under Patterson there is no due process barrier to imposing the burden of persuasion on the defendant to prove the affirmative defense of coercion.

However, the court held that Wisconsin state law imposed the burden of persuasion on the prosecution to disprove affirmative defenses. This was based on § 939.70, enacted as part of the 1956 revision of the Criminal Code, which provides that no provisions of the new code "shall be construed as changing the existing law with respect to presumption of innocence or burden of proof." The court held that "existing law" required the state to disprove affirmative defenses.

b. Statutes Placing The Burden Of Persuasion On The Defendant

The Moes general rule does not apply where the statute defining an offense specifically assigns the burden of persuasion to the defendant. This is permitted under the U.S. Constitution as interpreted in Patterson v. New York when the facts recognized by the defense are not inconsistent with – can exist at the same time as – the elements of the crime. This approach is also permissible under Moes, which recognized that assigning the burden of persuasion in this situation is a matter of state law choice. When the Patterson test is met, the legislature is free to choose to impose the burden of persuasion on the defendant. For example:

940.09(2)	Homicide By Intoxicated Use Of A Vehicle/Firearm [JI 1185, 1186, 1186A, 1187, 1189, 1190, 1191]
940.25(2)	Injury [Great Bodily Harm] By Intoxicated Use Of A Vehicle [JI 1262, 1263, 1263A, 1266]
943.201(3)	"Identity Theft" [JI 1458]
943.201(3)	"Identity Theft – Entity" [JI 1459]
943.23(3m)	Operating Motor Vehicle Without Owner's Consent [JI 1465A]
948.05(3)	Sexual Exploitation Of A Child [JI 2121A]
948.11(2)(c)	Exposing A Child To Harmful Material [JI 2142A]
948.22(6)	Failure To Support [JI 2152A]
948.31(4)	Interference With [Child] Custody [JI 2169]

Each of these provisions assigns the burden of persuasion to the defendant to establish the defense by "a preponderance of the evidence." [Note: the uniform instructions for these

defenses use the equivalent description of the civil burden of persuasion: "to a reasonable certainty by the greater weight of the credible evidence."]

C. Instructing The Jury

1. In The Absence Of A Specific Statute

Where a generally-applicable affirmative defense is involved, the court should instruct on the elements of the crime and, if the burden of production has been satisfied, instruct on the substance of the defense. The instructions must provide that the burden is on the state to prove all elements of the crime and to prove that the defense does not apply – all beyond a reasonable doubt. [This is the procedure required by Moes v. State, supra.]

Many of the published instructions have versions that integrate the affirmative defense with the offense definition. For example, Wis JI-Criminal 1220A Battery: Self-Defense In Issue, integrates an instruction on self-defense with the elements of battery under § 940.19(1). After defining the elements of battery, the instruction adds material beginning with the caption "Self-Defense Is An Issue In This Case." It then defines the law of self-defense and provides that "the state must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense."

2. Where A Statute Places The Burden Of Persuasion On The Defendant

Several Wisconsin statutes provide that the burden of persuasion is on the defendant to establish an affirmative defense recognized for a particular crime. [See list above.] The court should instruct on the elements of the crime and, if the burden of production has been satisfied, instruct on the substance of the defense. The instructions must provide that the burden is on the state to prove all elements of the crime beyond a reasonable doubt and that the burden is on the defendant to prove the defense by the greater weight/preponderance of the evidence.

Instructions typically call for adding a section captioned "Consider Whether the Defense Has Been Proved." The content of the defense is described, and the jurors are told that the burden is on the defendant to prove that the defense is established "by the greater weight of the credible evidence" and that if they are so satisfied, they must find the defendant not guilty.

III. Negative [Failure of Proof] Defenses

A. In General

Defenses in this category are sometimes referred to as "negative defenses" but the term "failure of proof defense" is used here as a more accurate description of their function. A failure of proof defense is based on facts that are inconsistent with an element required by the offense definition and therefore prevent that element from being proved.[13]

An example is a claim in a theft case that the person believed the property he or she took was his or her own. The elements of theft under § 943.20(1)(a) require intentionally taking and carrying away property of another without the owner's consent. "Intentionally" further requires that the actor knew the property belonged to another. § 939.23(3). If the actor actually believes that the property belonged to him or her, the prosecution fails to prove the knowledge element.

Some failure of proof defenses are recognized in the statutes. Mistake – § 939.43(1) – and involuntary intoxication – § 939.42(2) – are defenses when they "negative the state of mind essential to the crime."

Failure of proof defenses can exist whether or not they are recognized in the statutes – any fact that is logically relevant to the non-existence of an element of a crime can be a defense.

B. Constitutional And State Law Requirements

Case law interpreting the U.S. Constitution provides that the prosecution must prove all elements of the crime beyond a reasonable doubt and cannot be relieved of this burden by switching it, or any part of it, to the defendant. Mullaney v. Wilbur, 421 U.S. 684 (1975). A burden of production can be imposed on the defendant to point to sufficient facts to raise a defense that challenges proof of an element, but the burden of persuasion remains on the prosecution to prove that element, notwithstanding the evidence challenging it.

The corollary of this rule is that the defendant has a due process right to challenge the elements of the crime and to introduce relevant evidence to support that challenge. Martin v. Ohio, 480 U.S. 228 (1987); Chambers v. Mississippi, 410 U.S. 284 (1973).

Because the rule is constitutionally required, it is the same in Wisconsin.

C. Instructing The Jury

There are published instructions for the two codified failure of proof defenses: JI 770 Mistake and JI 755B Involuntary Intoxication. They each call for relating the instruction on the defense to the mental state to which it applies. The jurors are instructed that they must consider the evidence in deciding whether the state has proved the element beyond a reasonable doubt. In other words, if evidence relevant to the nonexistence of an element has been admitted, the state must prove the existence of the element notwithstanding the potentially element-negating evidence.

For example, JI 770 provides in part:

> Evidence has been received which, if believed by you, tends to show that the defendant believed that [HERE IDENTIFY THE DEFENDANT'S BELIEF]. You must consider this evidence in deciding whether the defendant acted with the (describe mental state) required for this offense.

Because failure of proof defenses can exist whether or not they are recognized in the statutes, a similar instruction should be considered whenever there is evidence of a fact that is logically relevant to the non-existence of an element of a crime.

IV. Inconsistent Defenses

Requests for instructions on defenses should not be denied solely because the defenses might be characterized as "inconsistent." As a practical matter, it may be difficult for significantly different claims to be persuasive or understandable, but any defensive matters supported by a reasonable view of the evidence should be presented to the jury. "As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63 (1988).

V. The "Insanity Defense"

What is commonly referred to as the "insanity defense" is designated in Wisconsin as "not guilty by reason of mental disease or defect." See §§ 971.15 - 971.17. An outline of the substance and procedure is provided at Wis JI-Criminal 600 Introductory Comment.

The defense is similar to other affirmative defenses in the sense that it is not an issue in the case until the defendant raises it. It differs from other affirmative defenses in that it must be raised by a special plea pursuant to § 971.06(1)(d) and is adjudicated in a two-part

procedure set forth in § 971.165.

The first phase involves a determination of guilt [by plea or trial] just like any other case. If there is a trial, the defendant is entitled to raise any defenses that are supported by the facts, including a challenge to any mental state required by the offense definition.[14]

If guilt is established at the first phase, the second phase addresses whether the defendant is "not guilty by reason of mental disease or defect." If there is a trial as to the second phase, the burden of persuasion is on the defendant to establish to a reasonable certainty by the greater weight of the evidence that:

- as a result of mental disease or defect, the defendant lacks substantial capacity either
- to appreciate the wrongfulness of the conduct OR
- to conform his or her conduct to the requirements of law.

If the defendant meets this burden, the result is a finding of guilty but "not guilty by reason of mental disease or defect." This is better characterized as "guilty but not criminally responsible" because the result of "success" at the second phase is not an acquittal but relief from criminal punishment and a commitment for treatment. § 971.17(1).

COMMENT

Wis JI-Criminal 700 Law Note was originally published in 1990 and revised in 2020. This revision was approved by the Committee in June 2023; it added a reference to the defense specified in § 939.46(1m) for victims of trafficking.

[NOTE TO COMMITTEE: In April, the Committee requested that the individual case citations, which are currently located in the footnotes, be moved to the body of the instruction.**]**

1. See State v. Watkins, 2002 WI 101, ¶¶39-40, 255 Wis.2d 265, 647 N.W.2d 244 and State v. Campbell, 2006 WI 99, ¶51, footnote 10, 294 Wis.2d 100, 718 N.W.2d 649. Also see §1.8(c) Affirmative Defenses, LaFave, Substantive Criminal Law 2d Ed., (West 2003).

2. The Wisconsin Supreme Court refers to "negative defenses" in State v. Watkins and State v. Campbell, note 1 supra. "Failure of proof defenses are nothing more than instances where, because of the 'defense,' the prosecution is unable to prove all the required elements of the offense . . ." § 21. A System of Defenses, Robinson, Criminal Law Defenses, (West Thomsen 1984-2019).

3. See State v. Pruitt, 95 Wis.2d 69, 80, 289 N.W.2d 343 (Ct. App. 1980), Johnson v. State, 75 Wis.2d 344, 307, 249 N.W.2d 593 (1977), State v. Lenarchick, 74 Wis.2d 425, 456, 247 N.W.2d 80 (1976), State v. Roubik, 137 Wis.2d 301, 309, 404 N.W.2d 105 (Ct. App. 1987).

4. The examples are based on instructions discussed in unpublished decisions of the Wisconsin Court of Appeals. The Committee believes they illustrate requested instructions calling for discussion of the evidence and, therefore, may properly be refused.

5. Although set forth in sec. 939.46, which is titled "Coercion," the defense in sub. (1m) is defined in completely different terms. The traditional coercion defense recognizes a situation commonly referred to as a "choice of evils," where individuals are presented with circumstances that force them to choose between committing a crime and facing death or great bodily harm. The requirements of this defense are enumerated in Section 939.46(1) as follow:

- a threat from another person [other than a coconspirator]
- causes the person to reasonably believe
- that his or her [criminal] act is the only means
- of preventing imminent death or great bodily harm to that person or another.

Further, in a prosecution for 1st degree intentional homicide, coercion is not a complete defense but mitigates the crime to 2nd degree intentional homicide.

The defense defined in sub. (1m) does not share any of the requirements of traditional coercion. Specific threats are not required, nor is an inquiry into what the person believed ["reasonably" or not]. Additionally, the commission of the crime does not necessarily have to be the only means of avoiding harm, and there is no requirement of imminent death or great bodily harm. Furthermore, the scope of the defense is not limited when it is applied to 1st degree intentional homicide. See State v. Kizer, 2022 WI 58, 403 Wis.2d 142, 976 N.W.2d 356.

6. For example, ". . . the defendant must point to some evidence of the degree of intoxication which constitutes a defense." State v. Strege, 116 Wis.2d 477, 486, 343 N.W.2d 100 (1984). [Emphasis added.] A more complete statement that attempts to relate the evidentiary standard to the requirement that the state to disprove defenses provides:

> [I]f it appears from the evidence, either that produced by the state or by the defense, that a jury, under a reasonable view of the evidence, could conclude that the state has not sustained its burden of disproving [the defense].

State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

7. State v. Mendoza, 80 Wis.2d 122, 153, 258 N.W.2d 260 (1977), citing Ross v. State, 61 Wis.2d 160, 172, 211 N.W.2d 827 (1973). Both cases addressed the issue in the context of the sufficiency of the evidence to require submitting an instruction on a lesser included offense based on a claim of self defense.

8. See, for example, Justice Callow's dissent in State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981), where he argued that where a recognized defense [in this case, intoxication] negates an element of the crime, it is unnecessary to advise the jury specifically that the State must "disprove" that defense: "It is elementary that to prove a thing exists one must in effect disprove its nonexistence. Thus when a jury is

instructed that the state must prove intent beyond a reasonable doubt, it means there must be no reasonable doubt arising from intoxication or any other intent-negating factor." 102 Wis.2d 423, 442-43.

9. See, for example, Wis JI-Criminal 770 Mistake.

10. See, for example, Elwork, Sales & Alfini, Making Jury Instructions Understandable (Michie 1982); Charrow & Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," 79 Columbia Law Review 1306 (1979); and Strawn & Buchanan, "Jury Confusion: A Threat to Justice," 59 Judicature 478 (1976).

11. Care must be taken to assure that adequate instruction is given on each element of the crime. This discussion assumes that the defense is requesting the attention-focusing instruction.

12. See note 1, supra.

13. "Failure of proof defenses are nothing more than instances where, because of the 'defense,' the prosecution is unable to prove all the required elements of the offense . . ." § 21. A System of Defenses, Robinson, Criminal Law Defenses, (West Thomsen 1984-2019).

14. In State v. Steele, 97 Wis.2d 72, 97-98, 294 N.W.2d 2 (1980), the Wisconsin Supreme Court held that expert opinion testimony on the defendant's capacity to form a mental element required as an element of the crime is not admissible at the first phase of the trial. Cases decided after Steele have made it clear that the rule excluding expert testimony is limited to expert opinion testimony on the capacity to form intent based on mental health history. State v. Flattum, 122 Wis.2d 282, 361 N.W.2d 705 (1985) and State v. Repp, 122 Wis.2d 246, 362 N.W.2d 41 (1985). [Emphasis added.] For a helpful discussion of what the current rule is and how it developed, see Haas v. Abrahamson, 910 F.2d 384 (7th Cir. 1990).

705 LAW NOTE: JURY NULLIFICATION

This law note discusses "jury nullification," a term generally understood as referring to a jury's returning of a not guilty verdict even though the evidence is sufficient to establish all the elements of a crime beyond a reasonable doubt. State v. Bjerkaas, 163 Wis.2d 549, 472 N.W.2d 615 (Ct. App. 1991), is the first published appellate decision in Wisconsin to consider directly several issues relating to the jury nullification issue. Bjerkaas and related cases are discussed below.

I. The Jury Has the Power But Not the Right to "Nullify"

A. The Power to Nullify

A jury has the power to nullify, that is, to return a not guilty verdict even though the evidence is sufficient to prove all elements beyond a reasonable doubt. This power flows from the interaction of practical concerns and legal rules:

1) the jury cannot be compelled to act in a particular way or reach a particular result;

2) once the jury retires, no one knows what goes on;

3) only general verdicts are used in criminal cases; and

4) there can be no appeal from a not guilty verdict.

Thus, when a jury returns a general, not guilty, verdict, no one can tell what the basis for that verdict was. The verdict may reflect legitimate disagreement about whether the elements of the crime were established; it may reflect honest doubt about whether the burden of proof was met; it may reflect a mistake about the facts; or it may reflect a conclusion reached in defiance of the proof. But unless individual jurors make posttrial statements to explain their verdict, the basis for the verdict will remain unknown.

Even if it becomes known that a jury engaged in nullification, no remedial action can be taken.[1] It is a fundamental principle of double jeopardy that the state cannot appeal from a not guilty verdict.[2] The principal applies regardless of the reason why the jury reached the not guilty conclusion.

Wisconsin courts have recognized the jury's power of nullification.[3] But they have distinguished between the "power to nullify the objectively correct application of the law and the right to do so." State v. Bjerkaas, 163 Wis.2d 949, 960, emphasis in original.

B. The Jury Does Not Have the Right to Nullify

One argument in favor of an expansive view of jury nullification is that the jury has a historical role as a check on prosecutors, judges, and legislatures.[4] Some go so far as to argue that for conduct to be criminal, it must be "blameworthy" in addition to meeting the statutory requirements, and that the "blameworthiness" is only for the jury to assess.[5] In support, proponents refer to situations where courageous juries have refused to convict "technically" guilty protesters like William Penn and John Peter Zenger.[6] The claim is that the nullification power is of the essence of the right to jury trial and may not be limited in any way without violating that constitutional right.

In 1895, the United States Supreme Court rejected the federal constitutional right argument. Sparf v. United States, 156 U.S. 51 (1895). More recently, the court has stated that "a defendant has no entitlement to the luck of a lawless decisionmaker, even if the decision cannot be reviewed." Strickland v. Washington, 446 U.S. 668, 695 (1984) (in holding that a harmless error analysis may be applied to claims of ineffective assistance of counsel). Federal and state courts have been uniform in rejecting the constitutional right argument. An exception exists in three states C Georgia, Indiana, and Maryland C where the state constitution expressly provides that the jurors are the judges of the law and the facts.[7] (Note that Article I, Section 3, of the Wisconsin Constitution provides that in criminal prosecutions for libel "the jury shall have the right to determine the law and the fact.")

The Bjerkaas court followed this trend: . . . that "juries have the power to do what they want . . . does not translate to have a jury decide a case contrary to law or fact. . . ." 163 Wis.2d 949, 960.

II. Defense Argument Relating to Jury Nullification is Properly Limited

The defendant in Bjerkaas argued that it was error for the trial court to refuse defense counsel permission to argue nullification by urging the jury to acquit regardless of the law. The court of appeals held that the trial court did not abuse its discretion in refusing to allow this line of argument. That "juries have the power to do what they want . . . does not translate to a right to have a jury decide a case contrary to law or fact, much less a right . . . to an argument urging them to nullify applicable laws." 163 Wis.2d 949, 960. The defense counsel in Bjerkaas was allowed to "talk in terms of fairness in general terms" but not to go further and argue that the jury "should discard the instructions and the law and find her not guilty because it seems fair." Ibid.

III. Jury Instructions For or Against Jury Nullification

A. A Jury Instruction on Jury Nullification May Properly be Refused

The argument in favor of a jury instruction on jury nullification is based in part on the rationale that since the jury has the practical power to engage in nullification, the jury ought to be told of that power. The court in Bjerkaas also rejected this assertion: that "juries have the power to do what they want . . . does not translate to a right to have a jury decide a case contrary to law or fact, much less a right . . . to an instruction telling jurors they may do so." 163 Wis.2d 949, 960. In accord is State v. Olexa, which held that an instruction telling jurors they "could ignore [a] statute if they felt it was unfair" could properly be denied. 136 Wis.2d 475, 485, 402 N.W.2d 733 (Ct. App. 1987).[8]

An instruction on jury nullification would contradict other general instructions jurors receive which tell them that they are to reach a verdict based only on applying the law given in the instructions to the facts properly proved by the evidence. (Wis JI-Criminal 100.) Jurors are told not to be swayed by sympathy, prejudice, or passion. (Wis JI-Criminal 460.) Standard questions asked of jurors during voir dire typically require a commitment that the juror can reach a verdict fairly and impartially, based on the law given in the instructions and the evidence presented. See, for example, SM-20, Suggested Jury Voir Dire, and Wisconsin Judicial Benchbook, CR-17 (1987).

B. Instructing that Nullification is Not Proper

Antijury nullification instructions have been approved. It has been held to be proper to admonish jurors that they are not at liberty to disregard the law no matter what their individual views as to its wisdom. Williams v. State, 192 Wis. 347, 352, 212 N.W.2d 631 (1927). In Schmidt v. State, 159 Wis. 15, 149 N.W. 388 (1914), the following instruction was approved:

> The jury have the power, if they see fit, to acquit the defendant of all crime, but in case you should do so you would disregard the undisputed facts and the law applicable to this case.

Despite these two cases, the Committee recommends that no instruction, pro or con, be given relating to jury nullification. The instructions for substantive criminal offenses do, in a sense, acknowledge the power of jury nullification. The concluding paragraphs always state that if the jury is satisfied that the facts necessary to constitute the crime are proved, they should find the defendant guilty but that if they are not so satisfied, they must find the defendant not guilty.[9] The Committee believes this accurately reflects the law on jury

nullification as discussed in Bjerkaas: it acknowledges that the power exists but declines to offer specific advice on its exercise.

COMMENT

This law note was approved by the Committee in August 1991.

1. The general rule is that impeachment of a verdict by receiving evidence relating to the jury's deliberations is not permitted. See § 906.06(2); after Hour Welding v. Lanceil Management Co., 108 Wis.2d 734, 324 N.W.2d 868 (1982); and State v. Poh, 116 Wis.2d 510, 343 N.W.2d 108 (1984).

2. "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that [a] verdict of acquittal . . . could not be reviewed . . . without putting [a defendant] twice in jeopardy. . . ." United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977), cited in State v. Turley, 128 Wis.2d 39, 48, 381 N.W.2d 309 (1986).

"To permit an appeal from the acquittal itself would violate the fundamental principles upon which the constitutional prohibition of double jeopardy is grounded. . . ." State v. Evjue, 254 Wis. 581, 591 37 N.W.2d 50 (1949). [The Evjue case held that the same rule applies when the acquittal is by the trial court in a nonjury case. It, in effect, recognized a power of nullification in a trial judge acting as the finder of fact.]

3. State v. Olexa, 136 Wis.2d 475, 402 N.W.2d 733 (Ct. App. 1987); Evjue v. State, note 2 supra.

4. The historical background is discussed in Scheflin and Van Dyke, "Jury Nullification: The Contours of a Controversy," 43 Law and Contemporary Problems 51 (Autumn 1980). Also see Scheflin, "Jury Nullification: The Right To Say No," 45 So. Cal. L. Rev. 168 (1972).

5. This view sees jury nullification as a technique for counteracting the trend toward legislature's adopting over-inclusive criminal legislation: "American criminal procedure responds to this legislative defect by giving both the prosecutor and the jury the power to decriminalize a particular defendant's conduct that is not sufficiently 'blameworthy' or 'dangerous'. . . ." Arenella, "Rethinking The Functions of Criminal Procedure," 72 Georgetown Law Journal 185, 216 (1983).

6. See note 4, supra.

7. For example, article 1, § 19, of the Indiana Constitution says that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts." Cited in Scheflin and Van Dyke, note 4, supra, at 79.

8. For federal cases holding that a specific nullification instruction should not be given, see, for example, United States v. Berrigan, 417 F.2d 1002 (4th Cir. 1969); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972), and United States v. Anderson, 716 F.2d 446, 449 (7th Cir. 1983).

9. "This distinction between 'must' and 'should' in the criminal law is long-standing in American jurisprudence, as it is in Wisconsin. Indeed, there is authority that this distinction is implicit in the Constitution's Sixth Amendment right to a trial by jury." State v. Thomas, 161 Wis.2d 616, 631, 468 N.W.2d 729 (Ct. App. 1991).

710 LAW NOTE: RIGHT TO RECAPTURE

The Committee concluded that a pattern instruction for the so-called right to recapture, claim of right, or self-help defense should not be drafted because such an instruction may relate to more than one element of a crime and should be closely tailored to the facts of the case. The defense, referred to here as "right to recapture," is best viewed as a general reference to factual situations where an element of the crime may not be present. Thus, it is not a true "defense" in the sense that facts are established which excuse or justify what would otherwise be criminal conduct. Rather, the right to recapture is what is sometimes referred to as a "negative defense" (meaning that it negates an element of the crime) or a "failure of proof" defense (meaning that the state fails to prove a fact necessary to constitute the crime.) Because the elements of the crime are already covered by the jury instructions for that crime, some believe that no additional instruction is required for a defense that attacks an element. Others believe that relating the defense to a specific element is helpful to the jury, especially where the matter has been emphasized during the trial. The Committee concluded that the matter is best resolved by the trial judge on a case-by-case basis.

Two elements of typical property crimes may be affected by the claim of a right to recapture. First, theft, robbery, and burglary all apply to taking "the property of another." If a person recaptures his or her own property, this element is not established. A simple statement to this effect would be the most that is needed by way of additional jury instruction if this aspect of the right to recapture is involved in a case.

The second, and more common, situation involves the "intent to steal" element. A person who intends to take back what is his does not intend to take and carry away property of another, thus lacking the intent to steal. In this situation, an additional jury instruction could simply apply the standard mistake instruction, Wis JI-Criminal 770, to the mental element of intent to steal.

This approach is consistent with the Comment to § 343.27, Robbery, in the 1953 Draft of the Criminal Code which states:

> . . . If the actor mistakenly but honestly believes that he is recovering his own property, he is guilty of neither stealing nor robbery. For example, the actor thinks the other person has cheated at gambling, so he forcibly retakes the money he has lost. If the actor believes the property to be his own, he is not guilty of robbery though he may be guilty of battery.
>
> 1953 Judiciary Committee Report on the Criminal Code, Vol. V, p. 124

This approach is also believed to be consistent with Wisconsin case law. The leading case is Edwards v. State, 49 Wis.2d 105, 181 N.W.2d 383 (1970), where the defendant claimed he was not guilty of robbery because he was just collecting money the victim owed him. The trial court instructed the jury that as a matter of law an indebtedness is not a defense to a charge of attempted robbery. The Edwards decision reviewed the majority and minority views on this issue and did not adopt either one. Instead, the court announced the "same property" rule: the defense is available if the "accused can trace his ownership to specific coins and bills in the possession of the debtor." 49 Wis.2d 105, 113. The rule has been cited with approval in two more recent cases: Austin v. State, 86 Wis.2d 213, 271 N.W.2d 668 (1978), and State v Pettit, 171 Wis.2d 627, 492 N.W.2d 633 (Ct. App. 1992). Both Austin and Pettit involved attempts to recover money; convictions were affirmed in each case because the evidence was sufficient to show that the money obtained was not the same money that originally belonged to the defendant.

The "same money" rule is referred to in these cases in a way that may seem to be inconsistent with the mistake approach recommended here. Under the mistake approach, it would be a defense (or, more precisely, the state would be unable to prove intent to steal) if the defendant subjectively intended to take only the property that belonged to him. The property would not, in fact, have to be the same; an actual belief on the part of the defendant would be enough to negate the intent to steal.

The Committee believes the mistake approach is consistent with the Edwards decision. Edwards reviewed the so-called majority and minority positions and rejected both. The majority position was described as follows:

> . . . a charge of robbery will fail where the money or property was taken at gunpoint with an intent to collect or secure payment of the debt, or as the rule is sometimes stated, if the taker in good faith believes he owns or is entitled to the possession of the property, 77 C.J.S., Robbery, p. 464, sec. 22. This rule is based on the theory than an animus furandi (intent to steal) does not exist when a person takes property under the belief he has a bona fide claim to it. It is this belief, whether valid or not, that the majority of jurisdictions hold is inconsistent with an intent to steal.

49 Wis.2d 105, 111-112.

The court rejected this rule, saying it could not:

> . . . accept the view of the majority cases which see no distinction between the reclaiming of one's own property by force and the taking of money by force from a debtor to repay a debt which is presently owing. We think the intent to steal is

> present when one at gunpoint or by force secures specific money which does not belong to him in order to apply it by such self-help to a debt owed to him.

49 Wis.2d 105, 113

Edwards described the minority position as one held by a few states which simply deny the defense on grounds of public policy. The court also rejected this position:

> . . . the intent must be to steal. If a person seeks to repossess himself of specific property which he owns and to which he has the present right of possession and the means he uses involves a gun or force, he might not have the intention to steal.

The Committee concluded that the mistake approach discussed here is consistent with the general principles of Wisconsin law as applied to mental states and mistake. Further, it is consistent with Edwards and the cases which follow it if Edwards can fairly be read to apply only to collecting-a-debt cases where the defendant claims that he believed it was lawful to reclaim an amount of money that would satisfy the debt. This could be characterized as a mistake of law, which is not a defense. However, even in a collecting-a-debt case, if the defendant intends to take back his own property, he lacks the intent to steal, whether or not the property he takes back is really his.

The final paragraph in Edwards appears to be consistent with this analysis:

> Neither Higgins' nor Edwards' view of the facts suggests an attempt to get specific money, the ownership title to which was in Edwards, and thus the crime of attempted robbery was committed. The trial court was correct in instructing the jury that the existence of a debt was not a defense to the charge of attempted armed robbery.

49 Wis.2d 105, 114

To summarize:

If the defendant's claim is that he thought it was lawful to take property from the victim equal in value to that which the victim owed the defendant, there is no defense. That is, all the elements of the crime can be established.

If the defendant claims that he intended to take back the specific property (which in the case of a money debt must be the same bills) that the victim had wrongfully appropriated from the defendant, that would be enough, if believed, to prevent the proof of intent to steal.

In crafting an instruction, care should be taken to avoid two problems discussed in the Pettit case. Pettit involved two specific challenges to the instruction given by the trial judge, which was modelled after language in the Edwards decision. In each instance, the court of appeals found the instruction given was not error but suggested that the alleged defects be avoided. The instruction given in Pettit read:

> Evidence has been received in this trial that one or more of the defendants believed he had a bona fide claim to money possessed by Larry Morrison. The use of self-help by force to enforce a bona fide claim for money does not necessarily negate an intent to steal. A person may have intent to steal when he takes money from another's possession against the possessor's consent even though he intends to apply the money to what he believes is a bona fide claim.
>
> Unless an accused can trace his ownership to specific coins and bills in the possession of another, the other is the owner of the money in his pocket.

First, the defendants claimed that the instruction did not focus the jury's attention on the need to prove that intent to steal existed at the time of entry for purposes of the burglary charge. The court acknowledged that the instruction given "might suggest that an alleged burglar's intent is measured at the time of the later theft B not at the time of the entry . . . [T]his portion of the instruction should have been more focused as to when the requisite intent must exist in a burglary situation." 171 Wis.2d 627, 637.

Second, the defendants claimed that the instruction shifted the burden to them to prove that they did not have the intent to steal, referring particularly to the last sentence of the instruction. The court of appeals rejected this argument, concluding that the instruction placed a burden on the defendants only to produce evidence that the bills repossessed "were the identical funds previously stolen by Morrison." The burden to prove intent to steal remained on the state. Again, the court said that if this could be considered error, it was isolated and cured by the rest of the instructions. The court suggested that an instruction on this topic "ideally should be accompanied by proximate language which stresses again that the state retains the burden of proof on the element of intent." 171 Wis.2d 627, 642, n. 7.

Pettit illustrates the potential confusion that can develop in a "right to recapture" case. Under the Pettit facts, the Committee believes the following analysis should apply. If Pettit entered Morrison's trailer with the intent to recover money Morrison stole from Pettit, Pettit is not guilty of burglary because he did not enter with the intent to steal. He lacked intent to steal because he intended to take property belonging to him, not "property of another." Pettit would not be guilty of armed robbery for the same reason: If he believed he was taking back

his own property, he did not intend to steal. Further, if he really did take only money Morrison had stolen from him, he would not be guilty for the additional reason that he did not take "property of another." It is with respect to the latter point, that the "same property rule" requires that bills must be exactly the same as those taken from Pettit.

COMMENT

Wis JI-Criminal 710 was approved by the Committee in October 1993.

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755 INVOLUNTARY INTOXICATION OR DRUGGED CONDITION — § 939.42(1)

[RENUMBERED WIS JI-CRIMINAL 755A]

COMMENT

This instruction was originally published as Wis JI-Criminal 755 in 1962 and revised in 1984, 1994, and 2005. This instruction was renumbered Wis JI-Criminal 755A in February 2015.

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755A INVOLUNTARY INTOXICATION OR DRUGGED CONDITION — § 939.42(1)

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.[1]

Involuntary Intoxication

The defense of involuntary intoxication is also an issue in this case.

(An intoxicated) (A drugged) condition is a defense to criminal liability if it is involuntarily produced and makes the person unable to tell whether his acts are right or wrong at the time the acts are committed.

(Intoxication) (A drugged condition) is involuntary when it is brought about by duress, deceit, or mistake.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements of this offense have been proved,[3] and that at the time of the alleged offense the defendant was not in an involuntary (intoxicated) (drugged) condition which made him unable to distinguish between right and wrong, you should find the defendant guilty.

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

COMMENT

This instruction was originally published as Wis JI-Criminal 755 in 1962 and revised in 1984, 1994, and 2005. This revision renumbered the instruction as Wis JI-Criminal 755A and was approved by the Committee in February 2015.

Section 939.42, the statute that formerly codified both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014].

As amended by Act 307, § 939.42 reads as follows:

939.42 Intoxication. An intoxicated or a drugged condition of the actor is a defense only if such condition is involuntarily produced and does one of the following:

(1) Renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed.

(2) Negatives the existence of a state of mind essential to the crime.

With the revision of § 939.42 by Act 307, the Committee decided to split former Wis JI-Criminal 755 into two versions: Wis JI-Criminal 755A for cases under sub. (1) and Wis JI-Criminal 755B for cases under sub. (2).

The 1953 Legislative Council Report on the Criminal Code commented on this defense as follows:

> In practice the defense provided by subsection (1) is seldom raised, for it is necessary to show that the intoxicated or drugged condition both (a) was involuntarily produced and (b) rendered the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act was committed. In order to show that the intoxication was involuntary, it generally is necessary to show that it was induced by force or fraud on the part of a third person, or that it resulted from a mistake on the part of the actor as to the intoxicating nature of the thing he consumed. If it can be established that the intoxicated or drugged condition was involuntary, it still is necessary to show that it was of such a degree as to render the actor incapable of distinguishing between right and wrong. Thus, in regard to the effect which involuntary intoxication must produce in order to be considered a defense, the same test applies as in the case of mental disease or deficiency as a defense. The fact that the temporary inability to distinguish between right and wrong dealt with under subsection (1) intoxication does not mean that a mental disease such as delirium tremens is not a defense when produced by voluntary intoxication, but it is a defense under the section on insanity and feeblemindedness rather than under this section.

The primary issue discussed by Wisconsin appellate courts since the 1953 Report has been the connection between involuntary intoxication and addiction to drugs or alcohol. See note 2, below.

1. The Committee recommends that all instructions on defensive matters be combined with the instruction on the underlying offense. Combining the instructions will help the jury understand the issues and clarify the allocation of the burden of persuasion.

Involuntary intoxication can be considered an "affirmative defense" in the sense that it is not an issue in the case until raised by the evidence and is not necessarily inconsistent with any elements of the crime. The Committee recommends combining the instruction on involuntary intoxication with that for the underlying crime by inserting Wis JI-Criminal 755 after the explanation of the elements of the crime but before the concluding paragraphs. The nonexistence of the defense should then be included in the concluding paragraph. This will clarify for the jury the facts that it must find in order to return a guilty verdict and make it less likely that the instructions could be interpreted as shifting the burden of persuasion to the defendant. The Wisconsin Court of Appeals has suggested this as "the better policy." State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

2. Addiction to drugs or alcohol is not a basis for "involuntariness" under the statute. Loveday v. State, 74 Wis.2d 503, 247 N.W.2d 116 (1976). Language in previous cases that may be inconsistent with this holding was withdrawn. (See Roberts v. State, 41 Wis.2d 537, 543, 545-46, 164 N.W.2d 525, 527, and 529 (1969); Staples v. State, 74 Wis.2d 13, 19-20, 245 N.W.2d 679 (1976).

In State v. Gardner, 230 Wis.2d 32, 601 N.W.2d 670 (Ct. App. 1999), the court held that the involuntary intoxication defense can apply where intoxication results from the effects of prescription drugs. The court declined to limit the defense to situations when the defendant did not know about the intoxicating effect of the medication. "Even if forewarned of the intoxicating effect of a prescription drug, a person should have recourse to the defense if the drug renders him or her unable to distinguish between right and wrong." 230 Wis.2d 32, 41. However, "this does not include cases where a patient knowingly takes more than the prescribed dosage, or mixes a prescription drug with alcohol or other controlled substance. Neither would the defense be available to one who voluntarily undertakes an activity incompatible with the drug's side effects." 230 Wis.2d 32, 42.

3. The Committee recommends that the absence of the defense be added to the concluding paragraph. See note 1, supra. The appropriate number of elements should be inserted in the blank. Refer to the applicable instruction for the offense.

Once a defensive matter, such as involuntary intoxication, is raised by the evidence, the burden is on the state to prove the absence of the defensive matter to support a conviction for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1974).

Using battery as an example, combining the elements with the absence of involuntary intoxication would result in the following:

> If you are satisfied beyond a reasonable doubt that all four elements of battery have been proved, and that at the time of the act the defendant was not in an involuntary intoxicated condition which made him unable to distinguish between right and wrong, you should find the defendant guilty.

(See Wis JI-Criminal 1220, Battery.)

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755B INVOLUNTARY INTOXICATION OR DRUGGED CONDITION — § 939.42(2)

ADD THE FOLLOWING TO THE INSTRUCTION ON THE OFFENSE CHARGED IMMEDIATELY AFTER THE DEFINITION OF THE MENTAL ELEMENT TO WHICH THE EVIDENCE OF INTOXICATION RELATES.

Involuntary Intoxication

Evidence has been presented which, if believed by you, tends to show that the defendant was involuntarily (intoxicated) (drugged) at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted with the (describe mental state) [1] required for this offense.

(An intoxicated) (A drugged) condition may be a defense to criminal liability if it is involuntarily produced. (An intoxicated) (A drugged) condition is involuntary when it is brought about by duress, deceit, or mistake.[2]

If the defendant was so (intoxicated) (drugged) that the defendant did not (describe mental state), you must find the defendant not guilty of (charged crime).

Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant (describe mental state).

COMMENT

This instruction was approved by the Committee in March 2015.

Wis JI-Criminal 755 originally addressed only the version of the involuntary intoxication defense now specified in § 939.42(1). With the revision of § 939.42 by Act 307, the Committee decided to split former Wis JI-Criminal 755 into two versions: Wis JI-Criminal 755A for cases under sub. (1) and Wis JI-Criminal 755B for cases under sub. (2).

Section 939.42, the statute that formerly codified both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014].

As amended by Act 307, § 939.42 reads as follows:

939.42 Intoxication. An intoxicated or a drugged condition of the actor is a defense only if such condition is involuntarily produced and does one of the following:

(1) Renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed..
(2) Negatives the existence of a state of mind essential to the crime.

The 1953 Legislative Council Report on the Criminal Code commented on this defense as follows:

In practice the defense provided by subsection (1) is seldom raised, for it is necessary to show that the intoxicated or drugged condition both (a) was involuntarily produced and (b) rendered the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act was committed. In order to show that the intoxication was involuntary, it generally is necessary to show that it was induced by force or fraud on the part of a third person, or that it resulted from a mistake on the part of the actor as to the intoxicating nature of the thing he consumed. If it can be established that the intoxicated or drugged condition was involuntary, it still is necessary to show that it was of such a degree as to render the actor incapable of distinguishing between right and wrong. Thus, in regard to the effect which involuntary intoxication must produce in order to be considered a defense, the same test applies as in the case of mental disease or deficiency as a defense. The fact that the temporary inability to distinguish between right and wrong dealt with under subsection (1) intoxication does not mean that a mental disease such as delirium tremens is not a defense when produced by voluntary intoxication, but it is a defense under the section on insanity and feeblemindedness rather than under this section.

The primary issue discussed by Wisconsin appellate courts since the 1953 Report has been the connection between involuntary intoxication and addiction to drugs or alcohol. See note 2, below.

1. Here insert either a general description of the required mental state (e.g., "knowledge that the property belonged to another") or a more specific one, tailored to the facts of the case (e.g., "knowledge that the wallet belonged to John Jones").

In a theft case, the instruction would read as follows:

Evidence has been received which, if believed by you, tends to show that the defendant was involuntarily (intoxicated) (drugged) at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted with knowledge that the property belonged to another required for this offense. If the defendant was so (intoxicated) (drugged) that he did not know the property belonged to another person, you must find him not guilty of theft. Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant knew the property belonged to John Jones.

Involuntary intoxication that tends to negate a mental element calls for the same approach to integrating the defense with the elements of the crime as that used for voluntary intoxication under former § 939.42(2). See the note following the Comment to Wis JI-Criminal 765 discussing the issue.

2. Addiction to drugs or alcohol is not a basis for "involuntariness" under the statute. Loveday v. State, 74 Wis.2d 503, 247 N.W.2d 116 (1976). Language in previous cases that may be inconsistent with this holding was withdrawn. (See Roberts v. State, 41 Wis.2d 537, 543, 545-46, 164 N.W.2d 525, 527, and 529 (1969); Staples v. State, 74 Wis.2d 13, 19-20, 245 N.W.2d 679 (1976).

In State v. Gardner, 230 Wis.2d 32, 601 N.W.2d 670 (Ct. App. 1999), the court held that the involuntary intoxication defense can apply where intoxication results from the effects of prescription drugs. The court declined to limit the defense to situations when the defendant did not know about the intoxicating effect of the medication. "Even if forewarned of the intoxicating effect of a prescription drug, a person should have recourse to the defense if the drug renders him or her unable to distinguish between right and wrong." 230 Wis.2d 32, 41. However, "this does not include cases where a patient knowingly takes more than the prescribed dosage, or mixes a prescription drug with alcohol or other controlled substance. Neither would the defense be available to one who voluntarily undertakes an activity incompatible with the drug=s side effects." 230 Wis.2d 32, 42.

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765 VOLUNTARY INTOXICATION[1] — § 939.42(2)

INSTRUCTION WITHDRAWN
FOR OFFENSES OCCURRING AFTER APRIL 18, 2014,
BECAUSE THE STATUTE TO WHICH IT PERTAINED
WAS REPEALED BY 2013 WISCONSIN ACT 307

ADD THE FOLLOWING TO THE INSTRUCTION[2] ON THE OFFENSE CHARGED IMMEDIATELY AFTER THE DEFINITION OF THE MENTAL ELEMENT TO WHICH THE EVIDENCE OF INTOXICATION RELATES.

Intoxication

Evidence has been presented which, if believed by you, tends to show that the defendant was intoxicated at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted with the (describe mental state) [3] required for this offense.

If the defendant was so intoxicated that the defendant did not (describe mental state), you must find the defendant not guilty of (charged crime).

Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant (describe mental state).

COMMENT

Wis JI-Criminal 765 was originally published in 1962 and revised in 1984, 1995, 1999, 2004, and 2010. Its withdrawal for offenses occurring after the effective date of 2013 Wisconsin Act 307 was approved by the Committee in March 2015.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication.

The Committee concluded that the text of Wis JI-Criminal 765 should be retained for use in cases involving crimes occurring before April 18, 2014 – the effective date of Act 307.

Questions remain whether evidence relevant to the non-existence of the mental element of a crime may be categorically excluded by the legislative repeal of a statute recognizing a defense like voluntary intoxication.

As amended by Act 307, § 939.42 reads as follows:

> **939.42 Intoxication**. An intoxicated or a drugged condition of the actor is a defense only if such condition is involuntarily produced and does one of the following:
>
> (1) Renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed.
> (2) Negatives the existence of a state of mind essential to the crime.

Act 307 also repealed former sub. (3) of § 939.24, which read as follows:

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

The 1995 revision of this instruction responded to the decision in State v. Foster, 191 Wis.2d 14, 528 N.W.2d 22 (Ct. App. 1995). In Foster, the trial court changed the then-current version of Wis JI-Criminal 765 from "you must consider the evidence that he was intoxicated" to "you may consider . . ." The defendant claimed this was error. The court of appeals rejected that claim but held that neither the standard instruction nor the trial court's modification was a correct statement of the law:

> We conclude that a correct statement of the law should be conveyed by instructing a jury that it 'must consider the evidence regarding whether the defendant was intoxicated at the time of the alleged offense.'

191 Wis.2d 14, 28.

The court agreed with the state's contention that the standard instruction advised a jury "not merely to consider evidence, but rather, to consider evidence in a way that favors the intoxication defense." But the trial court's modification to use "may" was erroneous because a "jury could interpret this to mean that it need not consider that evidence at all." 191 Wis.2d 14, 28. Thus, the court of appeals read the phrase "you must consider evidence that he was intoxicated" as an improper suggestion that the defendant really was intoxicated.

The Committee determined that the concerns discussed in Foster could best be addressed by changing the introductory section of the instruction to read:

> Evidence has been presented which, if believed by you, tends to show that the defendant was intoxicated at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted with the (describe mental state) required for this offense. . . .

This reaffirms that it is not mere intoxication that may constitute a defense; intoxication must negate the mental state required for the crime.

1. This instruction is for the defense formerly recognized by § 939.42(2), 2011-12 Wis. Stats., which provided that an "intoxicated or drugged condition" is a defense if it "[n]egatives the existence of a state of mind essential to the crime." The state was revised by 2013 Wisconsin Act 307 to apply only to involuntary intoxication.

2. The Committee recommends that the instruction be combined with the instruction on the crime charged. Specifically, it should be inserted at the point where the required mental state is defined. The Committee has concluded that this is the best way to instruct on defensive matters that are inconsistent with elements of a crime.

3. Here insert either a general description of the required mental state (e.g., "knowledge that the property belonged to another") or a more specific one, tailored to the facts of the case (e.g., "knowledge that the wallet belonged to John Jones").

In a theft case, the instruction would read as follows:

> Evidence has been received which, if believed by you, tends to show that the defendant was intoxicated at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted with knowledge that the property belonged to another required for this offense. If the defendant was so intoxicated that he did not know the property belonged to another person, you must find him not guilty of theft. Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant knew the property belonged to John Jones.

Combining the intoxication instruction with the instruction on the crime

This instruction is substantially briefer than the pre-1984 versions of Wis JI-Criminal 765. It differs in that it does not offer extensive explanation of what intoxication is or describe what effects intoxication must have in order to be a "defense." Further, it does not explicitly require the state to prove that the defendant was not intoxicated in order to support a finding of guilty.

The reasons for recommending this brief version are based on those articulated by Justice Callow in his dissent in State v. Schulz, 102 Wis.2d 423, 302 N.W.2d 151 (1981). He argued that where a recognized "defense" negates an element of the crime, it is unnecessary to specifically advise the jury that the state must "disprove" the existence of that defense:

> It is elementary that to prove a thing exists one must in effect disprove its nonexistence. Thus when a jury is instructed that the state must prove intent beyond a reasonable doubt, it means there must be no reasonable doubt arising from the defendant's intoxication or any other intent-negating factor.
>
> . . . [w]here the issue is merely the negative or nonexistence of an element of the crime, as it is with intoxication, to first instruct on the state's burden with respect to the elements of the crime and then to instruct on the state's burden as to the nonexistence of an alcohol or drug induced negation of these elements is not only redundant but also, I believe, impermissibly intrusive into the discretion of the state to prosecute its case.

> . . . . If a trial judge . . . decides an intoxication instruction is warranted, the jury need only be advised that in considering whether the defendant possessed the requisite intent to commit the crime, although intoxication alone does not relieve one of criminal responsibility, the fact that the defendant may have been intoxicated should be taken into account.

102 Wis.2d 423, 442-43.

The Committee concluded that the Callow suggestion should be pursued. The state's burden of proving all required elements does not change. Where certain evidence points to a reason why a required element might not be present (e.g., too intoxicated to intend to steal), nothing is to be gained by extensively defining that reason and requiring the state to prove the reason's absence. Rather, that duty is inevitably a part of proving the existence of the element with which the reason is inconsistent. To elaborate on the evidence relating to a particular reason why an element is not present is to increase the possibility for jury confusion and distraction. Rather than focussing on the central issue – did the defendant intend to steal – it is likely that the jury will be concerned with a tangential issue – how drunk was the defendant – which is important only to the extent that it has some effect on the existence of the central issue.

Thus, in the Committee's judgment, the briefer version accomplishes what it ought to accomplish. In a case where evidence has been received on the defendant's intoxicated condition, Wis JI-Criminal 765 puts that evidence into proper perspective by telling the jury that it should consider the evidence when determining whether the defendant had the mental state required for the crime charged. But the instruction does not give the evidence any more or any less emphasis than that, because evidence is only relevant to the extent that it tends to make more or less probable a fact of consequence to the determination of the action – the defendant's mental state. This approach has the additional advantage of avoiding long definitions of the "defense" that risk being interpreted by the jury as imposing a burden of persuasion on the defendant. See, for example, State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981). Compare Barrerra v. State, 109 Wis.2d 324, 325 N.W.2d 722 (1982).

Note that the Schulz case involved a modification of the then-standard intoxication instruction to include language stating that "the defendant must establish" that he was "utterly incapable" of forming the intent required. The court held that this was error, as it created the risk that the jury would understand the instruction as shifting the burden of persuasion to the defendant. [The source of the "utterly incapable" language is State v. Guiden, 46 Wis.2d 328, 174 N.W.2d 488 (1970).] Although three later cases distinguished similar instruction and found no error, the Committee recommends against the use of the "Guiden" language. [See State v. Reynosa, 108 Wis.2d 499, 322 N.W.2d 504 (Ct. App. 1982); State v. Hedstrom, 108 Wis.2d 532, 322 N.W.2d 513 (Ct. App. 1982); State v. Barrerra, 109 Wis.2d 324, 325 N.W.2d 722 (1982).]

Intoxication and crimes of recklessness

The voluntary intoxication instruction is appropriate when supported by the evidence in any case where the crime has a mental state with which intoxication may be inconsistent. An exception is provided for crimes involving recklessness. Although "criminal recklessness" is defined to include "awareness of the risk" – a mental element that intoxication arguably might negate – § 939.24(3) provides that "a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being." This reaches the same result as prior law. See Ameen v. State, 51

Wis.2d 175, 174 N.W.2d 488 (1971), holding that intoxication was not a defense to second degree murder under the pre-1989 homicide statutes.

The amount of evidence necessary to support an instruction on intoxication – the "burden of production"

It is difficult to describe precisely the extent and nature of evidence that is necessary to entitle the defendant to an instruction on voluntary intoxication. The Wisconsin Supreme Court has identified the following standard: An intoxication instruction is required when, "viewing the evidence in the light most favorable to the defendant, a jury could reasonably have found that he was so intoxicated that he lacked the intent to kill." Larson v. State, 86 Wis.2d 187, 195, 271 N.W.2d 647 (1978). The court has recently emphasized that what is required is evidence that the defendant was intoxicated to an extent that meets the legal standard. That is, there must be evidence that the defendant was intoxicated to an extensive degree; it is not sufficient to have a substantial amount of evidence of a lesser degree of intoxication.

> . . . in order to qualify for an instruction on the defense of voluntary intoxication, the defendant must produce evidence sufficient to raise intoxication as an issue. To do this he must come forward with some evidence of the degree of intoxication which constitutes the defense. An abundance of evidence which does not meet the legal standard for the defense will not suffice. There must be some evidence that the defendant's mental faculties were so overcome by intoxicants that he was incapable of forming the intent requisite to the commission of the crime. A bald statement that the defendant had been drinking or was drunk is insufficient C insufficient not because it falls short of the quantum of evidence necessary, but because it is not evidence of the right thing. In order to merit an intoxication instruction in this case, the defendant must point to some evidence of mental impairment due to the consumption of intoxicants sufficient to negate the existence of the intent to kill.

State v. Strege, 116 Wis.2d 477, 486, 343 N.W.2d 100 (1984).

In the Committee's judgment, several aspects of the above standard should be emphasized. First of all, the burden does not always lie with the defendant to produce the evidence relevant to intoxication. Such evidence may be produced as part of the state's case. Second, the standard helpfully stresses that it is not sufficient to simply point to evidence tending to show intoxication. There must be evidence of intoxication that is relevant to the nonexistence of the mental element required for the particular criminal offense. The relevance of evidence of intoxication may vary depending on the mental element involved. For example, intoxication may be much more likely to be inconsistent with the mental element required for theft (knowledge that the property belonged to another person) than it is with, for example, the intent to kill. Third, the way the revised version of Wis JI-Criminal 765 is written should make it more acceptable to give an intoxication instruction rather than invite unnecessary litigation over whether the instruction should have been given. The revised instruction does not require the state to negate intoxication; it simply tells the jury that in determining whether the defendant acted with the required intent or knowledge, they should consider the evidence tending to show that he was intoxicated. The intent or knowledge is always an issue for the jury and they will almost always have heard the testimony regarding intoxication. Simply telling them they may consider the evidence they have already heard, but emphasizing that the mental state is the ultimate issue to which they must direct their attention, should involve very little risk that the jury will be confused or misled into giving inappropriate consideration to the intoxication issue.

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770 MISTAKE[1] — § 939.43(1)

ADD THE FOLLOWING TO THE INSTRUCTION[2] ON THE OFFENSE CHARGED IMMEDIATELY AFTER THE DESCRIPTION OF THE MENTAL ELEMENT TO WHICH THE EVIDENCE OF MISTAKE RELATES.

Mistake

Evidence has been received which, if believed by you, tends to show that the defendant believed that [HERE IDENTIFY THE DEFENDANT'S BELIEF].[3] You must consider this evidence in deciding whether the defendant acted with the (describe mental state) required for this offense.

If an honest error of fact results in a person's not having the (intent) (knowledge)[4] required for a crime, the person is not guilty of that crime.

Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant (describe mental state).[5]

COMMENT

Wis JI-Criminal 770 was originally published in 1962 and revised in 1984, 1994, 1997, and 2005. This revision was approved by the Committee in June 2009.

The 2009 revision changed the first paragraph of the instruction to follow the approach used in Wis JI-Criminal 765, Voluntary Intoxication. In State v. Ludwig, No. 2008 AP2079-CR, [decided May 28, 2009, not published], the court of appeals held that the previous version of the instruction was in error in stating that the jury "must consider" evidence of the mistake that the defendant claims negated the mental state for the crime. The trial judge changed "must" to "may" and the court of appeals held this was error. But the court also held that the published instruction is in error in using "must." This is the same issue that arose with Wis JI-Criminal 765, Voluntary Intoxication, in 1995, and which was addressed in State v. Foster, 191 Wis.2d 14, 528 N.W.2d 22 (Ct. App. 1995). The 2009 revision of this instruction adopted the same approach as the one adopted for Wis JI-Criminal 765 in light of the Foster decision.

The mistake defense is applicable only to the extent that "an honest error" negates a mental element required for the crime. If a crime lacks a mental element, the defense of mistake is not available. In State v. Lindvig, 205 Wis.2d 100, 555 N.W.2d 197 (Ct. App. 1996), the court held that the defense of mistake was not

available to a defendant charged with a violation of § 940.24, causing injury by the negligent operation of a dangerous weapon. This is because criminal negligence does not require a mental state; it is an objective standard that requires "conduct which the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another." See § 939.25. However, the Committee recommends caution in making any broad statements to the jury in an attempt to communicate this rule. This is because evidence of the defendant's mistaken belief about the circumstances may be relevant to a jury's determination about whether criminal negligence is established. For example, if there is evidence that a defendant believed that no one was present in the area where a dangerous weapon was being handled and if there is a basis for finding that the belief was reasonable, the jury must be allowed to consider that evidence in deciding whether the defendant should have realized that his or her conduct created an unreasonable and substantial risk. This consideration would not be under the label of a mistake defense, but rather would simply be part of the jury's consideration of whether the elements of the crime are established. For discussion of a related problem, see Wis JI-Criminal 926, Contributory Negligence.

In State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393, the issue was whether the defendant was entitled to an instruction on the mistake defense in his prosecution for physical abuse of a child by recklessly causing great bodily harm under § 948.03(3)(a). The court of appeals concluded that the mistake defense did not apply because the crime charged does not require a mental element that the alleged mistake could negate. "Inasmuch as § 948.03 sets out its own unique definition of 'recklessly,' the general definition of criminal recklessness [in § 939.24] does not apply." 2006 WI App 185, ¶11. Note that the general definition of criminal recklessness in § 939.24 does require a mental element: awareness of an unreasonable and substantial risk of death or great bodily harm to another.

1. This is for the defense recognized by § 939.43, which reads as follows:

> (1) An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime.
>
> (2) A mistake as to the age of a minor or as to the existence or constitutionality of the section under which the actor is prosecuted or the scope or meaning of the terms used in that section is not a defense.

Thus, the mistake can be one of fact or of law other than the criminal law. The commentary in the 1953 Report on the Criminal Code is helpful in explaining "mistake." It is included at the end of this Comment.

2. The Committee recommends that the instruction be combined with the instruction on the crime charged. Specifically, it should be inserted at the point where the required mental state is defined. The Committee has concluded that this is the best way to instruct on defensive matters that are inconsistent with elements of a crime.

3. Here insert the mistake the defendant claims to have made (e.g., ". . . he had permission to use the automobile" C in a case of "operating without the owner's consent"). (See complete sample instruction in note 5, below.)

4. The mental state for most crimes is either intent (e.g., "intent to cause bodily harm") or knowledge (e.g., "knew that the owner did not consent").

5. Here insert the mental state required for the crime charged (e.g., "knew the taking and driving of the automobile was without the owner's consent" C in a case of "operating without the owner's consent").

In a case involving a violation of § 943.23(2), taking and driving a vehicle without the owner's consent, the instruction would read as follows:

> Evidence has been received which, if believed by you, tends to show that the defendant believed that he had the permission of the owner to use the vehicle. You must consider this evidence in deciding whether the defendant knew that the owner did not consent to the taking and driving the vehicle.
>
> If an honest error of fact results in a person not having the knowledge required for a crime, the person is not guilty of that crime.
>
> Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant knew that the taking and driving of the automobile was without the owner's consent.

— — — — — — — — — —

The commentary from the 1953 Report on the Criminal Code follows.

COMMENT. Criminal intent or any other mental element of crime is nearly always proved circumstantially, by inference from the actor's conduct. Mistake is a defense when it rebuts the inference of criminal intent or some other mental element necessary for the particular crime in question. Aside from this, there is no saving power in mistake. Two conclusions can be drawn immediately: (1) In crimes which do not require proof of a mental element, mistake is no defense; and (2) in crimes which require proof of a mental element, any mistake other than a mistake of criminal law which rebuts the inference of the existence of that mental element is a defense.

The defendant who raises the defense of mistake basically is contending that the state cannot establish a mental element essential to the crime charged. Since that mental element generally is criminal intent, it follows that the defense of mistake is closely related to the definition of criminal intent. A mistake as to the existence or constitutionality of the section under which the actor is prosecuted or as to the scope or meaning of the terms used in that section is not a defense because, as stated in the section on criminal intent, proof of knowledge of those things is not necessary for proof of criminal intent. For the same reason, a mistake as to the age of a minor is not a defense, although in the absence of the special provision in the section defining criminal intent making proof of knowledge of the age of a minor unnecessary, the state would generally have to prove that the actor knew the victim was under a certain age. On the other hand, if proof of knowledge of certain facts or law is necessary for proof of criminal intent, ignorance or mistake as to such facts or law (other than criminal law) is a defense.

An example may help to clarify the explanation. Assume that a statute provides that it is a crime to "intentionally cause physical damage to any property of another without his consent" and that "property of another" is defined to mean property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair. Assume as facts that the United States government when it first surveyed the land now belonging to the actor put thereon a stone slab as a survey marker and that the actor destroys this

marker for the purpose of better utilizing his land. He may do so under any of several different beliefs which will have a bearing upon the defense of mistake:

Case 1. He destroys the marker, mistakenly believing that there is no statute prohibiting damage to property of another. Such a mistake is no defense for criminal intent does not require proof of knowledge of the existence of the statute under which the actor is prosecuted.

Case 2. He destroys the marker, mistakenly believing that the statute prohibiting damage to property of another is unconstitutional. Such a mistake is no defense, for criminal intent does not require proof of knowledge of the constitutionality of the statute under which the actor is prosecuted.

Case 3. He destroys the marker, mistakenly believing that the term "property of another" does not include property belonging to the United States government. Such a mistake is no defense, for criminal intent does not require proof of knowledge of the scope or meaning of terms used in the statute under which the actor is prosecuted.

Case 4. He destroys the marker, mistakenly believing that when he purchased the land he got title to the marker also. Such a mistake is a defense, for criminal intent requires proof of all those facts set forth after the word "intentionally" and which must be proved to exist in order to make out the objective part of the crime. If the actor believed the property to be his own, he could not have known it to be property of another. The fact that the actor's erroneous conclusion as to his property rights may have been based upon a mistake of law is immaterial.

Case 5. He destroys the marker, mistaking it for an ordinary rock. Such a mistake is a defense for the same reason that his mistake in Case 4 is a defense. In both cases, the mistake renders it impossible for the state to establish that he knew it was property of another that he damaged.

The above analysis shows that the efficacy of mistake as a defense does not depend entirely on whether the mistake is one of fact or one of law. In both Case 3 and Case 4, the mistake is one of law; in Case 3, the mistake is not a defense while in Case 4 it is. The distinction between the two is that in Case 3, the mistake goes to the meaning of a term used in the statute under which the actor is prosecuted, while in Case 4, the mistake is as to nonpenal or property law which under the particular statute is an essential basis for a factual conclusion necessary for criminal intent.

The claim of mistake must of course be honest rather than spurious. The use of the term "honest error" in the section is merely for the purpose of emphasizing that point. However, if the mistake is real and it negatives a state of mind essential to the crime, the actor is entitled to the defense even though the mistake is unreasonable. It may be difficult for a defendant to raise a reasonable doubt that his mistake was real if it appears to be unreasonable, but this is a problem of proof and not a matter of substantive law.

772 ACCIDENT

ADD THE FOLLOWING TO THE INSTRUCTION ON THE OFFENSE CHARGED IMMEDIATELY AFTER THE DESCRIPTION OF THE ELEMENT TO WHICH THE EVIDENCE OF ACCIDENT RELATES.[1]

Accident

The defendant contends that (he) (she) did not act with (describe mental state),[2] but rather that what happened was an accident.

If the defendant did not act with the (describe mental state) required for a crime, the defendant is not guilty of that crime.

Before you may find the defendant guilty of (name charged crime),[3] the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant (describe mental state).

COMMENT

Wis JI-Criminal 772 was originally published in 2002. This revision was approved by the Committee in December 2004.

This instruction is intended to provide a suggested format for instructing the jury on the defense of "accident." In State v. Watkins, 2002 WI 101, 255 Wis.2d 265, 647 N.W.2d 244, the Wisconsin Supreme Court recognized that "'[a]ccident' is a defense to homicide recognized at common law and specifically recognized in Wisconsin statutes dating back to 1849." 2002 WI 101, &33. The defense survived the revision of the homicide statutes in the 1950's as "a defense that negatives intent, and may negative lesser mental elements." 2002 WI 101, &41. Because the significance of evidence of accident is its tendency to negate an element C usually, the mental element C the state overcomes the defense by proving that element beyond a reasonable doubt.

Watkins involved a death caused by the discharge of a firearm during an encounter between the defendant and the victim. The incident occurred in a motel room with no witnesses present. The defendant was charged with first degree intentional homicide and raised the defense of accident. That is, the defendant claimed he did not cause the death with intent to kill because the firearm discharged accidentally. If the format suggested by Wis JI-Criminal 772 was used to instruct the jury on this claim, it would read as follows:

The defendant contends that he did not act with the intent to kill, but rather that what happened was an accident.

If the defendant did not act with the intent required for a crime, the defendant is not guilty of that crime.

Before you may find the defendant guilty of first degree intentional homicide, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant acted with the intent to kill.

Because evidence tending to show accident is significant only to the extent that it negates an element of the crime, it can be argued that a special jury instruction is not necessary. A jury finding that the element is established necessarily establishes that evidence of accident is not sufficient to negate that element. However, this is also true with the statutorily-recognized defenses of voluntary intoxication, see § 939.42(2) and Wis JI-Criminal 765, and mistake, see § 939.42(2) and Wis JI-Criminal 770. The Committee concluded that where the evidence has referred to "accident" as a defense, the jury's understanding will be aided by an instruction that puts the evidence in its proper context.

1. The Committee recommends that this instruction be combined with the instruction on the crime charged. Specifically, it should be inserted at the point where the element to which evidence of accident relates is defined. Usually, this will be the mental state required for the crime, but other elements could be involved. The test should simply be one of relevance: does the evidence have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See, § 904.01.

2. Here describe the element to which the evidence of accident relates. This will usually be the mental state, such as, intent to kill. For cases involving recklessness, the relevant mental state would be "awareness of the risk."

3. The Committee suggests identifying the crime to which the defense of accident relates because in some cases lesser included offenses may be submitted for which the evidence of accident might not be relevant. For example, evidence that a firearm discharged accidentally would tend to show the absence of intent to kill [required for intentional homicide] but may not tend to show the absence of awareness of the risk of death or great bodily harm [required for reckless homicide]. The relevance of the evidence must be analyzed separately for each crime that is to be submitted to the jury.

775 ALIBI

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

TO BE GIVEN ONLY ON THE REQUEST OF THE DEFENDANT[1]

Alibi

There is evidence in this case that at the time of the commission of the offense charged, the defendant was at a place other than that where the crime occurred.[2]

It is not necessary for the defendant to establish that he was not present at the scene of the crime or that he was at some other place. The burden is upon the State to convince you beyond a reasonable doubt that the defendant committed the offense as charged.

COMMENT

Wis JI-Criminal 775 was originally published in 1962 and revised in 1984 and 1995. This revision was approved in December 2004.

1. The Committee recommends that this instruction be given only when requested by the defendant. The state is required to prove that the defendant committed the crime, and it is obvious that if the defendant was somewhere else when the crime was committed, he did not commit it. To call this an "alibi" and specially instruct on it strikes the Committee as unnecessary, unless the defendant makes a specific request.

2. In the former version of this instruction, the following sentence appeared at this point: "This is what is known in the law as an alibi." While it is not reversible error to use the word "alibi" in the instruction (State v. Williamson, 84 Wis.2d 370, 267 N.W.2d 337 (1978)), the Committee concluded that it is preferable not to, because it may have prejudicial connotations to the jury. However, if the lawyers or witnesses have used "alibi," it is recommended that the following be added at the beginning of the instruction:

> References have been made to the defendant having an "alibi." The word, "alibi," is simply the Latin word for "elsewhere." It is used as a shorthand method of describing evidence that the defendant was elsewhere at the time the alleged crime took place.

See Logan v. State, 43 Wis.2d 128, 135, 168 N.W.2d 171 (1969).

— — — — — —

Section 971.23(8) sets forth the procedural requirements that apply to the presentation of alibi evidence. Exclusion of the defendant's own testimony may not be a proper remedy for failure to comply with the statute's notice requirements. Less drastic measures, such as granting a continuance to the state to allow it to prepare for such testimony, should be explored. See Alicea v. Gagnon, 675 F.2d 913 (7th Cir. 1982). Also see State v. Burroughs, 117 Wis.2d 293, 344 N.W.2d 149 (1984).

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780 ENTRAPMENT

SUBSTITUTE THE FOLLOWING FOR THE FINAL TWO PARAGRAPHS OF THE INSTRUCTION FOR THE CRIME CHARGED.[1]

Whether You Should Consider the Defense of Entrapment

You should consider the defense of entrapment only if you are satisfied beyond a reasonable doubt that the defendant committed all the elements of (name of offense) .

If you are not so satisfied, you must find the defendant not guilty, and you need not consider entrapment.

The Meaning of "Entrapment"

"Entrapment" is a defense available to defendants when a law enforcement officer has used improper methods to induce them to commit an offense they were not otherwise disposed to commit.[2]

Did Police Induce the Defendant?

First consider whether police induced the defendant to commit the crime. "Induce" means to persuade or influence someone to do something.[3] Giving someone the opportunity to commit the crime is not the same as inducing or persuading someone to commit the crime.[4]

ADD THE FOLLOWING WHEN ILLEGAL SALE OR PROSTITUTION IS INVOLVED.

[A mere offer to buy does not create more than the usual opportunity to commit an offense. For example, when the police desire to obtain evidence against a person who they

have some reason to believe is (selling controlled substances) (selling obscene literature) (selling liquor after hours) (engaged in prostitution), it is not improper for the police to pretend to be somebody else and to offer, either directly or through an informer or other decoy, (to purchase the goods which are being sold illegally) (to have intercourse for money). When that occurs, the police are creating only the usual opportunity to commit this kind of an offense.][5]

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that there was inducement.[6]

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.

If you are not satisfied that police induced the defendant to commit the crime, you should find that the defendant was not entrapped and need not consider any other issues relating to entrapment.

If you are satisfied that police induced the defendant to commit the crime, you must consider whether the defendant was entrapped.

The State's Burden Of Proof

If you are satisfied that police induced the defendant to commit the crime, the state must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not entrapped.

The state may prove that the defendant was not entrapped by showing either:

- that the inducement was not excessive; or,
- that the defendant was predisposed to commit the crime before being induced.

Was There Excessive Inducement?

The law recognizes that, in the enforcement of the law, it is often necessary for law enforcement officers to afford persons the freest opportunity to commit offenses which those persons are disposed to commit. Some inducement, encouragement, or solicitation by law enforcement officers is, therefore, permissible. But it is not proper for them to use excessive incitement, urging, persuasion, or temptation.[7] Inducement is excessive when it is likely to induce the commission of an offense by a person not already disposed to commit an offense of that kind. It is the duty of law enforcement officers to detect criminals but not to create them.

Was the Defendant Predisposed To Commit the Crime?

Entrapment is present when a person who is not predisposed to commit a crime is induced or persuaded to do so by law enforcement officers. If a person is predisposed to commit a crime, then entrapment is not present, even though law enforcement officers or their agents did induce the person to commit a crime.

In determining whether the defendant was predisposed to commit the crime charged, you may consider the defendant's personal background, the nature and extent of any inducements

of the law enforcement officer, and all the other circumstances relating to the alleged offense.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant committed all _____ elements of (name of offense) [9] and that the defendant was not entrapped, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 780 was originally published in 1971; the Comment was updated in 1986 and 1991. An alternative, Wis JI-Criminal 780A, was published in 1985 and withdrawn in 2001. This revision was approved by the Committee in September 2001.

The instruction was substantially revised in 2001 in an attempt to increase its understandability. The text reorganizes the material of the prior version but retains its substance, which had been approved in several appellate decisions. See, State v. Saternus, 127 Wis.2d 460, 381 N.W.2d 290 (1986), and State v. Hillesheim, 172 Wis.2d 1, 9, 492 N.W.2d 381 (Ct. App. 1992).

This revision provides for integrating the instruction on the defense with the instruction on the elements of the crime. It retains the dual burden of proof approach that was reaffirmed as the law of the state in State v. Saternus, supra. ["Dual burden" refers to the requirement that the defendant establish inducement by satisfying the civil burden of proof, which imposes a duty on the state to prove beyond a reasonable doubt that entrapment was not present.] The Saternus court summarized its holding as follows:

> In short, there is nothing in the statutes, the legislative history of sec. 939.70, Stats., the common law of Wisconsin, or in federal law which prohibits or limits the right of this court to place the burden of persuasion by a preponderance of the evidence on a defendant to show inducementCand, of course, the final burden, that of proving beyond a reasonable doubt that even an "induced" defendant had a prior disposition to commit the crime, concededly rests upon the state. Those burdens were correctly stated by this court in Hawthorne and were correctly incorporated in the jury instructions used in this case. 127 Wis.2d 460, 480-81.

From 1985 to 2001, an alternative version was published, JI 780A, which eliminated the defendant's burden to prove inducement. JI 780A was withdrawn in 2001 in light of the observation in Saternus that "the alternative instruction does not reflect the decisions as determined by Hawthorne and other holdings of this court." 127 Wis.2d 460, 481, n. 13.

This instruction reflects the following interpretation of the substance of the entrapment defense:

- the defendant may meet the burden to prove inducement by showing inducement of any kind -- there need not be a showing of excessive or improper inducement at this stage;
- if the defendant does show inducement, the state assumes the burden to prove that entrapment was not present and may do so in either of two ways:
  - by showing that the inducement was not excessive or improper; or,
  - by showing that the defendant was predisposed to commit the crime; and,
- if the state proves that the defendant was predisposed to commit the crime, no amount of inducement is improper.

The defense of entrapment, while adopted in almost all jurisdictions, is not based on the United States Constitution. Thus, while decisions of the U.S. Supreme Court and the federal courts are often referred to in connection with the entrapment defense, those decisions are not binding on the states. The two leading Wisconsin cases are State v. Hochman, 2 Wis.2d 410, 413, 86 N.W.2d 446, 448 (1957) and Hawthorne v. State, 43 Wis.2d 82, 168 N.W. 85 (1969).

In State v. Hochman, the Wisconsin Supreme Court defined entrapment as follows: "Entrapment is the inducement of one to commit a crime not contemplated by him for the mere purpose of instituting criminal prosecution against him." In Hawthorne v. State, the court adopted the "origin of intent" test and further held that the accused has the burden to show by a preponderance of the evidence that the inducement occurred and the state has the burden to show beyond a reasonable doubt that the accused has a prior disposition to commit the crime. The Wisconsin analysis follows that developed by the United States Supreme Court in Sorrells v. United States, 287 U.S. 435 (1932), and Sherman v. United States, 356 U.S. 369 (1958).

The most recent entrapment decision of the United States Supreme Court is Jacobson v. United States, 503 U.S. 540, 549 (1992), holding that in federal prosecutions, the government "must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."

Evidentiary Basis for Instructing On Entrapment

The Wisconsin Court of Appeals reversed a conviction for failure to submit an entrapment instruction in State v. Schuman, 226 Wis.2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999), identifying the proper evidentiary standard as follows:

> Only "slight evidence' is required to create a factual issue and put the defense before the jury. United States. v. Kessee, 992 F.2d 1001, 1003 (9th Cir. 1993). . . The evidence may be "weak, insufficient, inconsistent or of doubtful credibility," United States. v. Sotlo-Murillo, 887 F.2d 176, 178 (9th Cir. 1989) . . . ; but the defendant is entitled to the instruction unless the evidence is rebutted by the prosecution to the extent that no rational jury could entertain a reasonable doubt as to either element." United States. v. Hoyt, 879 F.2d 505, 509 (9th Cir. 1989).

Entrapment and Denial of Guilt

In Mathews v. United States, 485 U.S. 58, 62 (1988), a case involving a federal prosecution originating in Milwaukee, the Court held "that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." The holding resolved a split in the federal courts, where several circuits had held that a defendant must "admit the offense" in order to claim entrapment. The Supreme Court addressed the issue by referring to general principles that entitle a defendant to an "instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews at 63. This extends even to inconsistent defenses, if supported by the evidence.

The Mathews holding involves the standard for entrapment in federal courts and is not binding on state courts because entrapment is not constitutionally based. Wisconsin cases suggest a contrary result. In State v. Jansen, 198 Wis. 2d 765, 543 N.W.2d 552 (Ct. App. 1995), the defendant was charged with attempted possession of marijuana with intent to deliver. In a bench trial, the court found him not guilty of that crime because he was entrapped and because intent to deliver was not proven. But the court found him guilty of the lesser included offense of simple possession. The court of appeals held this was error because it is bound by State v. Monsoor, 56 Wis.2d 689, 203 N.W.2d 20 (1973), which held that a defendant who stands on the entrapment defense could not request instructions on lesser included charges. But see, Hawthorne v. State, 43 Wis.2d 82, 94, 168 N.W. 85 (1969): "It does not seem logical to force the defendant to admit guilt in order to raise the issue of entrapment. . . [and providing examples.]

1. The Committee has determined that instructions on "defenses" should be combined with the instruction on the elements of the crime. See State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

2. This statement is based on State v. Hochman, 2 Wis.2d 410, 413-14, 86 N.W.2d 446 (1957).

3. This is based on the common dictionary definition of "induce." See, for example, The American Heritage Dictionary of the English Language, 3rd Edition, 1992, at p. 921: "To lead or move, as to a course of action, by influence or persuasion."

4. This statement is based on State v. Hochman, 2 Wis.2d 410, 414, 86 N.W.2d 446 (1957).

5. State v. Hillesheim, 172 Wis.2d 1, 9, 492 N.W.2d 381 (Ct. App. 1992); State v. Bjerkaas, 163 Wis.2d 949, 955, 472 N.W.2d 615 (Ct. App. 1991).

6. Placing the burden of persuasion on the defendant, and using the civil burden, was approved in State v. Saternus, 127 Wis.2d 460, 381 N.W.2d 290 (1986).

7. "Simply cultivating a friendship with a person . . . does not constitute entrapment." State v. Bjerkaas, 163 Wis.2d 949, 956, 472 N.W.2d 615 (Ct. App. 1991), citing, State v. Boutch, 60 Wis.2d 443, 449, 210 N.W.2d 730 (Ct. App. 1973).

8. Evidence of conduct occurring after the charged offense may be admissible if it is relevant to predisposition. State v. Monsoor, 56 Wis.2d 689, 703-04, 203 N.W.2d 20 (1973); State v. Pence, 150 Wis.2d 759, 442 N.W.2d 540 (Ct. App. 1989). There is no fundamental difference in the analysis whether the evidence is treated as other acts evidence under § 904.04(2) or character evidence under §§ 904.04(1) and 904.05(2). Pence, at 758-60.

9. Refer to the uniform instruction for the charged crime for the number of elements and the short title of the crime. For example, for a charge of delivering a controlled substance, the statement would read as follows:

> If you are satisfied beyond a reasonable doubt that the defendant committed all three elements of delivery of a controlled substance and that the defendant was not entrapped, you should find the defendant guilty.

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780A ENTRAPMENT: ALTERNATE FORM

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 780A was originally published in 1985; it was withdrawn in 2001.

Wis JI-Criminal 780A provided an alternate form for submitting entrapment which eliminated the defendant's burden to prove inducement. It was withdrawn in 2001 in light of the observation in State v. Saternus, 127 Wis.2d 460, 381 N.W.2d 290 (1986), that "the alternative instruction does not reflect the decisions as determined by Hawthorne and other holdings of this court." 127 Wis.2d 460, 481, n. 13.

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790 COERCION — § 939.46

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.[1]

Coercion

The defense of coercion is an issue in this case. The defense of coercion allows a person to engage in conduct that would otherwise be criminal under certain circumstances.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully under the defense of coercion.[2]

The law allows the defendant to act under the defense of coercion only if a threat by another person (other than the defendant's co-conspirator)[3] caused the defendant to believe that his act was the only means of preventing [imminent public disaster] [imminent death or great bodily harm to himself (or to others)][4] and which pressure caused him to act as he did.

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

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements of this offense have been proved,[5] and that the defendant did not act lawfully under the defense of coercion, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 790 was originally published in 1984 and revised in 1995. This revision was approved by the Committee in December 2004.

This instruction deals with the defense of coercion which is defined by § 939.46 as follows:

> **939.46 Coercion.** (1) A threat by a person other than the actor's co-conspirator which causes the actor reasonably to believe that his act is the only means of preventing imminent death or great bodily harm to himself or another and which causes him so to act is a defense to a prosecution for any crime based on that act except that if the prosecution is for first degree intentional homicide the degree of the crime is reduced to second degree intentional homicide.
>
> (2) It is no defense to a prosecution of a married person that the alleged crime was committed by command of the spouse nor is there any presumption of coercion when a crime is committed by a married person in the presence of the spouse.

Coercion is closely related to the defense of necessity, see § 939.47 and Wis JI-Criminal 792. The distinction between the two defenses is that with coercion, the outside force which influences the actor has its source in the actions of other human beings. Necessity involves natural physical forces beyond the actor's control which force him to choose committing the crime as the lesser of two evils. United States v. Bailey, 444 U.S. 394 (1980). For application of this defense to prison or jail escape, see Comment to Wis JI-Criminal 1774.

Coercion is a complete defense to all crimes except first degree intentional homicide, which coercion reduces to second degree intentional homicide. See §§ 939.46(1) and 940.01(2)(d). For cases where first degree intentional homicide is charged, coercion should be handled in the same manner as other mitigating circumstances, such as adequate provocation (see Wis JI-Criminal 1014) and unnecessary defensive force (see Wis JI-Criminal 1016). For cases involving criminal recklessness, coercion is best addressed by including its consideration as part of the determination whether the conduct presents an unreasonable and substantial risk. In cases involving first degree reckless charges, whether the circumstances show "utter disregard for human life" also requires evaluation of facts relating to coercion. See Wis JI-Criminal 1020 for a model.

For a case finding the evidence insufficient to raise the coercion defense, see State v. Keeran, 2004 WI App 4, 268 Wis.2d 761, 674 N.W.2d 570.

1. The Committee recommends that all instructions on defensive matters be combined with the instruction on the underlying offense. Combining the instructions will help the jury understand the issues and clarify the allocation of the burden of persuasion.

Coercion can be considered an "affirmative defense" in the sense that it is not an issue in the case until raised by the evidence and is not necessarily inconsistent with any elements of the crime. The Committee recommends combining the instruction on coercion with that for the underlying crime by inserting Wis JI-Criminal 790 after the explanation of the elements of the crime but before the concluding paragraphs. The nonexistence of the defense should then be included in the concluding paragraph. This will clarify for the jury the facts that it must find in order to return a guilty verdict and make it less likely that the instructions could be interpreted as shifting the burden of persuasion to the defendant. The Wisconsin Court of Appeals has suggested this as "the better policy." State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

2. In Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979), the Wisconsin Supreme Court held that the burden is on the state to disprove an asserted coercion defense beyond a reasonable doubt.

3. The threat must come from someone "other than the actor's co-conspirator." § 939.46(1). If there is an issue about the threat coming from a co-conspirator the phrase should be included in the instruction. It may also be appropriate to instruct the jury on the meaning of "co-conspirator." Wis JI-Criminal 570 defines the crime of "conspiracy."

4. The defense apparently applies where the threat is made to any third person, without limitation. In this respect, coercion has been likened to the defense of others under § 939.48(4), Wis. Stats. See 1950 Report on the Criminal Code of the Wisconsin Legislative Council, pages 35-36 and 38-39.

5. The Committee recommends that the absence of the defense be added to the concluding paragraph. See note 1, supra. The appropriate number of elements should be inserted in the blank. Refer to the applicable instruction for the offense.

Once a defensive matter, such as coercion, is raised by the evidence, the burden is on the state to prove the absence of the defensive matter to support a conviction for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1974).

Using battery as an example, combining the elements with the absence of coercion would result in the following:

> If you are satisfied beyond a reasonable doubt that all four elements of battery have been proved, and that at the time of the act the defendant did not act lawfully under the defense of coercion, you should find the defendant guilty.

(See Wis JI-Criminal 1220, Battery.)

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791 [COERCION:][1] TRAFFICKING: DEFENSE FOR A VICTIM OF § 940.302(2) or 948.051 — § 939.46(1m)

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.[2]

Defense for a victim of human trafficking or trafficking of a child

The defense for a victim of (human trafficking) (trafficking of a child) is an issue in this case. This defense allows a person to engage in conduct that would otherwise be criminal under certain circumstances.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully under this defense.[3]

The law allows the defendant to act under this defense if the defendant was a victim of (human trafficking) (trafficking of a child) and the offense of (identify crime)[4] was committed as a direct result of (human trafficking) (trafficking of a child).

CONTINUE WITH THE APPROPRIATE BRACKETED OPTION(S)

[Human trafficking, as defined in section 940.302 of the Criminal Code of Wisconsin, is committed by one who knowingly [(recruits) (entices) (harbors) (transports) (provides) (obtains)] [attempts to (recruit) (entice) (harbor) (transport) (provide) (obtain)] an individual for the purpose of (labor or services) (a commercial sex act[5]) and does so by (insert applicable term or terms.)[6]]

[Trafficking of a child, as defined in section 948.051 of the Criminal Code of Wisconsin, is committed by one who knowingly [(recruits) (entices) (provides) (obtains)

(harbors) (transports) (patronizes) (solicits)] [attempts to (recruit) (entice) (provide) (obtain) (harbor) (transport) (patronize) (solicit)] any child for the purpose of commercial sex acts.[7]

"Commercial sex act" means (sexual contact) (sexual intercourse) (sexually explicit performance) (any conduct done for the purpose of sexual humiliation, degradation, arousal, or gratification) for which anything of value is given to, promised, or received, directly or indirectly, by any person.[8]]

This defense applies to any offense committed as a direct result of (human trafficking) (trafficking of a child) without regard to whether anyone was prosecuted or convicted for (human trafficking) (trafficking of a child).[9]

Direct Result

An offense is committed as a direct result of (human trafficking) (trafficking of a child) if there is a logical, causal connection between the offense and the trafficking such that the offense is not the result, in significant part, of other events, circumstances, or considerations apart from the trafficking.[10] The offense need not be a foreseeable result of the trafficking and need not proceed relatively immediately from the trafficking.[11]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements of this offense have been proved,[12] and that the defendant did not act lawfully under the defense of being a victim of (human trafficking) (trafficking of a child), you should find the defendant

guilty.

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

COMMENT

Wis JI-Criminal 791 was approved by the Committee in April 2023.

This instruction is drafted for the defense set forth in sub. (1m) of sec. 939.46. It may be raised by a defendant claiming to be the victim of a trafficking crime and claiming that the crime with which the defendant is charged was committed as a direct result of the trafficking crime:

> **939.46 Coercion. (1m).** A victim of a violation of § 940.302(2) or § 948.051 has an affirmative defense for any offense committed as a direct result of the violation of § 940.302(2) or § 948.051 without regard to whether anyone was prosecuted or convicted for the violation of § 940.302(2) or § 948.051.

Although set forth in § 939.46, which is titled "Coercion," the defense in sub. (1m) is defined in completely different terms. The traditional coercion defense recognizes a situation commonly referred to as a "choice of evils," where individuals are presented with circumstances that force them to choose between committing a crime and facing death or significant bodily injury. The requirements of this defense are enumerated in § 939.46(1) as follows:

- a threat from another person [other than a coconspirator]
- causes the person to reasonably believe
- that his or her [criminal] act is the only means
- of preventing imminent death or great bodily harm to that person or another.

Further, in a prosecution for first-degree intentional homicide, coercion under § 939.46(1) is not a complete defense but mitigates the crime to second-degree intentional homicide. See also Wis JI-Criminal 700 sec. II. A. 4.

The defense defined in sub. (1m) does not share any of the requirements of traditional coercion. Specific threats are not required, nor is an inquiry into what the person believed ["reasonably" or not]. Moreover, committing the crime does not have to be the sole method of preventing harm, and there is no requirement of imminent death or great bodily harm. Furthermore, the scope of the defense is not limited when it is applied to first-degree intentional homicide. Given these disparities, the Committee has determined that it is advisable to refrain from using the term "coercion" in the instructional language to the extent that it can be avoided.

Subsection (1m) specifically designates this defense as an "affirmative defense." This means that "the defendant must produce **some evidence** on which a reasonable jury could find that the defense applies." (Emphasis added.) State v. Kizer, 2022 WI 58, ¶19, 403 Wis.2d 142, 976 N.W.2d 356. See also, State v. Johnson, 2021 WI 61, ¶19, 397 Wis.2d 633, 961 N.W.2d 18. Though the burden of producing "some

evidence" is commonly referred to as the defendant's burden, that is not literally correct. The source of the evidence may be facts presented by the prosecution, facts elicited from prosecution witnesses by defense cross-examination, or evidence affirmatively presented by the defense. State v. Coleman, 206 Wis.2d 199, 214, 556 N.W.2d 701 (1996). The two elements that must be satisfied in order to utilize this defense are as follows: (1) the defendant was a victim of either human trafficking, as defined in § 940.302, or child trafficking, as defined in sec. 948.051; and (2) the crime for which the defendant is charged was committed as a direct result of the trafficking crime.

To satisfy the "some evidence" standard, the defendant must provide some degree of specification as to what trafficking crime or crimes are allegedly involved. Section 940.302 and § 948.051 are complex and provide many alternative methods of commission. See Wis JI-Criminal 1276 for violations of § 940.302 and Wis JI-Criminal 2124 for violations of § 948.051.

If the defendant successfully meets the "some evidence" standard, the burden of proof shifts to the State to demonstrate, beyond a reasonable doubt, that the defense does not apply. The State may satisfy this burden by showing that either: (1) the defendant was not a victim of a trafficking crime or (2) the crime for which the defendant is charged was not committed as a direct result of the trafficking crime.

Affirmative defenses and the "some evidence" standard are discussed in JI 700 Law Note Theory Of Defense Instructions; Instructing The Jury On Defensive Matters. See Section I, C.

The defense in sub. (1m) is a complete defense to "any offense committed as a direct result of the violation without regard to whether anyone was prosecuted or convicted for the violation of § 940.302(2) or § 948.051." See § 939.46(1m). See also State v. Kizer, 2022 WI 58, ¶5, 403 Wis.2d 142, 976 N.W.2d 356.

In Kizer, supra, the Wisconsin Supreme Court addressed the question of whether the provisions of § 939.46(1m) create a complete defense or merely mitigate a conviction for first-degree intentional homicide to one of second-degree intentional homicide, as is the case with coercion under § 939.46(1). After examination of the legislative history of § 939.46(1m), the Court found the statute to be ambiguous with respect to whether it creates a complete or mitigating defense to first-degree intentional homicide. In accordance with the principle of lenity, the Court resolved the ambiguity in favor of the defendant and held that § 939.46(1m) operates as a complete defense to a charge of first-degree intentional homicide. Id. at ¶¶27-29. See also State v. Cole, 262 Wis. 2d 167, ¶68, 663 N.W.2d 700.

Wis JI-Criminal 791 EXAMPLE is provided to demonstrate that selecting appropriate alternatives can simplify this instruction.

1. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. If the court chooses to include the title of this instruction, the omission of the bracketed term "coercion" is advised. Although the affirmative defense of being a victim of human trafficking or trafficking of a child as set forth in § 939.46 is titled "Coercion," the defense in sub. (1m) is defined in completely different terms. Therefore, including the term in the instruction may cause misunderstandings among the jurors. See the comment above for more information.

2. The Committee recommends that all instructions on defensive matters be combined with the instruction on the underlying offense. Combining the instructions will help the jury understand the issues and clarify the allocation of the burden of persuasion.

Subsection (1m) specifically calls this defense an "affirmative defense." This means that it is not an issue in the case until raised by the evidence and is not necessarily inconsistent with any element of the crime. The Committee recommends combining the instruction on the defense with that for the underlying crime by inserting Wis JI-Criminal 791 after the explanation of the elements of the crime but before the concluding paragraphs. The nonexistence of the defense should then be included in the concluding paragraph. This will clarify for the jury the facts that it must find in order to return a guilty verdict and make it less likely that the instructions could be interpreted as shifting the burden of persuasion to the defendant. The Wisconsin Court of Appeals has suggested this as "the better policy." State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

3. In Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979), the Wisconsin Supreme Court held that the burden is on the State to disprove an asserted coercion defense [under sec. 939.46(1)] beyond a reasonable doubt.

4. Here, insert the specific crime for which the defendant has been charged (e.g., first-degree intentional homicide). See Wis JI-Criminal 791 Example for how this instruction would be adapted for the offense of battery.

5. If the purpose chosen is a commercial sex act, include the definition of the term directly after the bracketed language pertaining to human trafficking. See footnote 8 below.

6. Here, insert at least one of the following ways in which the trafficking was done:

- Causing or threatening to cause bodily harm to any individual.
- Causing or threatening to cause financial harm to any individual.
- Restraining or threatening to restrain any individual.
- Violating or threatening to violate a law.
- Destroying, concealing, removing, confiscating, or possessing, or threatening to destroy, conceal, remove, confiscate, or possess, any actual or purported passport or any other actual or purported official identification document of any individual.
- Extortion.
- Fraud or deception.
- Debt bondage.
- Controlling or threatening to control any individual's access to an addictive controlled substance.
- Using any scheme or pattern or other means to directly or indirectly coerce, threaten, or intimidate any individual.
- Using or threatening to use force or violence on any individual.
- Causing or threatening to cause any individual to do any act against the individual's will or without the individual's consent.

§ 940.302(2)(a)2.a.-L. (See Wis JI-Criminal 1276).

For example, in a human trafficking case where the trafficking is done by use of force on an individual, the instructions would read:

Human trafficking, as defined in section 940.302 of the Criminal Code of Wisconsin, is committed by one who knowingly recruits an individual for the purpose of labor or services and does so by use of force.

7. See Wis JI-Criminal 2124 for additional information concerning the offenses of-trafficking of a child.

8. The definition of commercial sex act will be given in [adult] human trafficking cases that rely on that alternative and in all child trafficking cases.

This is the definition provided in § 940.302(1)(a) as amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014]. Section 948.051(1) specifically refers to this definition. For a definition of "sexual contact," see Wis JI-Criminal 934 and § 939.22(34). The Committee concluded that the definition in § 939.22(34) applies to the offense because § 948.051(1) specifically refers to trafficking "any child for the purpose of commercial sex acts, as defined in s. 940.302(1)(a) . . ." The definition in § 940.302(1)(a) refers to "sexual contact" and, since that statute is not part of § 940.225 or in Chapter 948, the definition of "sexual contact" in § 939.22(34) applies.

9. See Wis. Stat. § 939.46(1m).

10. In Kizer, supra, the Wisconsin Supreme Court concluded that with regard to the phrase "committed as a direct result of the violation," § 939.46(1m) "does not require that the trafficker be aware of the offense, or that it occur at the trafficker's behest in furtherance of the trafficking violation. It simply requires that the offense occur as a direct result of the violation of the trafficking statutes." Id. at ¶18.

11. Kizer, supra, held that "an offense that is unforeseeable or that does not occur immediately after a trafficking offense is committed can be a direct result of the trafficking offense, so long as there is still the necessary logical connection between the offense and the trafficking." Id. at ¶15.

12. The Committee recommends that the absence of the claimed trafficking defense be added to the concluding paragraph. See note 1, supra. The appropriate number of elements should be inserted in the blank. Refer to the applicable instruction for the offense.

For example, incorporating the elements of the offense of battery along with the absence of the human trafficking defense would result in the following:

If you are satisfied beyond a reasonable doubt that all four elements of battery have been proved, and that at the time of the act the defendant did not act lawfully under the defense of being a victim of human trafficking, you should find the defendant guilty.

(See Wis JI-Criminal 1220, Battery.)

791 EXAMPLE [COERCION:] TRAFFICKING: DEFENSE FOR A VICTIM OF § 940.302(2) or 948.051 — § 939.46(1m)

THE FOLLOWING ILLUSTRATES HOW WIS JI-CRIMINAL 791 WOULD BE ADAPTED FOR THE OFFENSE OF BATTERY IF THE AFFIRMATIVE DEFENSE OF A VICTIM OF HUMAN TRAFFICKING IS AN ISSUE IN THE CASE.

Statutory Definition of the Crime

Battery, as defined in § 940.19(1) of the Criminal Code of Wisconsin, is committed by one who causes bodily harm to another by an act done with the intent to cause bodily harm to that person or another without the consent of the person so harmed.

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

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

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

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

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].

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

3. The defendant caused bodily harm without the consent of (name of victim).

4. The defendant knew that (name of victim) did not consent.

Defense for a victim of human trafficking or trafficking of a child

The defense for a victim of human trafficking is an issue in this case. This defense allows a person to engage in conduct that would otherwise be criminal under certain circumstances.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully under this defense.

The law allows the defendant to act under this defense if the defendant was a victim of human trafficking and the offense of battery was committed as a direct result of human trafficking.

Human trafficking, as defined in section 940.302 of the Criminal Code of Wisconsin, is committed by one who knowingly recruits an individual for the purpose of a commercial sex act and does so by use of force.[1]

"Commercial sex act" means sexual intercourse for which anything of value is given to, promised, or received, directly or indirectly, by any person.

This defense applies to any offense committed as a direct result of human trafficking

without regard to whether anyone was prosecuted or convicted for human trafficking.

Direct Result

An offense is committed as a direct result of human trafficking if there is a logical, causal connection between the offense and the trafficking such that the offense is not the result, in significant part, of other events, circumstances, or considerations apart from the trafficking. The offense need not be a foreseeable result of the trafficking and need not proceed relatively immediately from the trafficking.

Deciding About Intent and Knowledge

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

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, and that the defendant did not act lawfully under the defense of being a victim of human trafficking, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 791 EXAMPLE was approved by the Committee in April 2023.

This instruction illustrates how the general model provided in Wis JI-Criminal 791 would be adapted

for a violation based on § 940.19(1) Battery if the defendant asserted the affirmative defense of being a victim of human trafficking.

Modification of the language used in this example may be necessary depending on the offense being prosecuted or the type of trafficking being alleged.

1. Here, insert at least one of the following ways in which the trafficking was done:

    - Causing or threatening to cause bodily harm to any individual.
    - Causing or threatening to cause financial harm to any individual.
    - Restraining or threatening to restrain any individual.
    - Violating or threatening to violate a law.
    - Destroying, concealing, removing, confiscating, or possessing, or threatening to destroy, conceal, remove, confiscate, or possess, any actual or purported passport or any other actual or purported official identification document of any individual.
    - Extortion.
    - Fraud or deception.
    - Debt bondage.
    - Controlling or threatening to control any individual's access to an addictive controlled substance.
    - Using any scheme or pattern or other means to directly or indirectly coerce, threaten, or intimidate any individual.
    - Using or threatening to use force or violence on any individual.
    - Causing or threatening to cause any individual to do any act against the individual's will or without the individual's consent.

§ 940.302(2)(a)2.a.-L. (See Wis JI-Criminal 1276).

792 NECESSITY — § 939.47

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.[1]

Necessity

The defense of necessity is an issue in this case. The defense of necessity allows a person to engage in conduct that would otherwise be criminal under certain circumstances.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully under the defense of necessity.

The law allows the defendant to act under the defense of necessity only if the pressure of natural physical forces[2] caused the defendant to believe that his act was the only means[3] of preventing [imminent public disaster] [imminent death or great bodily harm to himself (or to others)] and which pressure caused him to act as he did.[4]

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

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements of this offense have been proved,[5] and that the defendant did not act lawfully under the defense of necessity, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 792 was originally published in 1995 and revised in 1996. This revision was approved by the Committee in December 2004.

This instruction deals with the defense of necessity which is defined by § 939.47 as follows:

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

Necessity is closely related to the defense of coercion, see § 939.46 and Wis JI-Criminal 790.

Necessity is a complete defense to all crimes except first degree intentional homicide, which necessity reduces to second degree intentional homicide. See §§ 938.46(1) and 940.01(2)(d). For cases where first degree intentional homicide is charged, necessity should be handled in the same manner as other mitigating circumstances, such as adequate provocation (see Wis JI-Criminal 1014) and unnecessary defensive force (see Wis JI-Criminal 1016). For cases involving criminal recklessness, necessity is best addressed by including its consideration as part of the determination whether the conduct presents an unreasonable and substantial risk. In cases involving first degree reckless charges, whether the circumstances show "utter disregard for human life" also requires evaluation of facts relating to necessity. See Wis JI-Criminal 1020 for a model.

1. The Committee recommends that all instructions on defensive matters be combined with the instruction on the underlying offense. Combining the instructions will help the jury understand the issues and clarify the allocation of the burden of persuasion.

Necessity can be considered an "affirmative defense" in the sense that it is not an issue in the case until raised by the evidence and is not necessarily inconsistent with any elements of the crime. The Committee recommends combining the instruction on necessity with that for the underlying crime by inserting Wis JI-Criminal 792 after the explanation of the elements of the crime but before the concluding paragraphs. The nonexistence of the defense should then be included in the concluding paragraph. This will clarify for the jury the facts that it must find in order to return a guilty verdict and make it less likely that the instructions could be interpreted as shifting the burden of persuasion to the defendant. The Wisconsin Court of Appeals has suggested this as "the better policy." State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

2. In State v. Olsen, 99 Wis.2d 572, 299 NW.2d 632 (Ct. App. 1980), the court held that the defense of necessity was unavailable as a matter of law to a demonstrator who sought to stop the transportation of spent nuclear fuel. The court held that the defense is limited to the pressure of forces such as:

> . . . storms, fires and privations. Thus, a person lost in a storm who breaks into an isolated house in order to take refuge is justified in so doing by the doctrine of necessity. A person who, seeking to stop the spread of a fire, razes a building in order to save a town is similarly justified. A third example is that of a person who throws property from an overcrowded boat in order to prevent it from sinking. 99 Wis.2d 572, 576.

Similar examples were provided in the 1953 Legislative Council Report on the Criminal Code, Comment to § 339.47, which was adopted, with minor changes, as § 939.47. Also see LaFave and Scott, Substantive Criminal Law, Sec. 5.4 (West, 1986).

In State v. Anthuber, 201 Wis.2d 512, 518, 549 N.W.2d 477 (Ct. App. 1996), the court rejected a claim that heroin addiction, coupled with the Department of Corrections refusal to provide him with methadone treatment, established a necessity defense: ". . . the 'force' affecting Anthuber was not a 'natural physical force' because he set it in motion when he made the decision to start using heroin **and** there is no evidence that he had no control over whether to make this initial choice." 201 Wis.2d 512, 520.

3. In State v. Horn, 126 Wis.2d 447, 377 N.W.2d 176 (Ct. App. 1985), the defendants challenged their convictions for criminal trespass, which arose out of their refusal to leave a health care facility that provided abortions. They alleged that the trial court erred in ruling as a matter of law that the defenses of coercion and necessity were not available to them. The appellate court affirmed the conviction, holding that since the abortion services provided by the clinic were legal:

> . . . it is unreasonable [for the defendants] to believe that one must commit an act of criminal trespass in order to prevent an activity that is legal and constitutionally protected. If appellants wish to attempt to change the legal status of abortion, they must do so within channels provided by our democratic form of government. A contrary holding would allow an individual to violate the law without sanction whenever he felt that government had not made the proper choice between conflicting values.

126 Wis.2d 447, 456.

4. The statement of the necessity defense is taken almost verbatim from § 939.47. The only change is to split the statutory definition into two parts: the first describes the belief required; the second describes the requirement that the belief be reasonable. This is the way other privileges are defined in the instructions C see, for example, Wis JI-Criminal 800 Privilege: Self Defense.

In State v. Anthuber, 201 Wis.2d 512, 538, 549 N.W.2d 477 (Ct. App. 1996), the court cited an earlier decision as identifying four elements of the necessity defense:

1) the defendant must have acted under pressure from natural physical forces;

2) the defendant's act was necessary to prevent imminent public disaster, or death, or great bodily harm;

3) the defendant had no alternative means of preventing the harm; and

4) the defendant's beliefs were reasonable.

Citing, State v. Olsen, note 2, supra, at 577-78.

In a footnote, the Anthuber decision noted that Wis JI-Criminal 792 takes a different approach and stated: "While we find no substantive difference in the two tests, we nonetheless believe that the four-part test is simpler to understand and discuss." 201 Wis.2d 512, 518-19, at note 1. The Committee carefully reviewed the issue and decided not to change the text of the instruction. First, the instruction follows the words of the

statute. Second, the Olsen decision did not actually set forth four separate "elements" in the manner summarized in Anthuber. And third, there may be a substantive difference. The statute, and the text of the instruction, require that the defendant reasonably believe that the act was necessary to prevent the harm and reasonably believe that no alternative means existed. The statute does not require, as suggested by the "four elements" approach, that the defendant's act actually be necessary to prevent the harm and that there actually be no alternative means. A reasonable belief as to each aspect is sufficient.

5. The Committee recommends that the absence of the defense be added to the concluding paragraph. See note 1, supra. The appropriate number of elements should be inserted in the blank. Refer to the applicable instruction for the offense.

Once a defensive matter, such as necessity, is raised by the evidence, the burden is on the state to prove the absence of the defensive matter to support a conviction for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1974).

Using battery as an example, combining the elements with the absence of necessity would result in the following:

> If you are satisfied beyond a reasonable doubt that all four elements of battery have been proved, and that at the time of the act the defendant did not act lawfully under the defense of necessity, you should find the defendant guilty.

(See Wis JI-Criminal 1220, Battery.)

795 LAW NOTE: PRIVILEGE: RESISTING AN UNLAWFUL ARREST

This Law Note discusses the common law privilege recognizing a right to resist an unlawful arrest.

The Privilege Was Recognized But Has Been Abrogated

In State v. Hobson, 218 Wis.2d 550, 577 N.W.2d 825 (1998), the Wisconsin Supreme Court addressed the question whether a defendant charged with battery to a law enforcement officer could claim a privilege to resist an unlawful arrest. The court's holding was as follows:

> We conclude, based on the common law in this state, that Wisconsin has recognized a privilege to forcibly resist an unlawful arrest in the absence of unreasonable force. However, based upon public policy, we now decide to abrogate[1] that common law affirmative defense. Our decision to abrogate has prospective application only.
> 218 Wis.2d 350, 353.

The Abrogation Is Prospective

The Hobson decision was filed on May 27, 1998, and thus bars the invocation of the privilege to resist an unlawful arrest in any prosecution based on acts occurring after that date.[2]

Resisting An Arrest Where Unreasonable Force Is Used

Hobson was concerned with a situation where the arrest was unlawful because probable cause was lacking. The privilege the court recognized and then abrogated was a privilege "to forcibly resist unlawful arrest in the absence of unreasonable force." Not addressed is the privilege to resist an arrest where unreasonable force is used by the arresting officer. It seems clear that the general privilege of self defense defined in § 939.48 could apply to the unreasonable force situation: the unreasonable force would be the "unlawful interference" that is the predicate for invoking self defense. The majority opinion in Hobson appears to hold that self defense is the proper way to address this issue. 218 Wis. 2d 350, 368, note 17. A concurring opinion suggests that there is an additional common law privilege to resist an unreasonable force arrest that is separate from self defense. 218 Wis.2d 350, 387-88.

Lawfulness Of Arrest Can Be Relevant To An Element Of A Crime

Hobson was concerned with a privilege that was a true "affirmative defense" in the sense that it provided a defense that prevented conviction even though all the elements of the crime charged were present. That is, Hobson did commit a battery against a law enforcement officer, but claimed a defense to that crime based on facts that were not inconsistent with the presence of any of the elements of the crime. Notwithstanding the Hobson decision, the fact that a police officer was acting unlawfully in making an arrest would prevent a conviction for certain offenses because it may be inconsistent with the proof of an element of the crime. For example, if the charge is resisting or obstructing an officer, an element of the crime is that the officer was acting "with lawful authority." See § 946.41. An officer making an unlawful arrest would not be acting with lawful authority, thus negating an element of the crime. Battery to a law enforcement officer, the offense charged in Hobson, does not have a "with lawful authority" element.

COMMENT

Wis JI-Criminal 795 was approved by the Committee August 2002.

1. A definition of "abrogate" was noted by the court: "To annul, cancel, revoke, repeal, or destroy." State v. Hobson, 218 Wis.2d 350, 353, footnote 1.

2. Principles based on the Ex Post Facto clauses of the United States and Wisconsin Constitutions require prospective application of a "new rule of law [that] deprives a defendant of a previously available defense." 218 Wis.2d 350, 381.

800 PRIVILEGE: SELF-DEFENSE: FORCE LESS THAN THAT LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48

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

Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference[1] with the defendant's person; and,
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[2] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[3] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all __ elements of _____ have been proved and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.[4]

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

COMMENT

Wis JI-Criminal 800 was originally published in 1962 and revised in 1994, 2000, and 2021. The 2000 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment. This revision was approved by the Committee in June 2023; it added to the comment.

This instruction is intended for use with crimes involving the intentional causing of bodily harm. For cases involving criminal recklessness or criminal negligence, see Wis JI-Criminal 801. For cases involving the intentional use of force intended or likely to cause death or great bodily harm, see Wis JI-Criminal 805.

The instructions for homicide offenses include models for cases involving self-defense. See Wis JI-Criminal 1014, 1016, 1017, and 1052.

The 1994 revision of this instruction changed its format to allow integrating the description of self-defense with the instruction for the crime charged. The Committee concluded that this provides a clearer statement of the facts necessary to constitute guilt in a case when self-defense is an issue. This kind of approach was suggested in State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

For examples integrating the self-defense instruction with instructions for battery, see Wis JI-Criminal 1220A – 1225A.

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

In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court concluded that the trial court erred by declining to instruct on self-defense. The Court held that although Johnson unlawfully entered K.M.'s home in the middle of the night, there was some evidence that he had an objectively reasonable belief that he was preventing an unlawful interference with his person. Although the physical attack in Johnson occurred entirely inside K.M.'s home, the opinion did not interpret, apply, or limit the castle doctrine in any way because the Court was tasked with examining Johnson's, not K.M.'s, actions. Therefore, this decision did not alter the "some evidence" standard used to determine whether a jury should be instructed on self-defense.

1. For purposes of self-defense, "unlawful" means "either tortious or expressly prohibited by criminal law or both." § 939.48(6). Further instruction on what constitutes "unlawful interference" in the context of the facts of a particular case may be desirable.

The word "unlawful" also appears in sub. (2) of § 939.48, which provides that a "person who engages in unlawful conduct of a type likely to provoke others . . ." loses the right to claim the privilege of self-defense. [See Wis JI-Criminal 815.] In State v. Bougneit, 97 Wis.2d 687, 294 N.W.2d 675 (Ct. App. 1980), the court held that engaging in what would be considered disorderly conduct under § 947.01 could constitute "unlawful conduct" for the purposes of § 939.48(2).

The "unlawful" component of "unlawful interference" is just one part of the predicate for invoking the privilege of self-defense. As stated in the instruction, the defendant must have believed "that there was an actual or imminent unlawful interference with the defendant's person and [must have] believed the amount of force he used or threatened to use was necessary to prevent or terminate the interference."

2. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

3. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the

defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627 28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self-defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to use doctrines other than self-defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to "heat of passion, caused by reasonable and adequate provocation" rather than self-defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines. However, some cases of this type may legitimately be considered under self-defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

4. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved . . ." See Wis JI-Criminal 1222A.

801 PRIVILEGE: SELF-DEFENSE: FORCE LESS THAN THAT LIKELY TO CAUSE DEATH OR GREAT BODILY HARM: CRIMES INVOLVING RECKLESSNESS OR NEGLIGENCE — § 939.48)

[INSERT THE FOLLOWING AFTER THE FIRST PARAGRAPH OF THE INSTRUCTION ON THE CRIME CHARGED BUT BEFORE THE ELEMENTS OF THE CRIME ARE DEFINED.]

Self-Defense

Self-defense is an issue in this case. In deciding whether the defendant's conduct [was criminally reckless conduct which showed utter disregard for human life] [was criminally reckless conduct] [was criminally negligent conduct][1], you should also consider whether the defendant acted lawfully in self-defense.

The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference[2] with the defendant's person; and;
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

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

[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used

was necessary to prevent imminent death or great bodily harm to (himself) (herself).]

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[3] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[4] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

CONTINUE WITH THE DEFINITION OF THE ELEMENTS OF THE CRIME.

FOR ALL OFFENSES INVOLVING CRIMINAL RECKLESSNESS OR CRIMINAL NEGLIGENCE, ADD THE FOLLOWING TO THE DEFINITION OF THE RECKLESSNESS OR NEGLIGENCE ELEMENT:[5]

You should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, (his) (her) conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.[6]

FOR FIRST DEGREE RECKLESS OFFENSES, ALSO ADD THE FOLLOWING TO THE DEFINITION OF THE "UTTER DISREGARD FOR HUMAN LIFE" ELEMENT:[7]

[You should consider the evidence relating to self-defense in deciding whether the defendant's conduct showed utter disregard for human life. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the circumstances of the defendant's conduct showed utter disregard for human life.][8]

CONTINUE WITH THE CONCLUDING PARAGRAPHS OF THE INSTRUCTION.

COMMENT

Wis JI Criminal JI-Criminal 801 was originally published in 1993 and revised in 2001, 2014, 2019, and 2021. The 2014 revision added to the text to reflect the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833. See footnotes 6 and 8. This revision was approved by the Committee in June 2023; it added to the comment.

This instruction is intended for use with crimes involving criminal recklessness or criminal negligence. See §§ 940.02(1), 940.06, 940.08, 940.23, 940.24, 941.20, 941.30, and 948.03(3). Wis JI-Criminal 800 is intended for use with crimes involving the intentional causing of bodily harm.

A case illustrating the application of self-defense to criminal recklessness and criminal negligence is State v. Langlois, 2018 WI 73, 382 Wis.2d 414, 913 N.W.2d 812. The defendant was charged with 1st degree reckless homicide; 2nd degree reckless homicide and homicide by negligent handling of a dangerous weapon were submitted as lesser included offenses. (See Wis JI-Criminal 1023, which provides an instruction for this sequence of offenses). There was evidence of self-defense in the case. The defendant alleged it was error for the trial court to fail to repeat that the burden was on the prosecution to prove beyond a reasonable doubt that the defendant was not privileged to act in self-defense when addressing the lesser included offenses. Instead, the court's instructions stated "as I previously indicated," referring to the definition given when instructing on 1st degree reckless homicide, which included a full description of the burden of proof. The court held that this was not error – the context made the reference clear. In the

Committee's judgment, it is best practice to repeat the full statement of the burden of proof with each of the lesser included offenses.

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

In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court concluded that the trial court erred by declining to instruct on self-defense. The Court held that although Johnson unlawfully entered K.M.'s home in the middle of the night, there was some evidence that he had an objectively reasonable belief that he was preventing an unlawful interference with his person. Although the physical attack in Johnson occurred entirely inside K.M.'s home, the opinion did not interpret, apply, or limit the castle doctrine in any way because the Court was tasked with examining Johnson's, not K.M.'s, actions. Therefore, this decision did not alter the "some evidence" standard used to determine whether a jury should be instructed on self-defense.

1. The Committee concluded that the description of the privilege should be integrated with the definitions of recklessness or negligence. This is because both concepts require that conduct create an unreasonable risk of death or great bodily harm. A risk is not unreasonable if the conduct undertaken is a reasonable exercise of the privilege of self-defense. Because criminal recklessness or criminal negligence and lawful actions in self-defense cannot coexist, it is best to advise the jury to consider the law relating to self-defense when considering those elements.

For example, the issue of self-defense might arise in a case where the defendant is charged with recklessly causing great bodily harm in violation of § 940.23. Wis JI-Criminal 1250 provides that the second element of that offense is that the defendant recklessly caused harm. Wis JI-Criminal 801 should be added to the definition of "recklessly" in Wis JI-Criminal 1250 if the evidence provides the basis for the privilege of self-defense.

This approach treats the privilege differently in recklessness cases than in cases involving the intentional causing of harm. In the latter, intent to cause harm and self-defense can exist at the same time. Thus, the absence of the privilege is identified as a fact the state must prove in addition to the statutorily defined elements of the intentional crime. See Wis JI-Criminal 800.

2. For purposes of self-defense, "unlawful" means "either tortious or expressly prohibited by criminal law or both." § 939.48(6). Further instruction on what constitutes "unlawful interference" in the

context of the facts of a particular case may be desirable.

The word "unlawful" also appears in sub. (2) of § 939.48, which provides that a "person who engages in unlawful conduct of a type likely to provoke others . . ." loses the right to claim the privilege of self-defense. [See Wis JI-Criminal 815.] In State v. Bougneit, 97 Wis.2d 687, 294 N.W.2d 675 (Ct. App. 1980), the court held that engaging in what would be considered disorderly conduct under § 947.01 could constitute "unlawful conduct" for the purposes of § 939.48(2).

The "unlawful" component of "unlawful interference" is just one part of the predicate for invoking the privilege of self-defense. As stated in the instruction, the defendant must have believed "that there was an actual or imminent unlawful interference with the defendant's person and [must have] believed the amount of force he used or threatened to use was necessary to prevent or terminate the interference."

3. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

4. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self-defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to use doctrines other than self-defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to "heat of passion, caused by reasonable and adequate provocation" rather than self-defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines. However, some cases of this type may legitimately be considered under self-defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

5. The Committee concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless offenses. Conduct does not create an unreasonable risk of harm to another if the conduct is undertaken as reasonable action in self-defense. Recklessness and reasonable exercise of the privilege cannot coexist. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "unreasonable risk" component of recklessness.

6. The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833, in which the court of appeals ordered a new trial for a person convicted of 2nd degree recklessly endangering safety. The court held that the jury instructions given in that case – which followed the pattern suggested by Wis JI-Criminal 801 – were deficient because they did not specifically state that the prosecution must prove the absence of self-defense once raised. The first of the added sentences is intended to make that requirement clear. The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the defendant's conduct created an unreasonable risk of death or great bodily harm.

7. The Committee concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless offenses. Conduct does not show utter disregard for human life if it is undertaken in the reasonable exercise of the privilege of self-defense. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "utter disregard" element.

8. The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, see note 6, supra. Austin was concerned with the "unreasonable risk" element of the offense, but the same concern should apply to the "utter disregard" element of 1st degree reckless offenses. The first of the added sentences is intended to make it clear that the prosecution must prove the absence of self-defense once raised to meet its burden to prove "utter disregard for human life." The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the circumstances of the defendant's conduct showed utter disregard for human life.

805 PRIVILEGE: SELF-DEFENSE: FORCE INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48

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

Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference[1] with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

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

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[2] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[3] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts

and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ___ elements of _____[4] have been proved and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 805 was originally published in 1966 and revised in 1993, 2001, and 2021. This revision was approved by the Committee in June 2023; it added to the comment.

The 1994 revision of this instruction changed its format to allow integrating the description of self-defense with the instruction for the crime charged. See the Comment to Wis JI-Criminal 800. Instructions for homicide offenses include models for cases involving self-defense. See Wis JI-Criminal 1014, 1016, 1017, and 1022.

Wisconsin law establishes a "low bar" that the defendant must overcome to be entitled to a jury instruction on the privilege of self-defense. State v. Stietz, 2017 WI 58, ¶16, 375 Wis.2d 572, 895 N.W.2d 796 citing State v. Schmidt, 2012 WI App 113, ¶12, 344 Wis. 2d 336, 824 N.W.2d 839. A defendant needs

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

In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court concluded that the trial court erred by declining to instruct on self-defense. The Court held that although Johnson unlawfully entered K.M.'s home in the middle of the night, there was some evidence that he had an objectively reasonable belief that he was preventing an unlawful interference with his person. Although the physical attack in Johnson occurred entirely inside K.M.'s home, the opinion did not interpret, apply, or limit the castle doctrine in any way because the Court was tasked with examining Johnson's, not K.M.'s, actions. Therefore, this decision did not alter the "some evidence" standard used to determine whether a jury should be instructed on self-defense.

1. For purposes of self-defense, "unlawful" means "either tortious or expressly prohibited by criminal law or both." Section 939.48(6). Further instruction on what constitutes "unlawful interference" in the context of the facts of a particular case may be desirable.

The word "unlawful" also appears in sub. (2) of § 939.48, which provides that a "person who engages in unlawful conduct of a type likely to provoke others . . ." loses the right to claim the privilege of self-defense. [See Wis JI-Criminal 815.] In State v. Bougneit, 97 Wis.2d 687, 294 N.W.2d 675 (Ct. App. 1980), the court held that engaging in what would be considered disorderly conduct under § 947.01 could constitute "unlawful conduct" for the purposes of § 939.48(2).

The "unlawful" component of "unlawful interference" is just one part of the predicate for invoking the privilege of self-defense. As stated in the instruction, the defendant must have believed "that there was an actual or imminent unlawful interference with the defendant's person and [must have] believed the amount of force he used or threatened to use was necessary to prevent or terminate the interference."

2. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

3. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627 28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self-defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to

use doctrines other than self-defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to "heat of passion, caused by reasonable and adequate provocation" rather than self-defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines. However, some cases of this type may legitimately be considered under self-defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

4. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

805A LAW NOTE: SELF-DEFENSE UNDER § 939.48(1m)

Contents Page

Scope

This Law Note explains the Committee's conclusions about how to implement the provisions of § 939.48(1m), created by 2011 Wisconsin Act 94. [Effective date: December 21, 2011; the act first applies to a use of force that occurs on the effective date.] The provisions of sub. (1m) relate to what is commonly termed the "Castle Doctrine," but caution should be used in relying on that term to accurately describe the new provision. While it is a convenient term, the substance of the "Castle Doctrine" varies state by state; Wisconsin's version is more limited than that of Florida,[1] for example. This Law Note uses the term "the new rule."

The Committee's primary conclusions about the new rule are that it does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege, but that it does affect what a defendant must show to have the privilege of self-defense submitted to the jury – that is, it provides another way for the defendant to meet the burden of production. These conclusions are explained in Section II.

The primary focus of the Committee's work on the new rule was on how to implement it procedurally. But there are also issues with respect to its substance. These issues, under the Committee's approach that the new rule goes only to the defendant's burden of production, will not need to be defined for the jury. But they will be important to the judge in deciding whether the defendant meets the burden of production.

I. The Substance of the New Rule in § 939.48(1m).

The key part of the new provision is set forth in sub. (1m) (ar), which reads as follows:

> (ar) If an actor intentionally used force that was intended or likely to cause death or great bodily harm, the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force and shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself if the actor makes such a claim under sub. (1) and either of the following applies:
>
> 1. The person against whom the force was used was in the process of unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring.
> 2. The person against whom the force was used was in the actor's dwelling,

> motor vehicle, or place of business after unlawfully and forcibly entering it, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

In the discussion that follows, the requirements set forth in subdiv. 1. and 2. are referred to as the "predicate facts."

The new rule addresses the use of force by a person against someone who has unlawfully and forcibly entered the person's dwelling, motor vehicle, or place of business (or is in the process of doing so). The new rule does not define "unlawfully" or "forcibly." However, § 939.48(6) provides: "In this section, 'unlawful' means either tortious or expressly prohibited by criminal law or both." Thus, the definition in sub. (6) should apply to the new rule. With respect to "forcibly," the standard instructions for robbery use the term "forcibly" to refer to either the use or threat of use of force. See Wis JI-Criminal 1479.

Some of the terms used are defined in the new rule. Section 939.48(1m)(a)1. defines "dwelling": "'Dwelling' has the meaning given in s. 895.07(1)(h)." Section 895.07(1)(h) provides as follows:

> "Dwelling" means any premises or portion of a premises that is used as a home or a place of residence and that part of the lot or site on which the dwelling is situated that is devoted to residential use. "Dwelling" includes other existing structures on the immediate residential premises such as driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages, and basement.[2]

Section 939.48(1m)(a)2. defines "place of business" as "a business that the actor owns or operates."

The predicate facts that are the basis for the new rule are subject to exceptions set forth in § 939.48(1m)(b). These must be evaluated by the court in determining whether a defendant has met the burden of production on the new rule. The court must find that the exceptions do not apply and that there is some evidence of the predicate facts for the new rule.

Section 939.48(1m)(b) provides:

> (b) The presumption described in par. (ar) does not apply if any of the following applies:

1. The actor was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time.

2. The person against whom the force was used was a public safety worker, as defined in s. 941.375 (1) (b), who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties. This subdivision applies only if at least one of the following applies:

a. The public safety worker identified himself or herself to the actor before the force described in par. (ar) was used by the actor.

b. The actor knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

Section 941.375 (1) (b) defines "public safety worker" as follows:

"Public safety worker" means an emergency medical services practitioner licensed under § 256.15, an emergency medical responder certified under §256.15(8), a peace officer, a fire fighter, or a person operating or staffing an ambulance.

II. The Committee's Conclusions

The Committee has reached the following conclusions about the new rule set forth in § 939.48(1m):

- it does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege;

- it does affect what a defendant must show to have the privilege of self-defense submitted to the jury – that is, it provides another way for the defendant to meet the burden of production;

- when self-defense is presented to the jury in a case where the new rule applies, the substance of the new rule is not presented to the jury and the standard instructions on the privilege of self-defense can be used without change;

- the state may succeed in proving that the privilege does not apply by proving, beyond a reasonable doubt, that the defendant's conduct does not meet the definition in the standard instruction; and,

- when self-defense is presented to the jury in a case where the new rule applies, the standard instruction on retreat – Wis JI-Criminal 810 – should not be given.

The Committee realizes that this approach differs from what some may believe to be the impact of the new rule. However, the Committee believes that this approach is the one that is most faithful to the statutory language. The key aspects of the Committee's analysis are described in detail below.

A. The new rule does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege.

The new rule applies where "the actor makes . . . a claim under sub. (1)," referring to sub. (1) of § 939.48, which is the definition of the privilege of self-defense.[3] Because the new rule plays a role only if "the actor makes . . . a claim under sub. (1)," the new rule is tied to the definition of the existing privilege and does not create an alternative to the existing privilege. The existing privilege under sub. (1), was not changed by Act 94. As applied to the use of deadly force, § 939.48(1) still requires that the actor "reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to himself or herself."

B. The new rule does affect what a defendant must show to have the privilege submitted to the jury – that is, it provides another way for the defendant to meet the burden of production.

The new rule provides that if the actor makes a claim under sub. (1) and the predicate facts apply, "the court . . . shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself." The Committee considered two issues relating to this provision: 1) whether the reference to "the court" refers to the judge alone, or whether it also applies to the jury; and, 2) what the effect is of requiring the court to employ the presumption. The Committee concluded that the reference to "the court" refers to the trial judge, not the jury, and that the effect of the presumption is to assist the defendant in meeting the burden of production that is required to make the privilege of self-defense [as defined in sub. (1) of § 939.48] an issue in the case.

- **"The court" refers to the trial judge, not the jury.**

In most situations, "the court" refers to the circuit court, that is, the judge, not the jury. See, for example, § 967.02(7), which provides [for the purposes of the Criminal Procedure Code]: "Court means the circuit court unless otherwise indicated." The Committee's conclusion that the reference is to the judge only and does not include the jury is consistent with the usual meaning given to "the court" and is faithful to the language of Act 94.

Act 94 had two parts: one relating to civil liability – § 895.62 – and one relating to the criminal law privilege of self-defense – § 939.48(1m). The civil and criminal provisions have roughly the same content, though they are not set up in exactly the same way. Section 895.62(3) is the civil equivalent of § 939.48(1m)(ar) and specifically refers to the "finder of fact":

> . . . the finder of fact may not consider whether the actor had an opportunity to flee or retreat before he or she used force and the actor is presumed to have reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself or herself or to another person.

The legislature used the term "finder of fact" in the civil provision, which clearly includes both the judge in a case without a jury and the jury. In the criminal provision that is part of the same act, the legislature used the term "court." Because Act 94 did not use "finder of fact" in the criminal provision, the Committee concluded that the reference to "the court" means the judge and does not include the jury.

- **"The court shall presume" does not affect the state's burden of persuasion.**

The usual effect of a "presumption" is to shift the burden of persuasion from one party to another. This is routinely done in civil cases. In criminal cases, the burden of persuasion is always on the state to prove all facts necessary to constitute the crime[4] and this burden cannot be shifted to the defendant by use of a "presumption."[5] With respect to the privilege of self-defense in Wisconsin, the burden is on the state to prove the privilege does not apply once the defendant meets the burden of production by showing "some evidence" of each aspect of the privilege.[6] The basic problem the Committee confronted is: how do you give defendants the benefit of a presumption as to a specific part of the case when a) they bear no burden of persuasion with respect to establishing that part of the case, and, b) they already enjoy a presumption of innocence as to all aspects of the case?

A defendant has a "presumption of innocence." This means the defendant must be found not guilty unless the state proves beyond a reasonable doubt both that all the facts

necessary to constitute the crime have been established and that any defense raised by the evidence has been disproved. For example, as applied to a first degree intentional homicide case, the state must prove that the defendant caused death with intent to kill [the "elements" of the crime], and, if there is "some evidence" of the privilege of self-defense, that the defendant did not act lawfully in self-defense.[7]

Given the structure of the existing privilege of self-defense, and given that Act 94 did not change that privilege, the Committee concluded that creating a "presumption" about a part of the definition of self-defense [namely, that the defendant reasonably believed deadly force was necessary] does not add anything to what the state is already required to prove. The state already has burden to disprove the privilege of self-defense [once the burden of production is met] and that burden cannot be increased by any presumption the court might employ. Thus, the Committee concluded, Act 94 does not create any new, alternative standard for the jury to consider and there is no reason to communicate the substance of the new rule to the jury.

- **"The court . . . shall presume" provides another way for the defendant to meet the burden of production.**

The Committee concluded that the requirement that "the court shall presume" should be implemented by applying it to the defendant's obligation to meet the burden of production on the privilege of self-defense. The complete privilege of self-defense as defined in § 939.48(1) is to be submitted to the jury when there is "some evidence" of the privilege.[8] In a case that does not involve the new rule, the defendant must point to evidence that he or she reasonably believed the following:

- that there was an actual and imminent unlawful interference with the defendant's person; and,
- that it was necessary to use force or threaten force to prevent or terminate the interference; and,
- when deadly force is used, that it was necessary to prevent imminent death or great bodily harm to himself or herself.

Once there is evidence tending to show these matters, the burden of persuasion is on the state to prove that the defendant's conduct did not meet the standard.[9]

The Committee concluded that under the new rule, the effect of "the court shall presume" is to provide the defendant with another way to meet the burden of production on self-defense. If there is evidence of the predicate facts under § 939.48(1m)(ar)1. or 2., the requirement that "the court shall presume" means that no additional evidence is

required as to the issue of the defendant's reasonable belief that the force used was necessary to prevent imminent death or great bodily harm to himself or herself.

Thus, under § 939.48 as amended by 2011 Wisconsin Act 94, there are two ways for a defendant to meet the burden of production on the privilege of self-defense:

- by pointing to some evidence of each part of the definition of self-defense in sub. (1) of § 939.48; or,
- by pointing to some evidence of the predicate facts set forth in sub. (1m)(ar)1. or 2., the provisions created by Act 94.

The determination whether the facts meet the "some evidence" threshold is for the trial court as is the case in other situations involving defenses or mitigating factors.

C. When a defendant asserts the privilege of self-defense under the new rule, the "some evidence" test is applied to the predicate facts.[10]

This section details what is required when a defendant asserts the privilege of self-defense under the new rule set forth in sub. (1m). The trial court should review the evidence, including that produced by the state and by the defendant, to determine whether there is "some evidence" of the predicate facts recognized by the new rule. Specifically, the court must determine whether the evidence, when viewed most favorably to the defendant, shows three things:

1) that the person against whom the force was used

- was in the process of unlawfully and forcibly entering the the defendant's dwelling, motor vehicle, or place of business OR
- was in the the defendant's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it; AND

2) that the defendant was present in the dwelling , motor vehicle, or place of business; AND

3) that the defendant knew or reasonably believed either that

- an unlawful and forcible entry was occurring OR
- the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

The court must also determine that the evidence, when viewed most favorably to the defendant, shows that the exceptions to the new rule set forth in sub. (1m)(b) do not apply. Those exceptions are:

- the defendant was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time;

- the person against whom the force was used was a public safety worker who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties AND the public safety worker identified himself or herself to the defendant before the force was used by the defendant OR the defendant knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

If the court finds that there is some evidence that the predicates for the new rule are present, and that the exceptions to the new rule do not apply, the privilege of self-defense should be presented to the jury.

D. When self-defense is presented to the jury in a case where the new rule applies, the substance of the new rule is not presented to the jury and the standard instructions on the privilege of self-defense can be used without change.

Because the Committee concluded that the new rule does not define a new alternative to the standard for the privilege of self-defense and goes only to the defendant's burden of production, nothing in the substance of the new rule need be communicated to the jury. The standard instruction on self-defense and the standard homicide instructions that incorporate self-defense can be given to the jury without change.[11]

E. The state may succeed in proving that the privilege does not apply by proving, beyond a reasonable doubt, that the defendant's conduct does not meet the definition in the standard instruction.

Because the Committee concluded that the new rule does not define a new alternative to the standard for the privilege of self-defense and goes only to the defendant's burden of production, and because the standard instruction on self-defense and the standard homicide instructions that incorporate self-defense can be given to the jury without change, the state can succeed in proving the privilege does not apply by proving that the defendant did not act lawfully in self-defense.[12] The state may do this by proving beyond a reasonable doubt that the defendant did not reasonably believe any of the following:

- that there was an actual and imminent unlawful interference with the defendant's person; or,
- that it was necessary to use force or threaten force to prevent or terminate the interference; or,
- that the force used was necessary to prevent imminent death or great bodily harm to himself or herself.

F. When self-defense is presented to the jury in a case where the new rule applies, the standard instruction on retreat – Wis JI-Criminal 810 – should not be given.

Section 939.48(1m)(ar) also addresses retreat, providing that if the predicate facts apply, "the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force . . ." The standard instruction that addresses retreat is Wis JI-Criminal 810. It provides that while "there is no duty to retreat" evidence relating to retreat may be considered in determining "whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the [unlawful] interference."

In a case where the new rule may apply, the court must not consider evidence relating to "whether the actor had an opportunity to flee or retreat" in making any decisions the court may be called upon to make regarding the privilege of self-defense. Further, as part of the court's obligation to instruct the jury on the law, the court should, upon request, instruct the jury as follows:

> There is no duty to retreat. You must not consider evidence relating to whether the defendant had an opportunity to flee or retreat in deciding whether the state has proved that the defendant did not act lawfully in self-defense.

COMMENT

Wis JI-Criminal 805A Law Note was originally published in 2013 and revised in 2019, and 2021. This revision was approved by the Committee in June 2023; it added to the comment.

This Law Note explains the Committee's approach to the expanded privilege of self-defense set forth in § 939.48(1m), created by 2011 Wisconsin Act 94. [Effective date: December 21, 2011; the act first applies to a use of force that occurs on the effective date.].

1. See §§ 776.013 and 776.032, Fla. Stats.

2. In State v. Chew, 2014 WI App 116, 358 Wis.2d 368, 856 N.W.2d 541, the court of appeals affirmed a trial court ruling that the evidence was not sufficient to raise the "Castle Doctrine." The court concluded that a shooting in a parking lot of an apartment complex did not occur in the "dwelling" – a factual predicate for the applicability of the new rule in § 939.48(1m).

3. While the new rule refers to the actor making "a claim under sub. (1)," and while the facts of a case may make it clear that self-defense will be an issue, under Wisconsin law a defendant does not have a general obligation to "claim" a defense in any formal way.

4. The term "facts necessary to constitute the crime" is used to refer to those facts on which the state bears the burden of persuasion. See In Re Winship, 397 U.S. 358, 364 (1970): ". . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged . . ." These facts will always include the statutory elements of the crime and will include other facts on which the state bears the burden due to definitions of terms, exceptions recognized by the offense definition, defenses, and some penalty-increasing facts.

5. Mullaney v. Wilbur, 421 U.S. 684 (1974). "Mullaney surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." Patterson v. New York, 432 U.S. 197, 215 (1977). Also see, Sandstrom v. Montana, 442 U.S. 510 (1979).

6. See State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413 and Wis JI-Criminal 1014.

7. A more complete statement of the "some evidence" standard is: when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

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

9. See State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413 and Wis JI-Criminal 1014.

10. In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court concluded that the trial court erred by declining to instruct on self-defense. The Court held that although Johnson unlawfully entered K.M.'s home in the middle of the night, there was some evidence that he had an objectively reasonable belief that he was preventing an unlawful interference with his person. Although the physical attack in Johnson occurred entirely inside K.M.'s home, the opinion did not interpret, apply, or limit the castle doctrine in any way because the Court was tasked with examining Johnson's, not K.M.'s, actions. Therefore, this decision did not alter the "some evidence" standard used to determine whether a jury should be instructed on self-defense.

11. The free-standing instruction on self-defense involving deadly force is Wis JI-Criminal 805. The instructions for homicide offenses that incorporate instructions on self-defense are Wis JI-Criminal 1014, 1016, and 1017.

12. The standard instructions for intentional homicides involving the privilege of self-defense address both first and second degree intentional homicide and include instructions on the complete privilege and the mitigating circumstance of "unnecessary defensive force." Thus, the approach described above will not be presented to the jury in exactly that form. Absence of the mitigating circumstance is presented as part of the facts necessary to constitute first degree intentional homicide; absence of the complete privilege is presented as part of the facts necessary to constitute second degree intentional homicide. See Wis JI-Criminal 1014, 1016, and 1017.

810 PRIVILEGE: SELF-DEFENSE: RETREAT

[ADD THE FOLLOWING TO WIS JI-CRIMINAL 800, 801, OR 805 WHEN SUPPORTED BY THE EVIDENCE. DO NOT GIVE THIS INSTRUCTION IF § 939.48(1m) APPLIES. SEE WIS JI-CRIMINAL 805A.][1]

Retreat

[There is no duty to retreat. However, in determining whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, you may consider whether the defendant had the opportunity to retreat with safety, whether such retreat was feasible, and whether the defendant knew of the opportunity to retreat.].

COMMENT

Wis JI-Criminal 810 was originally published in 1966 and revised in 1993 and 1999. This revision updated the comment and was approved in June 2019; it added footnote 1 and the directions immediately preceding it.

This instruction reflects the rule that a person generally has no duty to retreat before acting in self-defense. A duty to retreat does exist where the person provokes the attack. See Wis JI-Criminal 815.

The Committee concluded that while reference to "duty to retreat" is arguably unnecessary given the potential relevance of retreat to the reasonable use of force, it was advisable to continue to publish Wis JI-Criminal 810. It is intended to be "optional" in the sense that it is to be used only when the trial judge concludes that "retreat" is an important issue in the case and that the jury's understanding will be aided by a statement of the rather general legal standard that applies. It is drafted to apply to both deadly and nondeadly force cases.

The description of law provided in this instruction was cited with apparent approval in State v. Wenger, 225 Wis.2d 495, 502-03, 593 N.W.2d 467 (Ct. App. 1999).

The reference to "duty" to retreat is to a flat rule of the common law making the privilege of self-defense unavailable to one who did not exhaust all means of avoiding physical confrontation. Thus, a factfinder would not be allowed to consider self-defense and a defendant would not be allowed to introduce evidence relating to self-defense unless there was a showing that the duty to retreat was fulfilled.

It appears that the common law duty to retreat distinguished between nondeadly and deadly force cases. The LaFave and Scott treatise states that "it is everywhere agreed that one who can safely retreat need not do so before using nondeadly force." Substantive Criminal Law, § 5.7(f), at 659.

The basis for making a distinction appeared to be a balancing of the interests involved. The actor's interest in staying where he or she has a right to be and in not compromising his or her self-respect by engaging in cowardly conduct was seen as sufficient to outweigh the interest in not causing bodily harm to the aggressor. But the actor's interests in self-respect were not seen as sufficient to outweigh the causing of death or serious bodily harm to the aggressor. A classic law review article on retreat describes this balancing in the following terms:

> A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would always regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow being on his hands.

Beale, "Retreat From Murderous Assault," 16 Harv. L. Rev. 567, 581 (1903).

As to retreat in deadly force cases, LaFave and Scott describe two views. The majority view is that there is no duty to retreat before using deadly force unless the actor is the original aggressor. It appears that Wisconsin adopted this view in the Miller case, discussed below. The minority view imposed a duty to retreat "to the wall" if the actor could do so with safety and knew of the chance to do so.

But even the minority view recognized exceptions to this duty, the leading one being that a person need not retreat in his own home: there is no safer place to which the person can retreat. Some courts recognized the same rule as applying to the place of business.

To summarize the common law rule: "Duty" in "duty to retreat" referred to a flat rule precluding reliance on self-defense in cases where the person did not retreat as required. There was no duty to retreat in nondeadly force cases. There was a split in authority in deadly force cases, but even where retreat was required in deadly force cases, it did not apply where the actor was in his own home and did not provoke the attack.

The common law rule's development and rejection is discussed in three dated but interesting decisions of the United States Supreme Court. See Beard v. United States, 158 U.S. 550 (1895), Rowe v. United States, 164 U.S. 546 (1896), and Brown v. United States, 256 U.S. 335 (1921). Each decision reversed a federal conviction for manslaughter on the basis of jury instructions that incorrectly imposed a duty to retreat on the defendant.

There are relatively few Wisconsin cases on this topic. The leading case, Miller v. State, 139 Wis. 57, 119 N.W. 850 (1909), precedes the 1955 Criminal Code revision, when the current definition of the privilege of self-defense was adopted.

Miller involved a killing that followed a drunken argument at Bromley's house. Miller, Bromley's housekeeper, was charged as a conspirator. The victim and two other men were ordered to leave Bromley's house and, after some scuffling, they did. The victim returned a short time later, asking for his coat and hat. Bromley shot him in the chest with a rifle and killed him. Bromley was standing at his front door at the time; the victim was a short distance away in the yard.

Many errors were argued on appeal. With respect to Bromley's claim of self-defense, the Wisconsin Supreme Court found that the jury was improperly instructed. One of the errors was the requirement that the defendant should have retreated if the incident occurred outside his house. The court rejected this as "offend[ing] against the long-established law of this state."

> The ancient doctrine requiring the party assaulted to "retreat to the wall," . . . may have been all right in the days of chivalry, so called, but, by almost common consent of the moulders of the unwritten law, in later years, it is unadaptable to our modern development and, therefore, has been pretty generally, and in this state very definitely, abandoned. It has been superseded by a doctrine in harmony with the divine right of self-defense; the doctrine that when one is where he has a right to be and does not create the danger by his own wrongful conduct, he may stand his ground. . . .

139 Wis. 57, 75.

The error was found to be harmless, however, since the court found that there was no evidence to support the defendant's claim that he reasonably believed it was necessary to use deadly force when the victim returned, unarmed, to the house to ask for his hat.

State v. Kelley, 107 Wis.2d 540, 319 N.W.2d 869 (1982), considers retreat only in passing. A fight erupted at the home of Kelley's friends. Kelley went to the home and was told that Lowery was in the house and had a gun. Kelley went into the house. Lowery fired a shot at him, hitting Kelley in the right hand and wounding another man, Burgess. Kelley continued up the stairs in pursuit of Lowery and was shot by Lowery again, this time in the left hand. Lowery ran into a bedroom and closed the door. Kelley fired three shots through the door, killing Lowery.

Kelley appealed his conviction for manslaughter, claiming that the evidence showed his conduct was completely privileged. The Wisconsin Supreme Court upheld the conviction, finding the evidence sufficient to show that a reasonable person would not have believed himself to be in imminent danger after Lowery went into the bedroom. Further, the court found that the evidence was sufficient to show that the amount of force used was excessive.

The reference to retreat came in the context of analyzing the sufficiency of the evidence:

> After the defendant had been shot, Lowery disappeared into a bedroom. There was nothing at this point which prevented the defendant from retreating to the first floor rather than proceeding to the second floor. Furthermore, Lowery's disappearance, along with the fact that defendant had received two relatively minor wounds, is sufficient evidence upon which a jury could find that a reasonable person would not have believed himself to be in 'imminent danger. . . .'

107 Wis.2d 540, 548.

State v. Herriges, 155 Wis.2d 279, 119 N.W.2d 850 (Ct. App. 1990), involved a person who physically resisted police when they attempted to arrest him in his home. He was charged with battery; only nondeadly force was involved. The trial court instructed on self-defense, including the rule that a person who provokes the attack must retreat to regain the privilege.

The appellate court upheld the instructions given, holding that the provocation rule applied even though the person was in his home:

> . . . . The home provides a haven, not an arena. 'One assaulted in his house need not flee therefrom. But his house is his castle only for the purposes of defense. It cannot be turned into an arsenal for the purpose of offensive effort against the lives of others. It is a shelter, but not a sally port.' Raines v. State, 455 So.2d 967, 972 (Ala. Crim. App. 1984). We therefore follow the direction given by our supreme court in Miller and adopt the rule that if there has been provocation by the one assaulted, even if that provocation occurs in the home, successful assertion of self-defense requires a reasonable belief that one cannot retreat before force likely to cause death or great bodily harm may be used.

155 Wis.2d 297, 304-05.

By implication, the court approved the rule that aside from the provocation situation, there is no duty to retreat in the home, or anywhere else.

When the privilege of self-defense was codified in the 1956 revision of the Criminal Code, the duty to retreat was recognized only where the person provoked the attack; such a person must "exhaust every other reasonable means to escape" before resorting to deadly force. Subsection 939.48(2)(a). In all other situations, the feasibility of retreat is to be considered along with all the other circumstances, in deciding whether the person reasonably believed the use of force was necessary in self-defense. The Comment to the 1953 Draft of the revised criminal code provides:

> Under this section, the feasibility of retreat from the assailant, with one exception, is handled as an aspect of the question of whether the actor reasonably believed the force used was necessary to prevent or terminate the interference. The exception is the case where the actor himself provoked the attack. In such a case, it is desirable to emphasize the fact that the actor should do everything reasonably possible to escape from the attack before he resorts to the use of deadly force.

Comment to § 339.48(2), 1953 Report on the Criminal Code (Wisconsin Legislative Council, 1953).

Wis JI-Criminal 810 implements the standard set forth in the first sentence of the above comment.

1. Section 939.48(1m) relates to what is commonly termed the "Castle Doctrine." [Note: the Committee recommends that caution should be used in relying on that term to describe the provision. While it is a convenient term, the substance of the "Castle Doctrine" varies state by state; Wisconsin's version is more limited than that of Florida, for example. This footnote uses the term "the new rule."] Section 939.48(1m) was created by 2011 Wisconsin Act 94. [Effective date: December 21, 2011; the act first applies to a use of force that occurs on the effective date.] The Committee's interpretation of the provision is explained in Wis JI-Criminal 805A Law Note: Self-Defense Under § 939.48(1m).

When self-defense is presented to the jury in a case where the new rule applies, JI-810 should not be given. Section 939.48(1m)(ar) addresses retreat, providing that if the predicate facts apply, "the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force . . ." JI-810's statement that while "there is no duty to retreat" evidence relating to retreat may be considered in determining "whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the [unlawful] interference" runs counter to sub. (1m)(ar)'s command that "the court may not consider whether the actor had an opportunity to flee or retreat ..."

In addition, the court should, upon request, instruct the jury as follows:

There is no duty to retreat. You must not consider evidence relating to whether the defendant had an opportunity to flee or retreat in deciding whether the state has proved that the defendant did not act lawfully in self-defense.

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815 PRIVILEGE: SELF-DEFENSE: NOT AVAILABLE TO ONE WHO PROVOKES AN ATTACK: REGAINING THE PRIVILEGE — § 939.48(2)

[ADD THE FOLLOWING TO WIS JI-CRIMINAL 800, 801, OR 805 WHEN SUPPORTED BY THE EVIDENCE.]

Provocation

You should also consider whether the defendant provoked the attack. A person who engages in unlawful conduct[1] of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack.

[USE ANY OF THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.]

[However, if the attack which follows causes the person reasonably to believe that he or she is in imminent danger of death or great bodily harm, he or she may lawfully act in self-defense. But the person may not use or threaten force intended or likely to cause death unless he or she reasonably believes he or she has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.]

[A person who provokes an attack may regain the right to use or threaten force if the person in good faith withdraws from the fight and gives adequate notice of the withdrawal to his assailant.]

[A person who provokes an attack whether by lawful or unlawful conduct with intent to use such an attack as an excuse to cause death or great bodily harm to another person is not entitled to use or threaten force in self-defense.]

COMMENT

Wis JI-Criminal 815 was originally published in 1962 and revised in 1994 and 1999. The 1999 revision updated the comment. This revision amended the language of the instruction to more accurately reflect the language of Wis. Stat. 939.48(2)(a) and was approved by the Committee in July 2019.

The 1962 version of Wis JI-Criminal 815 was cited as a correct statement of the law in State v. Walker, 99 Wis.2d 687, 695-96, 299 N.W.2d 861 (1981). It was reviewed again in State v. Herriges, 155 Wis.2d 297, 455 N.W.2d 635 (Ct. App. 1990). The court held that a person who provokes an attack must retreat in order to regain the privilege of self-defense, even if that person is in his own home:

> . . . . The home provides a haven, not an arena. "One assaulted in his house need not flee therefrom. But his house is his castle only for the purposes of defense. It cannot be turned into an arsenal for the purposes of offensive effort against the lives of others. It is a shelter, but not a sally-port." Raines v. State, 445 So.2d 967, 972 (Ala. Crim. App. 1984). We therefore follow the direction given by our supreme court in Miller and adopt the rule that if there has been provocation by the one assaulted, even if that provocation occurs in the home, successful assertion of self-defense requires a reasonable belief that one cannot retreat before force likely to cause death or great bodily harm may be used.

155 Wis.2d 297, 304-05.

The "duty to retreat" is extensively discussed in Wis JI-Criminal 810.

1. The first paragraph of the instruction reflects the rule stated in sub. (2) of § 939.48, which provides that a "person who engages in unlawful conduct of a type likely to provoke others . . ." loses the right to claim the privilege of self-defense. In State v. Boughneit, 97 Wis.2d 687, 294 N.W.2d 675 (Ct. App. 1980), the court held that engaging in what would be considered disorderly conduct under § 947.01 would constitute "unlawful conduct" for the purposes of § 939.48(2).

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

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

Self-Defense As To (Name Person)

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

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

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

FOR FIRST DEGREE RECKLESS OFFENSES, ALSO ADD THE FOLLOWING:

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

Self-Defense

Self-defense requires that:

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

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

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

Determining Whether Beliefs Were Reasonable

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

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

COMMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Statutory Definition of the Crime

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

State's Burden Of Proof

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

Elements of the Crime That the State Must Prove

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

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

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

   "Criminally reckless conduct" means:

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

substantial risk of death or great bodily harm.

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

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

Self-Defense As To (Name Person)

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

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

Self-Defense

Self-defense requires that:

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

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

Determining Whether Beliefs Were Reasonable

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

Jury's Decision

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

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

COMMENT

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

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

821 PRIVILEGE: SELF-DEFENSE: UNINTENDED HARM TO THIRD PARTY CHARGED AS INTENTIONAL CRIME — § 939.48(3)

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

Self Defense

There is evidence in this case that the defendant was acting in self-defense as to (name of person).[1] If the defendant was privileged to use force in self-defense against (name of person), that privilege extended to harm caused to [(name of victim)[2]].

The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference[3] with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

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

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

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[4] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[5] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements _____[6] have been proved [as to the harm caused to (name of victim)] and that the defendant did not act lawfully in self-defense as to (name of person), you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 821 was approved by the Committee in December 2017 and revised in 2021. This revision was approved by the Committee in June 2023; it added to the comment.

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

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

The Committee concluded that two types of cases can arise in which this statute could apply. First, the defendant may be charged with a negligent or reckless crime committed against the third person. For that type of case, see Wis JI-Criminal 820. Second, the defendant may be charged with intentionally causing harm to the third person under a statute that defines an offense as acting with intent to cause harm "to that person or another" or where there is a dispute about whether self-defense applies at all. This instruction is intended for use in that type of case and adapts the wording of Wis JI-Criminal 800 to these circumstances.

For an example where this instruction may be used, consider the crime of simple battery as defined in § 940.19(1): "Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor." A defendant could be charged with committing a battery against the victim by an act done with intent to cause bodily harm to another person – a person as to whom the defendant claims the right to use force in self-defense. If the defendant is lawfully acting in self-defense as to the other person, the privilege extends to "the infliction of unintended harm" upon the victim of the charge offense. That harm is "unintended" as the term is used in § 939.48(3), but is "intentional" under § 940.19(1) which defines the crime as requiring "intent to cause bodily harm to that person or another."

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

In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court

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

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

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

3. For purposes of self-defense, "unlawful" means "either tortious or expressly prohibited by criminal law or both." Section 939.48(6). Further instruction on what constitutes "unlawful interference" in the context of the facts of a particular case may be desirable. See footnote 1, Wis JI-Criminal 800 for additional discussion.

4. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

5. The phrase "in the defendant"s position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627 28, 230 N.W.2d 789 (1975). See footnote 3, Wis JI-Criminal 800 for additional discussion.

6. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved . . ." See Wis JI-Criminal 1222A.

825 PRIVILEGE: DEFENSE OF OTHERS: FORCE LESS THAN THAT LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48(4)

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

Defense of Others

Defense of others is an issue in this case. The law of defense of others allows the defendant to threaten or intentionally use force to defend another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the person of (name of third person) ; and,
- the defendant believed that (name of third person) was entitled to use or to threaten to use force in self-defense; and,
- the defendant believed that the amount of force used or threatened by the defendant was necessary for the protection of (name of third person) ; and,
- the defendant's beliefs were reasonable.

Determining Whether Beliefs Were Reasonable

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

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE THIRD PERSON PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 835].

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in defense of others.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of _____[1] have been proved and that the defendant did not act lawfully in defense of others, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 825 was originally published in 1966 and revised in 1994. This revision was approved by the Committee in April 2005.

The 1994 revision of this instruction changed its format to allow integrating the description of defense of others with the instruction for the crime charged. See the Comment to Wis JI-Criminal 800.

This instruction is for cases where less than deadly force is involved. For deadly force cases, see Wis JI-Criminal 830.

1. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

830 PRIVILEGE: DEFENSE OF OTHERS: FORCE INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48(4)

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

Defense of Others

Defense of others is an issue in this case. The law of defense of others allows the defendant to threaten or intentionally use force to defend another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the person of (name of third person) ; and,
- the defendant believed that (name of third person) was entitled to use or to threaten to use force in self-defense; and,
- the defendant believed that the amount of force used or threatened by the defendant was necessary for the protection of (name of third person) ; and,
- the defendant's beliefs were reasonable.

The defendant may intentionally use or threaten force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (name of third person) .

Determining Whether Beliefs Were Reasonable

A belief may be reasonable, even though mistaken. In determining whether the defendant's beliefs were reasonable the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must

be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE THIRD PERSON PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 835].

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in defense of others.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of _____[1] have been proved and that the defendant did not act lawfully in defense of others, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 830 was originally published in 1966 and revised in 1989 and 1994. This revision was approved by the Committee in April 2005.

This instruction deals with the privilege to use or threaten the use of "deadly force" in the defense of a third person. See § 939.48(4).

The 1994 revision of this instruction changed the format to allow integrating the description of defense of others with the instruction for the crime charged. See the Comment to Wis JI-Criminal 800.

This instruction was revised in 1988 in response to State v. Ambuehl, 145 Wis.2d 343, 425 N.W.2d 649 (Ct. App. 1988). Ambuehl held that the 1966 version of Wis JI-Criminal 830 was in error because it referred only to "use of force" and did not mention the other alternative, "threat of force." The 1994 revision includes reference to "use" and "threat of use" of force throughout.

The facts in Ambuehl illustrate why the omission of "threat of force" may be a problem. Ambuehl was charged with attempted murder and injury by conduct regardless of life. The charges arose from a barroom fight during which a gun Ambuehl was holding went off, injuring one of the combatants. Ambuehl claimed she intentionally pointed the gun at the man who was fighting with her friend, and the gun went off accidentally. Thus, she claimed she intentionally threatened force but did not intentionally use forceCthe actual use was accidental. In this situation, the court of appeals found that the instruction's failure to include reference to the threat of force alternative "was likely to divert the jury from Ambuehl's version of the shooting to a version which she denied had occurred." 145 Wis.2d 343, 373. This resulted in the real controversy not being tried and required reversal, even though the instruction had not been objected to.

1. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

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835 PRIVILEGE: DEFENSE OF OTHERS: EFFECT OF PROVOCATION BY PERSON DEFENDED — § 939.48(4)

ADD THE FOLLOWING TO WIS JI-CRIMINAL 825 OR 830 WHEN SUPPORTED BY THE EVIDENCE.

Provocation

You should consider whether (name of person defended) provoked the attack. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack.

[USE ANY OF THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.]

[However, if the attack which follows causes the person reasonably to believe that he[1] is in imminent danger of death or great bodily harm, he may lawfully act in self-defense. But the person may not use or threaten force intended or likely to cause death or great bodily harm unless he reasonably believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.]

[A person who provokes an attack may regain the right to use or threaten force if the person in good faith withdraws from the fight and gives adequate notice of the withdrawal to his assailant.]

[A person who provokes an attack whether by lawful or unlawful conduct with intent to use such an attack as an excuse to cause death or great bodily harm to another person is not entitled to use or threaten force in self-defense.]

However, even if (name of person defended) had provoked the attack, the defendant would still be allowed to act in defense of (name of person defended) if the defendant actually and reasonably believed that (name of person defended) was entitled to act in his or her own defense.

COMMENT

Wis JI-Criminal 835 was originally published in 1962 and revised in 1994. This revision was approved by the Committee in April 2005.

This instruction is intended for use with Wis JI-Criminal 825 or 830, if applicable.

1. This instruction uses "he" to refer to the "person" serving as the general standard against which the defendant's conduct is being measured. The Committee attempts to avoid using the masculine form of the pronoun in these situations. See Wis JI-Criminal 5, Comment: Gender Neutral Language. In this case, attempts to rewrite the instruction to avoid use of the pronoun were unsuccessful; they made an already complicated statement too difficult to understand. If the case involves a female defendant, the Committee recommends changing the pronoun in this paragraph to "she."

855 PRIVILEGE: DEFENSE OF ONE'S PROPERTY — § 939.49(1)

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

Defense of Property

Defense of property is an issue in this case. The law of defense of property allows the defendant to threaten or intentionally use force to defend (his) (her) property only if:

- the defendant believed that (name of victim) was unlawfully interfering with the defendant's property; and,
- the defendant believed that the amount of force the defendant used or threatened was necessary to prevent or terminate the interference; and,
- the defendant's beliefs were reasonable.

The law of defense of property does not allow a person to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property.[1]

Determining Whether Beliefs Were Reasonable

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

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in defense of property.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of _____[2] have been proved and that the defendant did not act lawfully in defense of property, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 855 was originally published in 1962 and revised in 1994. This revision was approved by the Committee in April 2005.

The 1994 revision of this instruction changed the format to allow integrating the description of defense of property with the instruction for the crime charged. See the Comment to Wis JI-Criminal 800.

1. This statement is a slight change from the text of § 939.49, which is phrased: "it is not reasonable." No change in substance is intended. What is being expressed is a flat rule that "it is not permissible to use deadly force for the sole purpose of protecting property." Comment to § 339.49, 1953 Judiciary Committee Report on the Criminal Code, p. 48.

2. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

860 PRIVILEGE: DEFENSE OF ANOTHER'S PROPERTY — § 939.49(2)

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

Defense of Another's Property

Defense of the property of another is an issue in this case. The law of defense of property allows the defendant to threaten or intentionally use force to defend the property of another only if:

- the defendant believed that there was an unlawful interference with the property of (name of third person) ; and,
- the defendant believed that the property belonged to (a member of the defendant's immediate family or household) (a person whose property the defendant has a legal duty to protect) (a merchant who employs the defendant) (a library that employs the defendant); and,
- the defendant believed that (name of third person) was entitled to use or threaten to use force to defend his property; and,
- the defendant believed that the amount of force used or threatened was necessary for the protection of (name of third person) 's property; and,
- the defendant's beliefs were reasonable.

The law of defense of property does not allow a person to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of property.[1]

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken. In determining whether the beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would

have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in defense of the property of another

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of _____[2] have been proved and that the defendant did not act lawfully in defense of property of another, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 860 was originally published in 1962 and revised in 1994. This revision was approved by the Committee in April 2005.

The 1994 revision of this instruction changed the format to allow integrating the description of defense of property with the instruction for the crime charged. See the Comment to Wis JI-Criminal 800.

1. This statement is a slight change from the text of § 939.49, which is phrased: "it is not reasonable." No change in substance is intended. What is being expressed is a flat rule that "it is not permissible to use deadly force for the sole purpose of protecting property." Comment to § 339.49, 1953 Judiciary Committee Report on the Criminal Code, p. 48.

2. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

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

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

Privilege Of A Public Office

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

- First, the defendant acted in good faith.

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

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

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

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

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

State's Burden of Proof

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

Jury's Decision

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

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

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

COMMENT

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

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

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

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

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

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

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

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

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

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880 PRIVILEGE TO USE FORCE: REASONABLE ACCOMPLISHMENT OF A LAWFUL ARREST BY A PEACE OFFICER: NONDEADLY FORCE

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

Use of Force by Peace Officer

The use of force by a peace officer[1] is an issue in this case. The law allows a peace officer to use force in making a lawful arrest[2] only if:

- the defendant believed that it was necessary to use force to make an arrest; and,
- the defendant believed that the amount of force used was necessary to secure and detain the person arrested, to overcome any resistance, to prevent escape, or to protect the defendant from bodily harm; and,
- the defendant's beliefs were reasonable.

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what an ordinary, prudent, and reasonably intelligent officer would have believed in the defendant's position, having the knowledge and training that the defendant possessed, and acting under the circumstances that existed at the time of the alleged offense.[3]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in the use of force to make an arrest.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of _____[4] have been proved and that the defendant did not act lawfully in using force to make an arrest, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 880 was originally published in 1974 and revised in 1987 and 1994. This revision was approved by the Committee in April 2005.

The 1987 and 1994 revisions of this instruction changed its format to allow integrating the description of the privilege to use force with the instruction on the crime charged. See the Comment to Wis JI-Criminal 800.

Wis JI-Criminal 880 addresses the privilege to use nondeadly force in making an arrest. Wis JI-Criminal 885 addresses the use of deadly force. The privilege to use force to make a lawful arrest is recognized in broad terms in § 939.45(4). It is not specifically limited to peace officers, though this instruction is. Police may also be privileged to use force in self-defense or in defense of others, situations that are not covered by this instruction. See Wis. Stat. § 939.48 and Wis JI-Criminal 800 through 835.

1. "Peace officer" is defined as follows in § 939.22(22):

> "Peace officer" means any person vested by law with a duty to maintain public order, whether that duty extends to all crimes or is limited to specific crimes.

2. With regard to whether the arrest was lawful, footnote 1 to the 1974 version of this instruction provided as follows:

> 1. An element of this defense is that the arrest is lawful (defined Wis. Stat. § 968.07 (1971)), that is, that the arrest was made pursuant to a warrant or if made without a warrant, there was probable cause for the arrest. The question for arrest, without a warrant, based upon probable cause, is a mixed question of law and fact. If there is no dispute as to the facts of the arrest, then it is up to the court to decide if they show probable cause for arrest. If the facts are in dispute, the court should instruct the jury as to what facts will constitute probable cause, and submit to them only the question of the existence of those facts. 5 Am. Jur.2d Arrest § 49, p. 741 (1962). An arrest made pursuant to a warrant valid in form and issued by a court of competent jurisdiction is considered lawful as to the arresting officer. 5 Am. Jur.2d Arrest § 4, p. 698 (1962). Validity of the warrant then is a matter for the court to decide. It is suggested that the lawfulness of the arrest, if it is a matter for merely the court to decide, should be decided first because if the arrest is found to be unlawful, the defense would be unavailable to the defendant and therefore no longer an issue for the jury to decide.

3. The 1986 and 1994 revisions substantially shortened the text of the instruction. No case law or other developments required the change. The intent was to simplify and clarify the instruction.

The Committee is aware of no reported criminal cases dealing with the privilege of a peace officer to use force in making an arrest. The following are some of the civil cases that discuss the issue: McCluskey v. Steinhorst, 45 Wis.2d 350, 173 N.W.2d 148 (1969); Celmer v. Quarberg, 56 Wis.2d 581, 203 N.W.2d 45 (1973); and Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981). Also see Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975).

4. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

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885 PRIVILEGE TO USE FORCE: REASONABLE ACCOMPLISHMENT OF A LAWFUL ARREST BY A PEACE OFFICER: DEADLY FORCE

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

Use of Force by Peace Officer

The use of force by a peace officer[1] is an issue in this case. The law allows a peace officer to use force in making a lawful arrest[2] only if:

- the defendant believed that it was necessary to use force to make an arrest; and,
- the defendant believed that the amount of force used was necessary to secure and detain the person arrested, to overcome any resistance, to prevent escape, or to protect himself from bodily harm; and,
- the defendant's beliefs were reasonable.

The defendant may intentionally use force which is intended or likely to cause death or great bodily harm in making a lawful arrest only if (he) (she) believed that such force was necessary to prevent the escape of (name of victim) and believed that (name of victim) posed a significant threat of death or serious physical injury to the defendant or others.[3]

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what an ordinary, prudent, and reasonably intelligent officer would have believed in the defendant's position, having the knowledge and training that the defendant possessed, and acting under the circumstances that existed at the time of the alleged offense.[4]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in the use of force to make an arrest.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of _____[5] have been proved and that the defendant did not act lawfully in using force to make an arrest, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 885 was originally published in 1987 and revised in 1994. This revision was approved by the Committee in April 2005.

The 1987 and 1994 revisions of this instruction changed its format to allow integrating the description of the privilege to use force with the instruction on the crime charged. See the Comment to Wis JI-Criminal 800.

Wis JI-Criminal 885 attempts to explain the limits on the use of deadly force by peace officers in making a lawful arrest. The privilege to use force to make a lawful arrest is recognized in broad terms by § 939.45(4). It is not specifically limited to peace officers, though this instruction is. Peace officers may also be privileged to use force in self-defense or defense of others, situations that are beyond the scope of this instruction. See Wis. Stat. § 939.48 and Wis JI-Criminal 800 through 835.

1. "Peace officer" is defined as follows in § 939.22(22):

> "Peace officer" means any person vested by law with a duty to maintain public order, whether that duty extends to all crimes or is limited to specific crimes.

2. With regard to whether the arrest was lawful, footnote 1 to the 1974 version of this instruction provided as follows:

> 1. An element of this defense is that the arrest is lawful (defined Wis. Stat. § 968.07 (1971)), that is, that the arrest was made pursuant to a warrant or if made without a warrant, there was probable cause for the arrest. The question for arrest, without a warrant, based upon probable cause, is a mixed question of law and fact. If there is no dispute as to the facts of the arrest, then it is up to the court to decide if they show probable cause for arrest. If the facts are in dispute, the court should instruct the jury as to what facts will constitute probable cause, and submit to them only the question of the existence of those facts. 5 Am. Jur.2d Arrest § 49, p. 741 (1962). An arrest made pursuant to

a warrant valid in form and issued by a court of competent jurisdiction is considered lawful as to the arresting officer. 5 Am. Jur.2d Arrest § 4, p. 698 (1962). Validity of the warrant then is a matter for the court to decide. It is suggested that the lawfulness of the arrest, if it is a matter for merely the court to decide, should be decided first because if the arrest is found to be unlawful, the defense would be unavailable to the defendant and therefore no longer an issue for the jury to decide.

3. The standard for the use of deadly force is based on the decision of the United States Supreme Court in Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). Garner held that deadly force may not be used to accomplish an arrest "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." 471 U.S. 1, 3.

The Garner decision is based on the Fourth Amendment's rule against unreasonable seizures: "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." 471 U.S. 1, 7. Thus, Garner does not articulate principles of substantive criminal law. However, the Committee concluded that it was instructive in setting forth the two requirements for the valid use of deadly force which are adopted in the instruction.

It is not clear whether Wisconsin had continued to follow the common law "fleeing felon rule" that Garner invalidated. (The fleeing felon rule being that deadly force could be used to accomplish any felony arrest.) In Garner, the Court assumed that Wisconsin did continue to follow the rule. See footnote 14 at 471 U.S. 1, 16. Also see the discussion in Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975). After Garner, it is obvious that Wisconsin must adopt a rule consistent with that decision.

4. The 1987 revision substantially shortened the text of the instruction. No case law or other developments required the change. The intent was to simplify and clarify the instruction.

The Committee is aware of no reported criminal cases dealing with the privilege of a peace officer to use force in making an arrest. The following are some of the civil cases that discuss the issue: McCluskey v. Steinhorst, 45 Wis.2d 350, 173 N.W.2d 148 (1969); Celmer v. Quarberg, 56 Wis.2d 581, 203 N.W.2d 45 (1973); and Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981). Also see Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975).

5. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

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901 CAUSE

The _____ element requires that the defendant caused (identify harm or consequence) to (name of victim). "Cause" means that the defendant's conduct was a substantial factor in producing (identify harm or consequence).

FOR CASES WHERE THERE IS EVIDENCE OF MORE THAN ONE CAUSE, ADD THE FOLLOWING:

[There may be more than one cause of (identify harm or consequence). The act of one person alone might produce it, or the acts of two more persons might jointly produce it.]

COMMENT

Wis JI-Criminal 901 was originally published in 1996 and the Comment was updated in 2004, and 2016. This revision was approved by the Committee in October 2021; it added to the comment.

This instruction is intended to provide a basic definition of "cause." Its substance is incorporated into most instructions for substantive offenses. That typically involves a relatively brief statement, which may be inadequate in a case where a contested or difficult cause issue is presented. The material provided here may be helpful for the preparation of a more detailed cause instruction in those cases.

Cause In Wisconsin: "Substantial Factor"

Wisconsin has no statutory definition of cause; through case law it has adopted the "substantial factor" test. The same standard is used in civil cases – see Wis JI-Civil 1500 and 1505.

Even the comprehensive Wisconsin Criminal Code Revision in the 1950's did not define "cause." But the state of the law at the time was summarized in the commentary to a general section on homicide – sec. 340.01 of the 1950 draft – that was not enacted:

> *Causation:* In criminal law, as in torts, the term causation is used to refer to 2 quite different problems: (a) Did the actor's act in fact cause the consequences, and, (b) assuming that it did, is there any reason based on policy considerations for limiting liability?

> Whether the actor's act did in fact cause the prescribed consequence is, in the ordinary case, not difficult to determine. The state has the burden of proving this element to the jury. The "substantial factor" test currently in use in tort litigation works equally well in criminal law.
>
> Whether there is any reason based on policy considerations for limiting liability may be more difficult to determine. Part of this difficulty is attributable to the fact that the problem is often treated as one of causation rather than one of limiting liability based on policy considerations present in the particular case. . .
>
> **Wisconsin Legislative Council 1950 Report Vol. VII – Judiciary – Part III**
> **April 1951, p. 50**

For a case finding the evidence insufficient to prove that a defendant's conduct caused death, see State v. Serebin, 119 Wis. 2d 837, 350 N.W.2d 65 (1984).

In State v. Below, 2011 WI App 64, 333 Wis. 2d 690, 799 N.W.2d 95, the court held that the "substantial factor" test was met as to reckless homicide and physical abuse of a child and affirmed the trial court's refusal to give an instruction on "intervening cause."

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

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

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

Intervening Medical Treatment

The issue of intervening medical treatment and cause of death was discussed in State v. Block, 170 Wis.2d 676, 489 N.W.2d 715 (Ct. App. 1992). Block was convicted of second degree murder in connection with the death of his 73-year-old grandmother, whom he stabbed on October 5, 1987. Between the day of

the stabbing and the day of death on December 24, 1987, the victim was hospitalized three times and underwent three operations. She died from a pulmonary embolism. The treating physicians testified that the stabbing was a substantial factor in causing her death.

Block claimed that negligence by the treating physicians caused the death. Over Block's objection, the trial court instructed the jury as follows:

> In Wisconsin, if the defendant inflicts a wound of potentially mortal or life threatening nature on another and negligence, if any, of the doctor contributes to the victim's death, such negligence does not break the chain of causation between the acts of the defendant and the subsequent death. The State is only required to prove beyond a reasonable doubt that the defendant's acts were a substantial factor in producing the death.

The court of appeals held that the instruction was warranted by the evidence and also accurately stated the law:

> . . . any medical negligence in connection with procedures undertaken in response to a life-threatening situation created by the defendant does "not break the chain of causation" even though that negligence may have "contributed" to the victim's death.

170 Wis.2d 676, 682, citing Cranmore v. State, 85 Wis.2d 722, 271 N.W.2d 402 (Ct. App. 1978).

Also see, State v. Below, 2011 WI App 64, 333 Wis. 2d 690, 799 N.W.2d 95, which involved the termination of life support measures for a child victim injured by the defendant's actions.

"As a Result" Means "Cause"

Some criminal statutes, primarily outside the Criminal Code, use a phrase like "as a result" or "results in" where one might expect to see the word "cause" used. These phrases mean the same thing as "cause" and should be defined in terms of "substantial factor." State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989) and State v. Wille, 2007 WI App 27, 299 Wis.2d 531, 798 N.W.2d 343. See, for example, § 346.17 [Wis JI-Criminal 2630] and § 125.075 [Wis JI-Criminal 5050].

The "Year And A Day" Rule

In State v. Picotte, 2003 WI 42, 261 Wis.2d 249, 661 N.W.2d 381, the court held that the common law year and a day rule had been the law in Wisconsin since statehood. That rule provided that a prosecution for homicide was barred if death occurred more than one year and one day after the act which caused the death. The court exercised its authority to abrogate the rule, finding that it was archaic and no longer made sense. The court further held that "purely prospective abrogation of the year-and-a-day rule best serves the interest of justice. Thus, prosecutions for murder in which the conduct inflicting the death occurs after the date of this decision are permissible regardless of whether the victim dies more than a year and a day after the infliction of the fatal injury." 2003 WI 42, ¶5. The date of the Picotte decision was May 16, 2003.

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905 LIABILITY FOR FAILURE TO ACT — CRIMINAL OMISSION

ADD THE FOLLOWING TO THE INSTRUCTION FOR THE CRIME CHARGED WHEN THERE IS EVIDENCE THAT THE CRIME WAS COMMITTED BY OMISSION.[1]

Criminal liability may be based on either affirmative conduct or on a failure to act.

Evidence has been received that the defendant committed (specify crime) by failing to act. Criminal liability may be based on a failure to act when:

- the defendant has a legal duty to act.[2] In this case, it is alleged that the defendant had a legal duty to (identify the legal duty).[3]
- the defendant has knowledge of facts giving rise to the duty;[4]
- the defendant has the physical ability to act as the duty requires;[5] and,
- the defendant failed to act as the legal duty requires.

For criminal liability based on failure to act, the state must satisfy you beyond a reasonable doubt that all four of these requirements are present and that the defendant's failure to act (specify the harm required for the crime charged).[6]

COMMENT

Wis JI-Criminal 905 was approved by the Committee in March 2015.

Criminal liability for an omission or failure to act is not codified in the Wisconsin Statutes but has been recognized in case law. See the summary titled "The Basis For Omission Liability In Wisconsin" that follows the footnotes below.

Criminal liability for omissions exists in two situations:

- where a statute defines a crime based on a failure to do something that the statute requires be done: failure to pay child support – § 948.22 [see Wis JI-Criminal 2152]; failure to file a tax return – § 71.83(2) [see Wis JI-Criminal 5010].;

- where a failure to act – when there is a legal duty to do so – substitutes for the act required for a generally applicable crime.

This instruction is drafted for the latter situation. The prosecution is for a generally applicable crime; the omission is a substitute for the "act" expressly or implicitly required by the statute defining that crime. All the regular elements of the crime must be established, along with the components necessary for omission liability.

1. The Committee recommends that the explanation of criminal liability for an omission, or failure to act when there is a legal duty to act, be added to the instruction for the crime charged. An example of how this could be done for a second degree reckless homicide charge based on an omission is provided at Wis JI-Criminal 1060A.

2. State v. Williquette, 129 Wis.2d 239, 251-253, 255-266, 385 N.W.2d 145 (1986).

The existence of a legal duty is the necessary predicate for omission liability. It is likely that a trial court may be requested to make a pretrial ruling whether a legal duty exists based on the facts of the case. If the court concludes that alleged facts, if proved, would support the existence of a legal duty, the case could proceed to trial, where the state will have to prove that the alleged facts exist.

The source of the legal duty must be found in state law. Williquette recognized the common law duty of a parent to protect children from harm. State v. Neumann, 2013 WI 58, ¶104, 348 Wis.2d 455, 832 N.W.2d 560, recognized the duty of a parent to provide medical care to children, basing that duty in part on Williquette, ¶¶105-109, and in part on the fact that "the statute books are replete with provisions imposing responsibility on parents for the care of their children, including the requirement that they provide medical care when necessary." ¶102.

Beyond the situations addressed in Neumann and Williquette there is little direct authority in Wisconsin defining legal duties to act. A leading commentator lists the following potential sources:

1) duty based on relationship B parent/child; husband/wife; ship captain/crew
2) duty based on statute (other than the criminal statute whose violation is in question
3) duty based on contract
4) duty based on voluntary assumption of care
5) duty based on creation of the peril
6) duty to control the conduct of others
7) duty of landowner
Wayne R. LaFave, Substantive Criminal Law [2d ed.], Sec. 6.2(a).

3. Here, the duty should be identified in general terms. The specific aspects of the duty will be at issue with the fourth requirement: that the defendant failed to act as the duty requires.

4. In State v. Williquette, supra, the court referred to a requirement that the defendant "knowingly act in disregard of the facts giving rise to the duty." 129 Wis.2d 239, 256. Also see State v. Cornellier where the court found the complaint was sufficient in alleging facts tending to show that the defendant knew of the dangerous conditions that led to a fatal explosion in his fireworks factory. 144 Wis.2d 745, 761, 425 N.W.2d 21 (Ct. App. 1988).

5. See State v.Williquette, supra, 129 Wis.2d 239, 251 (quoting LaFave and Scott, Criminal Law,

sec. 2.6).

6. Relying on omission liability substitutes the failure to act for the affirmative act usually required by an offense definition. Therefore, the components of omission liability need to be connected the offense definition for the crime charged. This will often relate to the cause element required by the offense definition. For crimes involving criminal recklessness, the Committee concluded that it is best to connect the requirements for omission liability with the definition of "criminal recklessness." For an example, see Wis JI-Criminal 1060A.

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The Basis For Omission Liability In Wisconsin

Wisconsin statutes do not define omission liability, but case law has recognized it.

State v. Neumann, 2013 WI 58, ¶94, 348 Wis.2d 455, 832 N.W.2d 560, confirmed that a prosecution for reckless homicide under § 940.06 may be based on an omission where a parent failed to provide medical care to a child: "Although the second degree reckless homicide statute, Wis. Stat. § 940.06(1), does not include specific language criminalizing an omission, the parties agree, as do we, that an actor may be criminally liable for a failure to act if the actor has a legal duty to act." [Citing State v. Williquette, 129 Wis.2d 239, 255-56, 385 N.W.2d 145 (1986).] Also see State ex rel. Cornellier v. Black, 144 Wis.2d 745, 758, 425 N.W.2d 11 (Ct. App. 1988): ". . . the statute [referring to § 940.06 1987 Wis. Stats.], impliedly, if not directly, acknowledges that the crime of reckless homicide may be committed by omission, as well as commission."

Neumann referred to Williquette as "the lead case" on omission liability. Williquette involved charges against the wife/mother for abuse of children directly committed by her husband. The defendant was charged under a child abuse statute B § 940.201, since repealed B that prohibited "subjecting a child to cruel maltreatment." The court held that the mother's actions and failure to protect the children were sufficient to constitute "subjecting," but it also directly addressed how an omission can constitute an element of a crime, even where the statute defining that crime is silent on that issue.

> The court, however, also expressly rejects the defendant's claim that an act of commission, rather than omission, is a necessary element of a crime. The essence of criminal conduct is the requirement of a wrongful "act." This element, however, is satisfied by overt acts, as well as omissions to act where there is a legal duty to act. LaFave and Scott, Criminal Law sec. 26 at 182, states the general rule applicable to omissions:
>
> > Some statutory crimes are specifically defined in terms of omission to act. With other common law and statutory crimes which are defined in terms of conduct producing a specified result, a person may be criminally liable when his omission to act produces that result, but only if (1) he has, under the circumstances, a legal duty to act, and (2) he can physically perform the act. The trend of the law has been toward enlarging the scope of duty to act.
> >
> > . . .
>
> The requirement of an overt act, therefore, is not inherently necessary for criminal liability. Criminal liability depends on conduct which is a substantial factor in producing consequences. Omissions are as capable of producing consequences as overt acts. Thus, the common law rule that there is no general duty to protect limits criminal liability where it would otherwise exist. The

special relationship exception to the "no duty to act" rule represents a choice to retain liability for some omissions, which are considered morally unacceptable.

The defendant argues that imposing criminal liability for omissions is tantamount to creating a common law crime. She notes that sec. 939.10, Stats., specifically abolished common law crimes. Thus, she claims that the criminal code does require an overt act, regardless of whether an overt act otherwise is unnecessary for criminal liability.

Section 939.10, Stats., abolishes common law crimes, but it also states that "the common law rules of criminal law not in conflict with chs. 939 to 948 are preserved." We conclude that the rule applicable to omissions does not define a substantive crime. Failure to act when there is a special relationship does not, by itself, constitute a crime. The failure must expose the dependent person to some proscribed result. The definition of proscribed results constitutes the substantive crime, and it is defined in the criminal code. The rule regarding omissions, therefore, is not inconsistent with chs. 939 to 948.

Our conclusion is supported by persuasive authority. William A. Platz, formerly a Wisconsin Assistant Attorney General and the principal draftsman of the revised criminal code, construed the new code in an authoritative law review article, published contemporaneously with the code in 1956. Platz, The Criminal Code, 1956 Wis.L.Rev. 350. We consider such articles by the principal draftsman of a statutory enactment to be persuasive authority when construing a particular statute. Platz specifically concluded that the rule regarding criminal liability for omissions was not abolished by sec. 939.10, Stats.:

> But the common law rules of criminal law not inconsistent with the code are expressly preserved by sec. 939.10. This is because the code fails to state all the rules, such as the defense of insanity, criminal liability for omissions, and others. It is unfortunate and in part unnecessary that the code omits some of the rules of criminal law which could have been (and were in the 1953 draft) codified.

The 1953 Legislative Council report on the proposed revision of the criminal code contained a section entitled "When Criminal Liability May Be Based on Omissions" (1953 Report, Vol. V at 7). This section was deleted from the final version of the 1955 code. Nonetheless, we agree with Platz that the rule regarding omissions was not abolished because it is not inconsistent with the criminal code.

State v. Williquette, 129 Wis.2d 239, 251-255, 385 N.W.2d 145 (1986).

The section of 1953 draft of the criminal code referred to in the quoted material above states the basic principles of omission liability that are reflected in this instruction:

339.09 When A Criminal Liability May Be Based On Omissions.

Criminal liability may be based upon an omission to act only if under the circumstances the actor has a legal duty to act and he is physically capable of performing that act and the crime charged is specifically prohibited by statute.

The Existence of a Legal Duty

The key requirement for omission liability is the establishment of a legal duty to act. The decisions in Neumann and Williquette recognize the duty of a parents to protect their children. Beyond that situation, there is less direct authority defining a duty to act. A leading commentator lists the following potential sources:

1) duty based on relationship B parent/child; husband/wife; ship captain/crew
2) duty based on statute (other than the criminal statute whose violation is in question
3) duty based on contract
4) duty based on voluntary assumption of care
5) duty based on creation of the peril
6) duty to control the conduct of others
7) duty of landowner

Wayne R. LaFave, Substantive Criminal Law [2d ed.], Sec. 6.2(a).

Failure To Act v. Affirmative Conduct

In some situations, it may be possible to characterize the basis for the defendant's criminal liability as affirmative conduct, making reliance on omission liability unnecessary. For example:

- leaving children in the home where they are abused could be characterized as an affirmative act [leaving] rather than an omission [failure to protect];
- leaving chemicals in improper storage conditions [improper storage rather than failure to properly store];
- praying for a seriously child's recovery rather than taking the child for medical treatment.

In these situations, the basis for criminal liability should be clearly identified:

- conduct and failure to act should not be combined, that is, "did X or failed to do Y" should not be presented as undefined alternatives;
- relying on omission liability may often be a clearer way to frame the issue – allowing a direct focus on exactly what the defendant did wrong;
- if there is to be any reliance on omission, all the requirements for omission liability must be presented – they become, in effect, additional elements of the crime.

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910 DANGEROUS WEAPON — § 939.22(10)

"Dangerous weapon" means[1]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.[2]][3]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.[4]][5]

[any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede partially or completely, breathing or circulation of blood.][6]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.][7]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.[8]][9]

COMMENT

Wis JI-Criminal 910 was originally published in 1989 and revised in 1993, 1994, 1996, 2000, 2002, and 2009. This revision was approved by the Committee in October 2011; it updated the comment to reflect 2011 Wisconsin Act 35.

This instruction is intended to provide a basic definition of "dangerous weapon." Its substance is incorporated into instructions for offenses having "dangerous weapon" as an element. The comment here contains a more complete discussion of the substantive issues relating to the definition.

Section 939.22(10) reads as follows, as amended by 2011 Wisconsin Act 35:

> "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede partially or completely, breathing or circulation of blood; any electric weapon, as defined in § 941.295(1c)(a); or any other

device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

The Comment in the 1953 Judiciary Committee Report on the Criminal Code explains the statutory definition as follows:

A firearm is treated as a dangerous weapon whether or not it is loaded. It often is very difficult to prove that a weapon was loaded unless it was actually fired. Furthermore, from the standpoint of safety it is desirable to treat an unloaded firearm the same as a loaded one, for there are numerous occasions when "unloaded" firearms have discharged with disastrous results. Things like blackjacks and brass knuckles are dangerous weapons per se. They are designed as weapons and have few, if any, lawful uses. As to other devices or instrumentalities, their classification as dangerous weapons must depend on the manner in which they are used or intended to be used rather than on their inherent dangerousness. Automobiles, baseball bats, acid and razors are items ordinarily used for lawful purposes. However, they may be just as lethal as firearms or blackjacks if they are used in a manner calculated or likely to produce death or great bodily harm. If so found, or if intended to be so used, they fall within the definition of "dangerous weapon."

1. Choose the alternative supported by the evidence.

2. Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

3. See discussion of loaded and unloaded firearms in this comment preceding note 1.

Air guns do not qualify as firearms under this definition but may be dangerous weapons as "devices designed as a weapon and capable of producing death or great bodily harm," or, when used as a bludgeon, as a "device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm." See Rafferty v. State, 29 Wis.2d 470, 138 N.W.2d 741 (1966); and Boyles v. State, 46 Wis.2d 473, 175 N.W.2d 277 (1970). Also see State v. Antes, 74 Wis.2d 317, 246 N.W.2d 671 (1976). Rafferty was cited in support of the conclusion that a "BB" air pistol is a dangerous weapon in In Interest of Michelle A.D., 181 Wis.2d 917, 512 N.W.2d 248 (Ct. App. 1994).

4. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

5. This alternative is intended to apply to items designed as weapons, such as blackjacks or brass knuckles. See this comment preceding note 1. Such items must be capable of producing death or great bodily harm. This category can be applied to air guns. See note 3, supra.

6. This alternative was added to the definition in § 939.22(10) by 2007 Wisconsin Act 127. [Effective date: April 4, 2008.]

7. The definition of electric weapon is adapted from the one provided in § 941.295(1c)(a), which reads as follows:

In this section, "electric weapon" means any device which is designed, redesigned, used or intended to be used, offensively or defensively, to immobilize or incapacitate persons by the use of electric current.

8. See note 4, supra.

9. This is the broadest category under the statute and can extend to virtually any "device or instrumentality" capable of producing death or great bodily harm. The Wisconsin Supreme Court has held that large soft drink bottles can qualify as dangerous weapons under this part of the definition. See Langston v. State, 61 Wis.2d 288, 293, 212 N.W.2d 113 (1973). The same is true with regard to a bottle of nitroglycerine. Beamon v. State, 93 Wis.2d 215, 219, 286 N.W.2d 592 (1980). Also see this comment preceding note 1. A "BB" air pistol is a dangerous weapon under this category. See note 3, supra.

In State v. Sinks, 168 Wis.2d 245, 483 N.W.2d286 (Ct. App. 1992), the court of appeals held that a dog could qualify as a dangerous weapon under the "instrumentality" alternative. The court found the plain language of the statute "sufficiently broad to include animate, as well as inanimate, objects." 168 Wis.2d 245, 253.

In State v. Bodoh, 226 Wis.2d 718, 736, 595 N.W.2d 330 (1999), the Wisconsin Supreme Court relied on Sinks and the definition of § 939.22(10) to hold that "a dog can be a dangerous weapon if it is used or intended to be used in a manner calculated or likely to cause death or great bodily harm." The decision emphasized:

> . . . It is the manner in which the dog is used and the nature of the act that is determinative of whether the dog is a dangerous weapon. . . . We must . . . determine whether there was sufficient evidence presented to the jury to prove that Bodoh used or intended to use his two Rottweiler dogs in a manner so as to produce death or great bodily harm.

226 Wis.2d 718, 726-27.

The Committee concluded that in cases like Sinks and Bodoh, a tailored instruction would be more helpful than providing only the abstract statutory definition. The Committee recommends adding something like the following:

> In this case, the state claims that the dogs were dangerous weapons. Dogs can be dangerous weapons but only if the defendant used or intended to use them in a manner likely to cause great bodily harm or death.

In State v. Frey, 178 Wis.2d 729,505 N.W.2d 786 (Ct. App. 1993), the court of appeals concluded that the defendant's bare hands are not "instrumentalities" under § 939.22(10). The court found that while the statutory language was ambiguous, there were several reasons for excluding parts of the accused's anatomy: (1) an undefined standard would be presented to the jury; (2) aggravated use of body parts can be accommodated by the penalty provisions that already increase penalties where serious injury is caused; and (3) the "rule of lenity" should be applied where a statute is ambiguous.

[The previous version of this instruction reached the same conclusion. The explanation of the Committee's decision has been dropped from this footnote in light of Frey.]

In State v. Bidwell, 200 Wis.2d 200, 206, 546 N.W.2d 507 (Ct. App. 1996), the court held that a motor vehicle could qualify as a "dangerous weapon" as "an instrumentality which, in the manner it was used, was likely to produce death or great bodily harm." Thus, it was proper to enhance Bidwell's sentences for second degree reckless homicide and second degree reckless injury with the "while armed" provision of § 939.63. The court cautioned that this should be reserved for "the most egregious circumstances" and found they were present in this case: ". . . a drunk driver who operated his car recklessly for miles in heavy traffic near the City of Kenosha in mid-day with a blood/alcohol level twice the legal limit. . . . [He] was fully aware of the risk as he had been arrested for drunken and reckless driving several times in the past." 200 Wis.2d 200, 206, at note 2.

A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, 162.

Using Wis JI-Criminal 910 for the alternative involved in that case would result in the following:

> "Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

> The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

914 GREAT BODILY HARM — § 939.22(14)

Great bodily harm means injury which creates a substantial risk[1] of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[2]

COMMENT

Wis JI-Criminal 914 was originally published in 1989 and revised in 2005. This revision was approved by the Committee in April 2008.

Section 939.22(14), defining "great bodily harm," was amended by 1987 Wisconsin Act 399 to read as follows:

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

The underlined words were added to replace "high probability" which was deleted. The change was part of the revision of the homicide statutes, originally introduced as 1987 Senate Bill 191, and passed as part of the budget bill, 1987 Wisconsin Act 399. The effective date for the change is January 1, 1989.

The change from "high probability" to "substantial risk" is discussed in note 1, below.

1. "Substantial risk" was substituted for "high probability" by a legislative change effective January 1, 1989, enacted as part of the revision of the state's homicide statutes. The change in the definition of "great bodily harm" was part of the original homicide revision bill, 1987 Senate Bill 191. The Note to the bill states: "The words 'substantial risk' are substituted for 'high probability' to avoid any inference that a statistical likelihood greater than 50% was ever intended." 1987 Senate Bill 191, NOTE to Section 42.

2. The interpretation of the phrase "other serious bodily injury" has undergone a change in decisions of the Wisconsin Supreme Court.

In State v. Bronston, 7 Wis.2d 627, 97 N.W.2d 504 (1959), the court concluded that the injuries suffered in the case did not constitute great bodily harm as a matter of law. It reached that conclusion by invoking two commonly accepted rules of statutory construction: First, that penal statutes are to be interpreted strictly against the state and in favor of the accused; second, that the canon of statutory interpretation, ejusdem generis, was applicable. The court applied those rules of construction to interpret "other serious bodily injury" in light of the other types of injury described by the more specific language of the statute. This interpretation of the statute has been reversed by more recent decisions of the court.

In LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976), the court reexamined the legislative history of the great bodily harm definition and concluded that "other serious bodily injury" was a phrase of distinct meaning, intended to broaden the scope of the statute rather than to limit it. The court found that adding that phrase to the statute in 1955 was intended to include serious bodily injury of a kind not encompassed in the specific language of the original statute. Accordingly, the court overruled the ejusdem generis rationale of Bronston. The court found that under the facts of the LaBarge case, it was for the jury to decide whether or not the injury suffered constituted "serious bodily injury." Also see, Cheatham v. State, 85 Wis.2d 112, 270 N.W.2d 194 (1978) and State v. Wellington, 2005 WI App 243, 288 Wis.2d 264, 707 N.W.2d 907.

915 ACTING IN OFFICIAL CAPACITY

_____[1] act in an official capacity when they perform duties that they are employed[2] to perform.[3] [The duties of a _____ include: _____.[4]]

COMMENT

Wis JI-Criminal 915 was originally published in 1988 and revised in 1991 and 2005. This revision was approved by the Committee in February 2008.

The phrase "acting in an official capacity" or its equivalent is used in the following statutes: § 940.20(2), Battery to a Law Enforcement Officer or Fire Fighter (see Wis JI-Criminal 1230); § 940.20(2m), Battery to a Probation and Parole Agent or Aftercare Agent (see Wis JI-Criminal 1231); § 940.20(5), Battery to a Technical College District or School District Officer or Employee (see Wis JI-Criminal 1235); § 940.20(7), Battery to an Emergency Department Worker, an Emergency Medical Technician, a First Responder, or an Ambulance Driver (see Wis JI-Criminal 1237); § 940.203, Battery or Threat to a Judge (see Wis JI-Criminal 1240A and 1240B); § 940.205, Battery or Threat to a Department of Revenue Employee (see Wis JI-Criminal 1242); § 940.207, Battery or Threat to a Department of Commerce or Workforce Development Employee (see Wis JI-Criminal 1244); § 941.21, Disarming a Peace Officer (see Wis JI-Criminal 1328); § 946.41, Resisting or Obstructing an Officer (see Wis JI-Criminal 1765-1766A). While the Wisconsin appellate courts have tended to use the same definition for the phrase under each statute (see note 3, below), the Committee suggests using Wis JI-Criminal 915 only for those offenses where the officer or employee is the victim of the crime. Using the same definition for crimes where the officer is the defendant (for example, for § 946.12, Misconduct in Public Office) creates the problem that acts of an illegal nature would never fall within the scope of what the person was employed to do. See State v. Schmit, 115 Wis.2d 657, 665, 340 N.W.2d 752 (Ct. App. 1983), discussed in note 3, below.

1. Use the plural form of the title. For example: "Sheriffs act in an official capacity if they perform duties. . . ."

2. The word "employed" is used in its broad sense of "using or engaging the services of another." Webster's New Collegiate Dictionary. In cases involving public officials, it may be helpful to substitute "elected" or "appointed" for "employed," as appropriate.

3. The Wisconsin cases on "official capacity" have reached general agreement on a definition for the term, using the same definition regardless of the statute being reviewed. The results in the cases, however, have not been entirely what one might expect. A review of the Wisconsin case law yields the following:

(1) Williams v. State, 45 Wis.2d 44, 172 N.W.2d 31 (1969).
An off-duty police officer who was attacked while attempting to break up a fight was acting in his official capacity (under § 940.205, Battery to a Law Enforcement Officer).

(2) State v. Barrett, 96 Wis.2d 174, 291 N.W.2d 498 (1980).
A deputy sheriff conducting a traffic stop in a neighboring county was not acting in his official capacity (also under § 940.205).

(3) State v. Christensen, 100 Wis.2d 507, 302 N.W.2d 448 (1981).
A town constable investigating a disturbance was acting in his official capacity (under § 946.41, Resisting or Obstructing an Officer).

(4) State v. Schmit, 115 Wis.2d 657, 340 N.W.2d 752 (Ct. App. 1983).
A prison guard who engages in consensual sexual intercourse with a prisoner while on duty was not acting in her official capacity (under § 946.12, Misconduct in Public Office).

In State v. Barrett, a definition of "official capacity" was adopted for purposes of the battery to a peace officer statute. It was applied to resisting an officer in State v. Christensen and misconduct in public office in State v. Schmit. In Barrett, the court adopted a definition for the term "official duties" given in United States v. Heliczer, 373 F.2d 241, 245 (2d Cir. 1967):

> "Engaged in . . . performance of official duties" is simply acting within the scope of what the agent is employed to do. The test is whether the agent is acting within that compass or is engaging in a personal frolic of his own. It cannot be said that an agent who has made an arrest loses his official capacity if the arrest is subsequently adjudged to be unlawful.

The Barrett opinion elaborated on this definition as follows:

> The deputy sheriff in this case was not performing any of the duties conferred upon him as a deputy sheriff of Richland county when he questioned the defendant in Grant county. Once he crossed the county line, unless his purpose i[n] questioning and detaining the defendant, had some relation to his employment as a deputy in Richland county, he was no longer acting in his official capacity. By the phrase "some relation to his employment," we mean that he must be acting as a peace officer, that is, he must be doing "police work" and he must be acting with the powers vested in him as a peace officer. In this case, Officer Breneman must not only have been questioning the defendant as a deputy sheriff but he must also have been acting with the powers of a deputy sheriff for Richland county. If a deputy sheriff crosses the county line of his employment and if there are no circumstances of his employment extending his duty to act, then the attempt to exercise his powers as a peace officer outside of his county of employment is not within the scope of his employment. 96 Wis.2d 174, 180-81.

The definition in Wis JI-Criminal 915 attempts to identify the essential attributes of the Barrett definition.

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

920 POSSESSION

"Possession" means that the defendant knowingly[1] had actual physical control of the item.

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.][2]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.][3]

COMMENT

Wis JI-Criminal 920 was originally published in 1986. The comment was revised in 1990. The 2000 revision made nonsubstantive changes in the text and updated the comment.

Wis JI-Criminal 920 is intended to offer a basic definition of "possession." Its substance is incorporated into instructions for offenses having "possession" as an element.

This instruction, and the discussion of "constructive possession" in note 2, was cited with approval in State v. Allbaugh, 148 Wis.2d 807, 436 N.W.2d 898 (Ct. App. 1989).

The definition of "possession" in this instruction was cited with approval in State v. Peete, 185 Wis.2d 4, 16, 517 N.W.2d 149 (1999).

1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

2. The basic definition requires "actual physical control." The bracketed, optional paragraphs are intended for cases where the object is arguably under the defendant's control but not directly in his physical possession.

Cases sometimes refer to "constructive possession" to resolve this question, placing substantial reliance on the concept without making clear the exact role it is playing. After reviewing such cases, it seems that it is preferable not to refer to "constructive possession" as a substitute or alternative for "real" possession. Rather, it should be viewed as a description of circumstances that are sufficient to support an inference that the person exercised control over, or intended to possess, the item in question. These are aspects of "real," not "constructive," possession.

A decision of the Wisconsin Court of Appeals is consistent with this analysis. State v. R. B., 108 Wis.2d 494, 322 N.W.2d 502 (Ct. App. 1982), involved a charge of possession of beer by a minor in violation of § 66.054(20), since recodified as § 125.07(4). The state argued that R. B. "constructively" possessed beer because he knew there was beer present, it was immediately accessible to him, and he could easily exercise "dominion and control" over it whenever he chose to do so.

The court of appeals found the evidence insufficient to support a finding of "possession."

> We conclude that the mere presence of R. B. at the party, even coupled with his knowledge of the presence of beer and its accessibility to him, is insufficient to constitute possession for purposes of sec. 66.054(20)(b). Even under Dodd, the opportunity to possess, standing alone, does not establish possession. There must additionally be the exercise of some dominion or control over the substance. Unfortunately, the terms "dominion" and "control" are nothing more than labels used by courts to characterize a given set of facts. They are not informative in any functional manner and have been appropriately subject to criticism. See Whitebread and Stevens, Constructive Possession In Narcotics Cases: To Have And Have Not, 58 Va. L. Rev. 751 (1972). To be functional, the dominion and control necessary to permit conviction based on constructive rather than actual possession requires that the facts permit the inference of an intent to possess.
>
> Constructive possession is a legal concept used by courts to find possession where the facts and circumstances demand that the individual acquire the legal status of a possessor. In applying this concept, however, we must keep in mind that the basic question is whether the defendant did in fact possess the prohibited item. Blind application of the constructive possession concept as proposed by the state would require a finding of possession in many instances where possession in fact does not exist. This case is a good example. Under the state's theory of constructive possession, liability would be imposed upon a minor for being present at a place where beer is being used. Presumably, the individual who knows of its use must either leave or report a violation. Arguably, absent express statutory prohibition of a minor being in the presence of beer, judicial use of a possession statute to impose such broad liability usurps the legislature's proper function.
>
> If the doctrine of constructive possession is to have a rational role in the law, the inquiry must focus on the control element of the general possession offense. Unless actual control exists, there must be found from the surrounding facts and circumstances, aided by reasonable inferences, an intent to exercise control over the prohibited item. Without such a finding, there can be no constructive possession. The trial court finding that R. B. did not intend to possess the beer must therefore defeat

the conviction. Intent to possess or evidence that would support an inference of possession are absent.

108 Wis.2d 494, 496-98.

3. See, for example, Curl v. State, 40 Wis.2d 474, 482-83, 162 N.W.2d 77 (1968).

Also see, Schmidt v. State, 77 Wis.2d 370, 379, 253 N.W.2d 204, 208 (1977): "[p]ossession of an illicit drug may be imputed when the contraband is found in a place immediately accessible to the accused and subject to his exclusive or joint dominion and control, providing that the accused has knowledge of the presence of the drug."

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923A "INTENTIONALLY" AND "WITH INTENT TO": MENTAL PURPOSE — § 939.23(3) and (4)[1]

("Intentionally") (With intent to") means that the defendant must have had the purpose to _____.[2]

["Intentionally" also requires that the defendant must have acted with knowledge that _____.][3]

Deciding About Intent[4]

You cannot look into a person's mind to find intent.[5] Intent to _____[6] must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

[OPTIONAL LONG FORM]

[Deciding About Intent]

[You cannot look into a person's mind to find intent. You may determine intent directly or indirectly from all the facts in evidence concerning this offense. You may consider any statements or conduct of the defendant which indicate state of mind. You may find intent to _____[7] from statements or conduct, but you are not required to do so. You are sole judges of the facts, and you must not find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant intended to _____.][8]

When May Intent Exist?[9]

While the law requires that the defendant acted with intent to _____, it does not require that the intent exist for any particular length of time before the act is committed. The

act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to _____ may be formed at any time before the act, including the instant before the act and must continue to exist at the time of the act.

Intent and Motive[10]

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

COMMENT

This instruction replaced Wis JI-Criminal 923.1 which was originally published in 1989. It was revised in 2001. This revision was approved by the Committee in June 2009; it added the second paragraph below to the comment.

This instruction is intended as a reference for the various issues relating to the definition of "intentionally" and "with intent to" as those terms are used in the Wisconsin Criminal Code. Seldom, if ever, would all the parts of this instruction be given in a single case but putting them all in one place allows more complete discussion of the substantive issues and is intended to provide for convenient cross-reference in the instructions for individual offenses.

Most of the uniform offense instructions contain the "Deciding About Intent" paragraph above, but not the "When May Intent Exist" or "Intent and Motive" paragraphs. When either or both of those issues are important in a particular case the relevant paragraph(s) should be added.

The definitions of these terms in § 939.23(3) and (4) were modified by 1987 Wisconsin Act 399, effective January 1, 1989. See note 1, below.

1. 1987 Wisconsin Act 399 amended § 939.23(3) and (4) as follows:

(3) "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally." (Emphasis added.)

(4) "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. (Emphasis added.)

The addition of the material underlined above was part of the revision of the homicide statutes originally introduced as 1987 Senate Bill 191 and passed as part of the budget bill, 1987 Wisconsin Act 399. The effective date for the change is January 1, 1989. It applies to homicide cases as well as all other Criminal Code offenses, the more limited definition of "intent to kill" in § 940.01 having been repealed by the same legislation.

This instruction deals only with the mental purpose and knowledge aspects of the definition, which have not been changed. The new alternative – "practically certain to cause that result" – is discussed in Wis JI-Criminal 923B.

2. Here identify the result specified by the statute defining the criminal offense, for example: "take the life of another," or "cause great bodily harm to another."

3. Here identify those facts "which are necessary to make the conduct criminal and which are set forth after the word 'intentionally'," in the statute defining the crime. § 939.23(3). For example, with a charge of burglary under § 943.10, the defendant must know that the owner has not consented to the entry: "without the consent of the person in lawful possession" is a fact necessary to make the conduct criminal, and it is set forth in the statute after the word "intentionally."

4. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. Instructions formerly used a longer description of the intent-finding process, which is provided in brackets in the instruction for use where the court believes it will be helpful to the jury.

5. Where knowledge of facts is also required (see note 3, supra), modify this paragraph to read "intent and knowledge" throughout.

6. Here identify the result specified by the statute defining the criminal offense, for example: "take the life of another," or "cause great bodily harm to another."

7. Here identify the result specified by the statute defining the criminal offense, for example: "take the life of another," or "cause great bodily harm to another."

8. This paragraph was developed by the Committee in 1977 to replace the formerly used language: "The law presumes that a reasonable person intends all of the natural, probable, and usual consequences of his

deliberate acts." This paragraph was considered preferable because it avoids two problems of constitutional dimensions: the potential for relieving the prosecution of its burden of establishing all elements of the crime beyond a reasonable doubt; and the danger of shifting the burden of proof to the defendant on an element of the crime. The paragraph also meets the requirements of Wis. Stat. § 903.03(3), which applies to instructing the jury on presumptions in criminal cases. After the change was approved by the Committee, two decisions of the United States Supreme Court held instructions unconstitutional which used variations of "the law presumes. . . ." See United States v. United States Gypsum, 438 U.S. 422 (1978), and Sandstrom v. Montana, 442 U.S. 510 (1979).

With the passage of time, the connection with "the law presumes" version has become more attenuated and the Committee concluded that the longer paragraph no longer serves a need that cannot be met equally well by the shorter one. The long form is preserved here in the event that there may be a need for it. In no circumstances should an instruction on intent include the "the law presumes . . ." language.

9. This paragraph is incorporated into several of the standard instructions where the timing of formation of intent can be an important issue. See, for example, Wis JI-Criminal 1010, First Degree Intentional Homicide, and Wis JI-Criminal 1421, Burglary With Intent To Steal.

This paragraph is adapted from the one used for many years in the instruction for first degree murder. See Wis JI-Criminal 1100, © 1980. It addresses the issue referred to as "premeditation" in the common law of homicide and used in the Wisconsin Statutes that predated the 1956 revision of the Criminal Code. This paragraph has traditionally been used primarily in homicide cases. However, occasionally a "premeditation" type of issue may arise in other cases where attention is focussed on the timing of the formation of intent. This could logically happen in battery cases with respect to the intent to cause bodily harm or in burglary cases with respect to the intent to steal or commit a felony. In those situations, this paragraph may be useful as a model for an addition to the standard instruction.

10. This paragraph is based on Wis JI-Criminal 175, Motive. It is incorporated into several of the standard instructions where evidence of motive is believed to be likely. See, for example, Wis JI-Criminal 1010, First Degree Intentional Homicide. It is not necessarily appropriate for use in every instruction where intent is an element, but may, depending on the facts, be worth adding to standard instructions that do not already incorporate it.

923B "INTENTIONALLY" AND "WITH INTENT TO": "PRACTICALLY CERTAIN"[1] — § 939.23(3) and (4)

("Intentionally") ("With intent to") means that the defendant must have had the mental purpose to _____[2] or was aware that his conduct was practically certain to cause that result.[3]

[CONTINUE WITH OTHER PARAGRAPHS FROM WIS JI-CRIMINAL 923A AS APPROPRIATE.][4]

COMMENT

This instruction replaces Wis JI-Criminal 923.2, which was originally published in 1989. This revision, which made no substantive change, was approved by the Committee in March 2001.

Two appellate decisions have addressed the revised intent definition. In State v. Weeks, 165 Wis.2d 200, 477 N.W.2d 642 (Ct. App. 1991), the court held that the definition in § 939.23(4) applies to the term, "with intent that" found in the attempt statute, § 939.32. In State v. Smith, 170 Wis.2d 701, 490 N.W.2d 40 (Ct. App. 1992), the court held that the definition in § 939.23(3) did not violate constitutional principles of due process or vagueness. As to due process, the court held that the two alternatives in the definition of "intentionally" "are merely alternative means in which intent is manifested" and that "it was not necessary that all jurors agree that Smith acted with a purpose to cause the fire, or that he acted with an awareness that his conduct was practically certain to cause that result." 170 Wis.2d 701, 713. As to vagueness, the court held that the definition of intent "is not so obscure that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability." 170 Wis.2d 701, 712.

1. This instruction addresses the change in the definitions of "intentionally" and "with intent to" made by 1987 Wisconsin Act 399, effective date: January 1, 1989.

This change was made as part of the revision of Wisconsin's homicide statutes which was originally introduced as 1987 Senate Bill 191 and adopted as part of 1987 Wisconsin Act 399, the budget bill. The words, "is aware that his or her conduct is practically certain to [cause that result]," were substituted for "believes his act, if successful, will [cause that result]." See note 1, Wis JI-Criminal 923A for the revised text of subsections (3) and (4) of § 939.23. The more limited definition of "intent to kill" in § 940.01 was repealed so that the new definition applies to homicide offenses as well as to all other Criminal Code offenses.

The phrase in the former statutes "believed his act, if successful, would have that result" was not widely understood or used. It apparently was intended to reach the situation where a person had not formed the actual mental purpose to cause the prohibited result but believed that his act would cause it. For example, assume a criminal suspect is being chased through a parking lot by police in lawful pursuit. In trying to escape, the suspect runs across the hoods of several parked cars, causing serious damage to them. The suspect, if charged with criminal damage to property, might honestly be able to say that he had not acted with the mental purpose

to cause damage to the cars. But he probably did hold the belief that his acts would cause damage and thus would have had the required intent under the "believes his acts, if successful . . ." alternative.

The new phrase – "aware that his conduct is practically certain" – is based on the Model Penal Code, § 2.02(2)(b)ii, where almost identical language is used to define "knowingly." Acting either with "mental purpose" or "knowingly" is sufficient for liability for most offenses defined by the Model Penal Code. The basis for this approach is the conclusion that acting with awareness that one's conduct is "practically certain" to cause a result is as blameworthy as acting with the purpose to cause that harm. An example commonly used to illustrate the issue is that of the arsonist who is being paid to burn down a building. He knows that some people are in the building who will not be able to escape, but he sets the fire anyway. He does not have the purpose to cause their deaths; in fact, he hopes they are able to escape. Thus, he would not have "intent to kill" if that intent is limited to "purpose to cause the death of another." But he is "aware that his conduct is practically certain" to cause death and would have acted with the intent to kill under the Model Penal Code formulation now adopted in Wisconsin.

2. Here identify the result specified by the statute defining the criminal offense, for example: "take the life of another," or "cause great bodily harm to another."

3. When the "aware that it is practically certain" alternative is in the case, the Committee recommends simply adding it to the statement defining criminal intent. This style is illustrated in Wis JI-Criminal 1010. Jury agreement as to which alternative is established is not required. See State v. Smith, 170 Wis.2d 701, 490 N.W.2d 40 (Ct. App. 1992), discussed in the Comment preceding note 1, supra.

4. The complete alternatives for instructing on intent are set forth at Wis JI-Criminal 923A, and footnotes discuss their appropriate use.

924 CRIMINAL RECKLESSNESS — § 939.24

"Criminally reckless conduct" means:

- the conduct created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.

ADD THE FOLLOWING TO THE DEFINITION OF CRIMINAL RECKLESSNESS WHEN THERE IS EVIDENCE THAT THE CRIME WAS COMMITTED BY OMISSION.[1]

[Criminal recklessness may be based on either affirmative conduct or on a failure to act.

Evidence has been received that the defendant committed (specify crime) by failing to act. Criminal liability may be based on a failure to act when:

- the defendant has a legal duty to act.[2] In this case, it is alleged that the defendant had a legal duty to (identify the legal duty) .[3]
- the defendant has knowledge of facts giving rise to the duty;[4]
- the defendant has the physical ability to act as the duty requires;[5] and,
- the defendant failed to act as the legal duty requires.

For criminal liability based on failure to act, the state must satisfy you beyond a reasonable doubt that all four of these requirements are present and that the defendant's failure to act constituted criminal recklessness.[6]

COMMENT

Wis JI-Criminal 924 was originally published in 1994 and revised in 1999 and 2005. This revision was approved by the Committee in March 2015; it added to the text to address recklessness based on an omission and revised the Comment to reflect changes made by 2103 Wisconsin Act 307.

This instruction contains the definition of "criminal recklessness" found in the published instructions dealing with crimes of recklessness. It is published separately here to provide a convenient means of collecting appellate court decisions that deal with recklessness and to discuss issues in more detail than may be appropriate in the footnotes for individual offenses. The 1999 revision divided the definition into three parts to emphasize the separate characteristics of "criminal recklessness." For a discussion of the factor which aggravates simple recklessness to a more serious level, see Wis JI-Criminal 924A, Aggravated Recklessness: Circumstances Which Show Utter Disregard For Human Life.

The definition of "criminal recklessness" was created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. Therefore, it applies to offenses committed on or after January 1, 1989. "Criminal recklessness" is used in the following statutes: § 940.02, First Degree Reckless Homicide; § 940.06, Second Degree Reckless Homicide; § 940.23, Reckless Injury, and § 941.30, Recklessly Endangering Safety.

"Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

The first requirement – an unreasonable and substantial risk – is substantially the same as the corresponding part of the definition of "reckless conduct" found in § 940.06(2) before the revision. The only difference is the substitution of "unreasonable and substantial risk" for "a situation of unreasonable risk and high probability." The purpose of that change is to make it clear that no mathematical probability was required.

The second requirement – awareness of the risk – replaces the following statement under prior law: "demonstrates a conscious disregard for the safety of another and a willingness to take known chances of perpetrating an injury." The revision makes it clear that recklessness requires a subjective mental state: the defendant must actually (in his or her own mind) be aware of the risk created by the conduct.

The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense if the actor would have been aware of the risk if not intoxicated. This rule was set forth in § 939.24(3):

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

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element of criminal recklessness. For cases arising before the effective date of Act 307, the suggestion included in the previous version of the Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information."

For decisions finding evidence sufficient to establish an unreasonable and substantial risk and awareness of that risk, see State v. Johnson, 184 Wis.2d 324, 516 N.W.2d 463 (Ct. App. 1993); and State v. Brulport, 202 Wis.2d 506, 551 N.W.2d 824 (Ct. App. 1996). Both decisions also emphasize that the victim need not sustain serious injury; it is sufficient that the conduct create an unreasonable and substantial risk of death or great bodily harm. Also see State v. Kimbrough, 2001 WI App 138, 246 Wis.2d 648, 630 N.W.2d 752, discussing "awareness of the risk" in a case involving a defendant with below average intelligence.

1. Crimes involving criminal recklessness may involve liability based on criminal omission or failure to act when there is a legal duty to act. When this is the case, the Committee recommends that the explanation of criminal liability for an omission be added to the instruction for the crime charged. A general instruction on omission liability is provided at Wis JI-Criminal 905, the substance of which is adapted for use here. An example of how this could be done for a second degree reckless homicide charge based on an omission is provided at Wis JI-Criminal 1060A.

2. State v. Williquette, 129 Wis.2d 239, 251-253, 255-266, 385 N.W.2d 145 (1986).

The existence of a legal duty is the necessary predicate for omission liability. It is likely that a trial court may be requested to make a pretrial ruling whether a legal duty exists based on the facts of the case. If the court concludes that alleged facts, if proved, would support the existence of a legal duty, the case could proceed to trial, where the state will have to prove that the alleged facts exist.

The source of the legal duty must be found in state law. Williquette recognized the common law duty of a parent to protect children from harm. State v. Neumann, 2013 WI 58, ¶104, 348 Wis.2d 455, 832 N.W.2d 560, recognized the duty of a parent to provide medical care to children, basing that duty in part on Williquette, ¶¶105-109, and in part on the fact that "the statute books are replete with provisions imposing responsibility on parents for the care of their children, including the requirement that they provide medical care when necessary." ¶102.

Beyond the situations addressed in Neumann and Williquette there is little direct authority in Wisconsin defining legal duties to act. A leading commentator lists the following potential sources:

1) duty based on relationship – parent/child; husband/wife; ship captain/crew
2) duty based on statute (other than the criminal statute whose violation is in question
3) duty based on contract
4) duty based on voluntary assumption of care
5) duty based on creation of the peril
6) duty to control the conduct of others
7) duty of landowner
Wayne R. LaFave, Substantive Criminal Law [2d ed.], Sec. 6.2(a).

3. Here, the duty should be identified in general terms. The specific aspects of the duty will be at issue with the fourth requirement: that the defendant failed to act as the duty requires.

4. In State v. Williquette, supra, the court referred to a requirement that the defendant "knowingly act in disregard of the facts giving rise to the duty." 129 Wis.2d 239, 256. Also see State v. Cornellier where the court found the complaint was sufficient in alleging facts tending to show that the defendant knew of the dangerous conditions that led to a fatal explosion in his fireworks factory. 144 Wis.2d 745, 761, 425 N.W.2d 21 (Ct. App. 1988).

5. See State v.Williquette, supra, 129 Wis.2d 239, 251 (quoting LaFave and Scott, Criminal Law, sec. 2.6).

6. Relying on omission liability substitutes the failure to act for the affirmative act usually required by an offense definition. Therefore, the components of omission liability need to be connected the offense definition for the crime charged. This will often relate to the cause element required by the offense definition. For crimes involving criminal recklessness, the Committee concluded that it is best to connect the requirements for omission liability with the definition of "criminal recklessness."

924A AGGRAVATED RECKLESSNESS: CIRCUMSTANCES WHICH SHOW UTTER DISREGARD FOR HUMAN LIFE

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

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[1]

[Consider also the defendant's conduct after the [death] [great bodily harm] [act alleged to have endangered safety] to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the [death] [great bodily harm] [act alleged to have endangered safety] occurred.]

COMMENT

This instruction was originally published as Wis JI-Criminal 924.1 in 1994, revised as Wis JI-Criminal 924A in 2005, and revised in 2010. This revision added the material at footnote 1 and was approved by the Committee in December 2011.

This instruction contains the definition of "utter disregard for human life" found in the published instructions for "first degree reckless" offenses. It is published separately here to provide a convenient means of collecting appellate court decisions that deal with "utter disregard" and to discuss issues in more detail than may be appropriate in the footnotes for individual offenses.

The phrase "utter disregard for human life" was created by 1987 Wisconsin Act 399 as part of the revision of Wisconsin's homicide statutes. It applies to offenses committed on or after January 1, 1989. "Utter disregard" is used in the definition of the following offenses: First Degree Reckless Homicide, § 940.02(1); First Degree Reckless Injury, § 940.23(1); and First Degree Recklessly Endangering Safety, § 941.30(1).

"Under circumstances which show utter disregard for human life" is the factor that distinguishes first degree reckless offenses from second degree reckless offenses. Therefore, it is used only in connection with crimes involving criminal recklessness. See Wis JI-Criminal 924 for the definition of "criminal recklessness." The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

> First-degree reckless homicide is analogous to the prior offense of 2nd-degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness, is required for liability. See s. 939.24, stats. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).

Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to an aggravated reckless offense.

A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further clarified." Attempts to explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978), Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977), and Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15 [No. 2010AP2808-CR], ___ Wis.2d ___, ___ N.W.2d ___, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

> Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). Under this revision, the analogs of those crimes, i.e., first-degree reckless and 2nd-degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01(3), stats., are inapplicable.
>
> Judicial Council Note to § 940.02, 1987 Senate Bill 191.

In State v. Holtz, 173 Wis.2d 515, 496 N.W.2d 668 (Ct. App. 1992), the defendant appealed his conviction for first degree recklessly endangering safety. The charges were based on his attacking his wife with an axe. He argued that his conduct during the entire episode should be considered, claiming that he finally ceased his aggression, thus showing some regard for his wife's well-being. The court of appeals affirmed, finding that the defendant's show of regard came too late B doing so only after having shown no regard for his wife's life and safety. The court distinguished this case from Wagner and Balistreri, supra where, the court says, concern for the life of another was shown during the commission of the act.

For other discussions of the "utter disregard" standard under current law, see State v. Barksdale, 160 Wis.2d 284, 466 N.W.2d 198 (Ct. App. 1991), and State v. Blair, 164 Wis.2d 64, 473 N.W.2d 566 (Ct. App. 1991). In both cases, the evidence was found to be sufficient to meet the standard: discharge of a gun during an attempt to collect a drug debt (Barksdale); hitting a person in the head three times with a loaded pistol, which then discharged (Blair).

Also see Arave v. Creech, 507 U.S. 463 (1993), where the court rejected a challenge to the Idaho capital punishment statute, which uses "utter disregard for human life" as a factor authorizing imposition of the death penalty. The majority found it to be a "close question" whether the standard was unconstitutionally vague in the death penalty context. The majority found that further definition of "utter disregard" by the state court made it sufficiently objective to meet constitutional standards.

1. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

> ¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

> ¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The committee decided it was not necessary to include a reference to conduct before or during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.

925 CRIMINAL NEGLIGENCE — § 939.25

"Criminal negligence" means:[1]

- the conduct created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.

THE COMMITTEE BELIEVES THE ABOVE IS SUFFICIENT IN MOST CASES.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY, CONTINUE WITH THE FOLLOWING.[2]

Criminal negligence is ordinary negligence to a high degree. Ordinary negligence exists when a person creates an unreasonable risk of harm to another by failing to exercise ordinary care. Ordinary care is the amount of care which a reasonable person exercises under similar circumstances. Negligence does not require that the person be aware of the risk of harm that his or her conduct creates; it is sufficient that a reasonable person in the same circumstances would be aware of that risk.[3]

Criminal negligence differs from ordinary negligence in two respects. First, the conduct must create a risk not only of some harm but also of serious harm – that is, of death or great bodily harm. Second, the risk of that harm must not only be unreasonable, it also must be substantial. Therefore, for the defendant's conduct to constitute criminal negligence, the defendant should have realized that the conduct created a substantial and unreasonable risk of death or great bodily harm to another.[4]

IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED,[5] ADD THE FOLLOWING:

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that

Violating this statute does not necessarily constitute criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

COMMENT

Wis JI-Criminal 925 was originally published in 1994 and revised in 1999. This revision adopted a new format and was approved by the Committee in February 2005.

The current definition of "criminal negligence" in § 939.25 was created by 1987 Wisconsin Act 399, as part of the revision of Wisconsin's homicide statutes. It applies to offenses committed on or after January 1, 1989. It is used in the following statutes: § 940.08, Homicide By Negligent Handling Of A Dangerous Weapon, Explosives, Or Fire; § 940.10, Homicide By Negligent Operation Of A Vehicle; § 346.62, Reckless Driving; § 941.01, Negligent Operation Of A Vehicle (Not Upon A Highway); § 941.10, Negligent Handling Of Burning Material; and § 941.20(1)(a), Endangering Safety By Negligent Use Of A Weapon.

The definition of "criminal negligence" in § 939.25 is not unconstitutionally vague:

> The statute makes clear that causing death by highly negligent operation of a vehicle is prohibited. True, the statute does not tell the public which specific acts are criminally negligent. The statute is incapable of such precision; whether a reasonable person would foresee that the conduct engaged in created an unreasonable and substantial risk of death or great bodily injury will necessarily vary with the facts of each case. This does not make the law unconstitutionally vague.

State v. Barman, 183 Wis.2d 180, 200-01, 515 N.W.2d 493 (Ct. App. 1994).

For cases finding the evidence to be sufficient to establish "criminal negligence," see Barman, supra; State v. McIntosh, 137 Wis.2d 339, 404 N.W.2d 557 (Ct. App. 1987); and, State v. Cooper, 117 Wis.2d 30, 344 N.W.2d 194 (Ct. App. 1983).

In a case involving a vehicle that crossed the centerline of a highway, the evidence was sufficient to support a finding of criminal negligence; the jury is not required to agree unanimously about why the vehicle crossed the centerline. State v. Johannes, 229 Wis.2d 215, 228-29, 598 N.W.2d 299 (Ct. App. 1999).

1. The 1999 revision of this instruction divided the definition into three parts to emphasize the separate characteristics of "criminal negligence." The Committee concluded that the relatively brief definition in the first paragraph is sufficient in most cases, and it is included in the body of the instructions for offenses involving criminal negligence. The Committee concluded that the more concise definition is preferable to the approach used in the previously published instructions which began by trying to explain the meaning of "ordinary negligence." Then, the instruction tried to explain that criminal negligence required more than ordinary negligence. The Committee concluded that the statutory definition of criminal negligence is sufficiently clear that it is better to begin with it, rather than offering the potentially difficult definition of ordinary negligence and then asking the jury to go on from there.

The definition of "criminal negligence" provided in § 939.25 is essentially a restatement of what was known as "high degree of negligence" under prior Wisconsin law. (See § 940.08(2), 1985-86 Wis. Stats.) The only change is to substitute "substantial risk" for "high probability" in describing the risk of harm that must be presented by the conduct.

The nature of the risk is the same for criminal negligence as for criminal recklessness. Criminal recklessness differs in that it requires a subjective awareness of the risk. For criminal negligence, there is an objective standard – the defendant "should realize" the nature of the risk created by the conduct.

2. The paragraphs in brackets are included here in the event that a more extensive definition is believed to be necessary. The first brackets contain a revision of the long-standing definition of ordinary negligence. [Compare Wis JI-Civil 1005.] No substantive change was intended; the revision is believed to be more easily understood.

3. This is a revision of the long-standing definition of ordinary negligence. [Compare Wis JI-Civil 1005.] No substantive change was intended; the revision is believed to be more easily understood.

4. This paragraph attempts to emphasize and clarify the difference between ordinary and criminal negligence. That distinction is discussed in Hart v. State, 75 Wis.2d 371, 249 N.W.2d 810 (1977), and State v. Cooper, 117 Wis.2d 30, 344 N.W.2d 194 (Ct. App. 1983). (Both cases discuss § 940.08 as it existed before the 1989 homicide revision, but the law has not changed significantly. See note 1, supra.)

Hart involved a collision on a country road between an automobile and a person riding a bicycle. The automobile was going 65 miles per hour in a 55 mile per hour zone and struck the bicyclist in a no-passing zone just over the crest of a hill. The court concluded that

> Passing a bicyclist in a no-passing zone may not always be negligent. However, in this case the defendant passed in an intersection at a high rate of speed, and the jury properly could have found that an ordinarily prudent person would not have done so, but rather would have seen the bicyclist earlier than defendant did, would have moderated his speed well in advance of the intersection, and would have allowed the bicyclist to clear the intersection before overtaking him. The jury could have found that in acting as he did the defendant should have realized that he created a situation of unreasonable risk to persons near the intersection.
>
> Defendant's car was moving at 60 mph at the hillcrest by defendant's own admission, and if the risk of striking a human being on a bicycle at a speed such as this does not carry with it a high probability of death, it is difficult to imagine a situation that would.

75 Wis.2d 371, 397.

In Cooper, the defendant's car went through a red light and struck another vehicle, killing its two occupants. On appeal, the defendant argued that this was only ordinary negligence. The court of appeals disagreed:

> A high degree of negligence, as defined by sec. 940.08(2), Stats., requires not only an unreasonable risk of harm, as in ordinary negligence, but a high probability of death or great bodily harm to another. Consequently, if an actor is ordinarily negligent, and should reasonably foresee that his or

her negligence creates a high probability of death or great bodily harm to another, then the second element of the definition is met. Hart at 383, 249 N.W.2d at 814-15.

The jury could find that going through a red light at 50 m.p.h. creates a high probability of death or great bodily harm. The legality of the 50 m.p.h. speed has nothing to do with it. Every driver knows or should know that the greater the speed, the greater the impact, and the greater the probability of death or great bodily injury.

117 Wis.2d 30, 38

[The court in Cooper expressed its concern about the result. Though legally correct, it allows a finding of criminal negligence and thus, a felony, when lawful but high speed combines with ordinary negligence. The Wisconsin Legislature and courts have been involved in a series of attempted solutions to this problem. The experience is recounted in Hart, 75 Wis.2d 371, 379-84.]

5. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). In Dyess, the court held that the following instruction violated the requirements of § 903.03 by requiring the jury to find the presumed fact (negligence) upon proof of the basic fact (speeding):

The safety statute in the motor vehicle code provides that, no person shall drive a vehicle at a speed in excess, and on 14th Street in particular, of 30 miles per hour. Any speed in excess of that limit would be negligent speed regardless of other conditions. It is for you to determine whether Johrie Dyess's speed was over said limit and, if under, whether it was, nevertheless, a negligent speed under the conditions and circumstances then present and under the rules of law given to you in these instructions. (Emphasis in original.) 124 Wis.2d 525, 531.

The court said that if the directions of § 903.03 had been followed, the trial court "would have informed the jury that, if it found as a matter of fact that Dyess was exceeding the posted speed limit of 30 miles per hour, it could regard that fact as sufficient evidence of negligence to make that finding but it was not required to do so." 124 Wis.2d 525, 539.

The suggested instruction tries to implement Dyess and § 903.03 by advising the jury that it is for them to determine the weight to give the evidence that the defendant violated the statute in making its decision whether, under all the circumstances, the defendant's conduct constituted criminal negligence. This format should be used instead of the uniform civil instructions dealing with statutory violations. (See, e.g., Wis JI-Civil 1290.) As the court stated in Dyess: "No one in the instant case finds fault with Civil Jury Instruction No. 1290 as used in civil cases, but the authority to direct a jury in a criminal case that speed in excess of the posted limit, regardless of other conditions, is negligence, is specifically prohibited by sec. 903.03(3)." 124 Wis.2d 525, 536.

926 CONTRIBUTORY NEGLIGENCE[1] — § 939.14

DO NOT GIVE THE FOLLOWING WITHOUT CLEAR JUSTIFICATION.[2]

Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[3] does not by itself provide a defense to the crime charged against the defendant.[4] Consider evidence of the conduct of (name of victim) only to the extent that it relates to (describe the element of the crime or the defense to which the evidence relates).[5]

COMMENT

Wis JI-Criminal 926 was originally published in 1996 and revised in 1997. This revision adopted a new format and was approved by the Committee in February 2005.

This instruction addresses the rule set forth in § 939.14, which provides as follows: "It is no defense to a prosecution for a crime that the victim also was guilty of a crime or was contributorily negligent." While the use of this statute has tended to emphasize conduct of the victim that could be characterized as "negligence," note that the rule also applies to conduct of the victim that may constitute criminal conduct.

The Committee originally concluded that an instruction on the rule provided in § 939.14 should not be given and Wis JI-Criminal 926 as originally published so advised. However, in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996), the Wisconsin Supreme Court recommended that an instruction be drafted to articulate the rule in § 939.14. The court stated:

> . . . we recommend that the Criminal Jury Instruction Committee adopt a jury instruction that sets forth the law as contained in s. 939.14, to the effect that it is no defense to a prosecution for a crime that the victim was contributorily negligent. The instruction also should contain an explanation of this rule, in particular that it means the defendant is not immune from criminal liability merely because the victim may have been negligent as well. See Hart, 75 Wis.2d 398.
>
> In addition, we recommend that the Committee adopt a bridging instruction to be given when a court gives a contributory negligence instruction along with Wis JI-Criminal 1188, 1185, and/or 1186. The instruction should explain to the jury that although the victim's contributory negligence is not a defense, the jury may consider the acts of the victim in relation to the defendant's § 940.09(2) defense.
>
> It is further recommended that the Committee in its comments caution circuit court judges so that they will not, without clear justification, give a contributory negligence instruction in a criminal case.

205 Wis.2d 182, 197-98.

This instruction attempts to carry out the court's recommendations. A tailored version of this instruction has been built-in to Wis JI-Criminal 1188, the standard instruction on the affirmative defense applicable to operating under the influence cases. It is intended to provide the bridging instruction the court recommended.

As noted above, the originally published version of Wis JI-Criminal 926 recommended that no instruction be given on the rule set forth in § 939.14. The comment stated:

> The rule as stated is an accurate statement of the law, but can create problems if literally applied. That is, evidence that may indicate negligence on the part of a victim may be relevant to an element of the crime – especially the cause element – or to a defense. In such a situation, the evidence is admissible despite § 939.14.

The comment went on to cite the court of appeals decision in State v. Lohmeier, 196 Wis.2d 432, 538 N.W.2d 487 (Ct. App. 1995), as an example of a case where instructing the jury on the rule of § 939.14 could cause a problem. In Lohmeier, the defendant was charged with two counts of homicide by intoxicated use of a vehicle. The defendant introduced evidence that the two victims were walking on the roadway, offering it in support of the affirmative defense provided in § 940.09(2): ". . . that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant. . . ." The trial court instructed on the defense but added an instruction that ". . . it is no defense to a prosecution for a crime that the victim may have been contributorily negligent." The court of appeals reversed the conviction, holding that

> . . . under the circumstances of this case, the court's jury instruction on contributory negligence effectively denied Lohmeier his defense. Here, the victims' contributory negligence in walking in the roadway, or stepping out into the roadway as Lohmeier's car approached, as alleged by the defense, could have risen to the level of intervening cause, making it impossible for Lohmeier to avoid the accident. This was a question for the jury to decide.

196 Wis.2d 437, 443.

The Wisconsin Supreme Court reversed the court of appeals. Although it found that the jury in that case was not misled by the potentially conflicting instructions, the court made the specific recommendations to the Committee that are addressed in this version of the instruction.

1. The term "contributory negligence" is used only in the title of the instruction. The Committee recommends that the title not be communicated to the jury and has drafted this instruction without using the term. Referring to the rule of § 939.14 by using "contributory negligence" creates difficulties. It is a technical term with a specialized meaning that, if used in an instruction, probably should be explained to the jury. Defining "negligence" is routine, but defining "contributory" is more difficult. The latter connotes that the conduct "contributed" to the harm caused, highlighting potential conflict with the cause element of the crime. Even in civil cases, "contributory negligence" is not a term used in instructing the jury. (It appears in the title, but not in the text of Wis JI-Civil 1008.) Therefore, the instruction does not use the term "contributory negligence." See notes 2 and 3, below.

2. The Lohmeier decision recommended that "the Committee in its comments caution circuit court judges so they will not, without clear justification, give a contributory negligence instruction. . . ." In the Committee's judgment, the court's concern about giving an instruction is addressed in two ways by this version of Wis JI-Criminal 926.

First, the Committee drafted the instruction without using the term "contributory negligence" because it concluded that there will rarely be "clear justification" for giving an instruction that uses it. Precisely because of the rule articulated in § 939.14, evidence referring to a victim's conduct as "contributory negligence" should not be admissible and lawyers should not be using the term to describe the victim's conduct. If this is correct, the only clear justification for an instruction using the term "contributory negligence" would be as a curative instruction – to be used when the term "contributory negligence" has mistakenly been used. Wis JI-Criminal 926 is not drafted for that rare situation.

Second, even an instruction like this version of Wis JI-Criminal 926 that does not use the term "contributory negligence" should be given only with "clear justification." Despite the rule of § 939.14, evidence of the victim's conduct will often be relevant and admissible. Where that evidence involves what could be described as negligent conduct, the conflict with § 939.14 emerges. This is the problem Lohmeier dealt with, but the problem was caused by instructing the jury on the § 939.14 rule. Had no instruction been given, the Lohmeier problem would not have existed; the jury would have been unencumbered in considering all evidence relevant to the affirmative defense, including evidence of the victim's conduct that could be characterized as involving "contributory negligence."

The Committee concluded that there is "clear justification" for giving Wis JI-Criminal 926 in the following circumstances: evidence of the victim's conduct has been admitted; that conduct involves what might be described as "negligent" conduct; either the state or the defense requests the instruction; and the trial court concludes that in the context of the particular case, the instruction would add to the jury's ability to understand the legal standard it is to apply.

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

4. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under, for example, § 940.09(2). To the ordinary person, a "reason why the defendant is not guilty" is likely to be considered a "defense." For this reason, the Committee recommends following this general statement with a more specific description of how the victim's conduct relates to the facts of the particular case. See note 5, below. This, the Committee concluded, is consistent with the recommendations in Lohmeier that a "bridging" instruction be drafted. See the comment preceding note 1, supra.

5. The Committee recommends identifying the element or the defense to which the evidence of the victim's conduct relates. The element to which it will most often relate is the cause element. The defense most likely to be involved is the one at issue in the Lohmeier case: the affirmative defense available in operating under the influence cases under §§ 940.09, 940.25, and 346.63(2). Wis JI-Criminal 1188, the standard instruction for that affirmative defense, includes the text of Wis JI-Criminal 926 with a tailored "bridge" to the substance of the defense. This is intended to address the third recommendation in the Lohmeier decision. See the comment preceding note 1, supra.

934 SEXUAL CONTACT — § 939.22(34)

SELECT ONE OF THE FOLLOWING ALTERNATIVES RELATING TO THE TYPE OF SEXUAL CONTACT AND INSERT IT IN THE INSTRUCTION FOR THE OFFENSE.[1]

Meaning of "Sexual Contact"

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF THE INTIMATE PARTS OF ANOTHER PERSON [' 939.22(34)(a)]:

[Sexual contact is an intentional touching of the (name intimate part)[2] of (name of victim) (by the defendant) (by another person upon the defendant's instruction).[3] The touching may be of the (name intimate part) directly or it may be through the clothing. The touching may be done by any body part or by any object or device, but it must be an intentional touching.

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).][4]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF ANY PART OF ANOTHER PERSON'S BODY WITH THE INTIMATE PARTS OF THE DEFENDANT OR OF ANOTHER PERSON [§ 939.22(34)(b)]:

[Sexual contact is an intentional touching of any part of the body, clothed or unclothed, of (name of victim) with the (name intimate part), clothed or unclothed, of (the defendant) (another person upon the defendant's instruction).[5]

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).][6]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL PENILE EJACULATION OR INTENTIONAL EMISSION OF URINE OR FECES UPON ANOTHER PERSON [§ 939.22(34)(c)]:

[Sexual contact is (intentional penile ejaculation of ejaculate) (or) (intentional emission of urine or feces) (by the defendant) (by another person upon the defendant's instruction)[7] upon any part of the body, clothed or unclothed, of (name of victim) .[8]

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).][9]

FOR SEXUAL CONTACT INVOLVING INTENTIONALLY CAUSING ANOTHER PERSON TO EJACULATE OR EMIT URINE OR FECES ON ANY PART OF THE DEFENDANT'S BODY [§ 939.22(34)(d)]:

[Sexual contact is (ejaculation) (or) (emission of urine or feces) by (name of victim) on any part of the defendant's body, clothed or unclothed, which the defendant intentionally causes.[10]

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).][11]

GIVE THE FOLLOWING IN ALL CASES.

Deciding About Intent and Purpose

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

CONTINUE WITH THE INSTRUCTION FOR THE OFFENSE.

COMMENT

Wis JI-Criminal 934 was approved by the Committee in June 2010.

The Wisconsin criminal statutes provide three definitions of "sexual contact" which are substantially similar but not identical. This instruction addresses § 939.22(34), which applies to criminal offenses requiring sexual contact and not appearing in § 940.225 or in Chapter 948. See, for example, sub. (1)(a) of § 940.302, Human Trafficking, and sub. (5) of § 944.30, Prostitution.

The other two definitions of "sexual contact" are found in:

X § 940.225(5)(b), which applies to offenses defined in § 940.225 [see Wis JI-Criminal 1200A]; and,

X § 948.01(5), which applies to offenses defined in Chapter 948 [see Wis JI-Criminal 2101A].

This instruction provides all four alternatives specified by § 939.22(34); each alternative includes the type of touching or emission of bodily substances and the purpose of the touching or emission. This is intended to be more convenient to the users of the instructions and to make it easier to prepare an instruction that is tailored to the facts of the case.

1. The definition of "sexual contact" in § 939.22(34) applies to offenses not found in § 940.225, where the definition in § 940.225(5)(b) applies, or Chapter 948, where the definition in § 948.01(5) applies. Section 939.22(34) identifies two types of intentional touchings and two alternatives involving intentional emission of bodily substances. The instruction provides separate alternatives for each alternative, one of which should be selected and added to the instruction for the sexual assault offense.

Each alternative includes the second part of the statutory sexual contact definition: that the contact was for a prohibited purpose. See note 4, below.

2. Section 939.22(19) defines "intimate parts": "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved in the sexual contact.

In State v. Morse, 126 Wis.2d 1, 374 N.W.2d 388 (Ct. App. 1985), the court of appeals held that a trial court did not improperly broaden the scope of the sexual contact definition in § 939.22(19) by defining "intimate part" to include "the vaginal area."

"[T]he plain language of Wis. Stat. § 939.22(19) is meant to include a female and a male breast because each is 'the breast . . . of a human being' and thereby the touching of a [15 year old] boy's breast constitutes 'sexual contact' within the meaning of Wis. Stat. §948.02(2)." State v. Forster, 2003 WI App 29, 260 Wis.2d 149, 659 N.W.2d 144.

3. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

4. Each alternative definition includes the requirement that the contact be for a prohibited purpose. The Committee concluded that including purpose as part of each alternative will reduce the possibility that it would be inadvertently overlooked. Failure to include the purpose of the contact as a part of the jury instruction is

reversible error. State v. Krueger, 2001 WI App 14, 240 Wis.2d 644, 623 N.W.2d 211. Likewise, failure to include reference to purpose when accepting a guilty plea may be grounds for withdrawal of the plea. State v. Bollig, 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199; State v. Jipson, 2003 WI App 222, 267 Wis.2d 467, 671 N.W.2d 18; and, State v. Nichelson, 220 Wis.2d 214, 582 N.W.2d 460 (1998).

5. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

6. Each alternative definition includes the requirement that the contact be for a prohibited purpose. See note 4, supra.

7. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

8. This is the type of "sexual contact" defined in § 939.22(34)(c). It was created by 1995 Wisconsin Act 69, which first applied to offenses committed on December 2, 1995.

9. Each alternative definition includes the requirement that the contact be for a prohibited purpose. See note 4, supra.

10. This is the type of "sexual contact" defined in § 939.22(34)(d). It was created by 2005 Wisconsin Act 273, which first applied to offenses committed on April 20, 2006.

11. Each alternative definition includes the requirement that the contact be for a prohibited purpose. See note 4, supra.

948 WITHOUT CONSENT — § 939.22(48)

"Without consent" means that there was no consent in fact or that consent was given because

[the defendant put (name of victim) in fear by the use or threat of imminent use of physical violence on (a person in the presence of) (a member of the immediate family of) (name of victim) .]

[the defendant purported to be acting under legal authority.]

[(name of victim) did not understand the nature of the thing to which (he) (she) consents, by reason of (ignorance) (mistake of fact)[1] (mistake of law other than criminal law) (youth) (defective mental condition, whether permanent or temporary).]

COMMENT

Wis JI-Criminal 948 was originally published in 1999. This revision adopted a new format and was approved by the Committee in February 2005.

This presents the definition of "without consent" provided in § 939.22(48). In most cases, definition is not likely to be necessary, since the plain and ordinary meaning of the term will be sufficient for the jury. Definition will be appropriate in the case where the victim did in fact give consent, but the consent will not be legally effective because one of the circumstances recognized is present. For example, a person may have consented to the taking of his or her property by the defendant because the defendant threatened a member of the person's family.

NOTE: This definition applies generally to offenses defined in the Criminal Code. Sexual assaults under § 940.225 use a different definition of "without consent" that applies only to violations of § 940.225.

1. For a case relying on the "ignorance" or "mistake of fact" exception, see State v. Inglin, 224 Wis.2d 764, 592 N.W.2d 666 (Ct. App. 1999).

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950 PRIVILEGE: DISCIPLINE BY A PERSON RESPONSIBLE FOR THE WELFARE OF A CHILD — § 939.45(5)[1]

[AFTER THE ELEMENTS OF THE CRIME, BUT BEFORE THE CONCLUDING PARAGRAPHS, ADD THE FOLLOWING.]

Defense of Reasonable Discipline

Discipline of a child is an issue in this case.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act reasonably in the discipline of a child.

The law allows a person responsible for the child's welfare[2] to use reasonable force to discipline that child.[3] Reasonable force is that force which a reasonable person would believe is necessary.[4]

Whether a reasonable person would have believed that the amount of force used was necessary and not excessive must be determined from the standpoint of the defendant at the time of the defendant's acts. The standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[5]

In determining whether the discipline was or was not reasonable, you should consider the age, physical and mental condition and disposition of the child, the conduct of the child, the nature of the discipline, and all the surrounding circumstances.[6] It is never reasonable discipline to use force which is intended to cause great bodily harm or death or which creates an unreasonable risk of great bodily harm or death.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of this offense[8] have been proved and that the defendant did not act reasonably in the discipline of (name child), you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 950 was originally published in 1962 and revised in 1986, 1989, 1994, 1996, 2001, 2006, and 2013. The 2013 revision added footnotes 3 and 4 and was approved by the Committee in October 2013. Formatting errors were amended in 2023.

This instruction is for cases involving the privilege of reasonable discipline of a child as codified in § 939.45(5). That statute was amended by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. The primary change from prior law was the substitution of "person responsible for the child's welfare" for "parent or a person in the place of a parent." Compare § 939.45(5), 1985-86 Wis. Stats.

This instruction is drafted for cases involving the use of force against a child where it has resulted in a harm prohibited by law. Most often, the harm will be physical injury. However, § 948.04 penalizes the causing of mental harm to a child, a harm that could be caused by conduct not amounting to the use of force, though undertaken in the name of parental discipline. The Committee interprets the statute defining the privilege as applying to all conduct undertaken for the purpose of discipline, including conduct not involving the use of force. This instruction, however, is drafted for a case involving the use of force, which is anticipated to be the most common situation.

Wis JI-Criminal 950 was originally recommended for cases involving intentional causing of harm; Wis JI-Criminal 951 tailored the privilege of parental discipline for cases involving recklessness. In 2014, the Committee concluded that Wis JI-Criminal 950 was suitable for use in all cases and Wis JI-Criminal 951 was withdrawn. The instruction on the privilege should be integrated with the instruction on the offense charged. See, for example, Wis JI-Criminal 1220A, which combines the privilege of self-defense with the instruction on battery.

For a discussion of the substance of this defense, see State v. Kimberly B., 2005 WI App 115, 283 Wis.2d 731, 699 N.W.2d 641, which found the evidence was sufficient to allow the jury to "reasonably conclude that Kimberly was not making a genuine effort to discipline [the victim] by proper means . . . and that she instead was resorting to excessive and unreasonable force, abusive rather than corrective in nature." Kimberly B., ¶37.

1. Statutory privileges are treated as "affirmative defenses" in Wisconsin. That is, the absence of the privilege need not be alleged in the charging document or presented as part of the state's case-in-chief. But once there is some evidence of the privilege in the case, the burden is on the State to prove beyond a reasonable doubt that the defendant's conduct was not privileged. See, e.g., Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979).

2. "Person responsible for the child's welfare" is defined as follows in subsec. (a)3. of § 939.45(5):

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

[NOTE: "Stepparent" was added to the definition by 1995 Wisconsin Act 214 (effective date: May 1, 1996). This definition is not the same as the one provided in § 948.01(3) for the same term. See Wis JI-Criminal 2114.]

"Child" means a person who has not attained the age of 18 years. See §§ 939.45(5)(a)1 and 948.01(1).

In State v. West, 183 Wis.2d 46, 515 N.W.2d 484 (Ct. App. 1994), the court held that the plain language of § 939.45(5)(a)3. included "foster parent." They are persons "legally responsible for the child's welfare in a residential setting."

In State v. Dodd, 185 Wis.2d 560, 518 N.W.2d 300 (Ct. App. 1994), the court found that a live-in boyfriend was not a "person responsible" under § 939.45(5). The court concluded that the statutory definition does not extend to those who arguably would qualify under an "in loco parentis" standard.

In State v. Evans, 171 Wis.2d 471, 492 N.W.2d 141 (1992), the court interpreted the same phrase – "person responsible for the child's welfare" – as defined in § 948.01(3) for purposes of imposing criminal liability for various Chapter 948 offenses. The court held that under that statute, one who acknowledges in writing that he is the biological father of a child is the child's "parent," even though he had not been adjudicated the father.

Also see State v. Ward, 228 Wis.2d 301, 596 N.W.2d (Ct. App. 1999), holding that an unpaid babysitter is a "person responsible" under § 948.01(3), and State v. Hughes, 2005 WI App 155, 285 Wis.2d 388, 702 N.W.2d 87, reaching the same conclusion with regard to a 17-year-old voluntary caretaker.

3. State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719, stated that the first part of the test for the privilege of parental discipline is that it be for the purpose of disciplining the child:

> ¶29 Under *Kimberly B.*, the privilege of reasonable parental discipline imposes a two-part inquiry. First, the force used must be disciplinary, and not imposed "with a malicious desire to inflict pain." Id. Thus, if the parent's acts are not disciplinary, but merely an expression of rage and frustration towards the child, the acts are not protected by the privilege of reasonable parental discipline. If the acts are disciplinary, they are privileged if the amount and nature of force is reasonable, and not inflicted "immoderately, cruelly, or mercilessly." Id.

4. State v. Williams, 2006 WI App 212, ¶29, 296 Wis.2d 834, 723 N.W.2d 719, also identified three factors for determining if discipline is reasonable:

"(1) the use of force must be reasonably necessary; (2) the amount and nature of the force used must be reasonable; *and* (3) the force used must not be known to cause, or create a substantial risk of, great bodily harm or death." Id., ¶30 We also explained that the reasonableness of the amount of force used in imposing discipline is an objective standard:

> Wis JI-Criminal 950 includes (1) and (2) in narrative form, without breaking them down into a list. It also includes a statement containing the rule in (3). After identifying these three factors, the Williams decision then quotes and cites with apparent approval the paragraph from Wis JI-Criminal 950 that explains how to decide whether "reasonable force" was used. The Committee concluded that because the concepts were covered in the instruction, it was not necessary to include them in list form.

5. This paragraph is intended to describe the general "reasonable person" standard in the context of the privilege of child discipline. It was cited with apparent approval in State v. Kimberly B., 2005 WI App 115, ¶32, 283 Wis.2d 731, 699 N.W.2d 641. It differs slightly from the statement typically used (see, for example, Wis JI-Criminal 800, Privilege: Self-Defense) because the statutory definition does not directly state the privilege in terms of "reasonably believes." Rather, the statute refers to "reasonable discipline" and defines it as "only such force as a reasonable person believes is necessary," adding a step to the process of reasoning.

Section 118.31 addresses corporal punishment in schools, generally forbidding it, with some exceptions. Assuming that a school teacher would be considered a "person responsible for the child's welfare," the Committee concluded that § 118.31 would not be the source of any additional substantive rights or limitations relating to the privilege of reasonable discipline. Its provisions may be relevant to evaluating what may be considered "reasonable" in the use of force to impose discipline in the school setting.

Section 118.31 was amended by 1999 Wisconsin Act 137 by adding a new sub. (7):

> (7) Nothing in this section abrogates or restricts any statutory or common law defense to prosecution for any crime.

As to "statutory" defenses, this section seems to confirm the Committee's conclusion that § 118.31 would not be the source of any additional substantive rights or limitations relating to the privilege of reasonable discipline. As to a common law defense, the only case law authority explaining the common law defense of discipline by a teacher is Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925). The Steber decision was the primary resource for the original version of Wis JI-Criminal 950.

6. This paragraph was included in previous versions of Wis JI-Criminal 950. Because the 1989 revision of the definition of the privilege did not change the general standard of reasonableness, the Committee concluded it was appropriate to include this list of factors to consider.

7. This rule is explicitly set forth in § 939.45(5)(b), supra.

This provision apparently has the effect of limiting the application of the privilege to those crimes that do not have an element of intent to cause great bodily harm or engaging in conduct that creates an unreasonable risk of great bodily harm.

For example, a person charged with physical abuse of a child under § 948.03(2)(a), intentionally causing great bodily harm, would not be entitled to an instruction on the privilege of reasonable discipline – the law defining the privilege provides that it is never reasonable discipline to use force intended to cause great bodily harm. If the state proves the elements of the crime, including intent to cause great bodily harm, the state has also proved that the privilege cannot apply.

The situation with respect to other types of physical abuse under § 948.03 is less clear. Subsection (2)(c) prohibits intentionally causing bodily harm by conduct which creates a high probability of great bodily harm. Is "high probability" in that section the equivalent of "unreasonable risk" in § 939.45(5)? As a general matter, both statements are part of the concept of recklessness and refer to different things. "High probability" refers to the likelihood that the harm will occur, while "unreasonable risk" refers to whether there is any reason for the conduct, that is, whether it has any social utility. The two aspects are separately stated in the standard definition of "criminal recklessness" in § 939.24 which refers to "unreasonable and substantial risk." ("Substantial" was adopted by the homicide revision as a substitute for "high probability.")

Section 939.45(5)(a)2 as originally enacted stated that "great bodily harm" has the meaning provided in § 948.01(4) which in fact defines "sadomasochistic abuse." This was believed to be an inadvertent drafting error, which was corrected by 1989 Wisconsin Act 31 (Section 2825h), which deleted subsection (5)(a)2. The definition of "great bodily harm" in § 939.22(14) applies. See Wis JI-Criminal 914 for a suggested definition.

8. The number of elements for the offense should be stated in the blank. If the offense has a simple title, the title should be used in place of "this offense." But many of the crimes to which this privilege may be relevant are likely to have long titles – for example, "physical abuse of a child: intentionally causing great bodily harm" – making it advisable to use "this offense" instead of the title.

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951 PRIVILEGE: DISCIPLINE BY A PERSON RESPONSIBLE FOR THE WELFARE OF A CHILD: CASES INVOLVING RECKLESSNESS — § 939.45(5)

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 951 was originally published in 1989 and revised in 1994, 1996, and 2005. It was withdrawn in 2014.

This instruction tailored the privilege of parental discipline for cases involving recklessness. The Committee concluded that Wis JI-Criminal 950, originally tailored for cases involving intentional causing of harm, was suitable for use in all cases. Therefore, Wis JI-Criminal 951 was withdrawn.

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955 PRIVILEGE: DISCIPLINE BY ONE IN THE PLACE OF THE PARENT — § 939.45(5)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 955 was originally published in 1966 and revised in 1987. It was withdrawn in 1989.

This instruction is withdrawn because of changes made in the definition of the privilege of parental discipline by 1987 Wisconsin Act 332. That Act amended § 939.45(5) to refer to discipline by a "person responsible for the child's welfare" rather than by a "parent or a person in the place of a parent." See Wis JI-Criminal 950 and 951, which will cover all cases involving discipline by a person responsible for a child's welfare for crimes committed on or after July 1, 1989.

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980 LIFETIME SUPERVISION OF SERIOUS SEX OFFENDERS — § 939.615

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information alleges not only that the defendant committed the crime of (name offense) but also that one of the defendant's purposes for committing that crime was the defendant's sexual arousal or gratification.

If you find the defendant guilty of (name offense), you must answer the following question:

"Did the defendant commit the crime of (name offense) for the defendant's sexual arousal or gratification?"

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

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 980 was originally published in 1999 and revised in 2003 and 2007. This revision was approved by the Committee in June 2015; it updated the Comment to reflect changes made by 2013 Wisconsin Act 362.

Section 939.615 was created by 1997 Wisconsin Act 275; the statute applies to offenses committed on or after its effective date: June 26, 1998. It provides for lifetime supervision of persons convicted of certain "serious sex offenses." If a prosecutor seeks lifetime supervision, notice must be included in the charging document "before or at arraignment and before acceptance of any plea." See § 973.125.

Subsection (1)(b)1. of § 939.615 lists offenses that are always considered "serious sex offenses." Lifetime supervision may be ordered following conviction for these offenses without requiring new factual findings by the jury; the court needs to determine "that lifetime supervision of the person is necessary to protect the public." § 939.615(2)(a). 2005 Wisconsin Act 277 [effective date: April 20, 2006] amended the list of offenses in § 939.615(1)(b)1. to include § 948.085 Sexual assault of a child placed in substitute care, an offense created by Act 277.

Subsection (1)(b)2. of § 939.615 provides a second basis for ordering lifetime supervision:

> A violation, or the solicitation, conspiracy or attempt to commit a violation, under ch. 940, 942, 943, 944 or 948 other than a violation specified in subd. 1., if the court determines that one of the purposes for the conduct constituting the violation was for the actor's sexual arousal or gratification.

Reference to Chapter 942 was added to § 939.615(1)(b)2. by 2013 Wisconsin 362 [effective date: April 25, 2014].

This second basis is the option addressed by this instruction. An instruction is necessary because § 939.615(2)(c) provides that "the court shall direct that the trier of fact find a special verdict as to whether the conduct constituting the offense was for the actor's sexual arousal or gratification."

The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> > "Did the defendant commit the crime of (name offense) for the defendant's sexual arousal or gratification?"

Subsection (7) of § 939.615, as amended by 2001 Wisconsin Act 109, provides that it is a Class I felony if a person violates a condition of lifetime supervision by conduct that constitutes a felony. There is not a uniform instruction for that offense.

983 COMMITTING A DOMESTIC ABUSE CRIME WITHIN 72 HOURS OF ARREST — § 939.621(1)(a) and (2)

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information[1] alleges not only that the defendant committed the crime of (identify crime) but also that the crime was an act of domestic abuse committed during the 72 hours immediately following the defendant's arrest for a domestic abuse incident.

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

"Was the crime of (identify crime) an act of domestic abuse and did the defendant commit it during the 72 hours immediately following an arrest for a domestic abuse incident?"

Before you may answer this question "yes," you must find the following beyond a reasonable doubt:

(1) that the defendant was previously arrested for a domestic abuse incident;

(2) that the crime of (identify crime) charged in this case was an act of domestic abuse; and

(3) that the defendant committed the crime of (identify crime) charged in this case during the 72 hours immediately following the previous arrest.[2]

For a crime to constitute an act of "domestic abuse" two things are required.

First, it must involve

SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE:[3]

[intentional infliction of physical pain, physical injury, or illness.]

[intentional impairment of physical condition.]

[(first) (second) (third) degree sexual assault.][4]

[a physical act that may cause the other person reasonably to fear imminent engagement in (identify conduct described under § 968.075(1)(a) 1., 2., or 3.)].

Second, it must have been engaged in by an adult person (against his or her spouse or former spouse) (against an adult with whom the person resided or had formerly resided) (against an adult with whom the person has a child in common).

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE

[The victim of the domestic abuse crime charged in this case does not have to be the same as the victim of the domestic abuse incident that resulted in the previous arrest.][5]

If you are satisfied beyond a reasonable doubt that the crime of (identify crime) was an act of domestic abuse and that the defendant committed it during the 72 hours immediately following an arrest for a domestic abuse incident, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 983 was originally published in 1997 and revised in 2003 and 2013. The 2013 revision reflected changes made by 2011 Wisconsin Act 277. This revision was approved by the Committee in February 2014; it reordered the two parts of the definition of "domestic abuse" and modified the caption and the Comment.

Section 939.621 was created by 1987 Wisconsin Act 346. It was amended by 1995 Wisconsin Act 304 to extend the time period from 24 to 72 hours. (Effective date: May 16, 1996.) The statute was not affected by 2001 Wisconsin Act 109, which repealed several penalty-enhancing statutes. Section 939.621 provides for a penalty increase of up to two years if a person is a "domestic abuse repeater." The statute also provides that the penalty increase "changes the status of a misdemeanor to a felony."

Section 939.621 was amended by 2011 Wisconsin Act 277 [effective date: April 24, 2012]. Before being amended, the statute applied only to those who committed a second domestic abuse crime during the 72 hours immediately following an arrest for a domestic abuse incident. That provision is now found in § 939.621(1)(a). Act 277 added a second basis for the penalty increase, being a "domestic abuse repeater" – see § 939.621(1)(b) and Wis JI-Criminal 984.

> . . . convicted, on 2 separate occasions, of a felony or a misdemeanor for which a court imposed a domestic abuse surcharge under s. 973.055(1) or waived a domestic abuse surcharge pursuant to s. 973.055(4), during the 10-year period immediately prior to the commission of the crime for which the person presently is being sentenced, if the convictions remain of record and unreversed.

This instruction is drafted for a case where § 939.621(1)(a) applies – committing a second domestic abuse crime within 72 hours of release following an arrest for a domestic abuse incident. This is an issue for the jury because it provides for an increased penalty based on facts not covered by the offense definition of the crime to which the added penalty is being applied. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added.)

The Committee concluded that § 939.621(1)(a) requires two findings: that the crime charged was "an act of domestic abuse"; and that the crime charged was committed during the 72 hours immediately following the defendant's arrest for another act that constituted a domestic abuse incident. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> > "Was the crime of _____ an act of domestic abuse and did the defendant commit it during the 72 hours immediately following an arrest for a domestic abuse incident?"

1. Section 939.621(2) provides that the penalty increase "changes the status of a misdemeanor to a felony." Thus, there will always have been an information, even if the underlying offense would have been a misdemeanor in the absence of the penalty increase.

2. The definition of this penalty-increasing provision requires that the previous arrest and the commission of the new domestic abuse crime occurred within a 72-hour period. If there is a conflict in the evidence regarding when the previous arrest occurred, definition of "arrest" may be required. The Committee's advice is to use the definition that Wisconsin courts apply in the Fourth Amendment context. In State v. Swanson, 164 Wis.2d 437, 446, 475 N.W.2d 148 (1991) the court "abrogated" the subjective test for an arrest and adopted an objective test: "The standard generally used to determine the moment of arrest in a constitutional sense is whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances."

3. The definition of "domestic abuse" is provided in § 968.075(1)(a). The Committee recommends selecting the parts of the definition that apply.

4. The statute uses the phrase "a violation of § 940.225(1), (2), or (3)" to describe this option. The Committee concluded that the titles of those offenses should be used rather than the statute numbers.

5. This is stated in § 939.621(2).

984 COMMITTING A DOMESTIC ABUSE CRIME AS A DOMESTIC ABUSE REPEATER — § 939.621(1)(b) and (2)

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information[1] alleges not only that the defendant committed the crime of (identify crime) but also that the crime was an act of domestic abuse.

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

"Was the crime of (identify crime) an act of domestic abuse?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the crime of (identify crime) charged in this case was an act of domestic abuse.

For a crime to constitute an act of "domestic abuse" two things are required.

First, it must involve

SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE:[2]

[intentional infliction of physical pain, physical injury, or illness.]

[intentional impairment of physical condition.]

[(first) (second) (third) degree sexual assault.][3]

[a physical act that may cause the other person reasonably to fear imminent engagement in (identify conduct described under § 968.075(1)(a) 1., 2., or 3.)].

Second, it must have been engaged in by an adult person (against his or her spouse or former spouse) (against an adult with whom the person resided or had formerly resided) (against an adult with whom the person has a child in common).

If you are satisfied beyond a reasonable doubt that the crime of (identify crime) was an act of domestic abuse, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 984 was originally published in 2014. This revision updated the Comment and was approved by the Committee in October 2015.

Section 939.621 was created by 1987 Wisconsin Act 346. It provides for a penalty increase of up to two years if a person is a "domestic abuse repeater." The statute also provides that the penalty increase "changes the status of a misdemeanor to a felony."

Section 939.621 was amended by 2011 Wisconsin Act 277 [effective date: April 24, 2012]. Before being amended, the statute applied only to those who committed a second domestic abuse crime during the 72 hours immediately following an arrest for a domestic abuse incident. That provision is now found in § 939.621(1)(a). See Wis JI-Criminal 983. Act 277 added a second basis for the penalty increase, described as follows in § 939.621(1)(b):

> . . . convicted, on 2 separate occasions, of a felony or a misdemeanor for which a court imposed a domestic abuse surcharge under s. 973.055(1) or waived a domestic abuse surcharge pursuant to s. 973.055(4), during the 10-year period immediately prior to the commission of the crime for which the person presently is being sentenced, if the convictions remain of record and unreversed.

There are two parts to the finding required for enhancing the penalty under § 939.621(1)(b) and (2), one of which must go to the jury and one which does not. First, under § 939.621(2), the present conviction must be for a crime that is "an act of domestic abuse, as defined in s. 968.075(1)(a)." This an issue for the jury because it provides for an increased penalty based on facts not covered by the offense definition of the crime to which the added penalty is being applied. Second, under § 939.621(1)(b), the defendant must have been convicted on two separate occasions of a crime for which a domestic abuse surcharge was imposed under § 973.055(4). The Committee concluded that this fact need not be submitted to the jury because it relates solely to prior convictions. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added.) The Committee concluded that the Apprendi exception applies even though the prior convictions must be for violations subject to the domestic abuse surcharge, which could be characterized as a fact that goes beyond the mere fact of a conviction. This appears to be the same as the prior convictions, refusals, etc., that are the basis for increased penalties for operating under the influence or with a prohibited alcohol concentration: those must be priors that are counted under § 343.307, but their existence is determined by the court, not the jury.

In an unpublished opinion, the Wisconsin Court of Appeals reversed a conviction for disorderly conduct as both a repeater and a domestic abuse repeater. The decision concluded that the trial court erred in not instructing the jury to determine whether the underlying conduct qualified as an act of domestic abuse under § 939.621(1)(b) – the domestic abuse repeater statute. The court held that it is a jury issue because it increases

the maximum penalty for the underlying crime. The decision cites Wis JI-Criminal 984 in footnote 3 of the decision. State v. Johnson, Wis. Ct. App No. 2014AP2888-CR [not published – cited for persuasive value]. Note: Wis JI-Criminal 984 was published in 2014; Johnson's trial took place in May 2013.

For the purposes of § 939.621(1)(b), "it is immaterial that the sentence [for the prior conviction] was stayed, withheld or suspended, or that the person was pardoned, unless the person was pardoned on the ground of innocence." Further, § 939.621(2) states: "The victim of the domestic abuse crime does not have to be the same as the victim of the domestic abuse incident that resulted in the prior arrest or conviction."

As with similar provisions, the Committee recommends that the penalty-increasing fact be submitted to the jury as a special question following the instruction for the charged crime. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> "Was the crime of _____ an act of domestic abuse?"

1. Section 939.621(2) provides that the penalty increase "changes the status of a misdemeanor to a felony." Thus, there will always have been an information, even if the underlying offense would have been a misdemeanor in the absence of the penalty increase.

2. The definition of "domestic abuse" is provided in § 968.075(1)(a). The Committee recommends selecting the parts of the definition that apply.

3. The statute uses the phrase "a violation of § 940.225(1), (2), or (3)" to describe this option. The Committee concluded that the titles of those offenses should be used rather than the statute numbers.

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985 CRIMINAL GANG CRIMES — § 939.625

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of (offense charged) but also that the defendant did so for the benefit of, at the direction of, or in association with any criminal gang, with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members.

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

"Did the defendant commit the crime of (offense charged) [1] for the benefit of, at the direction of, or in association with any criminal gang, with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members?"

Before you may answer this question "yes," the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements are present.

The first element requires that the defendant committed the crime of (offense charged) for the benefit of, at the direction of, or in association with a criminal gang.

"Criminal gang" requires proof of all of the following:[2]

(1) an ongoing organization, association, or group of three or more persons, whether formal or informal;

(2) that has a common name or a common identifying sign or symbol;

(3) that has as one of its primary activities the commission of one or more of the following criminal acts: (specify crime or crimes listed in § 939.22(21)(a) to (s) ; and

(4) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

"Pattern of criminal gang activity" means the commission[3] of two or more of the following crimes within three years of one another: (specify crime or crimes listed in § 939.22(21)(a) to (s) .[4]

These crimes must have been committed either on separate occasions or, if committed on the same occasion, by two or more persons.

[The crime of (specify crime or crimes listed in § 939.22(21)(a) to (s) requires. . . .][5]

The second element requires that the defendant committed the crime of (offense charged) with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members.[6] This requires that the defendant acted with the purpose to promote, further, or assist criminal gang members in committing crimes.

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of (offense charged) for the benefit of, at the direction of, or in association with any criminal gang, and with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 985 was originally published in 1996. This revision was approved by the Committee in February 2003.

Section 939.625 was repealed by 2001 Wisconsin Act 109, effective February 1, 2003. Wis JI-Criminal 985 is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by § 939.625 have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(3)(c).

1. Here insert the name of the offense charged. It would be possible for the jury to find the defendant guilty of a lesser included offense. If a lesser included offense is submitted, and if the evidence supports a finding that it was a gang crime, the instruction should be changed to read: "Did the defendant commit the crime of [charged crime] or a lesser included offense for the benefit of . . ."

2. The definition is based on the one provided in § 939.22(9).

3. The instruction selects "commission of" crimes from the statutory alternatives which include "attempt to commit" and "solicitation to commit." The selection was made in an attempt to simplify the instruction and make it more understandable. If attempts or solicitations are involved, the model must, of course, be modified.

4. The concluding portion of the definition of "criminal gang" in § 939.22(9) refers to engaging in "a pattern of criminal gang activity." "Pattern of criminal gang activity" is in turn defined in § 939.22(21) as committing two or more of the crimes listed in the definition within three years of one another and on separate occasions or by two or more person. The instruction builds in this definition without separately referring to the "pattern of criminal gang activity."

"Pattern" is also used in Wisconsin's "RICO" statute. See § 946.83. Wis JI-Criminal 1881, at footnote 4, includes a discussion of the principles found inherent in the concept of "pattern" in decisions of the United States Supreme Court interpreting the federal RICO statute.

5. Because the definition of "gang activity" includes the requirement that particular crimes have been committed, it appears to be necessary for the jury to find that those crimes were in fact committed. It may be helpful to refer to the uniform jury instruction for the offense or offenses involved for a summary of the elements or a more complete description of the elements, as needed.

In an analogous situation, the Wisconsin Court of Appeals held that it was error to fail to instruct sufficiently on the crime committed against the victim where the charge was intimidation of a victim under § 940.44. That statute requires the target of the intimidation be a "victim," defined as a "person against whom any crime . . . has been perpetrated . . ." The jury in a case involving this charge "should have been told that it could not find the defendant guilty . . . unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt." State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991) [discussed in footnote 8, Wis JI-Criminal 1294].

6. "Criminal gang member" is defined in § 939.22(9g) as "any person who participates in criminal gang activity, as defined in s. 941.38(1)(b), with a criminal gang." A definition combining these statutes might read as follows:

> "Criminal gang member" means a person who commits, attempts to commit, or solicits another to commit one or more of the following crimes, committed for the benefit of, at the direction of or in association with any criminal gang, with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members: (specify crime or crimes listed in § 941.38(1)(b) .

The Committee concluded that separately defining "criminal gang member" in the instruction was unnecessary, since the "gang members" being referred to are those the defendant allegedly intended to assist, etc. The jury is likely to have a common understanding of "gang member" that is not helped by the elucidation attempted in the statutes. To the extent there is a difference, the common understanding is probably more limited, and thus to the defendant's advantage, than the statutory definition. The latter does not appear to require that the persons be "members" of a gang in the common meaning of the term; it is sufficient that they be involved in crimes intended to benefit a gang.

990 USING OR POSSESSING A DANGEROUS WEAPON — § 939.63

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint)[1] alleges not only that the defendant committed the crime of _____ but also that the defendant did so while (using) (threatening to use) (possessing) a dangerous weapon.

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

"Did the defendant commit the crime of _____ while (using) (threatening to use) (possessing)[2] a dangerous weapon?"

"Dangerous weapon" means[3]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.][4]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant committed the crime while [(using) (threatening to use) a dangerous

weapon.] [possessing a dangerous weapon and possessed the dangerous weapon to facilitate the crime.][5]

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 990 was originally published in 1980 and revised in 1990, 1994, 1996, 1997, and 2003. This revision made editorial corrections in the Comment and footnote 3.

See Wis JI-Criminal 910 for a complete definition of "dangerous weapon" and discussion of relevant case law.

Section 939.63 was revised by 2001 Wisconsin Act 109 [effective date: February 1, 2003]. The basic penalty-enhancing provision was retained, but subs. (2) and (3), which provided for a "presumptive minimum sentence," were repealed. After revision, § 939.63(1) provides for the following increased penalties if a person commits a crime specified under chapters 939 to 951 and 961 while possessing, using, or threatening to use a dangerous weapon.

(a) The maximum term of imprisonment for a misdemeanor may be increased by not more than 6 months.
(b) If the maximum term of imprisonment for a felony is more than 5 years or is a life term, the maximum term of imprisonment for the felony may be increased by not more than 5 years. [This applies to felonies in Classes A through H.]
(c) If the maximum term of imprisonment for a felony is more than 2 years, but not more than 5 years, the maximum term of imprisonment for the felony may be increased by not more than 4 years. [There are no classified felonies with a maximum of more than 2 years, but not more than 5 years.]
(d) The maximum term of imprisonment for a felony not specified in par. (b) or (c) may be increased by not more than 3 years. [This applies to Class I felonies, which have a maximum term of imprisonment of 3 years and 6 months.]

Section 973.01(2)(c), as created by 2001 Wisconsin Act 109, specifies the order in which penalty enhancement statutes are to be applied, including § 939.63.

The increased penalty provided by this statute does not apply if possessing, using, or threatening to use a dangerous weapon is an essential element of the crime charged. Section 939.63(2). In State v. Robinson, 140 Wis.2d 673, 412 N.W.2d 535 (Ct. App. 1987), the court of appeals held that the "possessing a dangerous weapon" penalty enhancer found in § 939.63 can be applied to the offense of (unarmed) robbery under § 943.32(1). Apparently, confusion on the part on the victim about exactly when Robinson pulled out the gun led the prosecutor to elect this charging scheme instead of simply charging armed robbery. The court found no ambiguity in the statute: § 939.63(1)(b), 1987 Wis. Stats., provides that the dangerous weapon penalty increase applies as long as possessing or using a weapon is not an essential element of the crime charged. This does not result in any conflict with the definition of armed robbery, because the two statutes apply to different conduct. Armed robbery requires using or threatening to use the dangerous weapon. Section 939.63 is violated if a person merely possesses a dangerous weapon during a crime.

Applying § 939.63 to a misdemeanor does not change the misdemeanor to a felony, and no preliminary examination is required. State v. Denter, 121 Wis.2d 118, 357 N.W.2d 555 (1984).

The Committee recommends that the "use of a dangerous weapon" issue be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).
>
> We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

> "Did the defendant commit the crime of _____ while (possessing) (using) (threatening to use) a dangerous weapon?"

When the provision in § 939.63 is invoked, it is not only a penalty enhancer, it is also an element of the crime charged. State v. Villarreal, 153 Wis.2d 323, 329, 450 N.W.2d 519 (Ct. App. 1989), citing State v. Carrington, 130 Wis.2d 212, 222, 386 N.W.2d 512 (Ct. App. 1986), reversed on other grounds, 134 Wis.2d 260, 397 N.W.2d 484 (1986). The Wisconsin Supreme Court confirmed that the "use of a dangerous weapon" provision, when charged, becomes an element of the crime. State v. Peete, 185 Wis.2d 4, 517 N.W.2d 149 (1994). See note 3, below. However, this is not inconsistent with submitting use of a dangerous weapon as a special question as recommended in this instruction. "The procedure suggested by the committee merely provides a convenient and efficient means of determining whether the accused has committed only the underlying crime or the greater crime with the added element." Villarreal, 153 Wis.2d 323 at 330.

The Villarreal court also noted that it "had no disagreement with" the suggestion made in the comment of the 1980 version of this instruction that the parties could agree to have the judge rather than the jury decide the use of a weapon issue. However, the court noted that if that approach is taken, there must be a personal waiver by the defendant of the right to a jury trial on the use of a weapon element.

1. The prosecutor's intention to seek the enhanced penalty authorized by § 939.63 should be disclosed by alleging the use of a weapon in the information or complaint. Section 939.63 may not be applied to any offense which has as an element the use or possession of a dangerous weapon.

2. See Wis JI-Criminal 920 for a definition of "possession."

3. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in § 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

4. A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, ¶62.

Wis JI-Criminal 990 was revised after Tomlinson to include all the statutory alternatives in the text of the instruction. Using the alternative involved in that case would result in the following:

> "Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

> The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

5. This alternative is intended to reflect the decision in State v. Peete, 185 Wis.2d 4, 517 N.W.2d 149 (1994), where the Wisconsin Supreme Court held that a "nexus" must be established between the predicate offense and the "possession" of a dangerous weapon before the penalty enhancer in § 939.63 can apply. Further, the jury must be instructed on the nexus.

Police executed a search warrant at the home of Peete's girlfriend. They found cocaine, cash, a beeper, and Peete's clothes in one of the bedrooms. A loaded handgun was found stuffed between the mattresses in that bedroom. Three other handguns were found in a cereal box in the kitchen pantry. Peete was charged with possession of cocaine with intent to deliver while possessing a dangerous weapon. He was convicted and appealed.

The court first held that "possession" includes "constructive possession" and cited the definition in Wis JI-Criminal 920 with approval.

The court also held that § 939.63 is intended to apply only where there is a relationship or "nexus" between the weapon and the substantive crime. Further, the jury must be instructed on this requirement. The court adopted a definition offered by the state:

> when a defendant is charged with committing a crime while possessing a dangerous weapon . . . the state should be required to prove that the defendant possessed the weapon to facilitate commission of the predicate offense.

185 Wis.2d 4, 18.

The court held that the "nexus" is always present where the offense involves using or threatening to use a weapon. Further definition is need only in "possessing" cases.

Peete did not offer a general definition of "facilitate." If one is desired, the Committee believes something like the following would be correct:

Possession of a dangerous weapon facilitates the commission of a crime when the possession is with the intent to use the weapon if the need arises, for example, to protect the defendant, to protect contraband, or to make an escape possible.

Possession does not facilitate a crime if it is accidental, coincidental or entirely unrelated to the crime.

This is based on examples offered in the Peete decision. See 185 Wis.2d 4, 18. Also see Smith v. United States, 110 S. Ct. 2050 (1993), interpreting 18 U.S.C. § 924, a federal statute similar to § 939.63.

In State v. Howard, 211 Wis.2d 269, 564 N.W.2d 753 (1997), the Wisconsin Supreme Court extended the nexus requirement to a case where the gun was in the personal possession of a person arrested for delivery of cocaine. The court held that the jury must still make a factual finding that the defendant possessed the gun to facilitate the crime. The court also held that the Peete requirement applied retroactively.

The Peete requirement was interpreted in State v. Page, 2000 WI App. 267, ¶13,240 Wis.2d 276, 622 N.W.2d 285:

> Under the correct reading of Peete, if the evidence is such that a reasonable jury may find beyond a reasonable doubt that the defendant possessed a dangerous weapon in order to use it or threaten to use it should that become necessary, the evidence is sufficient under § 939.63 even if the defendant did not actually use or threaten to use the weapon in the commission of the crime.

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992 VIOLENT CRIME IN A SCHOOL ZONE — § 939.632

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of (name violent crime) [1] but also that the defendant committed that crime in a school zone.

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

"Did the defendant commit the crime of (name violent crime) in a school zone?"

"School zone" means[2]

[(on) (within 1,000 feet from) the premises of a school.]

[on a school bus[3] or public transportation transporting students to and from a public, private, or tribal school.[4]]

[at school bus[5] stops where students are waiting for a school bus or are being dropped off by a school bus.]

["School" means a public, parochial, private, or tribal school[6] that provides an educational program for one or more grades between grades 1 and 12 and that is commonly known as an elementary school, middle school, junior high school, senior high school or high school.[7] "School premises" means any school building, grounds, recreation area or athletic field or any other property owned, used or operated for school administration.[8]]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of (name violent crime) in a school zone, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 992 was originally published in 1995 and revised in 2003 and 2008. This revision was approved by the Committee in February 2012; it involved adding reference to "tribal school" to the text and updating the comment.

Section 939.632 was not affected by 2001 Wisconsin Act 109, which repealed several penalty-enhancing provisions.

Section 939.632 was created by 1995 Wisconsin Act 22 (effective date July 14, 1995). It provides for the following increase in penalties if a person commits one of numerous specified "violent crimes" in a school zone:

B if the violent crime is a felony, the maximum term of imprisonment is increased by 5 years.

B if the violent crime is a misdemeanor, the maximum term of imprisonment is increased by 3 months, and the place of imprisonment is specified as the county jail.

The statute specifies that "the court shall direct that the trier of fact find a special verdict as to" whether the violent crime was committed in a school zone. See § 939.632(4).

The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information)(complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant commit the crime of _____ in a school zone?"

The constitutionality of § 939.632 was challenged in State v. Quintana, 2008 WI 33, 308 Wis.2d 615, 748 N.W.2d 447 [affirming 2007 WI App 29, 299 Wis.2d 234, 729 N.W.2d 776] by a defendant who lived within 1,000 feet of school and was charged with the enhanced penalties in connection with crimes committed in his home. The court held that § 939.632 was constitutional as applied to Quintana because the 1,000 foot perimeter is a reasonable distance to accomplish the legislative goal of deterring violent crime near schools. ¶2.

A similar provision increases the penalty for delivering a controlled substance while on or within 1,000 feet of school (and certain other designated) premises. See § 961.49 and Wis JI-Criminal 6004.

1. The "violent crimes" to which § 939.632 applies are listed in subsection (1)(e).

2. The alternatives provided are given as definitions of "school zone" in subsec. (1)(d)1. through 3m. of § 939.632.

3. "School bus" is defined in § 340.01(56); the definition applies to this offense, see § 939.632(1)(b).

4. "Tribal school" is defined in § 115.001(15m).

5. See note 3, supra.

6. "Tribal school" is defined in § 115.001(15m).

7. This is the definition provided in § 939.632(1)(a).

8. This is the definition provided in § 939.632(1)(c).

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993 WEARING A BULLETPROOF GARMENT — § 939.64

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information[1] alleges not only that the defendant committed the crime of _____ but also that the defendant did so while wearing a bulletproof garment.

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

"Did the defendant commit the crime of _____ while wearing a bulletproof garment?"

"Bulletproof garment" means a vest or other garment designed, redesigned, or adapted to prevent bullets from penetrating through the garment.[2]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of _____ while wearing a bulletproof garment, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 993 was originally published in 1998. This revision was approved by the Committee in February 2003.

Section 939.64 was repealed by 2001 Wisconsin Act 109, effective February 1, 2003. This instruction is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by § 939.64 have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(3)(d).

Section 939.64 was created by 1983 Wisconsin Act 478. It provides for a penalty increase of up to ten years if a person commits a felony while wearing a bulletproof garment. 1995 Wisconsin Act 340 amended the statute by increasing the penalty enhancement from 5 to 10 years. (Effective date: June 1, 1996.)

As with similar provisions that increase the maximum penalty for a criminal offense, the Committee concluded that the penalty-increasing facts should be submitted to the jury as a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant commit the crime of _____ while wearing a bulletproof garment?"

1. Section 939.64 applies only to felonies. See § 939.64(2).

2. This is the definition provided in § 939.64(1).

994 CONCEALING IDENTITY — § 939.641

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of _____ but also that he did so while his appearance was (concealed) (disguised) (altered)[1] with the intent to make it less likely that he would be identified with that crime.

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

"Did the defendant commit the crime of _____ while (concealing) (disguising) (altering) his identity with intent to make it less likely that he would be identified with that crime?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that both of the following facts were established:

First, that the defendant's appearance was (concealed) (disguised) (altered) at the time that he committed the crime of _____; and

Second, that the defendant so (concealed) (disguised) (altered) his appearance with the intent to make it less likely that he would be identified with the crime of _____. This means that he must have had the purpose to make it less likely that he would be identified with the crime of _____.[2] You cannot look into the mind of the

defendant to find intent. Rather you must find it, if you find it at all, from acts and words and statements bearing on such intent.

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of _____ while his appearance was (concealed) (disguised) (altered) and that he so (concealed) (disguised) (altered) his appearance with the intent to make it less likely that he would be identified with the crime of _____, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 994 is Wis JI-Criminal 1805 (© 1981) renumbered. Wis JI-Criminal 1805 was originally published in 1974; it was revised in 1979 and 1981. It was republished as Wis JI-Criminal 994 in 1986 and revised in 1990. This revision was approved by the Committee in February 2003.

Section 939.641 was repealed by 2001 Wisconsin Act 109, effective February 1, 2003. This instruction is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by § 939.641 have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(3)(a).

The renumbering of the instruction in 1986 followed the renumbering of the statute from § 946.62 to § 939.641 by 1985 Wisconsin Act 104 (effective date: November 28, 1985). The renumbering of the statute clarifies the status of "concealing identity" by placing it in the section of the Criminal Code that contains other penalty-increasing factors like using a weapon (' 939.63) and using a bulletproof garment (' 939.64).

This statutory change concluded the process of clarifying the status of "concealing identity" as a factor that increases the penalty for the underlying crime as opposed to constituting a separate criminal offense. The 1974 and 1979 versions of Wis JI-Criminal 1805 characterized concealing identity as a separate offense, upon conviction for which the defendant could have received a consecutive or concurrent sentence. This characterization was no longer correct in light of the decision of the Wisconsin Supreme Court in Robinson v. State, 102 Wis.2d 343, 306 N.W.2d 668 (1981), which held that concealing identity may not be charged as a separate crime or be punished by imposing a separate sentence. The 1981 version of Wis JI-Criminal 1805 reflected the court's conclusion in Robinson.

The Committee recommends that facts which increase the range of penalties be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____ , under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant commit the crime of _____ while (concealing) (disguising) (altering) his identity with intent to make it less likely that he would be identified with that crime?"

1. While the usual method of disguise is the wearing of a mask, the section is broad enough to cover the use of other means of concealing, disguising, or altering one's usual appearance to make it less likely to be identified with a crime. See Vol. V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 197 (February 1953).

The Committee concluded that the terms "concealed, disguised, and altered" are used in § 946.62 as synonyms, not to describe conceptually distinct acts. In instructing the jury, the word should be selected which most accurately describes the defendant's alleged conduct. If it is necessary to use more than one term in the instruction, the Committee concluded that the jury need not be instructed that they must unanimously agree on which term applies.

One may be found guilty, as a party to the crime, of committing a crime with identity concealed when he himself was not masked during the commission of the crime. Schroeder v. State, 96 Wis.2d 1, 291 N.W.2d 460 (1980).

2. "With intent to" is defined in § 939.23(4). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one part of the definition. It is the other alternative that changed from "believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

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996 SELECTING THE PERSON AGAINST WHOM A CRIME IS COMMITTED BECAUSE OF RACE, RELIGION, ETC. — § 939.645

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of _____[1] but also that he intentionally selected the person against whom the crime was committed in whole or in part because of the defendant's belief or perception regarding the race[2] of that person.

If you find the defendant guilty, you must answer the following question:[3]

"Did the defendant intentionally select the person against whom the crime of _____ was committed because of the race of that person?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant intentionally[4] selected (name of victim) as the victim of the crime of _____ in whole or in part because of the defendant's belief or perception regarding (name of victim) 's race, whether or not that belief or perception was correct.[5]

If you are satisfied beyond a reasonable doubt that the defendant intentionally selected (name of victim) as the person against whom the crime of _____ was committed because of his belief or perception regarding the race of (name of victim) , you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 996 was originally published in September 1988 and revised in 1990. It was withdrawn in June 1992 and republished in 1993. This revision was approved by the Committee in February 2003 and involved adding reference to 2001 Wisconsin Act 109 to the comment.

Section 939.645 was retained as a "penalty enhancer" by 2001 Wisconsin Act 109.

This instruction is drafted for the enhancement of penalty provided by § 939.645, Penalty; Crimes Committed Against Certain People or Property. The statute was created by 1987 Wisconsin Act 348, effective date: May 3, 1988. Wis JI-Criminal 996 is drafted for cases involving a crime against the person; Wis JI-Criminal 996A is drafted for cases where the crime is against property. The penalty increase depends on the ordinary penalty for the underlying crime:

- If the penalty for the underlying crime is less than that of a Class A misdemeanor, the revised maximum fine is $10,000 and the maximum term of imprisonment is one year in the county jail.

- If the penalty is ordinarily a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum term of imprisonment is 2 years. NOTE: This changes the status of the crime to a felony.

- If the crime is ordinarily a felony (of any class) the maximum fine may be increased by not more than $5,000 and the maximum term of imprisonment may be increased by not more than 5 years.

Section 939.645(2).

The penalty enhancement does not apply to a crime which already requires proof of the victim's race, etc. § 939.645(4). See, for example, § 943.012, Criminal Damage to Religious and Other Property, also created by 1987 Wisconsin Act 348, and addressed by Wis JI-Criminal 1401A, 1401B, and 1401C.

A brief history of the "hate crimes" statute and its review in the courts follows note 5.

The penalty enhancement under § 939.645 should be alleged in the complaint and information along with the underlying crime. Section 939.645(3) expressly provides that "the court shall direct that the trier of fact find a special verdict as to . . . [the penalty enhancement issue]." This comports with the Committee's usual recommendation that facts which increase the range of penalties be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> "Did the defendant intentionally select the person against whom the crime of _____ was committed because of the race of that person?"

1. Section 939.645 applies only to crimes "under chs. 939 to 948." § 939.645(1)(a).

2. The penalty enhancement provided by § 939.645 applies not only to victims selected because of race but also to victims selected because of "religion, color, disability, sexual orientation, national origin, or ancestry." § 939.645(1)(b). The references to "race" in the instruction must be changed to refer to the appropriate term if one of the other bases for selection is involved.

3. Section 939.645(3) requires the use of a special verdict. See the Comment preceding note 1, supra.

4. Although § 939.645(1)(b) uses the word "intentionally," it apparently does not have its usual meaning. See § 939.23(3). First, the statute's provision that the actor select the victim "in whole or in part" because of status seems to be a lesser standard than the typical "mental purpose" requirement. Second, the context of this offense makes it unlikely that the "aware that his or her conduct is practically certain to cause that result" alternative is likely to apply. Third, the general rule that "intentionally" carries with it a knowledge requirement appears to be superseded by the 1992 amendment of the statute which made "belief or perception" of the victim's status sufficient.

5. The phrase "in whole or in part because of the actor's belief or perception regarding the race . . . whether or not the actor's belief or perception was correct," was added to the statute by 1991 Wisconsin Act 291, effective date: May 14, 1992.

History of the Wisconsin "Hate Crimes" Statute

Section 939.645 was created by 1987 Wisconsin Act 348, effective date: May 3, 1988. It was amended by 1991 Wisconsin Act 291. (See note 5, above.)

The instructions for this offense were originally published in 1988 but were withdrawn in 1992 when the Wisconsin Supreme Court found that the statute was unconstitutional. The instructions were restored in 1993 after the United States Supreme Court reversed the Wisconsin decision.

In State v. Mitchell, 169 Wis.2d 153, 485 N.W.2d 807 (1992), the Wisconsin Supreme Court concluded that § 939.645 unconstitutionally infringed upon free speech by punishing thought rather than conduct. The court focused on the statute's phrasing: "intentionally selects the [victim] . . . because of . . . race. . . .":

> Without doubt the hate crimes statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of the defendant's selection, the reason the defendant selected the victim, the motive behind the selection. . . .
>
> While the statute does not specifically phrase the "because of . . . race, religion, color, [etc.]" element in terms of bias or prejudice, it is clear from the history of anti-bias statutes, detailed above, that sec. 939.645, Stats., is expressly aimed at the bigoted bias of the actor. Merely because the statute refers in a literal sense to the intentional "conduct" of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law – punishment of offensive motive or thought.

> . . . . A statute specifically designed to punish personal prejudice impermissibly infringes upon an individual's First Amendment rights, no matter how carefully or cleverly one words the statute. The hate crimes statute enhances the punishment of bigoted criminals because they are bigoted. The statute is directed solely at the subjective motivation of the actor – his or her prejudice. Punishment of one's thought, however repugnant the thought, is unconstitutional.

169 Wis.2d 153, 167, 170

The court indicated that its decision was supported by the decision of the United States Supreme Court in R.A.V. v. City of St. Paul, 112 S.Ct. 2538 (1992), which was decided one day before the decision in Mitchell. R.A.V. involved a different approach to the "hate crimes" issue in that the ordinance in question attempted to punish directly speech or other expressive conduct motivated by racial or other discriminatory prejudice: "The ideological context of the thought targeted by the [Wisconsin] hate crimes statute is identical to that targeted by the St. Paul ordinance – racial or other discriminatory animus. And, like the United States Supreme Court, we conclude that the legislature may not single out and punish that ideological content." State v. Mitchell, 169 Wis.2d 153, 172.

The United States Supreme Court reversed in Wisconsin v. Mitchell, 113 S.Ct. 2194, decided June 11, 1993. Chief Justice Rehnquist, writing for a unanimous court, held that the Wisconsin version of a "hate crime" statute did not violate First Amendment protections. Although it allows more severe punishment if a victim is selected because of a particular status, the court found this was no different from the standard practice which allows judges to consider a variety of factors in deciding on the sentence to be imposed:

> Mitchell argues that the Wisconsin penalty-enhancement statute is invalid because it punishes the defendant's discriminatory motive, or reason, for acting. But motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge.

The court distinguished the decision in R.A.V., saying that it involved a law aimed at the content of certain communications deemed to be offensive. Mitchell, on the other hand, involves a statute aimed at conduct. Further, said the court,

> . . . the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its amici, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. . . . The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases.

The court also rejected Mitchell's claim that the statute was overbroad, dismissing it as "too speculative." And, the court disagreed with the Wisconsin Supreme Court's conclusion regarding the evidentiary use of speech:

> The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like.

996A SELECTING PROPERTY DAMAGED BECAUSE OF THE RACE, RELIGION, ETC., OF THE OWNER — § 939.645

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of _____[1] but also that he intentionally selected the property damaged[2] by the crime in whole or in part because of the defendant's belief or perception regarding the race[3] of the owner[4] of that property.

If you find the defendant guilty, you must answer the following question:[5]

"Did the defendant intentionally select the property damaged by the crime of _____ because of the race of the owner of that property?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant intentionally[6] selected the property damaged by the crime of _____ in whole or in part because of the defendant's belief or perception regarding the race of the owner of that property, whether or not that belief or perception was correct.[7]

If you are satisfied beyond a reasonable doubt that the defendant intentionally selected the property damaged by the crime of _____ because of his belief or perception regarding the race of the owner of that property, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 996.1 was originally published in September 1988 and revised in 1990. It was withdrawn in June 1992 and republished in 1993. This revision was approved by the Committee in February 2003 when it was renumbered as Wis JI-Criminal 996A. The 2003 revision also added reference to 2001 Wisconsin Act 109 to the comment.

Section 939.645 was retained as a "penalty enhancer" by 2001 Wisconsin Act 109.

This instruction is drafted for the enhancement of penalty provided by § 939.645, Penalty; Crimes Committed Against Certain People or Property. The statute was created by 1987 Wisconsin Act 348, effective date: May 3, 1988. Wis JI-Criminal 996A is drafted for cases involving crimes against property; Wis JI-Criminal 996 is drafted for cases involving crimes against the person.

A brief history of § 939.645 follows note 5, Wis JI-Criminal 996.

The penalty increases depend on the original penalty for the underlying offense. See Comment to Wis JI-Criminal 996.

The penalty enhancement under § 939.645 should be alleged in the complaint and information along with the underlying crime. Section 939.645(3) expressly provides that "the court shall direct that the trier of fact find a special verdict as to . . . [the penalty enhancement issue]." This comports with the Committee's usual recommendation that facts which increase the range of penalties be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of _____ , under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> "Did the defendant intentionally select the property damaged by the crime of _____ because of the race of the owner of that property?"

1. Section 939.645 applies only to crimes "under chs. 939 to 948." § 939.645(1)(a).

2. The statute refers to "property which is damaged or otherwise affected by the crime." § 939.645(1)(b).

3. The penalty enhancement provided by § 939.645 applies not only to victims selected because of race but also to victims selected because of "religion, color, disability, sexual orientation, national origin, or ancestry." § 939.645(1)(b). The references to "race" in the instruction must be changed to refer to the appropriate term if one of the other bases for selection is involved.

4. The statute refers to "the owner or occupant of that property." § 939.645(1)(b).

5. Section 939.645(3) requires the use of a special verdict. See the Comment preceding note 1, supra.

6. Although § 939.645(1)(b) uses the word "intentionally," it apparently does not have its usual meaning. See note 4, Wis JI-Criminal 996.

7. The phrase "in whole or in part because of the actor's belief or perception regarding the race . . . whether or not the actor's belief or perception was correct," was added to the statute by 1991 Wisconsin Act 291, effective date: May 14, 1992.

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997 ELDER PERSON VICTIMS — § 939.623

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of (specify crime for which imprisonment may be imposed) but also that the defendant committed that crime against an elder person.

["Elder person" means any individual who is 60 years of age or older.][1]

If you find the defendant guilty of (specify crime for which imprisonment may be imposed), you must answer the following question:

"Did the defendant commit the crime of (specify crime for which imprisonment may be imposed) against a person who was 60 years of age or older?"[2]

Knowledge of the victim's age is not required and mistake about the victim's age is not a defense.[3]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of (specify crime for which imprisonment may be imposed) against a person who was 60 years of age or older, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 997 was approved by the Committee in December 2021.

Section 939.623 was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021]. § 939.623 allows a sentencing court to increase the maximum term of imprisonment prescribed by law if the defendant is convicted of a crime for which imprisonment may be imposed, and the crime victim is an elder person.

For "violent felony" offenses committed against an individual 62 years of age or older before February 1, 2003, see Wis JI-Criminal 998.

The maximum term of imprisonment for any crime for which imprisonment may be imposed may increased as follows if the victim is an elder person:

(a) A maximum term of imprisonment of one year or less may be increased to not more than 2 years.
(b) A maximum term of imprisonment of more than one year but not more than 10 years may be increased by not more than 4 years.
(c) A maximum term of imprisonment of more than 10 years may be increased by not more than 6 years.

1. This definition of "elder person" is the one provided in § 939.623.

2. Strictly following the statutory format would mean first stating the term "elder person" and then providing the definition: one who is 60 years of age or older. The Committee concluded that it was more direct simply to ask: Was the victim 60 years of age or older?

3. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (3) of § 939.623 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to an increased penalty under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

998 VIOLENT CRIME AGAINST AN ELDER PERSON — § 939.647

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of (name violent felony) [1] but also that the defendant committed that crime against an elder person.

If you find the defendant guilty of (name violent felony) , you must answer the following question:

"Did the defendant commit the crime of (name violent felony) against a person who was 62 years of age or older?"[2]

Knowledge of the victim's age is not required and mistake about the victim's age is not a defense.[3]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of (name violent felony) against a person who was 62 years of age or older, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 998 was originally published in 1999. This revision was approved by the Committee in February 2003.

Section 939.647 was repealed by 2001 Wisconsin Act 109, effective February 1, 2003. This instruction is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by § 939.647 have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(5).

Section 939.647 was created by 1997 Wisconsin Act 266 (effective date June 25, 1998). It provides for a five-year increase in the maximum penalty if a person commits a specified "violent felony" against an elder person. (See footnote 1 for the list of specified felonies.)

The statute provides that "the court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (2)." See § 939.647(4). Sub. (2) apparently specifies two issues: that the defendant committed a violent felony and that the victim is an elder person. Since this instruction would only be considered by the jury if they found the defendant guilty of one of the specified violent felonies, the Committee concluded that only the victim's status as an elder person need be submitted to the jury in a special question.

The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant commit the crime of _____ against person who was 62 years of age or older?"

1. The "violent felonies" to which § 939.647 applies are listed in subsection (1)(b) and include the following:

- battery under § 940.19(2), (3), (4), (5), or (6);

- first, second or third degree sexual assault under § 940.225(1), (2), or (3);

- first or second degree reckless injury under § 940.23; and

- robbery under § 943.32.

2. Strictly following the statutory format would mean first stating the term "elder person" and then providing the definition: one who is 62 years of age or older. The Committee concluded that it was more direct simply to ask: Was the victim 62 years of age or older?

3. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (3) of § 939.647 provides a similar rule for this offense: "Subsection (2) applies even if the person mistakenly believed that the victim had not attained the age of 62 years." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

999 MINOR PASSENGER IN THE VEHICLE — §§ 346.65(2)(f)2., 346.65(2j)(d), 346.65(3m), 940.09(1b), and 940.25(1b)

CAUTION: THIS INSTRUCTION IS TO BE USED FOR CHARGES UNDER § 940.09(1b) AND § 940.25(1b) ONLY WHEN THE OFFENSES OCCURRED BEFORE FEBRUARY 1, 2003. IT IS TO BE USED FOR CHARGES UNDER § 346.65(2)(f)2., § 346.65(2j)(d), AND § 346.65(3m) REGARDLESS OF THE DATE THE OFFENSE OCCURRED.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the offense of (specify the offense charged) but also that there was a passenger under 16 years of age in the motor vehicle at the time.

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

"Was there a passenger under 16 years of age in the motor vehicle at the time?

If you are satisfied beyond a reasonable doubt that there was a passenger under 16 years of age in the motor vehicle at the time, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 999 was originally published in 1996 and revised in 1999 and 2003. This revision added to the "caution." This revision made changes in the Comment and was approved by the Committee in June 2010.

Sections 940.09(1b) and 940.25(1b) were repealed by 2001 Wisconsin Act 109 (effective date: February 1, 2003). This instruction is to be used for charges under these statutes only when based on conduct occurring before February 1, 2003. The substance of the repealed statutes was recreated as an aggravating factor to be considered at sentencing. See § 973.017(7). The motor vehicle code provisions were not affected by Act 109.

2009 Wisconsin Act 100 created § 346.65(2)(f)1. which makes a first OWI offense a crime if there was a minor passenger under 16 years of age in the vehicle. A separate instruction has been drafted for that offense. See Wis JI-Criminal 2663D.

1995 Wisconsin Act 425 (effective date June 21, 1996), created several statutes that double the maximum penalty for operating while intoxicated offenses that occur while a child under the age of 16 is a passenger in the defendant's vehicle. 1997 Wisconsin Act 295 amended two of these penalty provisions – §§ 940.09(1b) and 940.25(b) – to apply when there is an unborn child in the vehicle. [Effective date: July 1, 1998.] See Wis JI-Criminal 999A.

The penalty provisions are found in the following statute sections:

§ 346.65(2)(f) - applicable to violations of § 346.63(1), operating under the influence or with a prohibited alcohol concentration

§ 346.65(2j)(d) - applicable to violations of § 346.63(5), involving offenses by a person holding a commercial operator's license

§ 346.65(3m) - applicable to violations of § 346.63(2) and (6), involving causing of injury by regular and commercial operators

§ 940.09(1b) - applicable to violations of § 940.09, homicide by intoxicated use of a vehicle
[Repealed by 2001 Wisconsin Act 109.]

§ 940.25(1b) - applicable to violations of § 940.25, injury [great bodily harm] by intoxicated use of a vehicle
[Repealed by 2001 Wisconsin Act 109.]

As with similar provisions that expand the maximum penalty for a criminal offense, the Committee concluded that this penalty-increasing factor should be submitted to the jury as a special question.

The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____ under Wis. Stat. § ____ at the time and place charged in the (information) (complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Was there a passenger under 16 years of age in the motor vehicle at the time?"

The instruction, and the suggested verdict, depart from the text of the statute in two respects. First, the statute refers to "minor passenger under 16 years of age." The instruction does not include "minor" because all passengers under age 16 are "minors." Second, the statute refers to the minor or unborn child being in the vehicle "at the time of the violation that gave rise to the conviction." The instruction drops "of the violation that gave rise to the conviction" to simplify the instruction and to avoid confusion that might result from referring to a "conviction." Literally speaking, the conviction does not occur until after the verdict is received.

999A UNBORN CHILD IN THE VEHICLE — §§ 940.09(1b) and 940.25(1b)

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information alleges not only that the defendant committed the offense of (specify the offense charged) but also that there was an unborn child in the motor vehicle at the time.

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

"Was there an unborn child in the motor vehicle at the time?

"Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.[1]

If you are satisfied beyond a reasonable doubt that there was unborn child in the motor vehicle at the time, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 999A was approved by the Committee in March 1999.

Sections 940.09(1b) and 940.25(1b) were repealed by 2001 Wisconsin Act 109, effective February 1, 2003. This instruction is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by §§ 940.09(1b) and 940.25(1b) have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(7).

1995 Wisconsin Act 425 (effective date June 21, 1996), created several statutes that double the maximum penalty for operating while intoxicated offenses that occur while a child under the age of 16 is a passenger in the defendant's vehicle. [See Wis JI-Criminal 999.] 1997 Wisconsin Act 295 amended two of those penalty provisions – §§ 940.09(1b) and 940.25(1b) – to apply when there is unborn child in the vehicle. [Effective date: July 1, 1998.]

Section 940.09(1b) is applicable to violations of § 940.09, Homicide by intoxicated use of a vehicle; section 940.25(1b) is applicable to violations of § 940.25, Injury [great bodily harm] by intoxicated use of a vehicle. Both of those statutes were amended by 1997 Wisconsin Act 295 to apply to causing the death of (§ 940.09) or great bodily harm to (§ 940.25) an unborn child. The penalty provisions addressed by this instruction apply to violations of those two statutes where the death of or great bodily harm to another person is caused when an unborn child is in the motor vehicle.

NOTE: The 1997-98 Wisconsin Statutes do not reflect the change made in § 940.25(1b) by 1997 Wisconsin Act 295 to include "unborn child." This was an inadvertent omission made in the course of preparing the printed statutes. The original act controls; see § 990.07. Therefore this instruction was drafted to apply to § 940.25(1b) as well as to § 940.09(1b).

As with similar provisions that expand the maximum penalty for a criminal offense, the Committee concluded that this penalty-increasing factor should be submitted to the jury as a special question.

The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____under Wis. Stat. § _____ at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Was there an unborn child in the motor vehicle at the time?"

1. This is the definition provided in § 939.75(1).

OFFICE OF JUDICIAL EDUCATION
1/2024

WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME II

Wisconsin Criminal Jury Instructions Committee

[Cite as Wis JI-Criminal]

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

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1000 INTRODUCTORY COMMENT: WISCONSIN'S NEW HOMICIDE LAW

[WITHDRAWN]

COMMENT

Wis JI-Criminal 1000, Introductory Comment: Wisconsin's New Homicide Law, was originally published in 1989. Its withdrawal was approved by the Committee in August 2005.

This Introductory Comment was published to identify and explain the substantial changes made to the Wisconsin law of homicide by 1987 Wisconsin Act 399. It outlined those changes and included as appendices copies of the new statutes and a copy of the original bill that included Judicial Council Notes explaining the changes.

Because the "new" homicide law has been in effect for over 15 years, the Committee concluded that the Introductory Comment was no longer needed. Further, with one exception, the information it contained is available from other sources. The Judicial Council Notes to the original bill [1987 Senate Bill 191] are provided as annotations in the Wisconsin Statutes, following each statute affected by the homicide revision. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review1325. The single item not generally accessible is the Prefatory Note to 1987 Senate Bill 191 and it is preserved below.

All case law interpreting the homicide statutes is included in the Comment to the relevant instructions.

In 1982, the Wisconsin Judicial Council created a committee to analyze Wisconsin's law of homicide and to draft a bill that would make the necessary clarifications. A bill introduced as 1985 Senate Bill 279 failed to pass and was reintroduced as 1987 Senate Bill 191. The provisions of that bill were incorporated into the budget bill and were passed as part of 1987 Wisconsin Act 399. A delayed effective date was adopted: the homicide changes would apply to offenses committed on or after January 1, 1989. The following is the "Prefatory Note" to 1987 Senate Bill 191; it provides information regarding the background of the homicide revision and summarizes the major provisions.

1987 SENATE BILL 191

PREFATORY NOTE: This bill contains the recommendations of the judicial council committee on homicide and lesser included offenses, the members of which are listed in the last paragraph of this NOTE. That committee held 11 meetings between September 1982 and May 1983, minutes of which are available from the judicial council. The committee concluded that:

(1) Wisconsin's homicide statutes contain antiquated legalistic terminology which obscures the actual elements of these offenses.

(2) The differences between various homicide offenses are statutorily expressed in misleading terms, which results in inappropriate charging.

(3) The relevancy of intoxication to crimes based on criminal recklessness is not statutorily defined, which has produced conflicting judicial interpretations of the recklessness offenses.

(4) The statutory mental elements of the homicide offenses are also used in crimes of injury and endangering safety, where they cause many of the same problems as in the homicide area.

(5) The felony murder statute is of minimal usefulness because it does not permit enhanced punishment for causing death in the commission of a Class B felony.

(6) The penalties for certain crimes resulting in death, injury or endangering safety do not reflect differences in the culpable mental elements or the seriousness of the results or both.

The committee therefore recommended, and this bill provides, that the most serious homicide offenses be divided into intentional and reckless categories, with 2 degrees of each, corresponding to present first-degree murder, manslaughter, 2nd-degree murder and homicide by reckless conduct. The revised codification preserves the traditional elements of each offense but modernizes terminology.

The bill conforms the definition of "intent to kill" to the uniform definition of criminal intent. It also creates a uniform definition of "criminal recklessness", requiring both the creation of an objectively substantial and unreasonable risk of death or serious injury, and the actor's subjective awareness of that risk. However, voluntary intoxication is not a defense if the actor, had he or she been sober, would have had such an awareness. The bill creates a uniform definition of criminal negligence, requiring the creation of a substantial and unreasonable risk of death or serious injury, of which the actor should be aware.

The bill increases the penalty for the offense now known as manslaughter from a Class C to a Class B felony and abolishes the legal fiction, that it is not an intentional homicide. Thus, persons convicted of this offense would be barred from benefitting from the victim's estate under chapter 228, laws of 1981. The revision clarifies the state's burden, of proof, both when this offense is charged and when it is submitted as a lesser included offense in prosecutions for first-degree intentional homicide. The bill defines "adequate provocation" to require both subjective loss of control and an objectively sufficient cause for that condition.

The bill limits felony murder to homicide caused in the commission or attempt to commit armed burglary, armed robbery, arson, first degree sexual assault or 2nd degree sexual assault by use or threat of force or violence. The bill allows punishment for the homicide and the underlying felony to be cumulative.

The bill eliminates the obsolete term, "depraved mind", clarifying that the offense now known as 2nd-degree murder requires not a mental disorder, but criminal recklessness aggravated by circumstances which show utter disregard for human life.

The same mental element is prescribed for first-degree reckless injury and first-degree recklessly endangering safety. The bill creates the crimes of 2nd-degree reckless injury and 2nd-degree recklessly endangering safety. Creation of the latter statute eliminates the need for the separate offenses of highway

obstruction (s. 941.03, stats.) and mooring watercraft to railroad tracks or fixtures (s. 941.04, stats.). The bill, therefore, eliminates both offenses.

The bill also reduces the .mental element of the offense now known as reckless use of weapons from reckless conduct to criminal negligence, to distinguish this Class A misdemeanor from the Class E felony of recklessly endangering safety, 2nd degree.

The bill retains the Class D felony of homicide by negligent use of weapon but reduces homicide by negligent use of vehicle to a Class E felony, as it was before May 1, 1986. The bill reduces the maximum imprisonment for causing great bodily harm by negligent use of vehicle from 2 years to 18 months.

Finally, the bill eliminates the phrase "high probability" from numerous provisions of the criminal code to avoid any inference that a statistical likelihood greater than 50% was ever intended. The bill substitutes the concept of "substantial risk".

The judicial council's homicide and lesser included offenses committee consisted of: Prof. Walter J. Dickey, (chair); Justice Shirley S. Abrahamson; Judge Michael J. Barron; Asst. Atty. Gen. David J. Becker; William U. Burke; William M. Coffey; Francis R. Croak; Jerome L. Fox; Sen. Donald .Hanaway; Asst. Dist. Atty. Michael Malmstadt; Judge Gordon Myse; Revisor of Statutes Orlan L. Prestegard; Prof. Frank J. Remington; Asst. Public Defender Michael J. Rosborough; Rep. James A. Rutkowski; Janet Schipper; and Prof. David E. Schultz. The reporter was James L. Fullin, Jr.

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1010 FIRST DEGREE INTENTIONAL HOMICIDE — § 940.01(1)(a)[1]

Statutory Definition of the Crime

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another.

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[2]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[3]

   "Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[4]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[5]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill, you should find the defendant guilty of first degree intentional homicide.

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

COMMENT

Wis JI-Criminal 1010 was originally published in 1989. This revision was approved by the Committee in November 1999 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 940.01, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a discussion of the homicide revision generally and of the offense covered by this instruction, see the Introductory Comment at Wis JI-Criminal 1000.

This offense, first degree intentional homicide, is essentially the same as first degree murder under prior law. The penalty is that of a Class A felony: life imprisonment.

1. This instruction is for a case where there is no evidence of any privilege or mitigating circumstance. Separate instructions are drafted for cases where, for example, evidence of adequate provocation or self-defense is in the case. See Wis JI-Criminal 1012, 1014.

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

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

Also see Wis JI-Criminal 901, **CAUSE**.

3. The parenthetical reference to "another human being" is to be used in a case involving the common law doctrine of "transferred intent," which has been described as follows:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section

incorporates the common law doctrine of "transferred intent." 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923.2.

5. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

1011 FIRST DEGREE INTENTIONAL HOMICIDE OF AN UNBORN CHILD — § 940.0l(1)(b)

Statutory Definition of the Crime

First degree intentional homicide, as defined in § 940.01(1)(b) of the Criminal Code of Wisconsin, is committed by one who causes the death of an unborn child with the intent to kill [that unborn child] [(or) the woman who is pregnant with that unborn child] [(or) another].

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

1. The defendant caused the death of an unborn child.

   "Cause" means that the defendant's act was a substantial factor in producing the death of the unborn child.[1]

   "Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.[2]

2. The defendant acted with the intent to kill [the unborn child] [(or) the woman who was pregnant with the unborn child] [(or) another human being].

   "Intent to kill" means that the defendant had the mental purpose to take the life of [an unborn child] [(or) the woman who was pregnant with the unborn child] [(or)

another human being] or was aware that his or her conduct was practically certain to cause the death of [an unborn child] [(or) the woman who was pregnant with the unborn child] [or another human being].

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[3]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict.

Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of an unborn child with the intent to kill [that unborn child] [(or) the woman who is pregnant with that unborn child] [(or) another], you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 1011 was originally published in 1999. This revision adapted the instruction to a new format and was approved by the Committee in April 2005.

This instruction is drafted for the offense defined in § 940.01(1)(b), which was created by 1997 Wisconsin Act 295 [effective date: July 1, 1998]. The act revised all the general homicide statutes to apply to causing the death of an unborn child; several nonhomicide statutes were similarly revised.

Section 939.75, also created by Act 295, defines "unborn child" and sets forth several exceptions to the applicability of the revised statutes. Subsection (2)(b) recognizes the following exceptions:

- induced abortions [subd. 1.]
- acts committed in accordance with usual and customary standards of medical practice during diagnostic testing or therapeutic treatment by a licensed physician [sub. 2.]
- an act by a health care provider that is in accordance with a pregnant woman's power of attorney for health care, etc. [subd. 2h.]
- an act by a woman who is pregnant with an unborn child [subd. 3.]
- the lawful prescription, dispensation or administration, and the use by a woman of, any medicine, drug or device that is used as a method of birth control or is intended to prevent pregnancy. [subd. 4]

Subsection (3) provides that if any of these exceptions are "placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist. . . ." Thus, these exceptions are to be handled in the same manner as, for example, the mitigating circumstance of adequate provocation under the general homicide law: once supported by some evidence, the absence of the exception becomes a fact the state must prove. The Committee decided not to draft instructions for the absence of these exceptions because it appeared to the Committee that their applicability would most likely be determined before charges were filed or at least before trial.

1. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

2. This is the definition provided in § 939.75(1).

3. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

1012 FIRST DEGREE INTENTIONAL HOMICIDE; ADEQUATE PROVOCATION; SECOND DEGREE INTENTIONAL HOMICIDE — § 940.01(2)(a); § 940.05

Crimes To Consider

The defendant in this case is charged with first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree intentional homicide, you must consider whether or not the defendant is guilty of second degree intentional homicide, which is a less serious degree of criminal homicide.

Intentional Homicide

The crimes referred to as first and second degree intentional homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates intentional homicides into two degrees, there are certain elements which are common to each crime. Both first and second degree intentional homicide require that the defendant caused the death of the victim with the intent to kill. First degree intentional homicide requires the State to prove the additional fact that the defendant did not act under the influence of adequate provocation. It is for you to decide of what degree of homicide the defendant is guilty, if guilty at all, according to the instructions which define the two degrees of intentional homicide.

Statutory Definition of First Degree Intentional Homicide

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another. In this case, first degree intentional homicide also requires that the defendant was not acting under the influence of adequate provocation.[1]

State's Burden of Proof

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

Elements of the Crime that the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[2]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[3]

3. The defendant did not act under the influence of adequate provocation.[4]

Meaning of "Intent to Kill"

"Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[5]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[6]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Adequate "Provocation"

The third element of first degree intentional homicide requires that the defendant did not act under the influence of adequate provocation.

"Provocation" means something the defendant reasonably believes the intended victim had done which caused the defendant to lose self-control completely at the time of causing death.[7] This requires that the defendant actually believed that there was provocation and that the defendant's belief was reasonable.

"Adequate" provocation means sufficient provocation to cause complete loss of self-control in an ordinary person.[8]

"Complete loss of self-control" is an extreme mental disturbance or emotional state. It is a state in which a person's ability to exercise judgment is overcome to the extent that the person acts uncontrollably. It is the highest degree of anger, rage, or exasperation.[9]

To determine whether the defendant reasonably believed that there was provocation by the victim and whether an ordinary person would have lost self-control completely you should use the same standard. The standard is what a person of ordinary intelligence and prudence would have believed and whether that person would have completely lost self-control under the same circumstances.

Jury's Decision – First Degree Intentional Homicide

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by an act committed with the intent to kill and that the defendant was not acting under the influence of adequate provocation, you should find the defendant guilty of first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree intentional homicide, and you must consider whether the defendant is guilty of second degree intentional homicide in violation of section 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before considering the offense of second degree intentional homicide.[10] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree intentional homicide, you should consider whether the defendant is guilty of second degree intentional homicide.

Statutory Definition of Second Degree Intentional Homicide

Second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another.

State's Burden of Proof

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

Elements of Second Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim) .
2. The defendant acted with the intent to kill ((name of victim)) (another human being).

"Cause" and "intent to kill" have already been defined for you.

The difference between first and second degree intentional homicide is that the first degree offense requires proof of one additional element: that the defendant was not acting under the influence of adequate provocation. Adequate provocation is not a defense to a charge of second degree intentional homicide.

Jury's Decision – Second Degree Intentional Homicide

If you are satisfied beyond a reasonable doubt that all the elements of first degree intentional homicide were present, except the element requiring that the defendant did not act under the influence of adequate provocation, you should find the defendant guilty of second degree intentional homicide.

In other words, if you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill,[11] you should find the defendant guilty of second degree intentional homicide.

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

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

COMMENT

Wis JI-Criminal 1012 was originally published in 1989. This revision was approved by the Committee in October 2005 and involved adoption of a new format.

This instruction is for a case where first degree intentional homicide is charged, there is evidence of adequate provocation, and the lesser included offense of second degree intentional homicide is to be submitted to the jury. The statutes defining these offenses are among those created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. [For a discussion of the homicide revision generally, and of the offenses covered by this instruction, see the Introductory Comment at Wis JI-Criminal 1000.]

1. When the issue of adequate provocation "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged.

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

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

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

Also see Wis JI-Criminal 901, **CAUSE**.

3. The parenthetical reference to "another human being" is to be used in a case involving the common law doctrine of "transferred intent," which has been described as follows:

It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent." 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See note 1, supra.

5. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923.2.

6. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

7. This paraphrases the statutory definition of "provocation" found in § 939.44(1)(b). No change in meaning is intended by substituting "lose" for "lack."

8. This paraphrases the statutory definition of "adequate" found in § 939.44(1)(a). No change in meaning is intended by substituting "loss" for "lack."

9. The explanation of "complete loss of self-control" is adapted from the description of "heat of passion" under prior law. See, e.g., Wis JI-Criminal 1130 (© 1982). "Adequate provocation" under § 939.44 is intended to be a codification of "Wisconsin decisions defining 'heat of passion' under prior s. 940.05." Judicial Council Note to § 939.44, 1987 Senate Bill 191, citing Ryan v. State, 115 Wis. 488, 92 N.W. 271 (1902); Johnson v. State, 129 Wis. 146, 108 N.W. 55 (1906); Carlone v. State, 150 Wis. 38, 136 N.W. 153 (1912); Zenou v. State, 4 Wis.2d 655, 91 N.W.2d 208 (1958); State v. Bond, 41 Wis.2d 219, 163 N.W.2d 601 (1969); State v. Williford, 103 Wis.2d 98, 307 N.W.2d 277 (1981).

10. This paragraph builds in the part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112A.

11. A complete description of the jury's finding at this point would include reference to "adequate provocation" and would be phrased with a double negative: ". . . and you are not satisfied beyond a reasonable doubt that the defendant did not act under the influence of adequate provocation." The advantage in including such a statement is that it accurately identifies and emphasizes the difference between what is necessary for a finding of guilt on the first and second degree offenses. The disadvantage is that the double negative may be hard to understand. On balance, the Committee decided to leave it out of the text of the instruction, preserving it in this footnote for possible use if it is thought to be helpful.

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1014 FIRST DEGREE INTENTIONAL HOMICIDE: SELF DEFENSE: SECOND DEGREE INTENTIONAL HOMICIDE — § 940.01(2)(b); § 940.05[1]

Crimes To Consider

The defendant in this case is charged with first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree intentional homicide, you must consider whether or not the defendant is guilty of second degree intentional homicide which is a less serious degree of criminal homicide.

Intentional Homicide

The crimes referred to as first and second degree intentional homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates intentional homicides into two degrees, there are certain elements which are common to each crime. Both first and second degree intentional homicide require that the defendant caused the death of the victim with the intent to kill. It will also be important for you to consider the privilege of self defense in deciding which crime, if any, the defendant has committed.

Self-Defense

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another for the purpose of preventing or terminating what (he) (she)

reasonably believes to be an unlawful interference with (his) (her) person by the other person. However, (he) (she) may intentionally use only such force as (he) (she) reasonably believes is necessary to prevent or terminate the interference. (He) (She) may not intentionally use force which is intended or likely to cause death unless (he) (she) reasonably believes that such force is necessary to prevent imminent death or great bodily harm to (himself) (herself).[2]

As applied to this case, the effect of the law of self defense is:

- The defendant is not guilty of either first or second degree intentional homicide if the defendant reasonably believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person, and reasonably believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[3]
- The defendant is guilty of second degree intentional homicide if the defendant caused the death of (name of victim) with the intent to kill and actually believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), but the belief or the amount of force used was unreasonable.[4]
- The defendant is guilty of first degree intentional homicide if the defendant caused the death of (name of victim) with the intent to kill and did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[5]

Because the law provides that it is the State's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty for first or second degree intentional homicide. If the State does not satisfy you that those facts are established by the evidence, you will be instructed to find the defendant not guilty.

The elements of each crime will now be defined for you in greater detail.

Statutory Definition of First Degree Intentional Homicide

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another. In this case, first degree intentional homicide also requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself.[6]

State's Burden of Proof

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

Elements of First Degree Intentional Homicide That the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[7]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[8]
3. The defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself.[9]

Meaning of "Intent to Kill"

"Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[10]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[11]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Actual Belief That The Force Used Was Necessary

The third element of first degree intentional homicide requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires the State to prove[12] either:

1) that the defendant did not actually believe (he) (she) was in imminent danger of death or great bodily harm; or

2) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to (himself) (herself).

When first degree intentional homicide is considered, the reasonableness of the defendant's belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide.[13]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and that the defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree intentional homicide, and you must consider whether the defendant is guilty of second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before considering the offense of second degree intentional homicide.[14] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree intentional homicide, you should consider whether the defendant is guilty of second degree intentional homicide.

Second Degree Intentional Homicide

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

Elements of Second Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).
2. The defendant acted with the intent to kill ((name of victim)) (another human being).
3. The defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[15]

You have already been instructed on the definitions of "causing death" and "with intent to kill." The same definitions apply to your consideration of second degree intentional homicide.

Reasonable Belief That The Force Used Was Necessary

The third element of second degree intentional homicide requires that the defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires that the State prove any one of the following:[16]

1) that a reasonable person in the circumstances of the defendant would not have believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person; or

2) that a reasonable person in the circumstances of the defendant would not have believed (he) (she) was in danger of imminent death or great bodily harm; or

3) that a reasonable person in the circumstances of the defendant would not have believed that the amount of force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[17] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[18] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of second degree intentional homicide.

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of second

degree intentional homicide, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

COMMENT

Wis JI Criminal 1014 was originally published in 1988 and revised in 1991, 1994 and 2002. The 2002 revision made changes required by State v. Head, 2002 WI 99, and adopted the new format. This revision was approved by the Committee in February 2021; it amended the paragraph on "Determining Whether Beliefs Were Reasonable" to mirror the language provided in Wis JI-Criminal 800 and Wis JI-Criminal 805 and added to the comment.

This instruction is drafted for a charge of first degree intentional homicide under § 940.01, where second degree intentional homicide in violation of § 940.05 is submitted as a lesser included offense. The statutes are among those created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statutes apply to offenses committed on or after January 1, 1989. For a discussion of the homicide revision generally, and of the offense covered by this instruction, see the Introductory Comment at Wis JI Criminal 1000.

1. This instruction is for a case where first degree intentional homicide is charged, there is evidence that the defendant acted in self defense, and the lesser included offense of second degree intentional homicide is to be submitted to the jury.

2. These statements are based on the definition of the privilege of self defense found in § 939.48.

3. The effect of the privilege of self defense in a case where first degree intentional homicide is charged is as follows:

(a) if the exercise of the privilege was reasonable, both in inception and scope, the defendant is not guilty of any crime;

(b) if the defendant actually believed it was necessary to use force in self defense, but acts unreasonably, the defendant is guilty of second degree intentional homicide. He or she may act unreasonably in either of two ways:

i) the belief that it was necessary to act in self defense may be unreasonable; or

ii) ii) the amount of force used may be unreasonable(c) if the defendant did not actually believe it was necessary to use force in self defense, the defendant is guilty of first degree intentional homicide.

4. Section 940.01(2)(b) provides that causing the death by "unnecessary defensive force" mitigates what would otherwise be first degree intentional homicide to second degree intentional homicide: "Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable."

5. The absence of the mitigating circumstance — no actual belief that the force used was necessary to prevent imminent death or great bodily harm — becomes a fact necessary to constitute the first degree offense. See § 940.01(3) and State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Also see the discussion in notes 12 and 13, below.

The Committee considered adding a "subjective threshold" to the definition of the mitigating circumstance. A "subjective threshold" would require that the defendant actually believed that there was an unlawful interference. The Head decision is unclear on this point. One statement in the opinion is consistent with adding this requirement:

> . . . If unnecessary defensive force is been [sic] placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the defendant did not actually believe she was preventing or terminating an unlawful interference with her person or did not actually believe that the force she used was necessary to prevent imminent death or great bodily harm — even if those beliefs were unreasonable — to sustain a conviction for first-degree intentional homicide.2002 WI 99, ¶70.

However, in two other paragraphs in the opinion the court stated the requirements for unnecessary defensive force without including the "actual belief in an unlawful interference" element. See 2002 WI 99, ¶¶5 and 90. Because § 940.01(2)(b) does not include this requirement, and because the Head decision placed great emphasis on the plain language of the statutes, the Committee decided that it should not be added to the instruction. As a practical matter, the requirement is probably implicit in the other aspects of the standard. Someone who actually believes that it is necessary to use force to prevent imminent death or great bodily harm almost certainly will believe that the source of that threat is an unlawful interference.

In State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, the court of appeals reversed a conviction for first degree intentional homicide because, under the standard set forth in the Head decision, second degree intentional homicide [unnecessary defensive force] and the complete privilege of self defense should have been submitted to the jury. As to unnecessary defensive force, Peters met the obligation set out in Head "to present only 'some' evidence that she actually believed that she was in imminent danger of death or great bodily harm and actually believed that the force she used was necessary to defend herself." 2002 WI App 243 at ¶19.

6. When the issue of self defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged.

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485,

508, 329 N.W.2d 161 (1983).

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

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

Also see Wis JI-Criminal 901, **CAUSE**.

8. The parenthetical reference to "another human being" is based on § 940.01(1), which addresses the common law doctrine of "transferred intent." That doctrine has been described as follows:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent." 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

9. See note 5, supra.

10. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923B.

11. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

12. Section 940.01(2) recognizes four circumstances as affirmative defenses which mitigate first degree intentional homicide to second degree intentional homicide. When the existence of an affirmative defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. See § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979).

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

Two beliefs must be held by the defendant in order to mitigate first degree intentional homicide on the basis of "unnecessary defensive force": a belief that the defendant (or another) was in imminent danger of death or great bodily harm; and a belief that the force used was necessary to defend against that danger. See § 940.01(2)(b). By proving that the defendant did not actually hold either one of these beliefs, the state may meet its burden of proving that "the facts constituting the defense did not exist." Section 940.01(3).

13. The 2002 revision of the instruction changed this element in response to the decision in State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Head modified State v. Camacho, 176 Wis.2d 860, 501 N.W.2d 380 (1993), by holding that there is no "objective threshold" for invoking the mitigating factor of "unnecessary defensive force." The "objective threshold" refers to a requirement that the defendant reasonably believe that he or she was preventing or terminating an unlawful interference. Head holds that it is sufficient for purposes of "unnecessary defensive force" that a defendant actually believe that the defensive force used was necessary. This is summarized in the following paragraphs of the opinion:

> ¶103. Based on the plain language of Wis. Stat. § 940.05(2), supported by the legislative history and articulated public policy behind the statute, we conclude that when imperfect self defense is placed in issue by the trial evidence, the state has the burden to prove that the person had no actual belief that she was in imminent danger of death or great bodily harm, or no actual belief that the amount of force she used was necessary to prevent or terminate this interference. If the jury concludes that the person had an actual but unreasonable belief that she was in imminent danger of death or great bodily harm, the person is not guilty of first degree intentional homicide but should be found guilty of second degree intentional homicide.
>
> ¶104. In light of this analysis, we must modify Camacho to the extent that it states that Wis. Stat. § 940.01(2)(b) contains an objective threshold element requiring a defendant to have a reasonable belief that she was preventing or terminating an unlawful interference with her person in order to raise the issue of unnecessary defensive force (imperfect self defense).

Also see State v. Peters, 2002 WI App 243, note 5 supra.

14. This paragraph builds in part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

15. The absence of the complete privilege of self defense is a fact necessary to constitute the offense of second degree intentional homicide, assuming there is evidence of the complete privilege in the case. Since there already has been a finding of "some evidence" of the imperfect privilege, (now called "unnecessary defensive force"), there will almost always be a basis for submitting the existence of the complete privilege to the jury. See State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

The 2002 revision of the instruction added the requirement that the "defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference." This requirement was previously part of the requirements for the mitigating factor of unnecessary defensive force. When State v. Head modified State v. Camacho, see note 13, supra, this "objective threshold" was removed from the mitigating factor determination. However, it remains part of the complete privilege of self defense and must be added here. Head's holding that the objective threshold does apply to claims of the complete privilege of self defense was stated as follows:

> . . . [A] defendant seeking a jury instruction on perfect self defense to a charge of first degree intentional homicide must satisfy an objective threshold showing that she reasonably believed

> that she was preventing or terminating an unlawful interference with her person and reasonably believed that the force she used was necessary to prevent imminent death or great bodily harm. A defendant is entitled to an instruction on perfect self defense when the trial evidence places self defense in issue. Perfect self defense is placed in issue when, under a reasonable view of the trial evidence, a jury could conclude that the state has failed to meet its burden to disprove one of the elements of self defense beyond a reasonable doubt. (Emphasis in original.) 2002 WI 99, ¶4.

In State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, the court of appeals reversed a conviction for first degree intentional homicide because, under the standard set forth in the Head decision, second degree intentional homicide [unnecessary defensive force] and the complete privilege of self defense should have been submitted to the jury. As to the complete privilege, Peters met the obligation set out in Head to present "some evidence" supporting the claim of self defense. "[V]iewing the evidence in the light most favorable to Peters, a jury could conclude the State had not disproved the perfect self-defense theory beyond a reasonable doubt and that Peters reasonably believed she was preventing or terminating an unlawful interference with her person and reasonably believed that the force she used was necessary to prevent imminent death or great bodily harm. 2002 WI App 243 at ¶24.

16. The exercise of the privilege may be proved to be unreasonable in any one of three ways: by showing that the defendant's belief that he or she was preventing or terminating an unlawful interference was unreasonable; or, by showing that the defendant's belief that he or she was in danger of imminent death or great bodily harm was unreasonable; or, by showing that the amount of force used was unreasonable. See note 15, supra.

17. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

18. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627 28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to use doctrines other than self defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to "heat of passion, caused by reasonable and adequate provocation" rather than self defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines. However, some cases of this type may legitimately be considered under self defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

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1015 FIRST DEGREE INTENTIONAL HOMICIDE: COERCION: SECOND DEGREE INTENTIONAL HOMICIDE — § 940.01(2)(d); § 940.05

Crimes To Consider

The defendant in this case is charged with first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree intentional homicide, you must consider whether or not the defendant is guilty of second degree intentional homicide, which is a less serious degree of criminal homicide.

Intentional Homicide

The crimes referred to as first and second degree intentional homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates intentional homicides into two degrees, there are certain elements which are common to each crime. Both first and second degree intentional homicide require that the defendant caused the death of the victim with the intent to kill. First degree intentional homicide requires the State to prove the additional fact that the defendant did not act under the defense of coercion. It is for you to decide of what degree of homicide the defendant is guilty, if guilty at all, according to the instructions which define the two degrees of intentional homicide.

Statutory Definition of First Degree Intentional Homicide

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another. In this case, first degree intentional homicide also requires that the defendant was not acting under the defense of coercion.[1]

State's Burden of Proof

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

Elements of the Crime that the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[2]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[3]

3. The defendant did not act under the defense of coercion.[4]

Meaning of "Intent to Kill"

"Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[5]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[6]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Coercion

The defense of coercion is an issue in this case. As applied to this case, coercion may reduce a charge of first degree intentional homicide to second degree intentional homicide.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting under the defense of coercion.[7]

The law allows the defendant to act under the defense of coercion only if a threat by another person (other than the defendant's co-conspirator)[8] caused the defendant to believe that (his) (her) act was the only means of preventing [imminent public disaster] [imminent death or great bodily harm to (himself) (herself) (or to others)][9] and which pressure caused (him) (her) to act as (he) (she) did.

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

Jury's Decision – First Degree Intentional Homicide

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by an act committed with the intent to kill and that the defendant was not

acting under the defense of coercion, you should find the defendant guilty of first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree intentional homicide, and you must consider whether the defendant is guilty of second degree intentional homicide in violation of section 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before considering the offense of second degree intentional homicide.[10] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree intentional homicide, you should consider whether the defendant is guilty of second degree intentional homicide.

Statutory Definition of Second Degree Intentional Homicide

Second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another.

State's Burden of Proof

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

Elements of Second Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim) .
2. The defendant acted with the intent to kill ((name of victim)) (another human being).

"Cause" and "intent to kill" have already been defined for you.

The difference between first and second degree intentional homicide is that the first degree offense requires proof of one additional element: that the defendant was not acting under the defense of coercion. Coercion is not a defense to a charge of second degree intentional homicide.

Jury's Decision – Second Degree Intentional Homicide

If you are satisfied beyond a reasonable doubt that all the elements of first degree intentional homicide were present, except the element requiring that the defendant did not act under the defense of coercion, you should find the defendant guilty of second degree intentional homicide.

In other words, if you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill,[11] you should find the defendant guilty of second degree intentional homicide.

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

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

COMMENT

Wis JI-Criminal 1015 was approved by the Committee in March 2010.

This instruction is for a case where first degree intentional homicide is charged, there is evidence of coercion, and the lesser included offense of second degree intentional homicide is to be submitted to the jury. The statutes defining these offenses are among those created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989.

Identifying the statutory basis for the mitigating circumstance addressed by this instruction requires putting several separate statutes together. Section 940.01(2) identifies "affirmative defenses" to first degree intentional homicide "which mitigate the offense to 2nd-degree intentional homicide under s. 940.05." Subsection (d) of § 940.01(2) is titled "Coercion; necessity" and provides: "Death was caused in the exercise of a privilege under s. 939.45(1)." Section 939.45(1) provides that a privilege may be claimed "[w]hen the actor's conduct occurs under circumstances of coercion or necessity so as to be privileged under s. 939.46 or 939.47." Section 939.46 defines "coercion," providing that it is "a defense to a prosecution for any crime based on that act, except that if the prosecution is for first degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide."

1. When the issue of coercion "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged. See, State v. Moes, 91 Wis.2d 756, 284 N.W.2d 66 (1979), which involved a coercion defense.

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

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

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

Also see Wis JI-Criminal 901, **CAUSE**.

3. The parenthetical reference to "another human being" is to be used in a case involving the common law doctrine of "transferred intent," which has been described as follows:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent." 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See note 1, supra.

5. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923.2.

6. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

7. In Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979), the Wisconsin Supreme Court held that the burden is on the state to disprove an asserted coercion defense beyond a reasonable doubt. Moes dealt with Wisconsin law as it existed before the 1989 homicide law revision. The procedure it recognized is consistent with that specified in § 940.01.

8. The threat must come from someone "other than the actor's co-conspirator." § 939.46(1). If there is an issue about the threat coming from a co-conspirator the phrase should be included in the instruction. It may also be appropriate to instruct the jury on the meaning of "co-conspirator." Wis JI-Criminal 570 defines the crime of "conspiracy."

9. The defense apparently applies where the threat is made to any third person, without limitation. In this respect, coercion has been likened to the defense of others under § 939.48(4), Wis. Stats. See 1950 Report on the Criminal Code of the Wisconsin Legislative Council, pages 35-36 and 38-39.

10. This paragraph builds in the part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112A.

11. A complete description of the jury's finding at this point would include reference to "coercion" and would be phrased with a double negative: ". . . and you are not satisfied beyond a reasonable doubt that the defendant did not act lawfully under the defense of coercion." The advantage in including such a statement is that it accurately identifies and emphasizes the difference between what is necessary for a finding of guilt on the first and second degree offenses. The disadvantage is that the double negative may be hard to understand. On balance, the Committee decided to leave it out of the text of the instruction, preserving it in this footnote for possible use if it is thought to be helpful.

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1016 FIRST DEGREE INTENTIONAL HOMICIDE: SELF-DEFENSE: SECOND DEGREE INTENTIONAL HOMICIDE: FIRST DEGREE RECKLESS HOMICIDE — § 940.01(2)(b); § 940.05; § 940.02(1)[1]

Crimes to Consider

The defendant in this case is charged with first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree intentional homicide, you must consider whether or not the defendant is guilty of second degree intentional homicide or first degree reckless homicide which are less serious degrees of criminal homicide.

Intentional and Reckless Homicide

The crimes referred to as first and second degree intentional homicide and first degree reckless homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates homicides into different types and degrees, there are certain elements which are common to each crime. Both intentional and reckless homicide require that the defendant caused the death of the victim. First and second degree intentional homicide require the State to prove the additional fact that the defendant acted with the intent to kill. First degree reckless homicide requires that the defendant acted recklessly, under circumstances which show utter disregard for human life. It will also be important for you to consider the privilege of self-defense in deciding which crime, if any, the

defendant has committed.

Self-Defense

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another for the purpose of preventing or terminating what (he) (she) reasonably believes to be an unlawful interference with (his) (her) person by the other person. However, (he) (she) may intentionally use only such force as (he) (she) reasonably believes is necessary to prevent or terminate the interference. (He) (She) may not intentionally use force which is intended or likely to cause death unless (he) (she) reasonably believes that such force is necessary to prevent imminent death or great bodily harm to (himself) (herself).[2]

As applied to this case, the effect of the law of self-defense is:

- The defendant is not guilty of any homicide offense if the defendant reasonably believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person, and reasonably believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[3]
- The defendant is guilty of second degree intentional homicide if the defendant caused the death of (name of victim) with the intent to kill and actually believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), but the belief or the amount of force used was unreasonable.[4]
- The defendant is guilty of first degree intentional homicide if the defendant caused

the death of (name of victim) with the intent to kill and did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[5]

- The defendant is guilty of first degree reckless homicide if the defendant caused the death of (name of victim) by criminally reckless conduct and the circumstances of the conduct showed utter disregard for human life. You will be asked to consider the privilege of self-defense in deciding whether the elements of first degree reckless homicide are present.[6]

Because the law provides that it is the State's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty for first or second degree intentional homicide or for first degree reckless homicide. If the State does not satisfy you that those facts are established by the evidence, you will be instructed to find the defendant not guilty.

The facts necessary to constitute each crime will now be defined for you in greater detail.

Statutory Definition of First Degree Intentional Homicide

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the

intent to kill that person or another. In this case, first degree intentional homicide also requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself.[7]

State's Burden of Proof

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

Elements of First Degree Intentional Homicide That the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[8]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[9]

3. The defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself.[10]

Meaning of "Intent to Kill"

"Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[11]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[12]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Actual Belief That The Force Used Was Necessary

The third element of first degree intentional homicide requires that the defendant did

not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires the State to prove[13] either:

1) that the defendant did not actually believe (he) (she) was in imminent danger of death or great bodily harm; or

2) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to (himself) (herself).

When first degree intentional homicide is considered, the reasonableness of the defendant's belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide.[14]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and that the defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree intentional homicide, and you must consider whether the defendant is guilty of second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before considering the offense of second degree intentional homicide.[15] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree intentional homicide, you should consider whether the defendant is guilty of second degree intentional homicide.

Second Degree Intentional Homicide

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

Elements of Second Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).
2. The defendant acted with the intent to kill ((name of victim)) (another human being).
3. The defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[16]

You have already been instructed on the definitions of "causing death" and "with intent

to kill." The same definitions apply to your consideration of second degree intentional homicide.

Reasonable Belief That the Force Used Was Necessary

The third element of second degree intentional homicide requires that the defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires that the State prove any one of the following:[17]

1) that a reasonable person in the circumstances of the defendant would not have believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person; or

2) that a reasonable person in the circumstances of the defendant would not have believed (he) (she) was in danger of imminent death or great bodily harm; or

3) that a reasonable person in the circumstances of the defendant would not have believed that the amount of force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[18] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that

existed at the time of the alleged offense.[19] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

Jury Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of second degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of second degree intentional homicide, and you should consider whether the defendant is guilty of first degree reckless homicide, in violation of § 940.02 of the Criminal Code of Wisconsin, which is also a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on the charge of second degree intentional homicide before considering the offense of first degree reckless homicide.[20] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of second degree intentional homicide, you should consider whether the defendant is guilty

of first degree reckless homicide.

Statutory Definition of First Degree Reckless Homicide

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

State's Burden Of Proof

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

Elements of the Crime That the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[21]

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

   "Criminally reckless conduct" means:[22]

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

unreasonable and substantial risk of death or great bodily harm.[23]

You should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, (his) (her) conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.[24]

3. The circumstances of the defendant's conduct showed utter disregard[25] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[26] and, all other facts and circumstances relating to the conduct. You should consider the evidence relating to self-defense in deciding whether the circumstances of the defendant's conduct showed utter disregard for human life. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the circumstances of the defendant's conduct showed

utter disregard for human life.[27]

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[28]

[Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.]

Jury's Decision

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

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

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

COMMENT

Wis JI-Criminal 1016 was originally published in March 1991 and revised in 1993, 2003, 2012, 2014, and 2015. The 2003 revision made changes in the treatment of self-defense required by State v. Head, 2002 WI 99, and adopted the new format. The 2012 revision involved adding footnote 26 and the text accompanying it. The 2014 revision added to the text to reflect the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833. See footnotes 22 and 25. The 2015 revision amended footnote 21 to reflect 2013 Wisconsin Act 307. This revision was approved by the Committee in December 2022; it amended the language concerning reasonable beliefs to be consistent with the definition provided in § 939.22(32). See footnote 18.

This instruction is for a case where first degree intentional homicide in violation of § 940.01 is charged

and lesser included offenses defined in §§ 940.02 and 940.05 are submitted. The statutes are among those created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

1. This instruction is for a case where first degree intentional homicide is charged, there is evidence that the defendant acted in self-defense, and the lesser included offenses of second degree intentional homicide and first degree reckless homicide are to be submitted to the jury.

2. These statements are based on the definition of the privilege of self-defense found in § 939.48.

3. The effect of the privilege of self-defense in a case where first degree intentional homicide is charged is as follows:

> (a) if the exercise of the privilege was reasonable, both in inception and scope, the defendant is not guilty of any crime;
>
> (b) if the defendant actually believed it was necessary to use force in self defense, but acts unreasonably, the defendant is guilty of second degree intentional homicide. He or she may act unreasonably in either of two ways:
>
> i) the belief that it was necessary to act in self-defense may be unreasonable; or
>
> ii) the amount of force used may be unreasonable
>
> (c) if the defendant did not actually believe it was necessary to use force in self defense, the defendant is guilty of first degree intentional homicide.

4. Section 940.01(2)(b) provides that causing the death by "unnecessary defensive force" mitigates what would otherwise be first degree intentional homicide to second degree intentional homicide: "Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable."

5. The absence of the mitigating circumstance – no actual belief that the force used was necessary to prevent imminent death or great bodily harm – becomes a fact necessary to constitute the first degree offense. See § 940.01(3) and State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Also see the discussion in notes 13 and 14, below.

The Committee considered adding a "subjective threshold" to the definition of the mitigating circumstance. A "subjective threshold" would require that the defendant actually believed that there was an unlawful interference. The Head decision is unclear on this point. One statement in the opinion is consistent with adding this requirement:

> . . . If unnecessary defensive force is been [sic] placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the defendant did not actually believe she was

> preventing or terminating an unlawful interference with her person or did not actually believe that the force she used was necessary to prevent imminent death or great bodily harm – even if those beliefs were unreasonable – to sustain a conviction for first-degree intentional homicide. 2002 WI 99, ¶70.

However, in two other paragraphs in the opinion the court stated the requirements for unnecessary defensive force without including the "actual belief in an unlawful interference" element. See 2002 WI 99, ¶¶5 and 90. Because § 940.01(2)(b) does not include this requirement, and because the Head decision placed great emphasis on the plain language of the statutes, the Committee decided that it should not be added to the instruction. As a practical matter, the requirement is probably implicit in the other aspects of the standard. Someone who actually believes that it is necessary to use force to prevent imminent death or great bodily harm almost certainly will believe that the source of that threat is an unlawful interference.

In State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, the court of appeals reversed a conviction for first degree intentional homicide because, under the standard set forth in the Head decision, second degree intentional homicide [unnecessary defensive force] and the complete privilege of self defense should have been submitted to the jury. As to unnecessary defensive force, Peters met the obligation set out in Head "to present only 'some' evidence that she actually believed that she was in imminent danger of death or great bodily harm and actually believed that the force she used was necessary to defend herself." 2002 WI App 243 at ¶19.

6. See notes 22 and 25, below.

7. When the issue of self-defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged.

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

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

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

Also see Wis JI-Criminal 901, **CAUSE**.

9. The parenthetical reference to "another human being" is based on § 940.01(1), which addresses the common law doctrine of "transferred intent." That doctrine has been described as follows:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been

> mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent." 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

10. See note 5, supra.

11. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923B.

12. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

13. Section 940.01(2) recognizes four circumstances as affirmative defenses which mitigate first degree intentional homicide to second degree intentional homicide. When the existence of an affirmative defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. See § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979).

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

Two beliefs must be held by the defendant in order to mitigate first degree intentional homicide on the basis of "unnecessary defensive force": a belief that the defendant (or another) was in imminent danger of death or great bodily harm; and a belief that the force used was necessary to defend against that danger. See § 940.01(2)(b). By proving that the defendant did not actually hold either one of these beliefs, the state may meet its burden of proving that "the facts constituting the defense did not exist." Section 940.01(3).

14. The 2002 revision of the instruction changed this element in response to the decision in State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Head modified State v. Camacho, 176 Wis.2d 860, 501 N.W.2d 380 (1993), by holding that there is no "objective threshold" for invoking the mitigating factor of "unnecessary defensive force." The "objective threshold" refers to a requirement that the defendant reasonably believe that he or she was preventing or terminating an unlawful interference. Head holds that it is sufficient for purposes of "unnecessary defensive force" that a defendant actually believe that the defensive force used was necessary. This is summarized in the following paragraphs of the opinion:

> ¶103. Based on the plain language of Wis. Stat. § 940.05(2), supported by the legislative history and articulated public policy behind the statute, we conclude that when imperfect self-defense is placed in issue by the trial evidence, the state has the burden to prove that the person had no

> actual belief that she was in imminent danger of death or great bodily harm, or no actual belief that the amount of force she used was necessary to prevent or terminate this interference. If the jury concludes that the person had an actual but unreasonable belief that she was in imminent danger of death or great bodily harm, the person is not guilty of first-degree intentional homicide but should be found guilty of second-degree intentional homicide.
>
> ¶104. In light of this analysis, we must modify Camacho to the extent that it states that Wis. Stat. § 940.01(2)(b) contains an objective threshold element requiring a defendant to have a reasonable belief that she was preventing or terminating an unlawful interference with her person in order to raise the issue of unnecessary defensive force (imperfect self-defense).

Also see State v. Peters, 2002 WI App 243, note 5 supra.

15. This paragraph builds in part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

16. The absence of the complete privilege of self-defense is a fact necessary to constitute the offense of second degree intentional homicide, assuming there is evidence of the complete privilege in the case. Since there already has been a finding of "some evidence" of the imperfect privilege, (now called "unnecessary defensive force"), there will almost always be a basis for submitting the existence of the complete privilege to the jury. See State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

The 2002 revision of the instruction added the requirement that the "defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference." This requirement was previously part of the requirements for the mitigating factor of unnecessary defensive force. When State v. Head modified State v. Camacho, see note 14, supra, this "objective threshold" was removed from the mitigating factor determination. However, it remains part of the complete privilege of self defense and must be added here. Head's holding that the objective threshold does apply to claims of the complete privilege of self defense was stated as follows:

> . . . [A] defendant seeking a jury instruction on perfect self-defense to a charge of first-degree intentional homicide must satisfy an objective threshold showing that she reasonably believed that she was preventing or terminating an unlawful interference with her person and reasonably believed that the force she used was necessary to prevent imminent death or great bodily harm. A defendant is entitled to an instruction on perfect self-defense when the trial evidence places self-defense in issue. Perfect self-defense is placed in issue when, under a reasonable view of the trial evidence, a jury could conclude that the state has failed to meet its burden to disprove one of the elements of self-defense beyond a reasonable doubt. (Emphasis in original.) 2002 WI 99, ¶4.

In State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, the court of appeals reversed a conviction for first degree intentional homicide because, under the standard set forth in the Head decision, second degree intentional homicide [unnecessary defensive force] and the complete privilege of self defense should have been submitted to the jury. As to the complete privilege, Peters met the obligation set out in Head to present "some evidence" supporting the claim of self defense. "[V]iewing the evidence in the light most favorable to Peters, a jury could conclude the State had not disproved the perfect self-defense theory beyond a reasonable doubt and that Peters reasonably believed she was preventing or terminating an unlawful interference with her person and reasonably believed that the force she used was necessary to

prevent imminent death or great bodily harm." 2002 WI App 243 at ¶24.

17. The exercise of the privilege may be proved to be unreasonable in any one of three ways: by showing that the defendant's belief that he or she was preventing or terminating an unlawful interference was unreasonable; or, by showing that the defendant's belief that he or she was in danger of imminent death or great bodily harm was unreasonable; or, by showing that the amount of force used was unreasonable. See note 16, supra.

18. This paragraph was amended in 2022 to mirror Wis JI-CRIMINAL 805 as suggested by the Wisconsin Court of Appeals in State v. Ochoa, 2022 WI App 35, ¶60, 404 Wis.2d 261 978 N.W.2d 501. The treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

19. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627 28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to use doctrines other than self defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to "heat of passion, caused by reasonable and adequate provocation" rather than self defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines. However, some cases of this type may legitimately be considered under self defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

20. This paragraph builds in part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

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

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

Also see, Wis JI-Criminal 901 Cause.

22. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm

and the actor's subjective awareness of that risk."

23. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.
>
> The Judicial Council Note to subsection (3) explains it as follows:
>
> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3)." The Committee concluded that simply reading the statute is the best way to provide the necessary information.

24. The Committee has concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless homicide. Conduct does not create an unreasonable risk of harm to another if the conduct is undertaken as reasonable action in self-defense. Recklessness and reasonable exercise of the privilege cannot coexist. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "unreasonable risk" component of recklessness.

The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833, in which the court of appeals ordered a new trial for a person convicted of 2nd degree recklessly endangering safety. The court held that the jury instructions given in that case – which followed the pattern suggested by Wis JI-Criminal 801 – were deficient because they did not specifically state that the prosecution must prove the absence of self-defense once raised. The first of the added sentences is intended to make that requirement clear. The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the defendant's conduct created an unreasonable risk of death or great bodily harm.

25. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. For a complete discussion of this factor, see Wis JI-Criminal 924A or note 4, Wis JI-Criminal 1020.

26. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. See Wis JI-Criminal 924A or note 5, Wis JI-Criminal 1020.

27. The Committee has concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless homicide. Conduct does not show utter disregard for human life if it is undertaken on the reasonable exercise of the privilege of self-defense. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "utter disregard" element.

The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, see note 22, supra. Austin was concerned with the "unreasonable risk" element of the offense, but the same concern should apply to the "utter disregard" element of 1st degree reckless offenses. The first of the added sentences is intended to make it clear that the prosecution must prove the absence of self-defense once raised to meet its burden to prove "utter disregard for human life." The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that circumstances of the defendant's conduct showed utter disregard for human life.

28. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. For a complete discussion of this issue, see Wis JI-Criminal 924A or note 6, Wis JI-Criminal 1020.

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1017 FIRST DEGREE INTENTIONAL HOMICIDE: SELF-DEFENSE: SECOND DEGREE INTENTIONAL HOMICIDE: FIRST DEGREE RECKLESS HOMICIDE: SECOND DEGREE RECKLESS HOMICIDE — § 940.01(2)(b); § 940.05; § 940.02(1); § 940.06[1]

Crimes to Consider

The defendant in this case is charged with first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree intentional homicide, you must consider whether or not the defendant is guilty of second degree intentional homicide or first degree reckless homicide or second degree reckless homicide which are less serious degrees of criminal homicide.

Intentional and Reckless Homicide

The crimes referred to as first and second degree intentional homicide and first and second degree reckless homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates homicides into different types and degrees, there are certain elements which are common to each crime. Both intentional and reckless homicide require that the defendant caused the death of the victim. First and second degree intentional homicide require the State to prove the additional fact that the defendant acted with the intent to kill. First and second degree reckless homicide require that the defendant acted

recklessly. First degree reckless homicide requires proof of one additional element: that the circumstances of the defendant's conduct showed utter disregard for human life. It will also be important for you to consider the privilege of self-defense in deciding which crime, if any, the defendant has committed.

Self-Defense

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another for the purpose of preventing or terminating what (he) (she) reasonably believes to be an unlawful interference with (his) (her) person by the other person. However, (he) (she) may intentionally use only such force as (he) (she) reasonably believes is necessary to prevent or terminate the interference. (He) (She) may not intentionally use force which is intended or likely to cause death unless (he) (she) reasonably believes that such force is necessary to prevent imminent death or great bodily harm to (himself) (herself).[2]

As applied to this case, the effect of the law of self-defense is:

- The defendant is not guilty of any homicide offense if the defendant reasonably believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person, and reasonably believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[3]
- The defendant is guilty of second degree intentional homicide if the defendant caused the death of (name of victim) with the intent to kill and actually

believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), but the belief or the amount of force used was unreasonable.[4]

- The defendant is guilty of first degree intentional homicide if the defendant caused the death of (name of victim) with the intent to kill and did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[5]
- The defendant is guilty of first degree reckless homicide if the defendant caused the death of (name of victim) by criminally reckless conduct and the circumstances of the conduct showed utter disregard for human life.
- The defendant is guilty of second degree reckless homicide if the defendant caused the death of (name of victim) by criminally reckless conduct.

You will be asked to consider the privilege of self-defense in deciding whether the elements of first and second degree reckless homicide are present.[6]

Because the law provides that it is the State's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty for first or second degree intentional homicide or for first or second degree reckless homicide. If the State does not satisfy you that those facts are established by the evidence,

you will be instructed to find the defendant not guilty.

The facts necessary to constitute each crime will now be defined for you in greater detail.

Statutory Definition of First Degree Intentional Homicide

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another. In this case, first degree intentional homicide also requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself.[7]

State's Burden of Proof

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

Elements of First Degree Intentional Homicide That the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[8]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[9]

3. The defendant did not actually believe that the force used was necessary to prevent

imminent death or great bodily harm to himself.[10]

Meaning of "Intent to Kill"

"Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[11]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[12]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt

of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Actual Belief That the Force Used Was Necessary

The third element of first degree intentional homicide requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires the State to prove[13] either:

1) that the defendant did not actually believe (he) (she) was in imminent danger of death or great bodily harm; or

2) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to (himself) (herself).

When first degree intentional homicide is considered, the reasonableness of the defendant's belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide.[14]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and that the defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree intentional homicide, and you must consider whether the defendant is guilty of second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before considering the offense of second degree intentional homicide.[15] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree intentional homicide, you should consider whether the defendant is guilty of second degree intentional homicide.

Second Degree Intentional Homicide

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

Elements of Second Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).
2. The defendant acted with the intent to kill ((name of victim)) (another human being).
3. The defendant did not reasonably believe that (he) (she) was preventing or

terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[16]

You have already been instructed on the definitions of "causing death" and "with intent to kill." The same definitions apply to your consideration of second degree intentional homicide.

Reasonable Belief That the Force Used Was Necessary

The third element of second degree intentional homicide requires that the defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires that the State prove any one of the following:[17]

1) that a reasonable person in the circumstances of the defendant would not have believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person; or

2) that a reasonable person in the circumstances of the defendant would not have believed (he) (she) was in danger of imminent death or great bodily harm; or

3) that a reasonable person in the circumstances of the defendant would not have believed that the amount of force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[18] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[19] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

Jury Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of second degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of second degree intentional homicide, and you should consider whether the defendant is guilty of first degree reckless homicide, in violation of § 940.02 of the Criminal Code of Wisconsin, which is also a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on the charge of

second degree intentional homicide before considering the offense of first degree reckless homicide.[20] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of second degree intentional homicide, you should consider whether the defendant is guilty of first degree reckless homicide.

Statutory Definition of First Degree Reckless Homicide

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

State's Burden Of Proof

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

Elements of the Crime That the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[21]

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

   "Criminally reckless conduct" means:[22]

   - the conduct created a risk of death or great bodily harm to another

person; and

- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[23]

You should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, (his) (her) conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.[24]

3. The circumstances of the defendant's conduct showed utter disregard[25] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[26] and, all other facts and circumstances relating to the conduct. You should consider the evidence relating to self-defense in deciding whether the circumstances of the

defendant's conduct showed utter disregard for human life. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the circumstances of the defendant's conduct showed utter disregard for human life.[27]

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[28]

[Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.]

Jury's Decision

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

If you are not so satisfied, you must not find the defendant guilty of first degree reckless homicide, and you should consider whether the defendant is guilty of second degree reckless homicide, in violation of § 940.06 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree reckless homicide.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on the charge of first

degree reckless homicide before considering the offense of second degree reckless homicide.[29] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree reckless homicide, you should consider whether the defendant is guilty of second degree reckless homicide.

Statutory Definition of Second Degree Reckless Homicide

Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.

Difference Between First and Second Degree Reckless Homicide

The difference between first and second degree reckless homicide is that the first degree offense requires proof of one additional element: that the circumstances of the defendant's conduct showed utter disregard for human life.[30]

Jury Decision

If you are satisfied beyond a reasonable doubt that all the elements of first degree reckless homicide were present, except the element requiring that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of second degree reckless homicide.

In other words, if you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct, you should find the defendant guilty of second degree reckless homicide.

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

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

COMMENT

Wis JI-Criminal 1017 was originally published in March 1991 and revised in 1993, 2003, 2012, 2014, and 2015. The 2003 revision made changes in the treatment of self-defense required by State v. Head, 2002 WI 99, and adopted the new format. The 2012 revision involved adding footnote 26 and the text accompanying it. The 2014 revision added to the text to reflect the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833. See footnotes 22 and 25. The 2015 revision; amended footnote 21 to reflect 2013 Wisconsin Act 307. This revision was approved by the Committee in December 2022; it amended the language concerning reasonable beliefs to be consistent with the definition provided in § 939.22(32). See footnote 18.

This instruction is for a case where first degree intentional homicide in violation of § 940.01 is charged and lesser included offenses defined in §§ 940.02, 940.05, and 940.06 are submitted. The statutes are among those created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

1. This instruction is for a case where first degree intentional homicide is charged, there is evidence that the defendant acted in self-defense, and the lesser included offenses of second degree intentional homicide and first and second degree reckless homicide are to be submitted to the jury.

2. These statements are based on the definition of the privilege of self-defense found in § 939.48.

3. The effect of the privilege of self-defense in a case where first degree intentional homicide is charged is as follows:

(a) if the exercise of the privilege was reasonable, both in inception and scope, the defendant is not guilty of any crime;

(b) if the defendant actually believed it was necessary to use force in self defense, but acts unreasonably, the defendant is guilty of second degree intentional homicide. He or she may act

unreasonably in either of two ways:

i) the belief that it was necessary to act in self-defense may be unreasonable; or

ii) the amount of force used may be unreasonable

(c) if the defendant did not actually believe it was necessary to use force in self defense, the defendant is guilty of first degree intentional homicide.

4. Section 940.01(2)(b) provides that causing the death by "unnecessary defensive force" mitigates what would otherwise be first degree intentional homicide to second degree intentional homicide: "Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable."

5. The absence of the mitigating circumstance – no actual belief that the force used was necessary to prevent imminent death or great bodily harm – becomes a fact necessary to constitute the first degree offense. See § 940.01(3) and State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Also see the discussion in notes 13 and 14, below.

The Committee considered adding a "subjective threshold" to the definition of the mitigating circumstance. A "subjective threshold" would require that the defendant actually believed that there was an unlawful interference. The Head decision is unclear on this point. One statement in the opinion is consistent with adding this requirement:

> . . . If unnecessary defensive force is been [sic] placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the defendant did not actually believe she was preventing or terminating an unlawful interference with her person or did not actually believe that the force she used was necessary to prevent imminent death or great bodily harm – even if those beliefs were unreasonable – to sustain a conviction for first-degree intentional homicide.

2002 WI 99, ¶70.

However, in two other paragraphs in the opinion the court stated the requirements for unnecessary defensive force without including the "actual belief in an unlawful interference" element. See 2002 WI 99, ¶¶5 and 90. Because § 940.01(2)(b) does not include this requirement, and because the Head decision placed great emphasis on the plain language of the statutes, the Committee decided that it should not be added to the instruction. As a practical matter, the requirement is probably implicit in the other aspects of the standard. Someone who actually believes that it is necessary to use force to prevent imminent death or great bodily harm almost certainly will believe that the source of that threat is an unlawful interference.

In State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, the court of appeals reversed a conviction for first degree intentional homicide because, under the standard set forth in the Head decision, second degree intentional homicide [unnecessary defensive force] and the complete privilege of self defense should have been submitted to the jury. As to unnecessary defensive force, Peters met the obligation set out in Head "to present only 'some' evidence that she actually believed that she was in imminent danger of death or great bodily harm and actually believed that the force she used was necessary to defend herself." 2002 WI App 243 at ¶19.

6. See notes 22 and 25, below.

7. When the issue of self-defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged.

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

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

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

Also see Wis JI-Criminal 901, **CAUSE**.

9. The parenthetical reference to "another human being" is based on § 940.01(1), which addresses the common law doctrine of "transferred intent." That doctrine has been described as follows:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent." 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

10. See note 5, supra.

11. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923B.

12. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

13. Section 940.01(2) recognizes four circumstances as affirmative defenses which mitigate first degree intentional homicide to second degree intentional homicide. When the existence of an affirmative defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that

the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. See § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979).

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

Two beliefs must be held by the defendant in order to mitigate first degree intentional homicide on the basis of "unnecessary defensive force": a belief that the defendant (or another) was in imminent danger of death or great bodily harm; and a belief that the force used was necessary to defend against that danger. See § 940.01(2)(b). By proving that the defendant did not actually hold either one of these beliefs, the state may meet its burden of proving that "the facts constituting the defense did not exist." Section 940.01(3).

14. The 2002 revision of the instruction changed this element in response to the decision in State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Head modified State v. Camacho, 176 Wis.2d 860, 501 N.W.2d 380 (1993), by holding that there is no "objective threshold" for invoking the mitigating factor of "unnecessary defensive force." The "objective threshold" refers to a requirement that the defendant reasonably believe that he or she was preventing or terminating an unlawful interference. Head holds that it is sufficient for purposes of "unnecessary defensive force" that a defendant actually believe that the defensive force used was necessary. This is summarized in the following paragraphs of the opinion:

> ¶103. Based on the plain language of Wis. Stat. § 940.05(2), supported by the legislative history and articulated public policy behind the statute, we conclude that when imperfect self-defense is placed in issue by the trial evidence, the state has the burden to prove that the person had no actual belief that she was in imminent danger of death or great bodily harm, or no actual belief that the amount of force she used was necessary to prevent or terminate this interference. If the jury concludes that the person had an actual but unreasonable belief that she was in imminent danger of death or great bodily harm, the person is not guilty of first-degree intentional homicide but should be found guilty of second-degree intentional homicide.
>
> ¶104. In light of this analysis, we must modify Camacho to the extent that it states that Wis. Stat. § 940.01(2)(b) contains an objective threshold element requiring a defendant to have a reasonable belief that she was preventing or terminating an unlawful interference with her person in order to raise the issue of unnecessary defensive force (imperfect self-defense).

Also see State v. Peters, 2002 WI App 243, note 5, supra.

15. This paragraph builds in part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

16. The absence of the complete privilege of self-defense is a fact necessary to constitute the offense of second degree intentional homicide, assuming there is evidence of the complete privilege in the case. Since there already has been a finding of "some evidence" of the imperfect privilege, (now called "unnecessary defensive force"), there will almost always be a basis for submitting the existence of the complete privilege to the jury. See State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

The 2002 revision of the instruction added the requirement that the "defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference." This requirement was previously part of the requirements for the mitigating factor of unnecessary defensive force. When State v. Head modified State v. Camacho, see note 14, supra, this "objective threshold" was removed from the mitigating factor determination. However, it remains part of the complete privilege of self defense and must be added here. Head's holding that the objective threshold does apply to claims of the complete privilege of self defense was stated as follows:

> . . . [A] defendant seeking a jury instruction on perfect self-defense to a charge of first-degree intentional homicide must satisfy an objective threshold showing that she reasonably believed that she was preventing or terminating an unlawful interference with her person and reasonably believed that the force she used was necessary to prevent imminent death or great bodily harm. A defendant is entitled to an instruction on perfect self-defense when the trial evidence places self-defense in issue. Perfect self-defense is placed in issue when, under a reasonable view of the trial evidence, a jury could conclude that the state has failed to meet its burden to disprove one of the elements of self-defense beyond a reasonable doubt. (Emphasis in original.) 2002 WI 99, ¶4.

In State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, the court of appeals reversed a conviction for first degree intentional homicide because, under the standard set forth in the Head decision, second degree intentional homicide [unnecessary defensive force] and the complete privilege of self defense should have been submitted to the jury. As to the complete privilege, Peters met the obligation set out in Head to present "some evidence" supporting the claim of self defense. "[V]iewing the evidence in the light most favorable to Peters, a jury could conclude the State had not disproved the perfect self-defense theory beyond a reasonable doubt and that Peters reasonably believed she was preventing or terminating an unlawful interference with her person and reasonably believed that the force she used was necessary to prevent imminent death or great bodily harm." 2002 WI App 243 at ¶24.

17. The exercise of the privilege may be proved to be unreasonable in any one of three ways: by showing that the defendant's belief that he or she was preventing or terminating an unlawful interference was unreasonable; or, by showing that the defendant's belief that he or she was in danger of imminent death or great bodily harm was unreasonable; or, by showing that the amount of force used was unreasonable. See note 16, supra.

18. This paragraph was modified in 2022 based on suggested amendments to Wis JI-CRIMINAL 1016 made by the Wisconsin Court of Appeals in State v. Ochoa, 2022 WI App 35, ¶60, 404 Wis.2d 261 978 N.W.2d 501. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

19. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627 28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to

use doctrines other than self defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to "heat of passion, caused by reasonable and adequate provocation" rather than self defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines. However, some cases of this type may legitimately be considered under self defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

20. This paragraph builds in part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

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

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

Also see, Wis JI-Criminal 901 Cause.

22. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

23. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

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

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information."

24. The Committee has concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless homicide. Conduct does not create an unreasonable risk of harm to another if the conduct is undertaken as reasonable action in self-defense. Recklessness and reasonable exercise of the privilege cannot coexist. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "unreasonable risk" component of recklessness.

The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833, in which the court of appeals ordered a new trial for a person convicted of 2nd degree recklessly endangering safety. The court held that the jury instructions given in that case – which followed the pattern suggested by Wis JI-Criminal 801 – were deficient because they did not specifically state that the prosecution must prove the absence of self-defense once raised. The first of the added sentences is intended to make that requirement clear. The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the defendant's conduct created an unreasonable risk of death or great bodily harm.

25. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. For a complete discussion of this factor, see Wis JI-Criminal 924A or note 4, Wis JI-Criminal 1020.

26. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. See Wis JI-Criminal 924A and note 5, Wis JI-Criminal 1020.

27. The Committee has concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless homicide. Conduct does not show utter disregard for human life if it is undertaken on the reasonable exercise of the privilege of self-defense. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "utter disregard" element.

The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, see note 22, supra. Austin was concerned with the "unreasonable risk" element of the offense, but the same concern should apply to the "utter disregard" element of 1st degree reckless offenses. The first of the added sentences is intended to make it clear that the prosecution must prove the absence of self-defense once raised to meet its burden to prove "utter disregard for human life." The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still

must be satisfied by all the evidence that circumstances of the defendant's conduct showed utter disregard for human life.

28. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. For a complete discussion of this issue, see Wis JI-Criminal 924A or note 6, Wis JI-Criminal 1020.

29. This paragraph builds in the part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112A.

30. This statement is based on Wis JI-Criminal 112A which is recommended as an alternative style of submitting a lesser included offense. The Committee concluded it should be used here to emphasize the distinction between first and second degree reckless homicide.

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1018 FIRST DEGREE INTENTIONAL HOMICIDE; FIRST DEGREE RECKLESS HOMICIDE — § 940.01(1)(a); § 940.02(1)

Crimes To Consider

The defendant in this case is charged with first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree intentional homicide, you must consider whether or not the defendant is guilty of first degree reckless homicide which is a less serious degree of criminal homicide.

Intentional and Reckless Homicide

The crimes referred to as first degree intentional and first degree reckless homicide are different types of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

Both intentional and reckless homicide require that the defendant caused the death of the victim. First degree intentional homicide requires the State to prove that the defendant acted with the intent to kill. First degree reckless homicide requires that the defendant acted recklessly, under circumstances which show utter disregard for human life. It is for you to decide of what type of homicide the defendant is guilty, if guilty at all, according to the instructions which define the two offenses.

Statutory Definition of First Degree Intentional Homicide

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another.

State's Burden of Proof

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

Elements of First Degree Intentional Homicide That the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[2]

   "Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[3]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not

be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[4]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill, you should find the defendant guilty of first degree intentional homicide.

If you are not so satisfied, you must find the defendant not guilty of first degree intentional homicide, and you should consider whether the defendant is guilty of first degree reckless homicide in violation of section 940.02(1) of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before considering the offense of first degree reckless homicide.[5] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree intentional homicide, you should consider whether the defendant is guilty of first degree reckless homicide.

Statutory Definition of First Degree Reckless Homicide

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

State's Burden of Proof

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

Elements of First Degree Reckless Homicide That the State Must Prove

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

"Cause" means that the defendant's act was a substantial factor in producing the death.[6]

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

"Criminally reckless conduct" means:[7]

- the conduct created a risk of death or great bodily harm to another person; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[8]

3. The circumstances of the defendant's conduct showed utter disregard[9] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all the other facts and circumstances relating to the conduct.[10]

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[11]

[Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.]

Jury's Decision

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

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

You are not, in any event, to find the defendant guilty of more than one offense.

COMMENT

Wis JI-Criminal 1018 was originally published in 1989 and revised in 2000 and 2010. This revision was approved the Committee in December 2011; it involved adding footnote 11 and the text accompanying it.

This instruction is for a case where first degree intentional homicide under § 940.01 is charged and second degree reckless homicide under § 940.02 is submitted as a lesser included offense. It applies to those statutes as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The revised statutes, and this instruction, apply to offenses committed on or after January 1, 1989.

This instruction combines the text of Wis JI-Criminal 1010, First Degree Intentional Homicide, and Wis JI-Criminal 1020, First Degree Reckless Homicide. See the comment to each of those instructions for discussion of substantive issues.

1. See note 2, Wis JI-Criminal 1010.

2. See note 3, Wis JI-Criminal 1010.

3. See note 4, Wis JI-Criminal 1010.

4. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

5. This paragraph builds in some of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

6. See note 2, Wis JI-Criminal 1010.

7. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

8. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. However, voluntary intoxication that may prevent the actor from being aware of the risk is not a defense. See § 939.24(3) and note 3, Wis JI-Criminal 1020.

9. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. See Wis JI-Criminal 924A or note 4, Wis JI-Criminal 1020.

10. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. See Wis JI-Criminal 924A or note 5, Wis JI-Criminal 1020.

11. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. For a complete discussion of this issue, see Wis JI-Criminal 924A or note 6, Wis JI-Criminal 1020.

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1020 FIRST DEGREE RECKLESS HOMICIDE — § 940.02(1)

Statutory Definition of the Crime

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

State's Burden Of Proof

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

Elements of the Crime That the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

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

   "Criminally reckless conduct" means:[2]

   - the conduct created a risk of death or great bodily harm to another person; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[3]

3. The circumstances of the defendant's conduct showed utter disregard[4] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[5] and, all other facts and circumstances relating to the conduct.

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[6]

[Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.]

Jury's Decision

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

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

COMMENT

Wis JI-Criminal 1020 was originally published in 1989 and revised in 2002 and 2012. The 2012 revision added the material at footnote 6. This revision was approved by the Committee in March 2015; it revised footnote 3 to reflect 2013 Wisconsin Act 307.

This instruction is for violations of § 940.02(1), created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

This offense, first degree reckless homicide, replaces what was called second degree murder under prior law. The Judicial Council Note to § 940.02 describes the change and is found at note 4, below.

Subsection (2) of § 940.02 defines a crime also denominated "first degree reckless homicide" which applies to causing death by furnishing a controlled substance. See Wis JI-Criminal 1021.

For a case involving the lesser included offense of second degree reckless homicide, see Wis JI-Criminal 1022.

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

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

Also see, Wis JI-Criminal 901 Cause.

2. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

3. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

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

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

4. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

> First-degree reckless homicide is analogous to the prior offense of 2nd-degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness, is required for liability. See s. 939.24, stats. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).
>
> Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to aggravated reckless homicide offense.

A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further clarified." Attempts to

explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978); Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); and Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15, 339 Wis.2d 170, 810 N.W.2d 226, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

5. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

> Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). Under this revision, the analogs of those crimes, i.e., first-degree reckless and 2nd-degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions

> for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01(3), stats., are inapplicable.
>
> Judicial Council Note to § 940.02, 1987 Senate Bill 191.

6. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

> ¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

> ¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The committee decided it was not necessary to include a reference to conduct before or during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.

1020A FIRST DEGREE RECKLESS HOMICIDE OF AN UNBORN CHILD — § 940.02(1m)

Statutory Definition of the Crime

First degree reckless homicide, as defined in § 940.02(1m) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of an unborn child under circumstances that show utter disregard for the life of [that unborn child] [(or) the woman who is pregnant with that unborn child] [(or) another].[1]

State's Burden Of Proof

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

Elements of the Crime That the State Must Prove

1. The defendant caused the death of an unborn child.

   "Cause" means that the defendant's act was a substantial factor in producing the death of the unborn child.[2]

   "Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.[3]

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

   "Criminally reckless conduct" means:[4]

   - the conduct created a risk of death or great bodily harm to [an unborn child] [(or) to the woman who is pregnant with the unborn child] [(or) to another]; and

- the risk of death or great bodily harm was unreasonable and substantial; and

- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[5]

3. The circumstances of the defendant's conduct showed utter disregard[6] [for the life of the unborn child] [(or) for the life of the woman who is pregnant with the unborn child] [(or) for the life of another].

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[7] and, all other facts and circumstances relating to the conduct.

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[8]

[Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of an unborn child by criminally reckless conduct and that the circumstances of the conduct showed utter disregard [for the life of the unborn child] [(or) for the life of the woman who is

pregnant with the unborn child] [(or) for the life of another], you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 1020A was originally published in 1999 and revised in 2002 and 2012. The 2012 revision added footnote 8 and the text accompanying it. This revision was approved by the Committee in March 2015; it revised footnote 5 to reflect 2013 Wisconsin Act 307.

This instruction is drafted for the offense defined in § 940.02(1m), which was created by 1997 Wisconsin Act 295 [effective date: July 1, 1998]. The Act revised all the general homicide statutes to apply to causing the death of an unborn child; several non-homicide statutes were similarly revised.

Section 939.75, also created by Act 295, defines "unborn child" and sets forth several exceptions to the applicability of the revised statutes. Subsection (2)(b) recognizes the following exceptions:

- induced abortions [subd. 1.]
- acts committed in accordance with usual and customary standards of medical practice during diagnostic testing or therapeutic treatment by a licensed physician [sub. 2.]
- an act by a health care provider that is in accordance with a pregnant woman's power of attorney for health care, etc. [subd. 2h.]
- an act by a woman who is pregnant with an unborn child [subd. 3.]
- the lawful prescription, dispensation or administration, and the use by any a woman of, any medicine, drug or device that is used as a method of birth control or is intended to prevent pregnancy. [subd. 4]

Subsection (3) provides that if any of these exceptions are "placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist. . ." Thus, these exceptions are to be handled in the same manner as, for example, the mitigating circumstance of adequate provocation in cases of intentional homicide: once supported by some evidence, the absence of the exception becomes a fact the state must prove. The Committee decided not to draft instructions for the absence of these exceptions because it appeared to the Committee that their applicability would most likely be determined before charges were filed or at least before trial. Further, in cases involving reckless homicide, most of the exceptions might better be handled as relevant to the elements of the crime. That is, actions taken in accordance with customary standards of medical practice, for example, tend to show that the circumstances do not show utter disregard for life and that the conduct does not create an unreasonable risk of harm. However, § 939.75(3) is unequivocal on this point: "if an exception is raised by the evidence at trial, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist . . ."

1. The bracketed material sets forth the options provided in § 940.02(1m), which reads: ". . . under circumstances that show utter disregard for the life of that unborn child, the woman who is pregnant with that unborn child or another . . ." Only the alternatives supported by the evidence should be selected. If more than one alternative is submitted, the Committee has concluded that jury agreement on one alternative is not required as long as the jury is satisfied that the circumstances of the conduct showed "utter disregard. . ."

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

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

Also see, Wis JI-Criminal 901 Cause.

3. This is the definition provided in § 939.75(1).

4. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

5. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

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

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

6. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. For a complete discussion of this factor, see Wis JI-Criminal 924A or note 4, Wis JI-Criminal 1020.

7. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. See Wis JI-Criminal 924A or note 5, Wis JI-Criminal 1020.

8. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. For a complete discussion of this issue, see Wis JI-Criminal 924A or note 6, Wis JI-Criminal 1020.

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

Statutory Definition of the Crime

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

State's Burden of Proof

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

Elements of the Crime that the State Must Prove

1. The defendant delivered[5] a substance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jury's Decision

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

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

COMMENT

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

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

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

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

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

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

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

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

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

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

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

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

5. See note 2, supra.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12. See note 9, supra.

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

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

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

14. See note 8, supra.

1022 FIRST DEGREE RECKLESS HOMICIDE: SECOND DEGREE RECKLESS HOMICIDE — § 940.02(1); § 940.06

Crimes To Consider

The defendant in this case is charged with first degree reckless homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree reckless homicide, you must consider whether or not the defendant is guilty of second degree reckless homicide which is a less serious degree of criminal homicide.

Reckless Homicide

The crimes referred to as first and second degree reckless homicide are varying degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates reckless homicides into two degrees, there are certain elements which are common to each crime. Both first and second degree reckless homicide require that the defendant caused the death of the victim by criminally reckless conduct. First degree reckless homicide requires the State to prove the additional fact that the circumstances of the defendant's conduct showed utter disregard for human life. It is for you to decide of what degree of homicide the defendant is guilty, if guilty at all, according to the instructions which define the two degrees of reckless homicide.

Statutory Definition of First Degree Reckless Homicide

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

State's Burden of Proof

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

Elements of First Degree Reckless Homicide That the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

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

   "Criminally reckless conduct" means:[2]

   - the conduct created a risk of death or great bodily harm to another person; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[3]

3. The circumstances of the defendant's conduct showed utter disregard[4] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[5] and, all other facts and circumstances relating to the conduct.

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[6]

[Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.]

Jury's Decision

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

If you are not so satisfied, you must not find the defendant guilty of first degree reckless homicide, and you should consider whether the defendant is guilty of second degree reckless homicide in violation of § 940.06 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree reckless homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree reckless homicide before considering the offense of second degree reckless homicide.[7] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree reckless homicide, you should consider whether the defendant is guilty of second degree reckless homicide.

Statutory Definition of Second Degree Reckless Homicide

Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.

Difference Between First and Second Degree Reckless Homicide

The difference between first and second degree reckless homicide is that the first degree offense requires proof of one additional element: that the circumstances of the defendant's conduct showed utter disregard for human life.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of first degree reckless homicide were present, except the element requiring that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of second degree reckless homicide.

In other words, if you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct, you should find the defendant guilty of second degree reckless homicide.

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

You are not, in any event, to find the defendant guilty of more than one offense.

COMMENT

Wis JI-Criminal 1022 was originally published in 1989 and revised in 2002 and 2012. The 2012 revision added footnote 6 and the text accompanying it. This revision was approved by the Committee in March 2015; it revised footnote 3 to reflect 2013 Wisconsin Act 307.

This instruction is for a case where first degree reckless homicide under § 940.02(1) is charged and second degree reckless homicide under § 940.06 is submitted as a lesser included offense. It applies to those statutes as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The revised statutes apply to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

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

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

Also see, Wis JI-Criminal 901 Cause.

2. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

3. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that

reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.
>
> The Judicial Council Note to subsection (3) explains it as follows:
>
> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

4. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

> First-degree reckless homicide is analogous to the prior offense of 2nd-degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness, is required for liability. See s. 939.24, stats. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).
>
> Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to aggravated reckless homicide offense.

A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further clarified." Attempts to explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978); Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); and Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15, 339 Wis.2d 170, 810 N.W.2d 226, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

5. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

> Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). Under this revision, the analogs of those crimes, i.e., first-degree reckless and 2nd-degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01(3), stats., are inapplicable.
> Judicial Council Note to § 940.02, 1987 Senate Bill 191.

6. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

> ¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

> ¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The committee decided it was not necessary to include a reference to conduct before or during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.

7. This paragraph builds in some of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

8. This statement is based on Wis JI-Criminal 112A which is recommended as an alternative style of submitting a lesser included offense. The Committee concluded it should be used here to emphasize the distinction between first and second degree reckless homicide.

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1023 FIRST DEGREE RECKLESS HOMICIDE: SECOND DEGREE RECKLESS HOMICIDE: NEGLIGENT HOMICIDE — § 940.02(1); § 940.06; § 940.08

Crimes to Consider

The defendant in this case is charged with first degree reckless homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree reckless homicide, you must consider whether or not the defendant is guilty of second degree reckless homicide which is a less serious degree of criminal homicide. If you are not satisfied that the defendant is guilty of second degree reckless homicide, you must consider whether or not the defendant is guilty of homicide by negligent handling of a dangerous weapon which is also a less serious degree of criminal homicide.

The crimes referred to as first degree reckless homicide, second degree reckless homicide, and homicide by negligent handling of a dangerous weapon are varying degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

Reckless Homicide

While the law separates reckless homicides into two degrees, there are certain elements which are common to each crime. Both first and second degree reckless homicide require that the defendant caused the death of the victim by criminally reckless

conduct. First degree reckless homicide requires the State to prove the additional fact that the circumstances of the defendant's conduct showed utter disregard for human life.

Homicide by negligent handling of a dangerous weapon requires that the defendant caused the death of the victim by criminally negligent conduct in the operation or handling of a dangerous weapon.

It is for you to decide of what degree of homicide the defendant is guilty, if guilty at all, according to the instructions which define these offenses.

Statutory Definition of First Degree Reckless Homicide

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

State's Burden of Proof

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

Elements of First Degree Reckless Homicide That the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

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

"Criminally reckless conduct" means:[2]

- the conduct created a risk of death or great bodily harm to another person; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[3]

3. The circumstances of the defendant's conduct showed utter disregard[4] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[5] and, all other facts and circumstances relating to the conduct.

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[6]

[Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct and that the circumstances of the

conduct showed utter disregard for human life, you should find the defendant guilty of first degree reckless homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree reckless homicide, and you should consider whether the defendant is guilty of second degree reckless homicide in violation of § 940.06 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree reckless homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree reckless homicide before considering the offense of second degree reckless homicide.[7] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree reckless homicide, you should consider whether the defendant is guilty of second degree reckless homicide.

Statutory Definition of Second Degree Reckless Homicide

Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.

Difference Between First and Second Degree Reckless Homicide

The difference between first and second degree reckless homicide is that the first degree offense requires proof of one additional element: that the circumstances of the defendant's conduct showed utter disregard for human life.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of first degree reckless homicide were present, except the element requiring that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of second degree reckless homicide.

In other words, if you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct, you should find the defendant guilty of second degree reckless homicide.

If you are not so satisfied, you must not find the defendant guilty of second degree reckless homicide, and you should consider whether the defendant is guilty of homicide by negligent handling of a dangerous weapon in violation of § 940.08 of the Criminal Code of Wisconsin, which is a lesser included offense of first and second degree reckless homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of second degree reckless homicide before considering the offense of homicide by negligent handling of a dangerous weapon.[9] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of second degree reckless homicide, you should consider

whether the defendant is guilty of homicide by negligent handling of a dangerous weapon.

Statutory Definition of Homicide By Negligent Handling Of A Dangerous Weapon

Homicide by negligent handling of a dangerous weapon, as defined in § 940.08 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by the negligent operation or handling of a dangerous weapon.

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

1. The defendant operated or handled a dangerous weapon.
2. The defendant operated or handled a dangerous weapon in a manner constituting criminal negligence.
3. The defendant's operation or handling of a dangerous weapon in a manner constituting criminal negligence caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[10]

Meaning of "Dangerous Weapon"

"Dangerous weapon" means[11]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.[12]]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm.[13] "Great bodily harm" means serious bodily injury.[14]]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Meaning of "Criminal Negligence"

"Criminal negligence" means:[15]

- the defendant's operation or handling of a dangerous weapon created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) operation or handling of a dangerous weapon created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[16]

The Difference Between Criminal Recklessness and Criminal Negligence

Criminal recklessness and criminal negligence both require conduct that creates an unreasonable and substantial risk of death or great bodily harm. Criminal recklessness

requires that the person engaging in that conduct be aware of that risk, while criminal negligence requires that the person engaging in that conduct should have been aware of that risk.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminal negligence in the operation or handling of a dangerous weapon, you should find the defendant guilty.

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

You are not, in any event, to find the defendant guilty of more than one offense.

COMMENT

Wis JI-Criminal 1023 was approved by the Committee in October 2018.

This instruction is for a case where first degree reckless homicide under § 940.02(1) is charged and second degree reckless homicide under § 940.06 and homicide by negligent handling of a dangerous weapon under § 940.08 are submitted as lesser included offenses. Section 940.08 applies to criminal negligence in the operation or handling of "dangerous weapons, explosives or fire." The instruction is drafted for a case involving a "dangerous weapon" and would need to be modified if "fire" or "explosives" was involved. The material relating to negligent homicide is adapted from Wis JI-Criminal 1175.

A case illustrating the sequence of offenses addressed by this instruction is State v. Langlois, 2018 WI 73, 382 Wis.2d 414, 913 N.W.2d 812. The defendant challenged the instructions given in part on the grounds that it was error for the trial court to refer to "the risk" rather than referring to the full term – unreasonable and substantial risk – in referring to the elements of a lesser included offense. The Wisconsin Supreme Court concluded that using that "short cut" was not reversible error, but also noted:

> We recognize that the circuit court was reasonably concerned about the length of the instructions in this case. Although we conclude that the abbreviated jury instructions given in this case were not erroneous, it is best practice to read the pattern instructions for each charge, except, of course, where the pattern instructions themselves are abbreviated.
> 2018 WI 73, ¶42, footnote 23.

Langlois also involved a claim of self defense. The defendant alleged it was error for the trial court to fail to repeat that the burden was on the prosecution to prove beyond a reasonable doubt that the defendant was not privileged to act in self defense when addressing the lesser included offenses. Instead, the instructions stated "as I previously indicated," referring to the definition given when instructing on 1st degree reckless homicide which included a full description of the burden of proof. The court held that this was not error – the context made the reference clear. In the Committee's judgment, it is preferable to repeat the full statement of the burden of proof with each of the lesser included offenses. See Wis JI-Criminal 801 which provides an instruction for the privilege of self defense as applied to crimes involving criminal recklessness and criminal negligence.

This instruction applies to the statutes as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The revised statutes apply to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

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

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

Also see, Wis JI-Criminal 901 Cause.

2. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

3. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

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

The Judicial Council Note to subsection (3) explains it as follows:

Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information."

4. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

> First-degree reckless homicide is analogous to the prior offense of 2nd-degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness, is required for liability. See s. 939.24, stats. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).
>
> Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to aggravated reckless homicide offense.

A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further

clarified." Attempts to explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978); Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); and Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15, 339 Wis.2d 170, 810 N.W.2d 226, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

5. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

> Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). Under this revision, the analogs of those crimes, i.e., first-degree reckless and 2nd-degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01(3), stats., are inapplicable.
> Judicial Council Note to § 940.02, 1987 Senate Bill 191.

6. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

> ¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

> ¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The Committee decided it was not necessary to include a reference to conduct before or during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.

7. This paragraph builds in some of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

8. This statement is based on Wis JI-Criminal 112A which is recommended as an alternative style of submitting a lesser included offense. The Committee concluded it should be used here to emphasize the distinction between first and second degree reckless homicide.

9. This paragraph builds in some of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

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

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

Also see, Wis JI-Criminal 901 Cause.

11. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in § 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

12. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

13. A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, ¶62.

In light of Tomlinson, the Committee concluded that the definition of "dangerous weapon" in the instructions should be revised to include all the statutory alternatives in the text of the instruction. The alternative to be used in a case like Tomlinson would be the following:

> "Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

14. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

15. The definition of "criminal negligence" is based on the one provided in § 939.25. The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

16. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

1030 FELONY MURDER: UNDERLYING CRIME COMPLETED — § 940.03

Statutory Definition of the Crime

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

State's Burden of Proof

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

Elements of Felony Murder That the State Must Prove

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

Determining Whether the Defendant Committed (name of crime)

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

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

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

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

The Meaning of "Cause"

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

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

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

Jury's Decision on Felony Murder

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

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

COMMENT

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

to the comment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- § 940.19 Battery

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Also see Wis JI-Criminal 901, Cause.

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

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

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

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1031 FELONY MURDER: UNDERLYING CRIME ATTEMPTED — § 940.03

Statutory Definition of the Crime

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

State's Burden of Proof

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

Elements of Felony Murder That the State Must Prove

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

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

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

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

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

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

(Name of crime) is committed by one who

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

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

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

Meaning of "Unequivocally"

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

Meaning of "Another Person"

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

Meaning of "Extraneous Factor"

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

Deciding About Intent

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

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

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

The Meaning of "Cause"

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

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

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

Jury's Decision on Felony Murder

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

COMMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Also see Wis JI-Criminal 901, Cause.

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

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

1032 FELONY MURDER: DEATH CAUSED WHILE COMMITTING A CRIME AS A PARTY TO THE CRIME: AIDING AND ABETTING — §§ 940.03 and 939.05

Statutory Definition of the Crime

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while committing[1] the crime of (name of crime)[2] as a party to the crime.

State's Burden of Proof

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

Elements of Felony Murder That the State Must Prove

1. The defendant was a party to the crime of (name of crime).
2. The death of (name of victim) was caused by the commission of the (name of crime).[3]

Determining Whether the Defendant Was A Party To the Crime of (name of crime)

The first element of felony murder requires that the defendant was a party to the crime of (name of crime). This determination has two parts. I will first define what it means to be a party to the crime, which is the first part. Then I will define the elements of (name of crime), which is the second part.

Party To A Crime

"Party to a crime" means that all persons concerned in the commission of a crime may be found to have committed that crime although they did not commit it directly.[4]

The State contends[5] that the defendant was concerned in the commission of the crime of (name of crime) by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either

- assists the person who commits the crime, or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name of crime), the defendant must know that another person is committing or intends to commit the crime of (name of crime) and have the purpose to assist the commission of that crime.[6]

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

(However, a person does not aid and abet if (he) (she) is only a bystander or spectator

and does nothing to assist the commission of a crime.)

Jury's Decision – Party To A Crime

Before you may find that the defendant was a party to the crime of (name of crime), the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant directly committed the crime of (name of crime) or that the defendant intentionally aided and abetted the commission of that crime.

Unanimous Agreement Not Required Regarding Theory Of Party To A Crime

All twelve jurors do not have to agree as to whether the defendant directly committed the crime or aided and abetted the commission of the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those ways.[7]

Elements of (name of crime) That the State Must Prove

Now I will define the elements of (name of crime).

(Name of crime), as defined in section _____[8] of the Criminal Code of Wisconsin, is committed by one who (here refer to the instruction for the underlying crime to fully define the elements of that crime).[9]

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

The second element of felony murder requires that the death of (name of victim) was caused by the commission of the (name of crime).[10]

The Meaning of "Cause"

"Cause" means that the commission of the (name of crime) was a substantial factor in producing the death.[11]

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM A FELONY.[12]

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

Jury's Decision on Felony Murder

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

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

COMMENT

Wis JI-Criminal 1032 was originally published in 1998 and revised in 2003, 2007, and 2013. The 2007 revision reflected the addition of several felonies to the list of those that can provide the predicate for a felony murder charge. This revision was approved by the Committee in April 2022; it also reflected the addition of a new felony to the list of those that can provide the predicate for a felony murder charge based on 2021 Wisconsin Act 209 [effective date: March 25, 2022].

This instruction tailors Wis JI-Criminal 1030, Felony Murder, to a case based on the defendant's being party to the felony that caused the death. It integrates material from Wis JI-Criminal 400, Party To Crime: Aiding and Abetting: Defendant Either Directly Committed Or Intentionally Aided the Crime Charged, and Wis JI-Criminal 1030, Felony Murder.

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

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

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

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

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

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

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

The proper way to integrate party to the crime with felony murder was addressed by the Wisconsin Supreme Court in State v. Oimen, 184 Wis.2d 423, 449, 516 N.W.2d 399 (1994):

> . . . [W]e wish to point out that [Oimen] should not have been charged as a party to the crime of felony murder. Oimen was appropriately charged as a party to the underlying offense, attempted armed robbery. Charging felony murder as a party to the crime is redundant and unnecessary. A person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony.

1. This instruction is for the case where the underlying felony was committed. For a case based on the attempt to commit the underlying felony, this instruction must be adapted to the format provided in Wis JI-Criminal 1031.

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

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

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

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

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

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

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

The other issue that may come up with respect to the cause issue involves relating the time of the death to the time the felony was committed. Since § 940.03 specifically includes attempts to commit the named felonies, the primary questions are likely to arise with respect to deaths caused after the felony is technically complete. For example, does the statute apply to deaths caused by the felon while fleeing the scene of the crime? Statutes in some states include deaths caused "while fleeing immediately after committing" a felony (§ 2903.01, Ohio Rev. Codes) or those caused in the "immediate flight after committing" the felony (17 A

§ 202, Me. Rev. Stats.). Wisconsin has reached the same result by case law. See note 6, below.

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

4. This is a paraphrase of § 939.05(2), which provides: "Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it. . . ."

5. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). If the defendant has not been charged as a party to crime, the material in the second set of brackets should be used.

6. The definition of "intentionally" deals with the clear cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis-JI Criminal 923.2. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

7. The jurors need not be instructed that they must unanimously agree on the basis of liability, that is, whether the defendant directly committed the crime or aided and abetted its commission. Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

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

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

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

- for § 943.10(2) Armed Burglary – Wis JI-Criminal 1422
- for § 943.23(1g) "Carjacking" – Wis JI-Criminal 1463
- for § 943.32(2) Armed Robbery – Wis JI-Criminal 1480, 1480A

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

10. See note 2, supra.

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

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

Also see Wis JI-Criminal 901, Cause.

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

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

1032 EXAMPLE FELONY MURDER: DEATH CAUSED WHILE COMMITTING ARMED BURGLARY AS A PARTY TO THE CRIME: AIDING AND ABETTING C §§ 940.03; 943.10(2), 939.05

Statutory Definition of the Crime

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while committing the crime of armed burglary as a party to the crime.

State's Burden of Proof

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

1. The defendant was a party to the crime of armed burglary.
2. The death of (name of victim) was caused by the commission of the armed burglary.

Determining Whether the Defendant Was A Party To the Crime of Armed Burglary

The first element of felony murder requires that the defendant was a party to the crime of armed burglary. This determination has two parts. I will first define what it means to be a party to the crime, which is the first part. Then I will define the elements of armed burglary, which is the second part.

Party To A Crime

"Party to a crime" means that all persons concerned in the commission of a crime may be found to have committed that crime although they did not commit it directly.

The State contends that the defendant was concerned in the commission of the crime of armed burglary by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either

- assists the person who commits the crime, or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet armed burglary, the defendant must know that another person is committing or intends to commit the crime of armed burglary and have the purpose to assist the commission of that crime.

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

(However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.)

Jury's Decision – Party To A Crime

Before you may find that the defendant was a party to the crime of armed burglary, the State must prove by evidence which satisfies you beyond a reasonable doubt that the

defendant directly committed the crime of armed burglary or that the defendant intentionally aided and abetted the commission of that crime.

Unanimous Agreement Not Required Regarding Theory Of Party To A Crime

All twelve jurors do not have to agree as to whether the defendant directly committed the crime or aided and abetted the commission of the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those ways.

Elements of Armed Burglary That the State Must Prove

Now I will define the elements of armed burglary.

Armed burglary, as defined in § 943.10(2) of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building without the consent of the person in lawful possession and with intent to steal.

State's Burden of Proof

Before you may find that armed burglary was committed, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

1. The defendant intentionally entered a building.
2. The defendant entered the building without the consent of the person in lawful possession.
3. The defendant knew that the entry was without consent.

4. The defendant entered the building with intent to steal.

"Intent to steal" requires that the defendant had the mental purpose to take and carry away movable property of another without consent and that the defendant intended to deprive the owner permanently of possession of the property. [It requires that the defendant knew the property belonged to another and knew the person did not consent to the taking of the property.]

5. The defendant or (name of other person) entered the building while armed with a dangerous weapon.

"Dangerous weapon" means _____.[1]

"Armed" means that at the time of the entry the weapon must have been either on the defendant's person or within the defendant's reach. In addition, the defendant must have been aware of the presence of the weapon.

When Must Intent Exist?

The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is no more or less than the mental purpose to steal formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

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

Jury's Decision on Armed Burglary

If you are satisfied beyond a reasonable doubt that the defendant was a party to the crime of armed burglary, you should determine whether the death of (name of victim) was caused by the commission of the armed burglary.

The Meaning of "Cause"

"Cause" means that the commission of the armed burglary was a substantial factor in producing the death.

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM A FELONY.

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

Jury's Decision on Felony Murder

If you are satisfied beyond a reasonable doubt that the defendant was a party to the crime of armed burglary and that the death of (name of victim) was caused by the commission of armed burglary as that crime has been defined, you should find the defendant guilty of felony murder.

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

COMMENT

Wis JI-Criminal 1032 EXAMPLE was originally published in 1989. This revision was approved by the Committee in April 2003; it adopted a new format.

This instruction adapts Wis JI-Criminal 1032 to case involving a felony murder based on the defendant's being party to the crime of armed burglary. It integrates material from four uniform instructions: Wis JI-Criminal 400, Party To Crime: Aiding and Abetting: Defendant Either Directly Committed Or Intentionally Aided the Crime Charged; Wis JI-Criminal 1032, Felony Murder: Death Caused While Committing A Felony As A Party To The Crime; Wis JI-Criminal 1421, Burglary With Intent To Steal; and, Wis JI-Criminal 1425A, Burglary While Armed.

This offense was chosen for the example in part because there is not a uniform instruction that integrates the "armed" component of armed burglary with the burglary instruction. Rather, it is treated as a special question. See Wis JI-Criminal 1425A. Footnotes are omitted from this instruction. A fully annotated model for felony murder is provided at Wis JI-Criminal 1032. See the other instructions cited above for footnotes specific to those components.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This is a change from 20 years under prior law. For crimes committee on or after February 1, 2003, the penalty for armed burglary under § 943.10(2) is a Class E felony.

1. See Wis JI-Criminal 910 for an instruction on "dangerous weapon."

1050 SECOND DEGREE INTENTIONAL HOMICIDE — § 940.05[1]

Statutory Definition of the Crime

Second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with intent to kill that person or another.[2]

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[3]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[4]

   "Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[5]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[6]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

ADD THE FOLLOWING IF IT APPEARS THAT EVIDENCE OF PROVOCATION MAY HAVE AN EFFECT ON THE JURY'S CONSIDERATION OF THE CASE:[7]

[Adequate provocation is not a defense to a charge of second degree intentional homicide.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill, you should find the defendant guilty of second degree intentional homicide.

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

COMMENT

Wis JI-Criminal 1050 was originally published in 1989. This revision was approved by the Committee in February 2006.

This instruction is for a violation of § 940.05, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989.

This offense, second degree intentional homicide, is essentially the same as manslaughter under prior law.

1. This instruction is drafted for the case where second degree intentional homicide is charged. Though the charging document need not indicate why the second degree rather than the first degree offense is being charged, this instruction is drafted for a case where evidence of adequate provocation is in the case. See note 7, below.

For a case where second degree intentional homicide is submitted as a lesser included offense (because of evidence of adequate provocation), see Wis JI-Criminal 1012.

A charge of second degree intentional homicide could also lie where "unnecessary defensive force" mitigates what would otherwise be first degree intentional homicide. However, the complete privilege of self-defense could be a defense to that charge and would be likely to be raised by the evidence. See Wis JI-Criminal 1052.

2. The statement of the facts necessary to constitute second degree intentional homicide is the same as the one for the facts that constitute the offense of first degree intentional homicide under § 940.01. The difference between the two offenses is that certain matters are defenses to the first degree offense but not to the second degree offense. Thus, "unnecessary defensive force" and "adequate provocation," for example, mitigate first degree intentional homicide to second degree intentional homicide. The absence of the mitigating circumstance becomes the additional fact necessary to constitute the more serious crime, furnishing the distinction between the two degrees of intentional homicide. By charging the defendant with the second

degree offense, the state is conceding that it could not have proven the absence of the mitigating circumstance had the first degree offense been charged.

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

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

Also see Wis JI-Criminal 901, Cause.

4. The parenthetical reference to "another human being" is to be used in a case based on the theory that the defendant caused the death of the victim "with intent to kill another human being." Wisconsin's intentional homicide statutes incorporate the common law doctrine of "transferred intent." See note 3, Wis JI-Criminal 1010.

5. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 923B.

6. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

7. The statement in brackets ought to be unnecessary in most cases because in a prosecution under § 940.05, the state is required to prove only that the defendant caused the death of another with intent to kill. Adequate provocation is not a defense to a charge of second degree intentional homicide. Section 940.05(3). Evidence or argument advancing the proposition that the defendant is not guilty of second degree intentional homicide because of provocation is therefore inadmissible and improper. However, because evidence of provocation may be presented as part of the testimony describing the incident, it may be desirable to inform the jury that provocation has no effect on what the state must establish to support a guilty finding for second degree intentional homicide.

1052 SECOND DEGREE INTENTIONAL HOMICIDE: SELF-DEFENSE — § 940.05[1]

Statutory Definition of the Crime

Second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with intent to kill that person or another.

You must also consider whether the defendant' conduct was privileged under the law of self-defense.

Self-Defense

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another under the following circumstances:

- force is used for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with (his) (her) person by the other person; and,
- the person uses only the amount of force that (he) (she) reasonably believes is necessary to prevent or terminate the interference; and,
- the person may not intentionally use force which is intended or likely to cause death unless (he) (she) reasonably believes that such force is necessary to prevent imminent death or great bodily harm to (himself) (herself).[2]

As applied to this case, the effect of the law of self-defense is that if the defendant reasonably believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), the defendant is not guilty of second degree intentional homicide.

State' Burden of Proof

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

Elements of the Crime That the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[3]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[4]

   "Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[5]

3. The defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary prevent imminent death or great bodily harm to (himself) (herself).[6]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not

be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant' acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[7]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person' reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Reasonable Belief That The Force Used Was Necessary

The third element of second degree intentional homicide requires that the defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent

imminent death or great bodily harm to (himself) (herself). This requires that the State prove any one of the following:[8]

1) that a reasonable person in the circumstances of the defendant would not have believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person; or

2) that a reasonable person in the circumstances of the defendant would not have believed (he) (she) was in danger of imminent death or great bodily harm; or

3) that a reasonable person in the circumstances of the defendant would not have believed that the amount of force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

The reasonableness of the defendant's belief must be determined from the standpoint of the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now. The standard is what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary prevent imminent death or great bodily

harm to (himself) (herself), you should find the defendant guilty of second degree intentional homicide.

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

COMMENT

Wis JI-Criminal 1052 was originally published in 1989. This revision was approved by the Committee in February 2006.

This instruction is for a violation of § 940.05, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989.

This offense, second degree intentional homicide, is essentially the same as manslaughter under prior law.

1. This instruction is drafted for the case where second degree intentional homicide is charged and where evidence of the complete privilege of self-defense is in the case. The absence of the privilege becomes a fact necessary to constitute the crime of second degree intentional homicide.

For a summary of the effect of self-defense in intentional homicide cases, see note 3, Wis JI-Criminal 1014. That instruction is drafted for a case where first degree intentional homicide is charged, there is evidence that the defendant acted in self defense, and the lesser included offense of second degree intentional homicide (unnecessary defensive force) is to be submitted to the jury.

2. These statements are based on the definition of the privilege of self-defense found in § 939.48.

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

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

Also see Wis JI-Criminal 901, Cause.

4. The parenthetical reference to "another human being" is to be used in a case based on the theory that the defendant caused the death of the victim "with intent to kill another human being." Wisconsin's intentional homicide statutes incorporate the common law doctrine of "transferred intent." See note 3, Wis JI-Criminal 1010.

5. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 923B.

6. The absence of the complete privilege of self-defense is a fact necessary to constitute the offense of second degree intentional homicide, assuming there is "some evidence" of the complete privilege in the case. See State v. Head,2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413, State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, and the discussion in footnotes 13 and 15, Wis JI-Criminal 1014.

7. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

8. The exercise of the privilege may be proved to be unreasonable in any one of three ways: by showing that the defendant's belief that he or she was preventing or terminating an unlawful interference was unreasonable; or, by showing that the defendant's belief that he or she was in danger of imminent death or great bodily harm was unreasonable; or, by showing that the amount of force used was unreasonable. See State v. Head, note 6, supra, and note 15, Wis JI-Criminal 1014.

1060 SECOND DEGREE RECKLESS HOMICIDE — § 940.06

Statutory Definition of the Crime

Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.

State's Burden Of Proof

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

Elements of the Crime That the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

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

   "Criminally reckless conduct" means:[2]

   - the conduct created a risk of death or great bodily harm to another person; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[3]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct, you should find the defendant guilty of second degree reckless homicide.

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

COMMENT

Wis JI-Criminal 1060 was originally published in 1989 and revised in 2002. This revision was approved by the Committee in March 2015; it revised footnote 3 to reflect 2013 Wisconsin Act 307.

This instruction is for violations of § 940.06, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

This offense, second degree reckless homicide, replaces what was called homicide by reckless conduct under prior law. It differs from first degree reckless homicide only in lacking the element of "circumstance which show utter disregard for human life." See Wis JI-Criminal 1020 for the instruction on first degree reckless homicide.

For a case involving second degree reckless homicide submitted as a lesser included offense where first degree reckless homicide is charged, see Wis JI-Criminal 1022.

Second degree reckless homicide is not a lesser included offense of homicide by intoxicated use of a vehicle under § 940.09. State v. Lechner, 217 Wis.2d 392, 576 N.W.2d 912 (1998). (Lechner concerned the 1993-94 Wisconsin Statutes, under which both § 940.06 and § 990.09 were Class C felonies.)

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

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

Also see, Wis JI-Criminal 901 Cause.

2. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

3. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

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

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

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1060A SECOND DEGREE RECKLESS HOMICIDE BY OMISSION — § 940.06

Statutory Definition of the Crime

Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.

State's Burden Of Proof

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

Elements of the Crime That the State Must Prove

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

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

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

   "Criminally reckless conduct" means:[2]

   - the conduct created a risk of death or great bodily harm to another person; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[3]

Criminally reckless conduct may be based on either an affirmative act or on a failure to act.

Evidence has been received that the defendant committed second degree reckless homicide by failing to act. Criminal liability may be based on a failure to act when:

- the defendant has a legal duty to act.[4] In this case, it is alleged that the defendant had a legal duty to (identify the legal duty) .[5]
- the defendant has knowledge of facts giving rise to the duty;[6]
- the defendant has the physical ability to act as the duty requires;[7] and,
- the defendant failed to act as the legal duty requires.

For criminal liability based on failure to act, the state must satisfy you beyond a reasonable doubt that all four of these requirements are present and that the defendant's failure to act constituted criminal recklessness.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct, you should find the defendant guilty of second degree reckless homicide.

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

COMMENT

Wis JI-Criminal 1060A was approved by the Committee in March 2015.

This instruction is for violations of § 940.06 that are based on liability for omission, or failure to act. Criminal liability for an omission or failure to act is not codified in the Wisconsin Statutes but has been recognized in case law. See Wis JI-Criminal 905 for a freestanding instruction on omissions and an explanation of the basis for omission liability in Wisconsin. This instruction adapts the model in JI 905 to a charge of second degree reckless homicide. See the Comment to Wis JI-Criminal 1060for a discussion of the history and application of second degree reckless homicide as defined in § 940.06.

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

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

Also see, Wis JI-Criminal 901 Cause.

2. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

3. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense if the actor would have been aware of the risk if not intoxicated. This rule was set forth in § 939.24(3):

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

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element of criminal recklessness. For cases arising before the effective date of Act 307, the suggestion included in the previous version of the Comment would still apply: "In a case where there is evidence of

intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information."

4. State v. Williquette, 129 Wis.2d 239, 251-253, 255-266, 385 N.W.2d 145 (1986).

The existence of a legal duty is the necessary predicate for omission liability. It is likely that a trial court may be requested to make a pretrial ruling whether a legal duty exists based on the facts of the case. If the court concludes that alleged facts, if proved, would support the existence of a legal duty, the case could proceed to trial, where the state will have to prove that the alleged facts exist.

The source of the legal duty must be found in state law. Williquette recognized the common law duty of a parent to protect children from harm. State v. Neumann, 2013 WI 58, ¶104, 348 Wis.2d 455, 832 N.W.2d 560, recognized the duty of a parent to provide medical care to children, basing that duty in part on Williquette, ¶¶105-109, and in part on the fact that "the statute books are replete with provisions imposing responsibility on parents for the care of their children, including the requirement that they provide medical care when necessary." ¶102.

Beyond the situations addressed in Neumann and Williquette there is little direct authority in Wisconsin defining legal duties to act. A leading commentator lists the following potential sources:

1) duty based on relationship – parent/child; husband/wife; ship captain/crew
2) duty based on statute (other than the criminal statute whose violation is in question
3) duty based on contract
4) duty based on voluntary assumption of care
5) duty based on creation of the peril
6) duty to control the conduct of others
7) duty of landowner
Wayne R. LaFave, Substantive Criminal Law [2d ed.], Sec. 6.2(a).

5. Here, the duty should be identified in general terms. The specific aspects of the duty will be at issue with the fourth requirement: that the defendant failed to act as the duty requires.

6. In State v. Williquette, supra, the court referred to a requirement that the defendant "knowingly act in disregard of the facts giving rise to the duty." 129 Wis.2d 239, 256. Also see State v. Cornellier where the court found the complaint was sufficient in alleging facts tending to show that the defendant knew of the dangerous conditions that led to a fatal explosion in his fireworks factory. 144 Wis.2d 745, 761, 425 N.W.2d 21 (Ct. App. 1988).

7. See State v.Williquette, supra, 129 Wis.2d 239, 251 (quoting LaFave and Scott, Criminal Law, sec. 2.6).

8. Relying on omission liability substitutes the failure to act for the affirmative act usually required by an offense definition. Therefore, the components of omission liability need to be connected the offense definition for the crime charged. This will often relate to the cause element required by the offense definition. For crimes involving criminal recklessness, the Committee concluded that it is best to connect the requirements for omission liability with the definition of "criminal recklessness."

1061 SECOND DEGREE RECKLESS HOMICIDE OF AN UNBORN CHILD — § 940.06(2)

Statutory Definition of the Crime

Second degree reckless homicide, as defined in § 940.06(2) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of an unborn child.

State's Burden of Proof

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

Elements of the Crime that the State Must Prove

1. The defendant caused the death of an unborn child.

   "Cause" means that the defendant's act was a substantial factor in producing the death of the unborn child.[1]

   "Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.[2]

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

   "Criminally reckless conduct" means:

   - the conduct created a risk of death or great bodily harm to [an unborn child] [(or) to the woman who is pregnant with the unborn child] [(or) to another]; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[3]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of an unborn child by criminally reckless conduct, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 1061 was originally published in 1999. This revision was approved by the Committee in April 2005 and included adoption of a new format.

This instruction is drafted for the offense defined in § 940.06(2), which was created by 1997 Wisconsin Act 295 [effective date: July 1, 1998]. The act revised all the general homicide statutes to apply to causing the death of an unborn child; several nonhomicide statutes were similarly revised.

Section 939.75, also created by Act 295, defines "unborn child" and sets forth several exceptions to the applicability of the revised statutes. Subsection (2)(b) recognizes the following exceptions:

- induced abortions [subd. 1.]
- acts committed in accordance with usual and customary standards of medical practice during diagnostic testing or therapeutic treatment by a licensed physician [sub. 2.]
- an act by a health care provider that is in accordance with a pregnant woman's power of attorney for health care, etc. [subd. 2h.]
- an act by a woman who is pregnant with an unborn child [subd. 3.]
- the lawful prescription, dispensation or administration, and the use by a woman of, any medicine, drug or device that is used as a method of birth control or is intended to prevent pregnancy. [subd. 4]

Subsection (3) provides that if any of these exceptions are "placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist. . . ." Thus, these exceptions are to be handled in the same manner as, for example, the mitigating circumstance of adequate provocation in cases of intentional homicide: once supported by some evidence, the absence of the exception becomes a fact the state must prove. The Committee decided not to draft instructions for the absence of these exceptions because it appeared to the Committee that their applicability would most likely be determined before charges were filed or at least before trial. Further, in cases involving reckless homicide, most of the exceptions might better be handled as relevant to the elements of the crime. That is, actions taken in accordance with customary standards of medical practice, for example, tend to show that the circumstances do not show utter disregard for life and that the conduct does not create an unreasonable risk of harm. However, § 939.75(3) is unequivocal on this point: if an exception is raised by the evidence at trial, "the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist. . . ."

1. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

2. This is the definition provided in § 939.75(1).

3. This is based on the definition of "criminal recklessness" provided in § 939.24(1) as amended by 1997 Wisconsin Act 295. It is broken into parts to emphasize the separate characteristics of "criminal recklessness."

In the context of this offense, the Committee concluded that the requirement that the defendant be "aware of that risk" means the following. If the conduct creates a substantial risk of death or great bodily harm only because the victim is pregnant, the defendant must be aware that the victim is pregnant. If the conduct creates a substantial risk of death or great bodily harm regardless of the victim being pregnant, the defendant need not

be aware that the victim is pregnant. To put it another way: the defendant must be aware that the conduct creates a substantial risk of death or great bodily harm; if that level of risk exists only because the victim is pregnant, the defendant must be aware that the victim is pregnant.

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1170 HOMICIDE BY NEGLIGENT OPERATION OF A VEHICLE — § 940.10

Statutory Definition of the Crime

Homicide by negligent operation of a vehicle, as defined in § 940.10 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by the negligent operation or handling of a vehicle.

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

1. The defendant operated[1] a vehicle.[2]
2. The defendant operated a vehicle in a manner constituting criminal negligence.
3. The defendant's criminal negligence caused the death of (name of victim) .

"Cause" means that the defendant's act was a substantial factor in producing the death.[3]

The Meaning of "Criminal Negligence"

"Criminal negligence" means:[4]

- the defendant's operation of a vehicle created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and

- the defendant should have been aware that (his) (her) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[5]

IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED, ADD THE FOLLOWING:[6]

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that (summarize the statute) . Violating this statute does not necessarily constitute criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

Jury's Decision

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

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

COMMENT

Wis JI-Criminal 1170 was originally published in 1966 and revised in 1983, 1984, 1986, and 1989. This revision was approved by the Committee in March 2002 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for violations of § 940.10, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a discussion of the homicide revision generally and of the offense covered by this instruction, see the Introductory Comment at Wis JI-Criminal 1000.

This offense was formerly covered by § 940.08. The homicide revision changed former § 940.08 by removing "vehicle" as one of the instrumentalities, creating a new statute, § 940.10, to cover homicide by negligent operation of a vehicle.

1. Though the statute refers to "operation or handling" of a vehicle, the instruction uses "operate" throughout.

The Criminal Code does not define "operate." If a definition is needed, the one provided in § 346.63(3)(b) may be appropriate: "Operate means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put in motion." See Milwaukee County v. Proegler, 95 Wis.2d 614, 291 N.W.2d 608 (Ct. App. 1980), which interprets § 346.63(3)(b). Also see Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977), which provide a definition of "operate" used before the § 346.63 definition was enacted.

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

2. If there is a question whether a device is a "vehicle," add the following, which is adapted from § 939.22(44):

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

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

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

Also, see Wis JI-Criminal 901 Cause.

4. The definition of "criminal negligence" is based on the one provided in § 939.25. The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

5. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

6. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). In Dyess, the court held that the following instruction violated the requirements of § 903.03 by requiring the jury to find the presumed fact (negligence) upon proof of the basic fact (speeding):

> The safety statute in the motor vehicle code provides that, no person shall drive a vehicle at a speed in excess, and on 14th Street in particular, of 30 miles per hour. Any speed in excess of that limit would be negligent speed regardless of other conditions. It is for you to determine whether Johrie Dyess's speed was over said limit and, if under, whether it was, nevertheless, a negligent speed under the conditions and circumstances then present and under the rules of law given to you in these instructions. (Emphasis in original.) 124 Wis.2d 525, 531.

The court said that if the directions of § 903.03 had been followed, the trial court "would have informed the jury that, if it found as a matter of fact that Dyess was exceeding the posted speed limit of 30 miles per hour, it could regard that fact as sufficient evidence of negligence to make that finding but it was not required to do so." 124 Wis.2d 525, 539.

The suggested instruction tries to implement Dyess and § 903.03 by advising the jury that it is for them to determine whether the defendant violated the statute and, if so, whether the conduct constituted negligence. Such a format should be used instead of the uniform civil instructions dealing with statutory violations. (See, e.g., Wis JI-Civil 1290.) As the court stated in Dyess: "No one in the instant case finds fault with Civil Jury Instruction No. 1290 as used in civil cases, but the authority to direct a jury in a criminal case that speed in excess of the posted limit, regardless of other conditions, is negligence, is specifically prohibited by sec. 903.03(3)." 124 Wis.2d 525, 536.

1072 ATTEMPTED FIRST DEGREE INTENTIONAL HOMICIDE: SELF-DEFENSE: ATTEMPTED SECOND DEGREE INTENTIONAL HOMICIDE — § 940.01(2)(b); § 940.05[1]; § 939.32

Crimes to Consider

The defendant in this case is charged with attempted first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of attempted first degree intentional homicide, you must consider whether or not the defendant is guilty of attempted second degree intentional homicide which is a less serious degree of criminal homicide.

Intentional Homicide

The crimes referred to as attempted first and second degree intentional homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of attempted homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates attempted intentional homicides into two degrees, there are certain elements which are common to each crime. Both attempted first and second degree intentional homicide require that:

- the defendant intended to kill another person; and
- the defendant did acts toward the commission of that crime which indicate unequivocally, under all the circumstances, that (he) (she) had formed that intent and would have caused the death of (name of victim) except for the intervention

of another person or some other extraneous factor.

It will also be important for you to consider the privilege of self-defense in deciding which crime, if any, the defendant has committed.

Self-Defense

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another under the following circumstances:

- force is used for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with (his) (her) person by the other person; and,
- the person uses only the amount of force that (he) (she) reasonably believes is necessary to prevent or terminate the interference; and,
- the person may not intentionally use force which is intended or likely to cause death unless (he) (she) reasonably believes that such force is necessary to prevent imminent death or great bodily harm to (himself) (herself).[2]

If you find that the elements of attempted first or second degree intentional homicide have been proved in this case, the effect of the law of self-defense is as follows:

- The defendant is not guilty of either attempted first or second degree intentional homicide if the defendant:

  (1) reasonably believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person, and

(2) reasonably believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[3]

- The defendant is guilty of attempted second degree intentional homicide if the defendant actually believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), but the belief or the amount of force used was unreasonable.[4]
- The defendant is guilty of attempted first degree intentional homicide if the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[5]

Because the law provides that it is the State's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty for attempted first or second degree intentional homicide. If the State does not satisfy you that those facts are established by the evidence, you will be instructed to find the defendant not guilty.

The elements of each crime will now be defined for you in greater detail.

Attempted First Degree Intentional Homicide

Before you may find the defendant guilty of attempted first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt

that the following three elements were present.

Elements of Attempted First Degree Intentional Homicide

That the State Must Prove

1. The defendant intended to kill (name of victim).

   "Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[6]

2. The defendant did acts which demonstrate unequivocally, under all the circumstances, that (he)(she) had formed that intent and would have caused the death of (name of victim) except for the intervention of another person or some other extraneous factor.[7]

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

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

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

3. The defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself.[8]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[9]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Actual Belief That The Force Used Was Necessary

The third element of attempted first degree intentional homicide requires that the defendant did not actually believe the force used was necessary to prevent imminent death

or great bodily harm to (himself) (herself). This requires the State to prove[10] either:

1) that the defendant did not actually believe (he) (she) was in imminent danger of death or great bodily harm; or

2) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to (himself) (herself).

When attempted first degree intentional homicide is considered, the reasonableness of the defendant's belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of attempted second degree intentional homicide.[11]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intended to kill (name of victim), and that the defendant's acts demonstrated unequivocally that the defendant intended to kill and would have killed (name of victim) except for the intervention of another person or some other extraneous factor, and that the defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of attempted first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty[12] of attempted first degree intentional homicide, and you must consider whether the defendant is guilty of

attempted second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of attempted first degree intentional homicide.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on the charge of attempted first degree intentional homicide before considering the offense of attempted second degree intentional homicide.[13] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of attempted first degree intentional homicide, you should consider whether the defendant is guilty of attempted second degree intentional homicide.

Attempted Second Degree Intentional Homicide

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

Elements of Attempted Second Degree Intentional Homicide

That the State Must Prove

1. The defendant intended to kill (name of victim).
2. The defendant did acts which demonstrate unequivocally, under all the circumstances, that (he)(she) had formed that intent and would have caused the death of (name of victim) except for the intervention of another person or some

other extraneous factor.

3. The defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[14]

You have already been instructed on the definitions of "intent to kill," "unequivocally," "another person," and "extraneous factor." The same definitions apply to your consideration of attempted second degree intentional homicide.

Reasonable Belief That the Force Used Was Necessary

The third element of attempted second degree intentional homicide requires that the defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires that the State prove any one of the following:[15]

1) that a reasonable person in the circumstances of the defendant would not have believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person; or
2) that a reasonable person in the circumstances of the defendant would not have believed (he) (she) was in danger of imminent death or great bodily harm; or
3) that a reasonable person in the circumstances of the defendant would not have

believed that the amount of force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[16] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[17] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intended to kill (name of victim), and that the defendant's acts demonstrated unequivocally that the defendant intended to kill and would have killed (name of victim) except for the intervention of another person or some other extraneous factor, and that the defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of attempted second degree intentional homicide.

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of attempted second degree intentional homicide, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

COMMENT

Wis JI-Criminal 1072 was approved by the Committee in February 2005. This revision was approved by the Committee in December 2022; it amended the language concerning reasonable beliefs to be consistent with the definition provided in § 939.22(32). See footnote 16.

This instruction combines Wis JI-Criminal 1014 and 1070 to address the following situation:

- attempted first degree intentional homicide under §§ 939.32 and 940.01 is charged;
- attempted second degree intentional homicide based on unnecessary defensive force under §§ 939.32 and 940.05 is submitted as a lesser included offense; and,
- there is evidence of the complete privilege of self-defense in the case.

The Committee concluded that the same substantive standards and procedures apply to attempt cases as apply to cases involving completed crimes. The substantive standards for completed homicides involving claims of self-defense are set forth in State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413, which is discussed extensively in the notes to Wis JI-Criminal 1014.

When there is evidence of the complete privilege of self-defense, there will always be a sufficient evidentiary basis for instructing on "unnecessary defensive force" – what was called "imperfect self-defense" under pre-1989 Wisconsin law. If the jury is instructed on the complete privilege, "an independent analysis of the property of imperfect self-defense as a lesser included offense is not required." State v. Gomaz, 141 Wis.2d 302, 309, 414 N.W.2d 626 (1987), citing Ross v. State, 61 Wis.2d 160, 211 N.W.2d 827 (1973).

1. This instruction is for a case where attempted first degree intentional homicide is charged, there is evidence that the defendant acted in self-defense, and the lesser included offense of attempted second degree intentional homicide is to be submitted to the jury. The same substantive standards and procedural approach used for the completed crime are used here. Compare Wis JI-Criminal 1014.

2. These statements are based on the definition of the privilege of self-defense found in § 939.48.

3. The effect of the privilege of self-defense in a case where attempted first degree intentional homicide is charged is the same as for the competed crime and is as follows:

(a) if the exercise of the privilege was reasonable, both in inception and scope, the defendant is

not guilty of any crime;

(b) if the defendant actually believed it was necessary to use force in self defense, but acts unreasonably, the defendant is guilty of attempted second degree intentional homicide. He or she may act unreasonably in either of two ways:

i) the belief that it was necessary to act in self-defense may be unreasonable; or

ii) the amount of force used may be unreasonable

(c) if the defendant did not actually believe it was necessary to use force in self defense, the defendant is guilty of attempted first degree intentional homicide.

4. Section 940.01(2)(b) provides that causing the death by "unnecessary defensive force" mitigates what would otherwise be first degree intentional homicide to second degree intentional homicide: "Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable." The same standard applies to attempts.

5. As with the completed crime, the absence of the mitigating circumstance "no actual belief that the force used was necessary to prevent imminent death or great bodily harm" becomes a fact necessary to constitute the attempted first degree offense. As to the completed crime, see § 940.01(3) and State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. See notes 14 and 15, below, and note 5, Wis JI-Criminal 1014.

6. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923B.

7. The statement of the facts necessary to constitute an "attempt" and the definitions of the relevant terms are based on those used in the standard attempt instruction. See Wis JI-Criminal 580. Also see Wis JI-Criminal 1070, Attempted First Degree Intentional Homicide.

8. See note 5, supra.

9. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

10. Section 940.01(2) recognizes four circumstances as affirmative defenses which mitigate first degree intentional homicide to second degree intentional homicide. The same standards apply to attempt cases. When the existence of an affirmative defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. See § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged. Moes v. State, 91 Wis.2d 756,

284 N.W.2d 66 (1979).

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

Two beliefs must be held by the defendant in order to mitigate attempted first degree intentional homicide on the basis of "unnecessary defensive force": a belief that the defendant (or another) was in imminent danger of death or great bodily harm; and a belief that the force used was necessary to defend against that danger. See § 940.01(2)(b). By proving that the defendant did not actually hold either one of these beliefs, the state may meet its burden of proving that "the facts constituting the defense did not exist." Section 940.01(3).

11. The statement of the alternative ways of satisfying this element is the same as that used in Wis JI-Criminal 1014. The 2002 revision of that instruction changed the element in response to the decision in State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Head modified State v. Camacho, 176 Wis.2d 860, 501 N.W.2d 380 (1993), by holding that there is no "objective threshold" for invoking the mitigating factor of "unnecessary defensive force." The "objective threshold" refers to a requirement that the defendant reasonably believe that he or she was preventing or terminating an unlawful interference. Head holds that it is sufficient for purposes of "unnecessary defensive force" that a defendant actually believe that the defensive force used was necessary. See note 13, Wis JI-Criminal 1014.

12. The instruction refers to "you must not find the defendant guilty . . ." rather than the typical "you must find the defendant not guilty . . ." in making the transition to consideration of the lesser included offense. This is to reflect the common practice of giving the jury only one not guilty verdict, along with guilty verdicts for the charged crime and the lesser included crime. Under that practice, the jury would not make a specific finding of "not guilty" on the charged crime – here, attempted first degree intentional homicide.

Thus, the jury would proceed to consider the lesser – here, attempted second degree intentional homicide – under two circumstances: 1) the jury unanimously agrees that the defendant is not guilty of attempted first degree intentional homicide; or , 2) the jury is unable to reach unanimous agreement on that charge. The next paragraph in the instruction addresses the latter situation.

13. This paragraph builds in part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

14. As with the completed crime, the absence of the complete privilege of self-defense is a fact necessary to constitute the offense of attempted second degree intentional homicide, assuming there is evidence of the complete privilege in the case. Since there already has been a finding of "some evidence" of the imperfect privilege, (now called "unnecessary defensive force"), there will almost always be a basis for submitting the existence of the complete privilege to the jury. As to completed crimes, see State v. Gomaz, 141 Wis.2d 302, 310, 414 N.W.2d 626 (1987), recognizing that the two comparable offenses under prior law "differ only in regard to the factual determination of 'reasonableness.'" Also see note 15, Wis JI-Criminal 1014.

15. The exercise of the privilege may be proved to be unreasonable in any one of three ways: by

showing that the defendant's belief that he or she was preventing or terminating an unlawful interference was unreasonable; or, by showing that the defendant's belief that he or she was in danger of imminent death or great bodily harm was unreasonable; or, by showing that the amount of force used was unreasonable. See note 14, supra, and note 15, Wis JI-Criminal 1014.

16. This paragraph was modified in 2022 based on suggested amendments to Wis JI-CRIMINAL 1016 made by the Wisconsin Court of Appeals in State v. Ochoa, 2022 WI App 35, ¶60, 404 Wis.2d 261 978 N.W.2d 501. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

17. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627 28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to use doctrines other than self defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to "heat of passion, caused by reasonable and adequate provocation" rather than self defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines. However, some cases of this type may legitimately be considered under self defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

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1100 HOMICIDE INSTRUCTIONS REPLACED FOR OFFENSES COMMITTED ON OR AFTER JANUARY 1, 1989

[WITHDRAWN]

COMMENT

Wis JI-Criminal 1100 was originally published in 1989. Its withdrawal was approved by the Committee in April 2006.

Wis JI-Criminal 1100 listed the instructions for homicide offenses that were replaced by new or revised instructions reflecting revisions made by 1987 Wisconsin Act 399. Because the "new" homicide law has been in effect for over 15 years, the Committee concluded that Wis JI-Criminal 1100 was no longer needed.

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1120 THIRD DEGREE MURDER: FIRST OR SECOND DEGREE MURDER NOT SUBMITTED

1122 THIRD DEGREE MURDER: FIRST OR SECOND DEGREE MURDER SUBMITTED

[BOTH INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1120 and 1122 were originally published in 1966 and were withdrawn in 1982.

The instructions were withdrawn because of statutory changes found in Chapter 173, Laws of 1977, relating to "felony murder": causing death "as a natural and probable consequence of the commission of or attempt to commit a felony." Prior to the change, the offense was covered by § 940.03, Third Degree Murder. Chapter 173, Laws of 1977, repealed § 940.03 but reenacted "felony murder" as subsection (2) of § 940.02, Second Degree Murder. There was no significant change in the definition of the offense, but there was a change in penalty.

Under former § 940.03, the penalty was fifteen years in addition to the penalty for the underlying felony. Under§ 940.02(2) the penalty is that for a Class B felony: a maximum of 20 years.

The penalty change creates a potential problem. Under former § 940.03, it was not possible to convict the defendant of both the underlying felony and "felony murder" (State v. Carlson, 5 Wis.2d 595, 93 N.W.2d 354 (1958)). Two convictions were not necessary because of the add-on nature of the former penalty for third degree murder.

It is not clear whether a person can be convicted of both the underlying felony and murder under § 940.02(2). It can be argued that the Carlson rule should still apply, and that the underlying felony is a lesser included offense of murder under § 940.02(2), thus prohibiting conviction for both offenses.

Because of this uncertainty the Committee concluded that charges under§ 940.02(2) would be rare and no instructions were prepared to replace Wis JI-Criminal 1120 and 1122.

1120 THIRD DEGREE MURDER: FIRST OR SECOND DEGREE MURDER NOT SUBMITTED

1122 THIRD DEGREE MURDER: FIRST OR SECOND DEGREE MURDER SUBMITTED

[BOTH INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1120 and 1122 were originally published in 1966 and were withdrawn in 1982.

The instructions were withdrawn because of statutory changes found in Chapter 173, Laws of 1977, relating to "felony murder": causing death "as a natural and probable consequence of the commission of or attempt to commit a felony." Prior to the change, the offense was covered by § 940.03, Third Degree Murder. Chapter 173, Laws of 1977, repealed § 940.03 but reenacted "felony murder" as subsection (2) of § 940.02, Second Degree Murder. There was no significant change in the definition of the offense, but there was a change in penalty.

Under former § 940.03, the penalty was fifteen years in addition to the penalty for the underlying felony. Under§ 940.02(2), the penalty is that for a Class B felony: a maximum of 20 years.

In State v. Gordon, 111 Wis.2d 133, 330 N.W.2d 564 (1983), the Wisconsin Supreme Court held that a person cannot be convicted of both the underlying felony and "felony murder" under § 940.02(2): "Inasmuch as the legislature did not clearly express its intent to authorize multiple punishment for felony-murder and the underlying felony and inasmuch as it did not specifically exempt felony-murder and kidnapping from the purview of §§ 939.66(1) and 939.71, this defendant's federal constitutional right to be free from double jeopardy was violated in this case."111Wis.2d 133, 146.

Gordon confirmed the Committee's conclusion that charges under § 940.02(2) would be rare. Therefore, no instructions were prepared to replace Wis JI-Criminal 1120 and 1122.

1125 ABORTION [FETICIDE][1] — § 940.04(1)

CAUTION: IT IS GENERALLY CONCEDED THAT THE WISCONSIN CRIMINAL ABORTION STATUTE, § 940.04, IS UNCONSTITUTIONAL AS APPLIED TO MEDICAL PROCEDURES CONDUCTED WITH CONSENT.[2]

Statutory Definition of the Crime

Section 940.04(1) of the Criminal Code is violated by one, other than the mother, who intentionally destroys the life of an unborn child.

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

1. (Name of mother) was pregnant with a living unborn child.

   The term "unborn child" means a human being from the time of conception until it is born alive.[3]

2. The defendant intentionally destroyed the life of the unborn child.[4]

Meaning of "Intentionally"

The term "intentionally" means that the defendant either had the purpose to destroy the life of an unborn child, or was aware that (his) (her) conduct was practically certain to cause that result.[5] In addition, the defendant must have known that the unborn child was living at the time of the act claimed by the State to have destroyed the life of the child.[6]

Deciding About Intent

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

Jury's Decision

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

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

COMMENT

Wis JI-Criminal 1125 was originally published in 1966 and revised in 1977 and 1985. The 1985 revision responded to the decision in State v. Black, see discussion below. This revision was approved by the Committee in April 2006 and involved adoption of a new format and nonsubstantive changes to the text.

1. The term "feticide" was used in State v. Black, 188 Wis.2d 639, 643-44, 526 N.W.2d 132 (1994):

> This is not an abortion case in the sense of Roe v. Wade. That is, this is not a case about a woman's right to terminate her pregnancy. This is not a case about a physician's right to perform the medical procedure of abortion. Further, this is not a case about when an unborn child "quickens" or becomes "viable."
>
> This is a case about feticide.

Black is discussed in note 2, below.

2. It is generally conceded that § 940.04 is unconstitutional as applied to abortions performed by medical personnel with the consent of the mother of the child. See Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970), Larkin v. McCann, 368 F. Supp. 1352 (E.D. Wis. 1974), and Roe v. Wade, 410 U.S. 113 (1973). However, in State v. Black, 188 Wis.2d 639, 526 N.W.2d 132 (1994), the Wisconsin Supreme Court held that § 940.04(2)(a) could be constitutionally applied to a man who "allegedly caused the death of an unborn quick child . . . by violently assaulting the unborn child's mother." 188 Wis.2d 639, 646. The court held that:

> . . . concerns . . . that sec. 940.04(2)(a) could be used against a woman or her physician (in the context of performing an abortion) are unfounded. Section 940.04(2)(a) cannot be used to charge for a consensual abortive type of procedure. By its own terms it cannot apply to a mother. See also

> sec. 940.13 (abortion statutes cannot be enforced against any woman who obtains an abortion). Any attempt to apply sec. 940.04(2)(a) to a physician performing a consensual abortion prior to viability would be unconstitutional under Roe v. Wade. Further, any attempt to apply it to a physician performing a consensual abortion after viability would be inconsistent with the newer sec. 940.15 which limits such action and establishes penalties for it.

188 Wis.2d 639, 646.

Black addressed a charge under subsec. (2)(a) of § 940.04. This instruction is drafted for violations of sub. (1). The only difference between the two subsections is that sub. (2)(a) applies a more serious penalty where the defendant destroys the life of an unborn "quick" child.

3. This is the definition provided in § 940.04(6).

4. The previous version of this instruction included the following at this point:

> If you are satisfied beyond a reasonable doubt that the unborn child was alive at a particular time, you may infer that it was alive at the time of the act of the defendant unless there is evidence tending to show that the child was dead at such time.

The Committee believes this is an accurate explanation of the reasoning process and may be included in the instruction if supported by the evidence. An instruction in equivalent terms was approved in Holt v. State, 17 Wis.2d 468, 481, 117 N.W.2d 626 (1962).

5. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

6. The knowledge requirement is based on § 939.23(3) which provides that the use of "intentionally" in a criminal requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally.'"

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1170 HOMICIDE BY NEGLIGENT OPERATION OF A VEHICLE — § 940.10

Statutory Definition of the Crime

Homicide by negligent operation of a vehicle, as defined in § 940.10 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by the negligent operation or handling of a vehicle.

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

1. The defendant operated[1] a vehicle.[2]
2. The defendant operated a vehicle in a manner constituting criminal negligence.
3. The defendant's criminal negligence caused the death of (name of victim) .

"Cause" means that the defendant's act was a substantial factor in producing the death.[3]

The Meaning of "Criminal Negligence"

"Criminal negligence" means:[4]

- the defendant's operation of a vehicle created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and

$ the defendant should have been aware that (his) (her) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[5]

IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED, ADD THE FOLLOWING:[6]

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that (summarize the statute) . Violating this statute does not necessarily constitute criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

Jury's Decision

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

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1170 was originally published in 1966 and revised in 1983, 1984, 1986, and 1989. This revision was approved by the Committee in March 2002 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for violations of § 940.10, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a discussion of the homicide revision generally, and of the offense covered by this instruction, see the Introductory Comment at Wis JI-Criminal 1000.

This offense was formerly covered by § 940.08. The homicide revision changed former § 940.08 by removing "vehicle" as one of the instrumentalities, creating a new statute, § 940.10, to cover homicide by negligent operation of a vehicle.

1. Though the statute refers to "operation or handling" of a vehicle, the instruction uses "operate" throughout.

The Criminal Code does not define "operate." If a definition is needed, the one provided in § 346.63(3)(b) may be appropriate: "Operate means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put in motion." See Milwaukee County v. Proegler, 95 Wis.2d 614, 291 N.W.2d 608 (Ct. App. 1980), which interprets § 346.63(3)(b). Also see Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977), which provide a definition of "operate" used before the § 346.63 definition was enacted.

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

2. If there is a question whether a device is a "vehicle," add the following which is adapted from § 939.22(44):

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

3. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

4. The definition of "criminal negligence" is based on the one provided in § 939.25. The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

5. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

6. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). In Dyess, the court held that the following instruction violated the requirements of § 903.03 by requiring the jury to find the presumed fact (negligence) upon proof of the basic fact (speeding):

> The safety statute in the motor vehicle code provides that, no person shall drive a vehicle at a speed in excess, and on 14th Street in particular, of 30 miles per hour. Any speed in excess of that limit would be negligent speed regardless of other conditions. It is for you to determine whether Johrie Dyess's speed was over said limit and, if under, whether it was, nevertheless, a negligent speed under the conditions and circumstances then present and under the rules of law given to you in these instructions. (Emphasis in original.) 124 Wis.2d 525, 531.

The court said that if the directions of § 903.03 had been followed, the trial court "would have informed the jury that, if it found as a matter of fact that Dyess was exceeding the posted speed limit of 30 miles per hour, it could regard that fact as sufficient evidence of negligence to make that finding but it was not required to do so." 124 Wis.2d 525, 539.

The suggested instruction tries to implement Dyess and § 903.03 by advising the jury that it is for them to determine whether the defendant violated the statute and, if so, whether the conduct constituted negligence. Such a format should be used instead of the uniform civil instructions dealing with statutory violations. (See, e.g., Wis JI-Civil 1290.) As the court stated in Dyess: "No one in the instant case finds fault with Civil Jury Instruction No. 1290 as used in civil cases, but the authority to direct a jury in a criminal case that speed in excess of the posted limit, regardless of other conditions, is negligence, is specifically prohibited by sec. 903.03(3)." 124 Wis.2d 525, 536.

1171 HOMICIDE OF AN UNBORN CHILD BY NEGLIGENT OPERATION OF A VEHICLE — § 940.10(2)

Statutory Definition of the Crime

Homicide by negligent operation of a vehicle, as defined in § 940.10(2) of the Criminal Code of Wisconsin, is committed by one who causes the death of an unborn child by the negligent operation or handling of a vehicle.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime that the State Must Prove

1. The defendant operated[1] a vehicle.[2]
2. The defendant operated a vehicle in a manner constituting criminal negligence.

   "Criminal negligence" means:

   - the defendant's operation of a vehicle created a risk of death or great bodily harm to [an unborn child] [(or) to the woman who is pregnant with the unborn child] [(or) to another]; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant should have been aware that (his) (her) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.[3]

3. The defendant's operation of the vehicle in a manner amounting to criminal negligence caused the death of an unborn child.

   "Cause" means that criminal negligence by the defendant was a substantial factor in producing the death.[4]

   "Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant operated a vehicle in a manner constituting criminal negligence and that the defendant's criminal negligence caused the death of an unborn child, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1171 was originally published in 1999. This revision was approved by the Committee in April 2005 and involved adoption of a new format.

This instruction is for a violation of § 940.10(2), created by 1997 Wisconsin Act 295. The penalty for violating § 940.10 is that for a Class E felony: imprisonment for not more than 2 years.

Act 295 also created sub. (2) of § 940.08, prohibiting causing the death of an unborn child by the negligent operation or handling of a dangerous weapon, explosives, or fire. A separate instruction for that offense has not been published. If one is needed, the third element of this instruction should be substituted for the third element of Wis JI-Criminal 1175.

1. Though the statute refers to "operation or handling" of a vehicle, the instruction uses "operate" throughout.

The Criminal Code does not define "operate." If a definition is needed, the one provided in § 346.63(3)(b) may be appropriate: "Operate means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put in motion." See Milwaukee County v. Proegler, 95 Wis.2d 614, 291 N.W.2d 608 (Ct. App. 1980), which interprets § 346.63(3)(b). Also see Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977), which provide a definition of "operate" used before the § 346.63 definition was enacted.

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

2. If there is a question whether a device is a "vehicle," add the following which is adapted from § 939.22(44):

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

3. The instruction on criminal negligence is based on the one provided in § 939.25. The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

4. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient in most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

5. This is the definition of "unborn child" provided in § 939.75(1).

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1175 HOMICIDE BY NEGLIGENT HANDLING OF A DANGEROUS WEAPON — § 940.08

Statutory Definition of the Crime

Homicide by negligent operation of a dangerous weapon, as defined in § 940.08 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by the negligent operation or handling of a dangerous weapon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated or handled a dangerous weapon.
2. The defendant operated or handled a dangerous weapon in a manner constituting criminal negligence.
3. The defendant's operation or handling of a dangerous weapon in a manner constituting criminal negligence caused the death of (name of victim) .

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

Meaning of "Dangerous Weapon"

"Dangerous weapon" means[2]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.[3]]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.[4]][5]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Meaning of "Criminal Negligence"

"Criminal negligence" means:[6]

- the defendant's operation or handling of a dangerous weapon created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) operation or handling of a dangerous weapon created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1175 was originally published in 1966 and revised in 1983, 1986, 1989, and 2006. This revision was approved by the Committee in February 2011 and involved adding reference to 2011 Wisconsin Act 2 to the Comment.

This instruction is for violations of § 940.08, which was changed by the 1989 homicide revision [1987 Wisconsin Act 399] in the following ways:

1) it removed "vehicle" as one of the instrumentalities, creating a new statute, § 940.10, to cover homicide by negligent operation of a vehicle [see Wis JI-Criminal 1170]; and,

2) it further amended the list of instrumentalities by striking "firearm, airgun, knife or bow and arrow" and replacing those terms with "dangerous weapons, explosives or fire."

As to the second change noted above, the Judicial Council Note to § 940.08 (1987 Senate Bill 191) indicates that the intent was not to eliminate any of the previously mentioned instrumentalities:

> The definition of the offense is broadened to include highly negligent handling of fire, explosives and dangerous weapons in addition to firearm, airgun, knife or bow and arrow. See s. 939.22(10), stats.

The instruction is drafted for a case involving a "dangerous weapon" and would need to be modified if "fire" or "explosives" was involved.

2011 Wisconsin Act 2 amended § 940.08 to add an exception by creating subsection (3) to read:

(3) Subsection (1) does not apply to a health care provider acting within the scope of his or her practice or employment.

"Health care provider" is defined in one other Criminal Code statute. Section 940.20(7)(a)3. provides: "'Health care provider' means any person who is licensed, registered, permitted or certified by the department of health services or the department of regulation and licensing to provide health care services in this state." Note that § 940.08 applies only to criminal negligence in the "operation or handling of a dangerous weapon, explosives, or fire . . ." It is not obvious to the Committee how the exception for health care providers would relate to the elements of this offense.

The usual practice in Wisconsin is to treat statutory exceptions like affirmative defenses: If there is some evidence of the exception, the burden is on the state to prove that the exception does not apply. See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon, which recommends adding an element where there is a claim that the defendant was a peace officer; peace officers are subject to an exception from the ban on carrying concealed weapon in § 941.23.

1. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

2. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in s. 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

3. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

4. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

5. A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, ¶62.

In light of Tomlinson, the Committee concluded that the definition of "dangerous weapon" in the instructions should be revised to include all the statutory alternatives in the text of the instruction. The alternative to be used in a case like Tomlinson would be the following:

> "Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

> The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

6. The definition of "criminal negligence" is based on the one provided in § 939.25. The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

7. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

1185 HOMICIDE BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE — § 940.09(1)(a)

Statutory Definition of the Crime

Section 940.09(1)(a) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle.[3]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[4]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[5] in producing the death.

3. The defendant was under the influence of an intoxicant at the time the defendant operated a vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was materially impaired because of consumption of an alcoholic beverage.[6]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be materially impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[7]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[8]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[9] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[10] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210

liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[11]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[12]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[13] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[14] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[15]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[16] does not by itself provide a defense to the crime charged against the defendant.[17] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not been under the influence of an intoxicant and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[18]]

COMMENT

Wis JI-Criminal 1185 was originally published in 1962 and revised in 1980, 1982, 1985, 1986, 1993, 2004, 2006, and 2014. This revision was approved by the Committee in December 2019; it added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31.

This instruction is drafted for violations of § 940.09(1)(a), causing death while operating under the influence an intoxicant. For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

See Wis JI-Criminal 1186 for the related offense involving a prohibited alcohol concentration [PAC] of .08 or more. For persons with three or more priors, the PAC level is .02. See Wis JI-Criminal 1186A. For cases involving two charges – under the influence and PAC – see Wis JI-Criminal 1189.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. See sub. (1c)(a) and sub. (1c)(b). Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09 was revised by 2019 Wisconsin Act 31. The offense definition did not change but sub. (1c)(a) and (b) were amended to require a mandatory minimum term of five years confinement unless the court finds "a compelling reason and places its reason on the record." [The effective date of

Act 31 is November 22, 2019; but this date does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the department of transportation or sentencing court.]

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 13 and following. The defense was formerly addressed in a separate instruction, Wis JI Criminal 1188, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

Offenses involving firearms and airguns are also covered by § 940.09, see sub. (1g) and Wis JI-Criminal 1190 and 1191.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. This instruction is drafted for cases involving the influence of an intoxicant, which is defined to include "an alcohol beverage, hazardous inhalant, . . . a controlled substance or controlled substance analog under ch. 961, . . . any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or . . . any other drug, or . . . an alcohol beverage and any other drug." See § 939.22(42) in note 6, below. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

2. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

3. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

4. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 12, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been under the influence and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

6. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. The definition in the instruction paraphrases the full definition provided in § 939.22(42):

> "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.

Note: "hazardous inhalant" was added to the definition in § 939.22(42) by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013]. Act 83 also created a definition of "hazardous inhalant" in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

7. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

8. It may be that cases will be charged under § 940.09(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

9. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI Criminal 2600 Introductory Comment, Sec. X.

13. See note 12, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

14. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

15. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

16. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

17. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 15, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

18. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1185A VIOLATIONS OF § 940.09 AND § 940.25 INVOLVING AN UNBORN CHILD

FOR VIOLATIONS OF § 940.09 AND § 940.25 WHERE THE VICTIM WAS AN UNBORN CHILD, MAKE THE FOLLOWING CHANGES IN THE APPLICABLE INSTRUCTION.

- In the opening paragraph, substitute "unborn child" for "another."

- Revise element 2. to read as follows:

2. The defendant's operation of a vehicle caused [the death of] [great bodily harm to] an unborn child.

"Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.

OR

2. The defendant's (operation) (handling) of the (firearm) (airgun) caused the death of an unborn child.

"Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.

COMMENT

Wis JI-Criminal 1185A was originally published in 1999 and revised in 2004. This revision was approved by the Committee in December 2023; it added the alternative language concerning the defendant's operation or handling of a firearm or airgun causing the death of an unborn child as provided in § 940.09.

The 2004 revision of this instruction changed it to provide suggested changes in the uniform instructions for violations of §§ 940.09 and 940.25 involving causing the death of or great bodily harm to an unborn child. Those instructions are:

JI 1185	HOMICIDE BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE – § 940.09(1)(a)
JI 1186	HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION – 0.08 GRAMS OR MORE – § 940.09(1)(b)
JI 1186A	HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION – 0.02 GRAMS OR MORE – § 940.09(1)(b)

JI 1189	HOMICIDE BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE/HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION – 0.08 GRAMS OR MORE – § 940.09(1)(a) and § 940.09(1)(b)
JI 1190	HOMICIDE BY OPERATION OR HANDLING OF A FIREARM WHILE UNDER THE INFLUENCE – § 940.09(1g)(a)
JI 1191	HOMICIDE BY OPERATION OR HANDLING OF A FIREARM WITH A PROHIBITED ALCOHOL CONCENTRATION – 0.08 GRAMS OR MORE – § 940.09(1g)(b)
JI 1192	HOMICIDE BY OPERATION OR HANDLING OF A FIREARM OR HANDGUN WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE – § 940.09(1g)(am)
JI 1262	INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE – § 940.25(1)(a)
JI 1263	INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION – 0.08 GRAMS OR MORE – § 940.25(1)(b)
JI 1263A	INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION – 0.02 GRAMS OR MORE – § 940.25(1)(b)

The definition of "unborn child" is the one provided in § 939.75.

1186 HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.08 GRAMS OR MORE — § 940.09(1)(b)

Statutory Definition of the Crime

Section 940.09(1)(b) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while that person has a prohibited alcohol concentration.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle.[3]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[4]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[5] in producing the death.

3. The defendant had a prohibited alcohol concentration at the time the defendant operated a vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[6]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[7]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[8] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[9] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[10]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[11]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[12] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[13] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[14]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[15] does not by itself provide a defense to the crime charged against the defendant.[16] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a prohibited alcohol concentration and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[17]]

COMMENT

Wis JI-Criminal 1186 was originally published in 1982 and revised in 1985, 1986, 1992, 2004, and 2005. This revision was approved by the Committee in December 2019; it added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31.

This instruction is drafted for violations of § 940.09(1)(b) involving a prohibited alcohol concentration [PAC] of .08 or more. The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003. For persons with three or more priors, the PAC level is .02. For an instruction addressing that case, see Wis JI-Criminal 1186A.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. See sub. (1c)(a) and sub. (1c)(b). Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09 was revised by 2019 Wisconsin Act 31. The offense definition did not change but sub. (1c)(a) and (b) were amended to require a mandatory minimum term of five years confinement unless the court finds "a compelling reason and places its reason on the record." [The effective date of Act 31 is November 22, 2019; but this date does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the department of transportation or sentencing court.]

See Wis JI-Criminal 1185 for the related offense of causing death while operating under the influence, as defined in § 940.09(1)(a). For cases involving two charges – operating under the influence and with a PAC – see Wis JI-Criminal 1189.

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 12 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 1188, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

Offenses involving firearms and airguns are also covered by § 940.09, see sub. (1g) and Wis JI-Criminal 1190 and 1191.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Section 940.09(1)(b) defines this offense as causing death by operation or handling a vehicle "while the person has a prohibited alcohol concentration as defined in s. 340.01(46m)." Section 340.01(46m), as amended by 2003 Wisconsin Act 30 [effective date: September 30, 2003], provides as follows:

> (46m) "Prohibited alcohol concentration" means one of the following:
>
> (a) If the person has 2 or fewer prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of 0.08 or more.
>
> [(b) – repealed]
>
> (c) If the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of more than 0.02.

Section 340.01(1v) defines "alcohol concentration" as follows:

> (1v) "Alcohol concentration" means any of the following:
>
> (a) The number of grams of alcohol per 100 milliliters of a person's blood.
>
> (b) The number of grams of alcohol per 210 liters of a person's breath.

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the third element. It then provides for using the appropriate measure of alcohol concentration – blood alcohol or alcohol in the breath – in the definition of the third element. For cases involving 0.02 level, see Wis JI-Criminal 1186A.

2. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

3. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

4. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 11, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been under the influence and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

6. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

7. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

8. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

12. See note 11, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

13. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

14. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court

recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

15. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

16. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 14, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

17. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

1186A HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.02 GRAMS OR MORE — § 940.09(1)(b)

Statutory Definition of the Crime

Section 940.09(1)(b) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while that person has a prohibited alcohol concentration.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [three] [four][2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[3] a vehicle.[4]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[5]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[6] in producing the death.

3. The defendant had a prohibited alcohol concentration at the time the defendant operated a vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[7]

[.02 grams or more of alcohol in 210 liters of the person's breath].

[.02 grams or more of alcohol in 100 milliliters of the person's blood].

NOTE: THE DEFENDANT'S ADMISSION OF THREE OR MORE PRIOR CONVICTIONS DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THIS ELEMENT AND PROCEED TO THE PARAGRAPH CAPTIONED "HOW TO USE THE TEST RESULT EVIDENCE."[8]

[4. The defendant had three or more convictions, suspensions, or revocations, as counted under § 343.307(1).][9]

IF THE FOURTH ELEMENT IS INCLUDED AND IF REQUESTED BY THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:[10]

[Evidence has been received that the defendant had prior convictions, suspensions, or revocations. This evidence was received as relevant to the status of the defendant's driving record, which is an issue in this case. It must not be used for any other purpose and, particularly, you should bear in mind that conviction, suspension, or revocation at some previous time is not proof that the defendant operated a motor vehicle with a prohibited alcohol concentration on this occasion.]

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[11]

IF AN ALCOHOL TEST IS INVOLVED, THE FOLLOWING MAY BE ADDED:[12]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[13]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[14] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[15] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[16]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[17] does not by itself provide a defense to the crime charged against the defendant.[18] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a prohibited alcohol concentration and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.][19]

COMMENT

This instruction was originally published as Wis JI-Criminal 1186.1 in 1992. It was revised and renumbered Wis JI-Criminal 1186A in 1998 and revised again in 2004. This revision was approved by the Committee in December 2019; it added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31.

This instruction has been revised for use for offenses involving a prohibited alcohol concentration level [PAC] of .02 or more, which applies to persons with three or more priors. See § 340.01(46m)(c), created by 1999 Wisconsin Act 109. [Effective date: January 1, 2001.]

The fact of having three or more priors is included as a bracketed fourth element in this instruction. It is an element because the existence of priors changes the substantive definition of the crime from an alcohol concentration of .08 or more to one of .02 or more. It is in brackets because it is not to be submitted to the jury if the defendant admits having the priors. See footnotes 2 and 8, below. When priors change the offense from a forfeiture to a crime or increase the criminal penalty, they need not be submitted to the jury. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

The instruction previously published as Wis JI-Criminal 1186A dealt with a PAC of .08 or more. 2003 Wisconsin Act 30 changed the generally applicable PAC level to .08 or more for persons with 2 or fewer prior convictions, suspensions or revocations, as counted under § 343.307(1). [Effective date: September 30, 2003.] Wis JI-Criminal 1186 has been revised to apply to those cases.

See Wis JI-Criminal 1185 for the related offense of causing death while operating under the influence, as defined in § 940.09(1)(a). For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. See sub. (1c)(a) and sub. (1c)(b). Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09 was revised by 2019 Wisconsin Act 31. The offense definition did not change but sub. (1c)(a) and (b) were amended to require a mandatory minimum term of five years confinement unless the court finds "a compelling reason and places its reason on the record." [The effective date of Act 31 is November 22, 2019; but this date does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the department of transportation or sentencing court.]

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 12 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 1188, which has been withdrawn. The

constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the statutory definition of "prohibited alcohol concentration," see note 1, Wis JI-Criminal 1186.

2. The instruction is drafted to allow for use with either three or four elements, depending on whether the fourth element, relating to the defendant having three or more prior convictions, suspensions or revocations, is submitted to the jury. See discussion at note 8, below.

3. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

4. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. See note 5, Wis JI-Criminal 1186.

7. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

8. The fourth element has been placed in brackets because the Committee concluded that the "status element" of this offense must be addressed in the same manner as for .08 offenses under the version of the law addressed in State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997). In Alexander, the Wisconsin Supreme Court referred to this element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions or revocations [the relevant number under prior law], the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 628, 646. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 628, 651. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 628, 649-50.

The court gave explicit direction to the trial courts as to how to handle this situation:

> "When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The 'prohibited alcohol concentration' means 0.08 . . ."
> 214 Wis.2d 628, 651-52.

By placing the "status element" in brackets, the Committee intends to implement the approach approved in Alexander. If the defendant admits the "status element," the instruction should be given with three elements: causing death, by operating a vehicle, and, having an alcohol concentration of more than .02. If the defendant does not admit the "status element," the instruction should be given with a fourth element: having three or more prior convictions, suspensions or revocations as counted under § 343.307(1).

Because the defendant's admission removes an element from the jury's consideration, the record should reflect the defendant's acknowledgment that a jury determination is, in effect, being waived on the "status element."

9. This element is not to be included if the defendant admits the priors. See note 8, supra.

The text of the fourth element is based on the definition of "prohibited alcohol concentration" in § 340.01(46m)(b). The types of convictions, suspensions, and revocations that are counted under § 343.307(1) are convictions for operating while intoxicated or suspensions or revocations for refusal to submit to chemical tests for alcohol. The priors may include offenses in other jurisdictions. The text of § 343.307(1) is provided in Wis JI-Criminal 2600 Introductory Comment.

The Committee concluded that the instruction should use the statutory language "as counted under § 343.307(1)" because evidence of the defendant's driving record will usually be submitted with testimony that the prior offenses are those that are counted under the statute.

10. Making the fact of prior convictions, etc., an issue for the jury creates the possibility that a jury may make improper use of the evidence relating to the defendant's driving record. Therefore, upon request, an instruction should be given on the limited use to be made of the driving record evidence. In State v. Ludeking, 195 Wis.2d 132, 536 N.W.2d 119 (Ct. App. 1995), the court pointed to this cautionary paragraph as a way to offset the inevitable prejudicial impact of presenting this evidence to the jury.

11. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of .02 or more any prima facie effect. So there is no statutory authority for the typical statement that discusses test results like the ones included in the instructions for .08 offenses. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising

due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

14. See note 12, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

15. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

16. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

17. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

18. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 16, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

19. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

1187 HOMICIDE BY OPERATION OF A VEHICLE WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE — § 940.09(1)(am)

Statutory Definition of the Crime

Section 940.09(1)(am) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[1] a vehicle.[2]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[3]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[4] in producing the death.

3. The defendant had a detectable amount of a restricted controlled substance in his or her blood at the time the defendant operated a vehicle.

   (Name restricted controlled substance) is a restricted controlled substance.[5]

GIVE THE FOLLOWING IF DELTA-9-TETRAHYDROCANNABINOL IS THE ALLEGED RESTRICTED CONTROLLED SUBSTANCE.

[Delta 9 tetrahydrocannabinol is considered a restricted controlled substance if it is at a concentration of one or more nanograms per milliliter of a person's blood.]

How to Use the Test Result Evidence

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the operating.[6]

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied beyond a reasonable doubt that there was a detectable amount of (name restricted controlled substance) in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the operating, but you are not required to do so. You, the jury, are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the alleged operating unless you are satisfied of that fact beyond a reasonable doubt.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[7]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[8] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a detectable amount of (name restricted controlled substance) in his or her blood.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[9] that this defense is established.

"By the greater weight of the evidence" means evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which, in the light of reason and common sense, is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[10]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[11] does not by itself

provide a defense to the crime charged against the defendant.[12] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a detectable amount of (name restricted controlled substance) in his or her blood.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[13]]

COMMENT

Wis JI Criminal 1187 was originally published in 2007 and revised in 2010, 2019, and 2021. The 2019 revision added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31. The 2021 revision added an alternative element to the instruction and modified footnotes 5 and 6 to incorporate changes made by the 2019 Wisconsin Act 68. This revision was approve by the Committee in December 2023; it added to the comment.

This instruction is drafted for violations of § 940.09(1)(am), causing death while operating a vehicle with a detectable amount of a restricted controlled substance. The statute was created by 2003 Wisconsin Act 97 and applies to offenses committed on or after the Act's effective date: December 19, 2003. For a general discussion of Act 97, see Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

This instruction may be useful as a model for violations of § 346.63(2)(a)3., which addresses causing great bodily harm and causing injury by operating with a detectable amount of a restricted controlled substance. There is no uniform instruction for this offense.

Violations of § 940.09 are Class D felonies unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. See sub. (1c)(a) and sub. (1c)(b). Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09 was revised by 2019 Wisconsin Act 31. The offense definition did not change, but sub. (1c)(a) and (b) were amended to require a mandatory minimum term of five years confinement unless the court finds "a compelling reason and places its reason on the record." [The effective date of Act 31 is November 22, 2019; but this date does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the Department of Transportation or sentencing court.]

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and . . . he or she did not have a detectable amount of a restricted controlled substance in his or her blood . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 8 and following. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

2. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

3. Regarding the definition of "operate," see Wis JI Criminal 2600 Introductory Comment, Sec. III.

4. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations; see footnote 8 below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been operating

"with a detectable amount" and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

5. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a detectable amount of the substance in his or her blood remains a jury question.

Section 340.01(50m) defines "restricted controlled substance" as follows:

(50m) 'Restricted controlled substance' means any of the following:

(a) A controlled substance included in schedule I other than tetrahydrocannabinol.
(b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
(c) Cocaine or any of its metabolites.
(d) Methamphetamine.
(e) Delta 9 tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person's blood.

2019 Act 68 amended the definition of delta-9-tetrahydrocannabinol to require that delta-9-tetrahydrocannabinol be at a concentration of one or more nanograms per milliliter of a person's blood. Prior to Act 68, the statute required only a detectable amount of delta-9-tetrahydrocannabinol.

6. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI-Criminal 2663. [The Committee's general approach to instructing on test results is discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper to use it for tests in "restricted controlled substance" cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for "detectable amount of a restricted controlled substance" cases is not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

> 885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

As for the admissibility of evidence concerning the concentration of delta-9- tetrahydrocannabinol in a person's blood, sec. 885.235(5), created by 2019 Wisconsin Act 68, reads as follows:

> [t]he only form of chemical analysis of a sample of human biological material that is

admissible as evidence bearing on the question of whether or not the person had delta-9-tetrahydrocannabinol at a concentration of one or more nanograms per milliliter of the person's blood is a chemical analysis of a sample of the person's blood.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of driving;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of driving.

As to the second difference – admissibility – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence" strongly implies that the analysis is admissible. As to the third difference – connection with the time of driving – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence on the issue of the person having . . ." may express a legislative intent that the analysis be admissible to prove the material issue "that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . ." as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the "prima facie" effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue that it is offered to prove.

7. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI Criminal 2600 Introductory Comment, Sec. X.

8. See note 7, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

9. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

10. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

11. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09,

940.25, and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

12. The instruction attempts to articulate a very fine distinction, which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 10, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

13. This statement is included to ensure that both options for a not-guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved because the defense has been established.

1188 HOMICIDE BY INTOXICATED USER OF VEHICLE, FIREARM, OR AIRGUN: AFFIRMATIVE DEFENSE UNDER § 940.09(2)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1188 was originally published in 1993 and revised in 1995, 1997 and 1998. It was withdrawn in 2004.

This instruction provided material describing the affirmative defense that applies to violations of § 940.09. The material was to be added to the instructions for the applicable offenses. In 2004, the instructions for violations of § 940.09 and § 940.25 were revised to incorporate instruction on the defense. See Wis JI-Criminal 1185, 1186, 1186A, 1189, 1190, 1191, 1262, 1263, and 1263A.

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1189 HOMICIDE BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE / HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION OF 0.08 GRAMS OR MORE — § 940.09(1)(a) and § 940.09(1)(b)

Statutory Definition of the Crime

The first count in the criminal complaint charges that the defendant caused the death of another by the operation or handling of a vehicle while under the influence of an intoxicant[1] in violation of § 940.09(1)(a) of the Wisconsin Statutes.

The second count in the criminal complaint charges that the defendant caused the death of another by the operation or handling of a vehicle on a highway while the defendant had a prohibited alcohol concentration in violation of § 940.09(1)(b) of the Wisconsin Statutes.

To these charges, the defendant has entered pleas of not guilty which means the State must prove every element of each offense charged beyond a reasonable doubt.[2]

It is for you to determine whether the defendant is guilty of one, both, or neither of the offenses charged. You must make a finding of guilty or not guilty for each offense charged.[3]

Each count charges a separate offense, and you must consider each one separately.

Definition of Count 1 – Homicide By Operation Of A Vehicle While Under The Influence Of An Intoxicant

Section 940.09(1)(a) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.[4]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of Count 1 – Homicide By Operation Of A Vehicle While Under The Influence Of An Intoxicant

1. The defendant operated[5] a vehicle.[6]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[7]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[8] in producing the death.

3. The defendant was under the influence of an intoxicant at the time the defendant operated a vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was materially impaired because of consumption of an alcoholic beverage.[9]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able

to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be materially impaired.

Definition of Count 2 – Homicide By Operation Of A Vehicle With A Prohibited Alcohol Concentration

Section 940.09(1)(b) of the Wisconsin Statutes is violated by one who operates or handles a vehicle on a highway with a prohibited alcohol concentration.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must satisfy you beyond a reasonable doubt that the following three elements were present.

Elements of Count 2 – Homicide By Operation Of A Vehicle With A Prohibited Alcohol Concentration

1. The defendant operated a vehicle.
2. The defendant's operation of a vehicle caused the death of (name of victim).
3. The defendant had a prohibited alcohol concentration at the time the defendant operated a motor vehicle.

"Prohibited alcohol concentration" means[10]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a motor vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[11]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[12] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[13] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, but you are not required to do so. You the jury are here to decide these questions on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[14]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not

required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[15]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that the defendant caused the death of another by the operation of a vehicle while under the influence of an intoxicant, you should find the defendant guilty of Count 1.

If you are not so satisfied, you must find the defendant not guilty of Count 1.

If you are satisfied beyond a reasonable doubt that the defendant caused the death of another by the operation of a vehicle while the defendant had a prohibited alcohol concentration, you should find the defendant guilty of Count 2.

If you are not so satisfied, you must find the defendant not guilty of Count 2.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[16] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to the crime charged in Count 1 if the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

Wisconsin law further provides that it is a defense to the crime charged in Count 2 if the death would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[17] that this defense is established as to each count.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION[18]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[19] does not by itself provide a defense to the crime charged against the defendant.[20] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant or had not had a prohibited alcohol concentration.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that the defense is proved as to Count 1, you must find the defendant not guilty of Count 1.

If you are not satisfied that the defense is proved as to Count 1 and you are satisfied beyond a reasonable doubt that all elements of the offense have been proved as to Count 1, you should find the defendant guilty of Count 1.

If you are not satisfied beyond a reasonable doubt that all elements of the offense have been proved as to Count 1, you must find the defendant not guilty of Count 1.[21]

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that the defense is proved as to Count 2, you must find the defendant not guilty of Count 2.

If you are not satisfied that the defense is proved as to Count 2 and you are satisfied beyond a reasonable doubt that all elements of the offense have been proved as to Count 2, you should find the defendant guilty of Count 2.

If you are not satisfied beyond a reasonable doubt that all elements of the offense have been proved as to Count 2, you must find the defendant not guilty of Count 2.[22]]

COMMENT

Wis JI-Criminal 1189 was originally published in 2004 and revised in 2006 and 2014. This revision was approved by the Committee in December 2019; it added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31.

This instruction is drafted for the case where two counts of homicide by intoxicated use of a vehicle under § 940.09 based on the same incident are submitted to the jury: one alleging causing death by the

operation of a vehicle while under the influence and one alleging causing death by the operation of a vehicle with a prohibited alcohol concentration of 0.08 or more. It includes the affirmative defense recognized by sub. (2) of § 940.09. Regarding the defense, see Wis JI-Criminal 2600, Sec. X.

This instruction is a combination of Wis JI-Criminal 1185 and 1186. It attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. See sub. (1c)(a) and sub. (1c)(b). Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09 was revised by 2019 Wisconsin Act 31. The offense definition did not change but sub. (1c)(a) and (b) were amended to require a mandatory minimum term of five years confinement unless the court finds "a compelling reason and places its reason on the record." [The effective date of Act 31 is November 22, 2019; but this date does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the department of transportation or sentencing court.]

For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

1. This instruction is drafted for cases involving the influence of an intoxicant, which is defined to include "an alcohol beverage, hazardous inhalant, . . . a controlled substance or controlled substance analog under ch. 961, . . . any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or . . . any other drug, or . . . an alcohol beverage and any other drug." See § 939.22(42) in note 9, below. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

2. This statement is the equivalent of Wis JI-Criminal 115, One Defendant: Two Counts. If Wis JI-Criminal 115 is also given, the sentence need not be repeated here.

3. This statement is the equivalent of Wis JI-Criminal 484, . . . One Defendant: Two Counts . . . If Wis JI-Criminal 484 is also given, the sentence need not be repeated here.

4. This instruction is drafted for cases involving the influence of an intoxicant. See note 1, supra.

5. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

6. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 15, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been under the influence and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

9. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. The definition in the instruction paraphrases the full definition provided in § 939.22(42):

> "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.

Note: "hazardous inhalant" was added to the definition in § 939.22(42) by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013]. Act 83 also created a definition of "hazardous inhalant" in § 939.22(15).

For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

11. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

14. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

15. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant or did not have [a prohibited] alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

16. See note 15, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

17. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

18. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

19. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of

§§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

20. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 18, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

21. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and
2) not guilty even though the elements have been proved, because the defense has been established.

A separate set of closing paragraphs is presented for each count in an attempt to avoid confusion that may result from combining consideration of the two counts and the possible defenses.

22. See note 21, supra.

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1190 HOMICIDE BY OPERATION OR HANDLING OF FIREARM OR AIRGUN WHILE UNDER THE INFLUENCE — § 940.09(1g)(a)

Statutory Definition of the Crime

Section 940.09(1g)(a) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the (operation) (handling) of (a firearm) (an airgun) while under the influence of an intoxicant.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [(operated) (handled)] [(a firearm)[2] (an airgun)[3]].
2. The defendant's (operation) (handling) of the (firearm) (airgun) caused the death of (name of victim).

   "Cause" means that the defendant's (operation) (handling) of the (firearm) (airgun) was a substantial factor[4] in producing the death.
3. The defendant was under the influence of an intoxicant at the time the defendant (operated) (handled) the (firearm) (airgun).

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to [(operate)

(handle)] [(a firearm) (an airgun)] was materially impaired because of consumption of an alcoholic beverage.[5]

Not every person who has consumed alcoholic beverages is "under the influence," as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to [(operate) (handle)] [(a firearm) (an airgun)].

It is not required that impaired ability to (operate) (handle) be demonstrated by particular unsafe acts. What is required is that the person's ability to safely (operate) (handle) the (firearm) (airgun) be materially impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of an incident is evidence of the defendant's alcohol concentration at the time of the incident.[6]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[7]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED,[8] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[9] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210

liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged incident, but you are not required to do so. You, the jury, are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged incident unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[10]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[11]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[12] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[13] that this defense is established.

"By the greater weight of the evidence" [is meant] [means] evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which, in the light of reason and common sense, is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[14]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[15] does not by itself provide a defense to the crime charged against the defendant.[16] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not been under the influence of an intoxicant and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[17]]

COMMENT

Wis JI-Criminal 1190 was originally published in 1962 and revised in 1980, 1982, 1985, 1986, 1993, 2004, 2006, and 2014. This revision was approved by the Committee in December 2023; it added to the comment.

This instruction is drafted for violations of § 940.09(1g)(a), causing death while handling a firearm or airgun under the influence an intoxicant. For cases involving the death of an unborn child, see Wis JI-Criminal 1185A, which identifies the changes that should be made in the instructions.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

See Wis JI-Criminal 1191 for the related offense involving an alcohol concentration of 0.08 or more of .08 or more. For cases with two charges under the influence and an alcohol concentration of 0.08 or more Wis JI-Criminal 1189 can be used as a model.

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 13 and following. Regarding the defense, see Wis JI-Criminal 2600, Sec. X.

The 2004 revision adopted a new format for footnotes. Although this offense involves firearms or airguns, the structure of the statute and its terms are the same as apply to motor vehicle offenses. Footnotes common to motor vehicle offenses are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. This instruction is drafted for cases involving the influence of an intoxicant, which is defined to include "an alcohol beverage, hazardous inhalant, . . . a controlled substance or controlled substance analog under ch. 961, . . . any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or . . . any other drug, or . . . an alcohol beverage and any other drug." See § 939.22(42) in note 6 below. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

2. "Firearm" has been defined as a weapon that acts by force of gunpowder. Rafferty v. State, 29 Wis.2d 470, 478, 138 N.W.2d 741 (1966).

3. "Airgun" means a weapon which expels a missile by the expansion of compressed air or other gas. See § 939.22(2).

4. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

The statute does provide the defendant with an affirmative defense in certain situations; see footnote 12 below.

5. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. The definition in the instruction paraphrases the full definition provided in § 939.22(42):

> "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.

Note: "hazardous inhalant" was added to the definition in § 939.22(42) by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013]. Act 83 also created a definition of "hazardous inhalant" in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

6. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of defendants with 3 or more priors any prima facie effect. So, there is no statutory authority for the typical statement that discusses the evidentiary value of test results.

7. It may be that cases will be charged under § 940.09(1g)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction that can be adapted for this situation.

8. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

12. See note 12, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

13. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence" because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

14. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

15. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25, and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

16. The instruction attempts to articulate a very fine distinction, which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction

be drafted. See note 15, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

17. This statement is included to ensure that both options for a not-guilty verdict are clearly presented:

> 1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and
>
> 2) not guilty even though the elements have been proved because the defense has been established.

1191 HOMICIDE BY OPERATION OR HANDLING OF FIREARM OR AIRGUN WITH AN ALCOHOL CONCENTRATION OF 0.08 OR MORE — § 940.09(1g)(b)

Statutory Definition of the Crime

Section 940.09(1g)(b) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a firearm[1] while that person has an alcohol concentration of 0.08 or more.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant handled[3] a firearm.[4]
2. The defendant's handling of a firearm caused the death of (name of victim) .

   "Cause" means that the defendant's handling of a firearm was a substantial factor[5] in producing the death.
3. The defendant had an alcohol concentration of 0.08 or more at the time the defendant handled a firearm.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of an incident is evidence of the defendant's alcohol concentration at the time of the incident.[6]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[7] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[8] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had an alcohol concentration of .08 or more at the time of the alleged incident, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had an alcohol concentration of .08 or more at the time of the alleged incident, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[9]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[10]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[11] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had an alcohol concentration of .08 or more.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[12] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[13]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[14] does not by itself provide a defense to the crime charged against the defendant.[15] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death

would have occurred even if the defendant had not had an alcohol concentration of .08 or more and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[16]]

COMMENT

Wis JI-Criminal 1191 was originally published in 1982 and revised in 1985, 1986, 1992, and 2004. This revision was approved by the Committee in June 2005.

This instruction is drafted for violations of § 940.09(1g)(b) involving an alcohol concentration of 0.08 or more. The 2004 revision reflected the change in the prohibited alcohol concentration level from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003. The prohibited level does not change for this offense where a defendant has prior convictions.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

See Wis JI-Criminal 1190 for the related offense of causing death by handling a firearm while under the influence, as defined in § 940.09(1g)(a). For cases with two charges – under the influence and an alcohol concentration of .08 or more – Wis JI-Criminal 1189 can be used as a model.

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have an alcohol concentration described under sub. . . . (1g)(b) . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 11 and following. Regarding the defense, see Wis JI-Criminal 2600, Sec. X.

The 2004 revision adopted a new format for footnotes. Although this offense involves firearms or airguns, the structure of the statute and its terms are the same as apply to motor vehicle offenses. Footnotes common to motor vehicle offenses are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Section 940.09(1g) applies to operation or handling of a "firearm" or "airgun. This instruction is drafted for cases involving a "firearm." "Airgun" is defined by § 939.22(2) as follows:

'Airgun' means a weapon which expels a missile by the expansion of compressed air or other gas.

2. Section 940.09(1g)(b) defines this offense as causing death by operation or handling a vehicle "while the person has an alcohol concentration of 0.08 or more." Unlike motor vehicle offenses, the prohibited level does not change if the defendant has prior convictions.

3. The statute applies to the "operation or handling" of a firearm or airgun. The instruction uses "handles" throughout, on the assumption that it is the term that fits best with instrumentalities like firearms and airguns.

4. "Firearm" has been defined as a weapon that acts by force of gunpowder. Rafferty v. State, 29 Wis.2d 470, 478, 138 N.W.2d 741 (1966).

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 10, below.

6. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of defendants with 3 or more priors any prima facie effect. So there is no statutory authority for the typical statement that discusses the evidentiary value of test results.

7. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

8. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

11. See note 10, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

12. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

13. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

14. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

15. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 13, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

16. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

1192 HOMICIDE BY OPERATION OR HANDLING OF A FIREARM OR AIRGUN WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE – § 940.09(1g)(am)

Statutory Definition of the Crime

Section 940.09(1g)(am) of the Criminal Code of Wisconsin is violated by a person who causes the death of another by the (operation) (handling) of (a firearm) (an airgun) while the person has a detectable amount of a restricted controlled substance in his or her blood.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [(operated) (handled)] [(a firearm)[1] (an airgun)[2]].

2. The defendant's (operation) (handling) of the (firearm) (airgun) caused the death of (name of victim).

   "Cause" means that the defendant's (operation) (handling) of the (firearm) (airgun) was a substantial factor[3] in producing the death.

3. At the time the defendant (operated) (handled) the (firearm) (airgun), there was a detectable amount of a restricted controlled substance in the defendant's blood.

   (Name restricted controlled substance) is a restricted controlled substance.[4]

GIVE THE FOLLOWING IF DELTA-9-TETRAHYDROCANNABINOL IS THE ALLEGED RESTRICTED CONTROLLED SUBSTANCE.

[Delta 9 tetrahydrocannabinol is considered a restricted controlled substance if it is at a concentration of one or more nanograms per milliliter of a person's blood.]

How to Use the Test Result Evidence

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the (operating) (handling).[5]

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied beyond a reasonable doubt that there was a detectable amount of (name restricted controlled substance) in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the (operating) (handling), but you are not required to do so. You, the jury, are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the alleged (operating) (handling) unless you are satisfied of that fact beyond a reasonable doubt.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[6]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[7] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a detectable amount of (name restricted controlled substance) in (his) (her) blood.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[8] that this defense is established.

"By the greater weight of the evidence" means evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which, in the light of reason and common sense, is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[9]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[10] does not by itself provide a defense to the crime charged against the defendant.[11] Consider evidence of the

conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a detectable amount of (name restricted controlled substance) in (his) (her) blood.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[12]]

Comment

This instruction was approved by the Committee in December 2023.

This instruction is drafted for violations of § 940.09(1g)(am), causing death while handling a firearm or airgun with a detectable amount of a restricted controlled substance. For cases involving the death of an unborn child, see Wis JI-Criminal 1185A, which identifies the changes that should be made in the instructions.

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and . . . he or she did not have a detectable amount of a restricted controlled substance in his or her blood . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 4 and following. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

1. "Firearm" has been defined as a weapon that acts by force of gunpowder. Rafferty v. State, 29 Wis.2d 470, 478, 138 N.W.2d 741 (1966).

2. "Airgun" means a weapon which expels a missile by the expansion of compressed air or other gas. See § 939.22(2).

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

The statute does provide the defendant with an affirmative defense in certain situations; see footnote 6 below.

4. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a detectable amount of the substance in his or her blood remains a jury question.

Section 967.055(1m)(b) defines "restricted controlled substance" as follows:

> (b) "Restricted controlled substance" means any of the following:
>
> 1. A controlled substance included in schedule I under ch. 961 other than a tetrahydrocannabinol.
> 2. A controlled substance analog, as defined in s. 961.01 (4m), of a controlled substance described in subd. 1.
> 3. Cocaine or any of its metabolites.
> 4. Methamphetamine.
> 5. Delta-9-tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person's blood.

2019 Act 68 amended the definition of delta-9-tetrahydrocannabinol to require that delta-9-tetrahydrocannabinol be at a concentration of one or more nanograms per milliliter of a person's blood. Prior to Act 68, the statute required only a detectable amount of delta-9-tetrahydrocannabinol.

5. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI-Criminal 2663. [The Committee's general approach to instructing on test results is discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper to use it for tests in "restricted controlled substance" cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for "detectable amount of a restricted controlled substance" cases is not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

> 885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that

> the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

As for the admissibility of evidence concerning the concentration of delta-9- tetrahydrocannabinol in a person's blood, sec. 885.235(5), created by 2019 Wisconsin Act 68, reads as follows:

> [t]he only form of chemical analysis of a sample of human biological material that is admissible as evidence bearing on the question of whether or not the person had delta-9-tetrahydrocannabinol at a concentration of one or more nanograms per milliliter of the person's blood is a chemical analysis of a sample of the person's blood.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of operating or handling;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of operating or handling.

As to the second difference – admissibility – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence" strongly implies that the analysis is admissible. As to the third difference – connection with the time of operating or handing – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence on the issue of the person having . . ." may express a legislative intent that the analysis be admissible to prove the material issue "that a person had a detectable amount of a restricted controlled substance in his or her blood while handing a firearm . . ." as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the "prima facie" effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue that it is offered to prove.

6. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

7. See note 4, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

8. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

9. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that

an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

10. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25, and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

11. The instruction attempts to articulate a very fine distinction, which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 10, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

12. This statement is included to ensure that both options for a not-guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved because the defense has been established.

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1193 MUTILATING A CORPSE — § 940.11(1)

Statutory Definition of the Crime

Section 940.11(1)[1] of the Criminal Code of Wisconsin is violated by one who mutilates, disfigures, or dismembers a corpse with intent to conceal a crime or avoid apprehension, prosecution, or conviction for a crime.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (mutilated) (disfigured) (dismembered) a corpse.[2]
2. The defendant (mutilated) (disfigured) (dismembered) a corpse with the intent to [conceal a crime] [avoid apprehension, prosecution, or conviction[3] for a crime].

   This requires that the defendant acted with the purpose to [conceal a crime] [avoid apprehension, prosecution, or conviction for a crime].[4]

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1193 was originally published in 1998 and revised in 2006. This revision was approved by the Committee in August 2023; it added to the comment.

This instruction is for violations of sub. (1) of § 940.11. For violations of sub. (2) of the same statute, see Wis JI-Criminal 1194.

Subsection (3) of § 940.11 provides as follows: "A person may not be subject to prosecution under both this section and §946.47 for his or her acts regarding the same corpse." Section 946.47 defines the offense of Harboring Or Aiding Felons.

Per the provisions of Wis. Stat. § 939.66: "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both." Further, subsection (7) of the statute states that an included crime could be "the crime specified in s. 940.11(2) when the crime charged is specified in s. 940.11(1)." Therefore, a guilty verdict can be rendered for both a count of mutilating a corpse and a count of hiding or burying a corpse, but only one judgment of conviction can be entered for each corpse.

1. "Corpse" means the dead body of a human being. American Heritage Dictionary of the English Language, 3rd Edition, 1992.

2. If the charging document specifies one of the alternatives (apprehension, prosecution, or conviction) or the evidence supports only one, only that alternative should be used in the instruction. If more than one alternative is supported by the evidence and included in the instruction, the Committee concluded that the jury need not be unanimous as to which applies because the alternatives do not state "conceptually distinct" categories. For a discussion of the same problem arising in connection with burglary with intent to commit a felony, see State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997).

3. "With intent to" is defined in § 939.23(4) as having the mental purpose to cause the result or being "aware that his or her conduct is practically certain to cause that result." The Committee believes that the mental purpose alternative is most likely to apply to this offense. Also see Wis JI-Criminal 923A and 923B.

1194 HIDING OR BURYING A CORPSE — § 940.11(2)

Statutory Definition of the Crime

Section 940.11(2)[1] of the Criminal Code of Wisconsin is violated by one who hides or buries a corpse [with intent to conceal a crime or avoid apprehension, prosecution, or conviction for a crime] [with intent to collect benefits under section (49.141) (49.49) (49.795)].[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (hid)[3] (buried) a corpse.[4]
2. The defendant (hid) (buried) a corpse with intent to [conceal a crime] [avoid apprehension, prosecution, or conviction[5] for a crime] [to collect benefits under section (49.141) (49.49) (49.795)].

   This requires that the defendant acted with the purpose to [conceal a crime] [avoid apprehension, prosecution, or conviction for a crime] [to collect benefits under section (49.141) (49.49) (49.795)].[6]

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found

at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1194 was originally published in 1994 and revised in 1998, 2006, and 2013. The 2013 revision modified the instruction to reflect changes made by 2011 Wisconsin Act 268. This revision was approved by the Committee in August 2023; it added to the comment.

This instruction is for violations of sub. (2) of § 940.11. For violations of sub. (1) of the same statute, see Wis JI-Criminal 1193.

Section 940.11 was amended by 2011 Wisconsin Act 268 [effective date: April 24, 2012] to add an alternative intent element: intent to collect benefits under sections 49.141 Wisconsin works, 49.49 Medical assistance or 49.795 Food stamps.

Subsection (3) of § 940.11 provides as follows: "A person may not be subject to prosecution under both this section and § 946.47 or under both this section and § 948.23 for his or her acts regarding the same corpse." Section 946.47 defines the offense of Harboring Or Aiding Felons. Section 948.23 defines the offense of Concealing or Not Reporting the Death of a Child.

Per the provisions of Wis. Stat. § 939.66: "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both." Further, subsection (7) of the statute clarifies that an included crime could be "the crime specified in s. 940.11(2) when the crime charged is specified in s. 940.11(1)." Therefore, a guilty verdict can be rendered for both a count of mutilating a corpse and a count of hiding or burying a corpse, but only one judgment of conviction can be entered for each corpse.

1. This alternative intent element was added to § 940.11(2) by 2011 Wisconsin Act 268 [effective date: April 24, 2012]. Section 49.141 refers to benefits under Wisconsin Works, 49.49 refers to medical assistance, and 49.795 refers to food stamps.

The material added to the statute by Act 268 reads: ". . . or notwithstanding s. 49.141(7), 49.49(1), or 49.795 with intent to collect benefits under one of those sections. . ." The statutes listed after "notwithstanding" are those that define criminal violations – what are typically referred to as "welfare fraud" or "food stamp fraud." The Committee interpreted this reference to mean that regardless of the other criminal penalties that may apply, an individual may be prosecuted under § 940.11 if the statute is violated with an intent to obtain benefits under those sections.

2. The evidence was found to be sufficient to establish that the defendant "hid" a corpse in State v. Badker, 2001 WI App 27, 240 Wis.2d 460, 623 N.W.2d 142. The court referred with apparent approval to the dictionary definition of "hide" as "to put or keep out of sight." 2001 WI App 27, ¶25, citing Webster's II New College Dictionary (1999).

3. "Corpse" means the dead body of a human being. American Heritage Dictionary of the English Language, 3rd Edition, 1992.

4. If the charging document specifies one of the alternatives (apprehension, prosecution, or conviction), or the evidence supports only one, only that alternative should be used in the instruction. If more than one alternative is supported by the evidence and included in the instruction, the Committee concluded that the jury need not be unanimous as to which applies because the alternatives do not state "conceptually distinct" categories. For a discussion of the same problem arising in connection with burglary with intent to commit a felony, see State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997).

5. "With intent to" is defined in § 939.23(4) as having the mental purpose to cause the result or being "aware that his or her conduct is practically certain to cause that result." The Committee believes that the mental purpose alternative is most likely to apply to this offense. Also see Wis JI-Criminal 923A and 923B.

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1195 ASSISTING SUICIDE — § 940.12

Statutory Definition of the Crime

Assisting suicide, as defined in § 940.12 of the Criminal Code of Wisconsin, is committed by one who with intent that another take his own life assists that person to commit suicide.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of deceased) committed suicide.[1]

   The term "suicide" means the voluntary and intentional taking of one's own life.[2]

2. The defendant assisted (name of deceased) in committing suicide.

   "Assisted" means that the defendant in some method or manner helped or aided (name of deceased) to commit suicide.[3] It is not necessary that the defendant was at the scene of the suicide at the time it occurred.[4]

3. The defendant gave assistance to (name of deceased) with intent that (name of deceased) take his own life.

"With intent that" means that the defendant had the purpose that (name of deceased) commit suicide or that the defendant was aware that (his) (her) conduct was practically certain to cause (name of deceased) to commit suicide.[5]

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1195 was originally published in 1974 and revised in 1977 and 1991. This revision was approved by the Committee in April 2006 and involved adoption of a new format and nonsubstantive changes to the text.

An "assisting suicide" statute from the State of Washington was upheld against a constitutional challenge in Washington v. Glucksberg, 521 U.S. 702 (1997). The court found no constitutional basis for a right to commit suicide or, by implication, to assistance in doing so.

1. Assisting an unsuccessful attempt at suicide would be punishable under the general attempt section, Wis. Stat. § 939.32. See Platz, "The Criminal Code," 1956 Wis. L. Rev. 350, 371 (1956).

2. Bisenius v. Karns, 42 Wis.2d 42, 52, 165 N.W.2d 377 (1969).

3. See 4A Words and Phrases, Assist; Black's Law Dictionary 155 (rev. 4th ed. 1968); Webster's Third New International Dictionary 132 (unabridged ed. 1961).

4. Volume V, 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, p. 65 (February 1953).

5. "With intent that" is defined in § 939.23(4). Also see Wis JI-Criminal 923A and 923B.

1200-1219 SEXUAL ASSAULT INSTRUCTIONS: INTRODUCTORY COMMENT

[WITHDRAWN]

COMMENT

Wis JI-Criminal 1200-1219, Sexual Assault Instructions Introductory Comment, was originally published in 1980. It was withdrawn in 1990.

This Introductory Comment was withdrawn because the issues it discussed have been addressed by statutory changes or are now adequately covered in the footnotes to individual instructions. Its primary purpose was to discuss the Wisconsin sexual assault statute, which represented a great change from the traditional law of "rape" at the time it was created in 1976. (See Chapter 184, Laws of 1975.) Judges and lawyers are now familiar with the sexual assault law, leading the Committee to conclude that the general discussion previously found in the Introductory Comment was no longer necessary.

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1200A SEXUAL CONTACT — § 940.225(5)(b)

SELECT ONE OF THE FOLLOWING ALTERNATIVES RELATING TO THE TYPE OF SEXUAL CONTACT AND INSERT IT IN THE INSTRUCTION FOR THE SEXUAL ASSAULT OFFENSE.[1]

Meaning of "Sexual Contact"

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF THE INTIMATE PARTS OF THE VICTIM:

[Sexual contact is an intentional touching of the (name intimate part)[2] of (name of victim) (by the defendant) (by another person upon the defendant's instruction)[3]. The touching may be of the (name intimate part) directly or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching.

Sexual contact also requires that the defendant acted with intent to (cause bodily harm to (name of victim).)[4] (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[5]]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING BY THE VICTIM OF THE INTIMATE PARTS OF THE DEFENDANT OR OF ANOTHER PERSON:

[Sexual contact is a touching by (name of victim) of the (name intimate part)[6] (of the defendant) (of another person upon the defendant's instruction)[7], if the defendant intentionally caused[8] (name of victim) to do that touching. The touching may be of the (name intimate part) directly or it may be through the clothing.

Sexual contact also requires that the defendant acted with intent to (cause bodily harm to (name of victim) .)[9] (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim) .)[10]]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL EJACULATION OR INTENTIONAL EMISSION OF URINE OR FECES UPON THE COMPLAINANT:

[Sexual contact is intentional penile ejaculation of ejaculate or intentional emission of urine or feces (by the defendant) (by another person upon the defendant's instruction)[11] upon any part of the body clothed or unclothed of (name of victim) .[12]

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim) .)[13]]

FOR SEXUAL CONTACT INVOLVING INTENTIONALLY CAUSING THE VICTIM TO EJACULATE OR EMIT URINE OR FECES ON ANY PART OF THE DEFENDANT'S BODY:

[Sexual contact is ejaculation or emission of urine or feces by (name of victim) on any part of the defendant's body, clothed or unclothed, which the defendant intentionally causes.[14]

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim) .)[15]]

GIVE THE FOLLOWING IN ALL CASES.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent.

CONTINUE WITH THE INSTRUCTION FOR THE SEXUAL ASSAULT OFFENSE.

COMMENT

Wis JI-Criminal 1200A was originally published in 1996 and revised in 1999, 2001, 2002, and 2003. This revision was approved by the Committee in October 2006; it reflected changes made by 2005 Wisconsin Acts 273 and 435.

[An instruction formerly numbered Wis JI-Criminal 1200A, FIRST DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE CAUSING PREGNANCY, has been renumbered Wis JI-Criminal 1201A.]

This instruction provides definitions of "sexual contact" that are to be integrated into the instruction for sexual assault offenses involving sexual contact as appropriate to the facts of the case. The material provided here was formerly included in the text of each offense instruction, dividing the sexual contact definition into two separate elements: one involving the type of touching; the other involving the purpose of the touching. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing this separate instruction with all the alternatives for both the type of touching and the purpose of the touching. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

A similar instruction is provided at Wis JI-Criminal 2101A for offenses in violation of § 948.02. This instruction differs in several ways, due to differences between the statutory definition of "sexual contact" provided in § 940.225(5)(b), addressed in this instruction, and the definition of the same term provided in § 948.01(5), addressed in Wis JI-Criminal 2101A. This instruction should be used only for violations of § 940.225.

The following definition of "sexual contact" is provided in § 940.225(5)(b), as amended by 2005 Wisconsin Acts 273 and 435 (effective date: June 6, 2006):

(b) "Sexual contact" means any of the following:

1. Any of the following types of intentional touching whether direct or through clothing if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19 (1):

a. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.

b. Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person.

2. Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

3. For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

1. The definition of "sexual contact" in § 940.225(5)(b) identifies two types of intentional touchings and two alternatives involving intentional emission of bodily substances. The instruction provides separate alternatives for each alternative, one of which should be selected and added to the instruction for the sexual assault offense.

Each alternative includes the second part of the statutory sexual contact definition: that the contact was for a prohibited purpose. See note 5, below.

2. Section 939.22(19) defines "intimate parts": "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved in the sexual contact.

In State v. Morse, 126 Wis.2d 1, 374 N.W.2d 388 (Ct, App. 1985), the court of appeals held that a trial court did not improperly broaden the scope of the sexual contact definition in § 939.22(19) by defining "intimate part" to include "the vaginal area."

"[T]he plain language of Wis. Stat. § 939.22(19) is meant to include a female and a male breast because each is 'the breast . . . of a human being' and thereby the touching of a [15 year old] boy's breast constitutes 'sexual contact' within the meaning of Wis. Stat. §948.02(2)." State v. Forster, 2003 WI App 29, 260 Wis.2d 149, 659 N.W.2d 144.

3. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

4. Note that this alternative – intent to cause bodily harm – is not to be used for cases based on sexual contact involving intentional ejaculation or intentional emission of urine or feces. The remaining two intent alternatives do apply to that type of case.

"Intent to cause bodily harm" is derived from that part of the statutory sexual contact definition which prohibits touchings which "contain the elements of actual or attempted battery as defined in § 940.19(1)." The elements of battery are: (1) that the defendant caused bodily harm to another person; (2) that the defendant intended to cause bodily harm; (3) that the bodily harm was caused without the consent of the victim; and (4) that the defendant knew the victim did not consent. [See Wis JI-Criminal 1220.] Attempted battery requires

proof of intent to commit all the elements of battery and an unequivocal act indicating that intent. (See Wis JI-Criminal 580.)

There is some difficulty in smoothly integrating the elements of battery, or attempted battery, into sexual contact offenses under § 940.225. The Committee determined that the essential element of battery or attempted battery that carries over to sexual contact offenses is that of intent to cause bodily harm.

The actual causing of bodily harm by the defendant (the first element of battery, supra) would be implicated only where offenses under § 940.225(1)(a) (see Wis JI-Criminal 1201) and 940.225(2)(b) (see Wis JI-Criminal 1211) are charged. In both offenses, the causing of bodily harm would be covered by other elements of the crime: with subsection (1)(a), the causing of great bodily harm would include it; with subsection (2)(b), the causing of injury, illness, etc., would include it.

For other sexual contact offenses, the causing of physical injury is not a required element. Therefore, these offenses would probably involve the elements of attempted battery. The Committee feels that the elements of a criminal attempt are established by including "intent to do bodily harm" as an element of the sexual contact offense. The "intentional touching" that is required for all sexual contact offenses would furnish the "unequivocal act" required for a criminal attempt. The requirement that intent to do bodily harm be proved fulfills the other element of a criminal attempt, that the defendant intend to commit the completed crime.

The other two elements of battery and attempted battery require that the victim not consent to the touching and that the defendant know of this fact. However, not all sexual assaults have "without consent" as an element (see § 940.225(1)(d) and (2)(c) through (e)). In these instances, the legislature has apparently made the decision that the consent of the victim should be irrelevant because of the victim's young age, mental disability, or unconsciousness. In these cases, the Committee concluded that the reference to the "elements of battery or attempted battery" should not be read to overrule the sexual assault subsections that do not require that "without consent" be proved.

If the "without consent" element is interpreted in this way, the only essential element of battery and attempted battery that carries over to the sexual contact offenses is the element of "intent to cause bodily harm." The Committee determined that it was better to select this distinctive element and make it an element of sexual contact offenses than to incorporate all the elements of battery or attempted battery into the instructions.

5. Each alternative definition includes the requirement that the contact be for a prohibited purpose. Earlier versions of the instructions included the purpose as a separate element, but the Committee concluded that it was preferable to deal with purpose as a second part of the sexual contact definition. The Committee also concluded that including purpose as part of each alternative will reduce the possibility that it would be inadvertently overlooked. Failure to include the purpose of the contact as a part of the jury instruction is reversible error. State v. Krueger, 2001 WI App 14, 240 Wis.2d 644, 623 N.W.2d 211. Likewise, failure to include reference to purpose when accepting a guilty plea may be grounds for withdrawal of the plea. State v. Bollig, 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199; State v. Jipson, 2003 WI App 222, 267 Wis.2d 467, 671 N.W.2d 18; and, State v. Nichelson, 220 Wis.2d 214, 582 N.W.2d 460 (1998).

The instruction phrases the alternatives as requiring that the defendant acted "with intent to" achieve one of the prohibited results. The statute refers to acting with "the purpose of . . ." No change in meaning is intended.

6. See note 2, supra.

7. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

8. The instruction refers to the touching of the defendant by the complainant as a touching which the defendant "causes" the complainant to do. The statute does not expressly provide for the "causing" alternative, but the Committee concluded that the requirement is implicit.

For sexual assault offenses against children, another alternative exists for this type of sexual contact: allowing a child to touch an intimate part of the defendant. This alternative was recognized in State v. Traylor, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992). See the discussion in note 5, Wis JI-Criminal 2101A. Under § 940.225, certain adult victims are in a situation very similar to that of a child victim: persons suffering from mental illness or deficiency [sub. (2)(c)]; persons under the influence of an intoxicant [sub. (2)(cm)]; or, patients or residents [sub. (2)(g)]. However, the Committee decided not to incorporate the "or allowed" alternative in this instruction in the absence of clear authority extending the Traylor decision beyond offenses against children.

Applied literally to a case where the victim is caused to touch the defendant, § 940.225(5)(b)1.b. requires an "intentional touching by the complainant . . . of the . . . defendants' intimate parts. . . ." The Committee concluded that it is proper to interpret this definition in a manner that focuses on the defendant's, rather than the victim's, intent. Thus, the instruction refers simply to "a touching" by the victim that the defendant "intentionally caused." This is consistent with the Traylor decision's interpretation of almost identical language in the definition of "sexual contact" in § 948.01(5)(a).

The constitutionality of the sexual contact definition (prior to its amendment by Chapter 309, Laws of 1981) was considered by the Wisconsin courts in several cases. The constitutionality of the basic definition was upheld in State ex rel. Skinkis v. Treffert, 90 Wis.2d 528, 280 N.W.2d 316 (Ct. App. 1979). In State v. Nye, 105 Wis.2d 63, 312 N.W.2d 826 (1981), the Wisconsin Supreme Court summarily affirmed a Wisconsin Court of Appeals decision (101 Wis.2d 398, 302 N.W.2d 83 (Ct. App. 1981)) which held that it was error to include in a jury instruction the former statutory language "if that touching can reasonably be construed to be for the purpose of sexual arousal or gratification." Chapter 309, Laws of 1981, eliminated the phrase from § 940.225(5)(b); the standard instructions had never included it in the definition of sexual contact.

9. Note that this alternative – intent to cause bodily harm – is not to be used for cases based on sexual contact involving intentional ejaculation or intentional emission of urine of feces. The remaining two alternatives do apply to that type of case. See note 4, supra.

10. See notes 4 and 5, supra.

11. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

12. This is the type of "sexual contact" defined in sub. (5)(b)2. of § 940.225. It was created by 1995 Wisconsin Act 69, which first applies to offenses committed on December 2, 1995.

13. See notes 4 and 5, supra.

14. This is the type of "sexual contact" defined in sub. (5)(b)3. of § 940.225. It was created by 2005 Wisconsin Act 273, which first applies to offenses committed on April 20, 2006.

15. See notes 4 and 5, supra.

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1200B SEXUAL INTERCOURSE — § 940.225(5)(c)

Meaning of "Sexual Intercourse"

INSERT THE ALTERNATIVE[S] SUPPORTED BY THE EVIDENCE INTO THE INSTRUCTION ON THE SEXUAL ASSAULT OFFENSE.

["Sexual intercourse" means any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required.][1]

["Sexual intercourse" includes (cunnilingus) (fellatio).

(Cunnilingus means oral contact with the clitoris or vulva.)[2]

(Fellatio means oral contact with the penis.)[3]]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[The act of sexual intercourse must be either by the defendant or upon the defendant's instruction.][4]

["Sexual intercourse" does not include an intrusion for a bona fide medical, health care, or hygiene procedure.][5]

COMMENT

Wis JI-Criminal 1200B was originally published in 1996 and revised in 2000 and 2006. This revision added to the text at footnote 5 and was approved by the Committee in February 2010.

[An instruction formerly numbered Wis JI-Criminal 1200B, "Without Consent" – Competency to Give Informed Consent in Issue, has been renumbered Wis JI-Criminal 1200C.]

The definitions provided here were formerly provided in each instruction for a sexual assault offense involving sexual intercourse. The 1996 revision combined sexual contact and sexual intercourse offenses into one instruction, making it necessary to refer to this instruction for definition of "sexual intercourse" and to Wis JI-Criminal 1200A for definition of "sexual contact."

The 2006 revision changed the definitions of "cunnilingus" and "fellatio." See footnotes 2 and 3.

1. Section 940.225(5)(c) defines "sexual intercourse" for purposes of the Sexual Assault Law as follows:

> "Sexual intercourse" includes the meaning assigned under § 939.22(36) as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

Section 939.22(36) defines "sexual intercourse" as follows: "'Sexual intercourse' requires only vulvar penetration and does not require emission." Thus the Sexual Assault Law definition begins with the relatively narrow definition in § 939.22(36) and broadens it considerably. The instruction begins with the broader definition, "any . . . intrusion . . .," since the § 939.22(36) definition is clearly contained therein.

2. This definition was revised in 2006 in light of the decision in State v. Harvey, 2006 WI App. 26, 289 Wis.2d 222, 710 N.W.2d 482, which held that defining cunnilingus as "oral stimulation . . ." is not required by the "statutory scheme of the sexual assault law" and "offends the principles underpinning the sexual assault law." Par. 14. The former definition was taken from Webster's New Collegiate Dictionary, but the court of appeals held that "a standard dictionary definition should not by default become the legal definition of a term if it unfairly or inaccurately states the law or misconveys the legislative intent." Par. 17. The court stated: "We think a better resource is BLACK'S LAW DICTIONARY 380 (6th ed. 1990) which more neutrally defines cunnilingus as '[a]n act of sex committed with the mouth and the female sexual organ.'" Par. 17. The Committee decided not to use that definition because it refers to a "sex act," which is inconsistent with the emphasis of Harvey that a purpose of the sexual assault law was to recognize that sexual assaults were crimes of violence, not of sexual passion. Par. 15. As noted in the Harvey decision, the current edition of Black's does not define the term. [See Par. 17, footnote 6.] The Committee believes the revised definition in the instruction is faithful to the substance of the Harvey decision.

3. This definition was revised in 2006 in light of the decision in State v. Harvey, 2006 WI App. 26, see note 2, supra. Harvey was concerned only with the definition of "cunnilingus," but the Committee concluded that the logic of the court's analysis would also apply to defining fellatio as "oral stimulation," which the instruction formerly did. The former definition had been approved in State v. Childs, 146 Wis.2d 116, 430 N.W.2d 353 (Ct. App. 1988).

4. In State v. Olson, 2000 WI APP 158, 238 Wis.2d 74, 616 N.W.2d 144, the court construed the definition provided in § 948.01(6) to require that "the defendant has to either affirmatively perform one of the actions on the victim, or instruct or direct the victim to perform one of them on him- or herself." Olson, ¶10. The Committee concluded that the same interpretation applies to the definition in § 940.225(5)(c) and that the bracketed sentence in the instruction adequately addresses the Olson requirement. The Olson decision also implies that "allowing" the sexual intercourse to take place may also satisfy the statute (see ¶12), but the holding is limited to the "upon the defendant's instruction" issue.

In State v. Lackershire, 2007 WI 74, 288 Wis.2d 609, 707 N.W.2d 891, the court held there was a defect in establishing a factual basis for a guilty plea to second degree sexual assault of a child, where the defendant claimed to be the victim of a sexual assault by the "child." The court held that being a victim constitutes a defense and that the trial court should have explored that issue as part of the factual basis inquiry: ". . . If the

defendant was raped, the act of having sexual intercourse with a child does not constitute a crime. § 948.01(6)." ¶29. The court relied on State v. Olson, supra, to conclude that the entire definition in § 948.01(6) is modified by the phrase "by the defendant or upon the defendant's instruction." Thus, sexual intercourse resulting from being forced to engage in it by the other party is not "by the defendant or upon the defendant's instruction." The Committee concluded the same interpretation must apply to the definition in § 940.225(5)(c), applicable to prosecutions under § 940.225.

5. This statement is based on the decision in State v. Neumann, 179 Wis.2d 687, 508 N.W.2d 54 (Ct. App. 1993). The court of appeals construed the definition of "sexual intercourse" in § 940.225(5)(c) narrowly in rejecting the defendant's claim that the definition was overbroad: "Although his argument is based on the literal language of the statute, it stretches all bounds of reason to believe that the legislature intended to include bona fide medical, health care, and hygiene procedures within the definition of 'sexual intercourse.'" Neumann, 179 Wis.2d 687, 712, n. 14. Also see State v. Lesik, 2010 WI App 12, ___ Wis.2d ___, ___ N.W.2d ___, [2008 AP 3072-CR], reaching the same conclusion with respect to the definition of "sexual intercourse" applicable to prosecutions under § 948.02.

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1200C "WITHOUT CONSENT" — COMPETENCE TO GIVE INFORMED CONSENT IN ISSUE — § 940.225(4)

CAUTION: THIS INSTRUCTION APPLIES ONLY TO SEXUAL ASSAULT OFFENSES UNDER SECTION 940.225.

SUBSTITUTE THE FOLLOWING[1] FOR THE STANDARD DEFINITION OF "WITHOUT CONSENT" WHEN THE VICTIM'S BEING "COMPETENT TO GIVE INFORMED CONSENT" IS AN ISSUE IN THE CASE.

Meaning of "Did Not Consent"[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant or that (name of victim) was not competent to give informed consent. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[3]

A person is not competent to give informed consent if that person does not have the mental capacity to understand the nature and the consequence of having sexual (intercourse) (contact).[4] The burden is on the State to satisfy you by proof beyond a reasonable doubt that (name of victim) was not competent to give informed consent.

COMMENT

This instruction was originally published as Wis JI-Criminal 1200B in 1983 and revised in 1990. It was revised and renumbered as Wis JI-Criminal 1200C in 1996. This revision adopted a new format and was approved by the Committee in December 2001.

The substance of this instruction was originally included in the body of each standard instruction to which it was relevant. It has been placed in a separate instruction in the interest of simplifying the instructions for the various sexual assault offenses.

1. This instruction is designed to implement § 940.225(4) which defines "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." (Emphasis added.) It should be substituted for the entire "without consent" definition found in the individual sexual assault instructions, in cases where the evidence supports its use.

The standard definition of "without consent" found in the sexual assault jury instructions does not include the "competent to give informed consent" material. The Committee assumed that in most cases the issue would be whether the victim did freely agree to the sexual intercourse or sexual contact. If there was no agreement, it makes no difference whether or not the victim was "competent to give informed consent." The victim's being "competent . . ." would be in issue primarily in cases where consent was indicated and where the state contends that the victim was not competent to consent. These cases were thought to be rare enough to justify removing the "competent to give informed consent" material from the standard definition and treating it separately here.

2. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being unconscious, or being mentally ill, see Wis JI-Criminal 1200D and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

3. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

4. Section 940.225(4) does not define "competent to give informed consent." There is no indication whether the classes of persons described in § 940.225(4)(b) and (c) are those who are not "competent to give informed consent," or whether a different category of individuals is contemplated. The Committee took the view that a broader category was intended and defined "competent to give informed consent" by reference to the general principles that apply to "informed consent" in other contexts – the ability to understand the act and its consequences.

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1200D "WITHOUT CONSENT" — COMPLAINANT SUFFERING FROM MENTAL ILLNESS — § 940.225(4)(b)

CAUTION: THIS INSTRUCTION APPLIES ONLY TO SEXUAL ASSAULT OFFENSES UNDER SECTION 940.225.

ADD THE FOLLOWING[1] TO THE STANDARD DEFINITION OF "WITHOUT CONSENT" IF THERE IS EVIDENCE THAT THE VICTIM WAS SUFFERING FROM MENTAL ILLNESS OR DEFECT AT THE TIME OF THE ALLEGED OFFENSE.

Effect of Mental Illness or Defect on Consent

There is evidence in this case that (name of victim) was suffering from a mental (illness) (defect) at the time of the alleged offense.

If you find that (name of victim) was suffering from a mental (illness) (defect) which impaired capacity to appraise personal conduct at the time of the alleged act of sexual (intercourse) (contact), you may find from that fact alone that (name of victim) did not consent, but you are not required to do so. You should not find that (name of victim) did not consent unless you are so satisfied beyond a reasonable doubt from all the evidence.[2]

COMMENT

This instruction was originally published as Wis JI-Criminal 1200C in 1983 and revised in 1990. It was revised and renumbered as JI 1200D in 1996. This revision adopted a new format and was approved by the Committee in May 2001.

The substance of this instruction was originally included in the body of each standard instruction to which it was relevant. It has been placed in a separate instruction in the interest of simplifying the instructions for the various sexual assault offenses.

1. This instruction is designed to implement § 940.225(4) and (4)(b) which provide that a person "suffering from a mental illness or defect which impairs capacity to appraise personal conduct" is "presumed" to be incapable of consent. (Sexual contact or intercourse with a mentally ill person is also prohibited by § 940.225(2)(c) as a second degree sexual assault; consent is not an issue for that offense. See Wis JI-Criminal 1211.)

The Committee decided not to define "mental illness or defect" in the uniform instruction. Existing statutory definitions did not seem suitable because they are written in the context of determining when treatment is required or when involuntary commitment of the mentally ill person is appropriate. (See, for example, Wis. Stat. § 51.01(13)(a) and (b), and Wis. Stat. § 51.75(2)(c) and (d).) For the purposes of the Sexual Assault Law, the Committee concluded that the term "mental illness or defect" has a meaning within the common understanding of the jury. Additional guidance as to the type of illness or defect required is offered by the qualifying phrase in the statute: ". . . which impairs capacity to appraise personal conduct."

2. In Wisconsin, presumptions in criminal cases are "permissive," that is, the jury may, but is not required to, find the presumed fact (no consent) from the basic fact (mental illness). Moreover, the judge may not direct the jury to find a presumed fact against the accused. Where the presumed fact is an element of the offense, it must be proved beyond a reasonable doubt. (See Wis. Stat. § 903.03 and Judicial Council Committee's note reported at 59 Wis.2d R57-66.) The Committee believes the proper method for instructing on a presumption is illustrated in the instruction: The jury is told that if they find the basic fact (mental illness), they may, from that fact alone, find the presumed fact (no consent), but they are not required to do so and if they do so find, they must be satisfied beyond a reasonable doubt from all the evidence. See Wis JI-Criminal 225 for a discussion of instructing on presumptions.

1200E "WITHOUT CONSENT" — COMPLAINANT UNCONSCIOUS — § 940.225(4)(c)

CAUTION: THIS INSTRUCTION APPLIES ONLY TO SEXUAL ASSAULT OFFENSES UNDER SECTION 940.225.

ADD THE FOLLOWING[1] TO THE STANDARD DEFINITION OF "WITHOUT CONSENT" IF THERE IS EVIDENCE THAT THE VICTIM WAS UNCONSCIOUS OR OTHERWISE UNABLE TO COMMUNICATE UNWILLINGNESS TO AN ACT AT THE TIME OF THE ALLEGED OFFENSE.

Effect of Unconsciousness on Consent

There is evidence in this case that (name of victim) was (unconscious) (unable to communicate unwillingness to an act) at the time of the alleged offense.

If you find that (name of victim) was (unconscious) (unable to communicate unwillingness to an act) at the time of the alleged act of sexual (intercourse) (contact), you may find from that fact alone that (name of victim) did not consent, but you are not required to do so. You should not find that (name of victim) did not consent unless you are so satisfied beyond a reasonable doubt from all the evidence.[2]

COMMENT

This instruction was originally published as Wis JI-Criminal 1200D in 1983 and revised in 1990. It was revised and renumbered as JI 1200E in 1996. This revision adopted a new format and was approved by the Committee in May 2001.

The substance of this instruction was originally included in the body of each standard instruction to which it was relevant. It has been placed in a separate instruction in the interest of simplifying the instructions for the various sexual assault offenses.

1. This instruction is designed to implement § 940.225(4) and (4)(c) which provide that a person who is "unconscious or otherwise unable to communicate unwillingness to an act" is "presumed" incapable of consent. Sexual contact or intercourse with an unconscious person is also prohibited by § 940.225(2)(d) as a second degree sexual assault; consent is not in issue for that offense. See Wis JI-Criminal 1213.

In a case which requires it, this material should be added to the standard definition of "without consent" found in each instruction on sexual assault offenses. It was the Committee's judgment that this instruction will seldom be used. If the victim was unconscious or unable to communicate at the time of the offense, there could clearly be no "words or overt actions" indicating consent as required by § 940.225(4).

2. In Wisconsin, presumptions in criminal cases are "permissive," that is, the jury may, but is not required to, find the presumed fact (no consent) from the basic fact (e.g., being unconscious). Moreover, the judge may not direct the jury to find a presumed fact against the accused. Where the presumed fact is an element of the offense, it must be proved beyond a reasonable doubt. (See Wis. Stat. § 903.03 and Judicial Council Committee's note reported at 59 Wis.2d R57-66.) The Committee believes the proper method for instructing on a presumption is illustrated in the instruction: The jury is told that if they find the basic fact (e.g., being unconscious), they may, from that fact alone, find the presumed fact (no consent), but they are not required to do so and if they do so find, they must be satisfied beyond a reasonable doubt from all the evidence. See Wis JI-Criminal 225 for a discussion of instructing on presumptions and "prima facie cases."

1200F SEXUAL ASSAULT: SPOUSE AS VICTIM — § 940.225(6)

CAUTION: THIS INSTRUCTION APPLIES ONLY TO SEXUAL ASSAULT OFFENSES UNDER SECTION 940.225.

Effect of Marriage on Consent

At the time of the alleged act of sexual (contact) (intercourse), (name of victim) was married to the defendant.

The fact that (name of victim) was married to the defendant does not mean that (name of victim) consented to sexual (contact) (intercourse). [The fact of marriage may be considered along with all the evidence in the case in determining whether there was consent.][1]

COMMENT

This instruction was originally published as Wis JI-Criminal 1200E in 1983 and revised in 1990. It was revised and renumbered as Wis JI-Criminal 1200F in 1996. This revision adopted a new format and was approved by the Committee in May 2001.

This instruction is to implement § 940.225(6), as repealed and recreated by Chapter 310, Laws of 1981. The revised statute applies to offenses committed on or after May 1, 1982, and reads as follows:

> (6) MARRIAGE NOT A BAR TO PROSECUTION. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.

The Prefatory Note to Chapter 310 provided: "This proposal repeals the spousal exception to the sexual assault law and creates a provision intended to negate any presumption that a person is incapable of committing sexual assault because of marriage to the victim."

1. The sentence in brackets should be included only for offenses which do not involve the use of weapons or force or the causing of great bodily harm. However, for charges of third and fourth degree sexual assault, for example, the sentence in brackets is appropriate because the fact of marriage is relevant to determining whether there was consent in those less aggravated instances.

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1200G CAUTIONARY INSTRUCTION: EVIDENCE OF VICTIM'S PRIOR SEXUAL CONDUCT — § 972.11(2)(b)

CHOOSE THE APPROPRIATE BRACKETED ALTERNATIVE[S].

EVIDENCE ADMITTED UNDER § 972.11(2)(b)1[1]

[Evidence of prior sexual conduct between (name of victim) and the defendant has been introduced. If you find that this conduct did occur, you should consider it only (describe acceptable purpose).[2] Do not consider it for any other purpose.]

EVIDENCE ADMITTED UNDER § 972.11(2)(b)2[3]

[Evidence of prior sexual conduct on the part of (name of victim) has been introduced. If you find that this conduct did occur, you should consider it only in determining the source or origin of (semen) (pregnancy) (disease).[4] Do not consider it for any other purpose.]

ADD THE FOLLOWING IF "WITHOUT CONSENT" IS AN ELEMENT OF THE CRIME AND THE EVIDENCE RELATES TO CONDUCT WITH A PERSON OTHER THAN THE DEFENDANT.[5]

[In particular, do not consider this evidence in determining whether (name of victim) consented to the alleged sexual (contact) (intercourse).]

EVIDENCE ADMITTED UNDER § 972.11(2)(b)3[6]

[Evidence of prior allegations of sexual assault made by (name of victim) has been introduced. If you find that the allegations were made and were untruthful, consider them only (describe acceptable purpose).[7] Do not consider this evidence for any other purpose.]

EVIDENCE ADMITTED UNDER THE GENERAL, CONSTITUTIONALLY-REQUIRED EXCEPTION[8]

[Evidence of prior sexual conduct on the part of (name of victim) has been introduced in this case. If you find that this conduct did occur, you should consider it only (describe acceptable purpose).[9] Do not consider this evidence for any other purpose.]

COMMENT

This instruction was originally published as Wis JI-Criminal 1200F in 1983 and revised in 1984 and 1990. It was revised and renumbered as Wis JI-Criminal 1200G in 1996 and revised in 2002, 2011, and 2012. The 2012 revision noted additions to the applicability of § 972.1(2) made by 2011 Wisconsin Act 271. This revision was approved by the Committee in December 2022; it updated the comment.

This instruction is intended to advise the jury on the proper use of evidence of prior sexual conduct when that evidence is admitted under § 972.11(2)(b). The statute applies only to prosecutions under twelve specified statutes:

- § 940.225, Sexual Assault;
- § 948.02, Sexual Assault of A Child;
- § 948.025, Engaging In Repeated Sexual Assaults of the Same Child;
- § 948.05, Sexual Exploitation of A Child;
- § 948.051, Trafficking of A Child;
- § 948.06, Incest With A Child;
- § 948.07, Child Enticement;
- § 948.08, Soliciting a Child for Prostitution;
- § 948.085, Sexual Assault of A Child Placed in Substitute Care;
- § 948.09, Sexual Intercourse with a Child Age 16 or Older;
- § 948.095, Sexual Assault of a Student by a School Instructional Staff Person; and,
- § 940.302(2), Human Trafficking, ["if the court finds that the crime was sexually motivated, as defined in s. 980.01(5)."]

Sections 948.07, 948.08, and 948.09 were added by 2011 Wisconsin Act 271 [effective date: April 24, 2012].

The 2001 revision modified this instruction by providing an alternative paragraph for each of the three exceptions recognized by § 972.11(2)(b)1.-3. and for the general, constitutionally-required exception recognized by case law.

Analysis of admissibility under § 972.11(2) involves three steps determining whether: the evidence falls within an exception set forth in § 972.11(2)(b)1.-3.; the evidence is material to a fact at issue; and, the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature. State v. DeSantis, 155 Wis.2d 774, 456 N.W.2d 600 (1990).

When evidence is admitted for a limited purpose, an instruction limiting the jury's consideration to the proper purpose must be given upon request. § 901.06.

Cases have established the following about § 972.11's prior sexual conduct evidence rule:

– "prior" means prior to trial; it is not limited to prior to the incident on which the criminal charge is based. State v. Gulrud, 140 Wis.2d 721, 421 N.W.2d 739 (Ct. App. 1987).

– "sexual conduct" evidence includes evidence of the lack of sexual activity or experience. State v. Mulhern, 2022 WI 42, 402 Wis.2d 64, 975 N.W.2d 209. See also, State v. Gavigan, 111 Wis.2d 150, 158-59, 330 N.W.2d 571 (1983); State v. Mitchell, 144 Wis.2d 596, 600, 609, 424 N.W.2d 698 (1988); State v. Penigar, 139 Wis.2d 569, 408 N.W.2d 862 (1987); and~~,~~ State v. Childs, 146 Wis.2d 116, 430 N.W.2d 353 (Ct. App. 1988).

– "sexual conduct" evidence includes written notes relating to sexual activity. State v. Vonesh, 135 Wis.2d 477, 401 N.W.2d 170 (Ct. App. 1987).

After § 972.11 was adopted in 1976, the supreme court held that prior sexual conduct evidence may be admissible even if it does not fit one of the statutory exceptions in § 972.11(2)(b)1.-3. See State v. Gavigan, 111 Wis.2d 150, 157-60. Gavigan involved evidence of the victim's lack of prior sexual experience introduced by the state. The court accepted the state's concession that testimony of the victim's virginity prior to being assaulted was covered by the definition of "sexual conduct" because that phrase includes evidence of the lack of sexual activity or experience. Id., at 158-59. The court held, however, that the evidence was admissible because it was offered "to prove a fact independent of the complainant's prior sexual conduct which is relevant to an issue in the case~~.~~"—in Gavigan, lack of consent. Id., at 157-61. The decision also held that a cautionary instruction should be given to "state the limited purpose of the evidence and inform the jury that the evidence may not be considered as indicating the complainant's prior sexual conduct." Id., at 158.

The legislature responded to Gavigan by enacting 1983 Wisconsin Act 449. Effective May 18, 1984, section 972.11(2)(c) was created to read:

(c) Notwithstanding § 901.06, the limitation on the admission of evidence of or reference to the prior sexual conduct of the complaining witness in par. (b) applies regardless of the purpose of the admission or reference unless the admission is expressly permitted under par. (b) 1., 2., or 3.

The supreme court has acknowledged that the creation of subsection (2)(c) limited the Gavigan decision, and that doing so was not an unconstitutional invasion of the powers of the judicial branch. Mulhern, 402 Wis.2d 64, ¶¶24-26; State v. Mitchell, 144 Wis.2d 596, 612-19.

In State v. Herndon, 145 Wis.2d 91, 426 N.W.2d 347 (Ct. App. 1988), the court held that § 972.11(2) must be subject to exceptions based on the defendant's 6th amendment right to present evidence and to

confront adverse witnesses:

> . . . where the evidence to be admitted is probative of the complainant's bias or prejudice, shows that she has a motive to fabricate, or shows a continuing pattern of conduct, the trial court must balance the probativeness of the evidence against its prejudicial nature. A refusal to allow this evidence in all cases based solely upon an evidentiary rule is a violation of the defendant's sixth amendment rights to confront adverse witnesses and present witnesses on his own behalf.

The court identified a six-part test to be used in conducting the required balancing. The Wisconsin Supreme Court adopted a similar rationale and balancing test in State v. Pulizzano, 155 Wis.2d 633, 456 N.W.2d 325 (1990). See note 8, below.

1. This paragraph is drafted for use where evidence is admitted under sub. (2)(b)1. of § 972.11, which provides an exception to the rape shield rule for "evidence of the complaining witness's past conduct with the defendant."

2. The issue to which the evidence is relevant should be described in this blank.

Determining whether past conduct between the complaining witness and the defendant is admissible for an acceptable purpose is a highly fact-dependent inquiry. Wisconsin case law suggests that past conduct can be relevant to the issue whether the act involved in the case was "without consent," but does not provide clear guidance.

State v. Neumann, 179 Wis.2d 687, 508 N.W.2d 54 (Ct. App. 1993), involved changes of forcible sexual assault – without consent and by use or threat of force – by Neumann against his girlfriend. The trial court allowed evidence of prior consensual sexual activity between them, but then instructed the jury that it could not be considered in determining whether there was consent. The court of appeals found this was error, but harmless because the evidence of prior consensual non-violent sexual conduct has virtually no probative value regarding consent to sexual intercourse by the use or threat of force. In a footnote, the court noted that while Wisconsin had no case directly on point, other jurisdictions have generally concluded that prior consensual activity is relevant to the consent issue. 179 Wis.2d 687, 701-02, footnote 5.

In State v. Jackson, 216 Wis.2d 646, 575 N.W.2d 475 (1998), the court held that while evidence of prior conduct between the complaining witness and the defendant fit the exception under sub. (2)(b)1., the evidence was still not admissible. "[M]erely offering proof of the general type described in a particular exception is not enough to defeat the rape shield statute." 216 Wis.2d 646, 658. The defendant must establish that the evidence is "of sufficient probative value to outweigh its inflammatory and prejudicial nature." See § 971.31(11). In this case, the defendant failed to do that. 216 Wis.2d 646, 663.

3. This paragraph is drafted for use where evidence is admitted under sub. (2)(b)2. of § 972.11, which provides an exception to the rape shield law for "evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered."

4. This tracks the language of sub. (b)2. of § 972.11, which goes on to specify the uses to which the evidence may be put: "for use in determining the degree of sexual assault or the extent of injury suffered." The Committee concluded that the latter need not be communicated to the jury; it merely describes the reasons the evidence was admitted. See State v. Dodson, 219 Wis.2d 65, 580 N.W.2d 181 (1998), finding

reversible error in the refusal to admit evidence to show alternative source of physical injury.

Evidence that the hymen of an eight-year-old victim was dilated is not admissible under the "source of . . . disease" exception. In the Interest of Michael R. B., 170 Wis.2d 713, 727-730, 499 N.W.2d 641 (1993). However, it was error to exclude the testimony of a doctor called by the defense who would have testified about the normal dilation of an eight-year-old's hymen. 170 Wis.2d 713, 733.

Evidence that the complainant did not have sexual intercourse in the week prior to the alleged sexual assault was not admissible to show "the origin of semen, pregnancy or disease" or for the purpose of "determining the degree of sexual assault or the extent of injury suffered." State v. Mulhern, 2022 WI 42, ¶¶41-42, 402 Wis.2d 64, 975 N.W.2d 209.

5. This optional paragraph is intended for use when the prior sexual conduct evidence relates to the victim's activity with someone other than the defendant. It is meant to emphasize one of the protections rape shield laws are designed to provide: that it is not to be assumed that a person consented to a sexual act merely because that person has consented to sexual activity in the past. Evidence of prior sexual conduct with the defendant is addressed by sub. (2)(b)1. in the preceding bracketed paragraph.

6. This paragraph is drafted for use where evidence is admitted under sub. (2)(b)3. of § 972.11, which provides an exception to the rape shield law for "evidence of prior untruthful allegations of sexual assault made by the complaining witness." It is intended to emphasize that the jury must first determine that other allegations of sexual assault were made and that those allegations were false. This is consistent with the 3-step procedure set forth in State v. DeSantis, 155 Wis.2d 774, 456 N.W.2d 600 (1990): the evidence falls within the exception set forth in § 972.11(2)(b)3.; the evidence is material to a fact at issue; and, the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature. As to the first step, the evidence must be "sufficient to support a reasonable person's finding that the complainant made prior untruthful allegations." DeSantis, supra, 155 Wis.2d 774, 788.

In State v. Ringer, 2010 WI 69, 326 Wis.2d 351, 785 N.W.2d 448, the court noted that DeSantis used two different statements in describing the test: whether a jury could reasonably find that there was a prior untruthful allegation and whether it could reasonably infer that there was a prior untruthful allegation. To resolve this perceived inconsistency, the court adopted "could reasonably find" as the proper statement. The court also held that the fact that there was no prosecution in connection with the prior allegations, "in and of itself, does not support a finding that the allegations were untruthful." Ringer, ¶40.

7. The issue to which the evidence is relevant should be described in this blank. Usually, that issue will be credibility.

8. This paragraph is drafted for use where evidence is admitted under the general, constitutionally-based, exception based on the defendant's due process right to present relevant evidence. The applicability of the exception is to be determined by using a five-part test, adopted in State v. Pulizzano, 155 Wis.2d 633, 456 N.W.2d 325 (1990):

> (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect.

If the defendant's offer of proof meets the five-part test, "the court must determine whether the defendant's rights to present the proffered evidence are nonetheless outweighed by the State's compelling interest to exclude the evidence." State v. Dodson, 219 Wis.2d 65, ¶11, 580 N.W.2d 181 (1998). For a case finding that the prior acts did not closely resemble those of the instant case, see State v. Dunlap, 2002 WI 19, 250 Wis.2d 466, 640 N.W.2d 112.

Pulizzano held that the evidence offered in that case was relevant to show an alternative source of sexual knowledge on the part of the child victim. The court also held that "[l]imiting instructions should be given to restrict the trier of fact's use of the evidence to that purpose." 155 Wis.2d 633, 656. Also see the following, each finding that excluding evidence offered for this purpose was reversible error: State v. Dodson, 219 Wis.2d 65, 580 N.W.2d 181 (1998); State v. Moats, 156 Wis.2d 74, 457 N.W.2d 299 (1990); and, State v. Jagielski, 161 Wis.2d 67, 467 N.W.2d 196 (Ct. App. 1991). In State v. Hammer, 2000 WI 92, 236 Wis.2d 686, 613 N.W.2d 629, the court held evidence of sexual acts between a child victim and others on the day before the crime was not admissible to show bias and a motive to fabricate.

9. The issue to which the evidence is relevant should be described in this blank. For example: ". . . you should consider it only as it relates to an alternative source of sexual knowledge." See, State v. Pulizzano, note 8, supra.

1201 FIRST DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT CAUSING GREAT BODILY HARM — § 940.225(1)(a)

Statutory Definition of the Crime

First degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with another person without consent and causes great bodily harm to that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. (Name of victim) did not consent to the sexual [contact] [intercourse].
3. The defendant caused great bodily harm to (name of victim).[1]

Meaning of [Sexual Contact] [Sexual Intercourse]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Meaning of Did Not Consent[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[3]

Meaning of Great Bodily Harm

"Great bodily harm" means serious bodily injury.[4] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of first degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1200 [for sexual intercourse offenses] and Wis JI-Criminal 1201 [for sexual contact offenses]. Those instructions were revised in 1983, 1990, and 1992. A revision combining the instructions as Wis JI-Criminal 1201 was published in 1996 and revised in 1998 and 2000. The 2000 revision involved adoption of a new format and nonsubstantive changes to the text. This revision made a minor change in the definition of consent and was approved by the Committee in December 2001.

This instruction is for two of the types of first degree sexual assault defined by § 940.225(1)(a): sexual contact or sexual intercourse without consent causing great bodily harm. Wis JI-Criminal 1201A is drafted for the other violation of this statute: sexual intercourse without consent causing pregnancy.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. In the Committee's judgment, if the act of intercourse or contact was without consent, the act itself need not cause the great bodily harm. It is sufficient if great bodily harm was caused by the defendant during the course of conduct that immediately preceded or followed the act of nonconsensual intercourse or contact. This analysis was adopted as an accurate statement of the law in State v. Schambow, 176 Wis.2d 286, 298-99, 500 N.W.2d 362 (Ct. App. 1993). [At that time, the statement was found at footnote 7 to Wis JI-Criminal 1200, © 1992.]

If there was consent to the act of intercourse and it is followed by acts causing great bodily harm, the Committee concluded that there is no violation of § 940.225(1)(a). However, the acts may constitute battery, aggravated battery, or related offenses.

2. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent

as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

3. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

4. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976). Although it was not a sexual assault case, Flores may be helpful in deciding when an instruction on the lesser included offense under § 940.225(2)(b), **SEXUAL INTERCOURSE CAUSING INJURY**, is appropriate. See Wis JI-Criminal 1210.

1201A FIRST DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE WITHOUT CONSENT CAUSING PREGNANCY — § 940.225(1)(a)

Statutory Definition of the Crime

First degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with another person without consent and causes that person to become pregnant.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse[1] with (name of victim).
2. (Name of victim) did not consent to the sexual intercourse.
3. The defendant caused (name of victim) to become pregnant.[2]

Meaning of "Did Not Consent"[3]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[4]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of first degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1200A and revised in 1983 and 1990 and was renumbered Wis JI-Criminal 1201A in 1996. This revision was approved by the Committee in December 2001 and involved adoption of a new format and nonsubstantive changes to the text.

1. "Sexual intercourse" is not defined in this instruction because "causing pregnancy" is an element of the crime. If it is established that pregnancy was caused, both penetration and emission must have occurred, which makes much of the definition of "sexual intercourse" in § 940.225(5)(c) inapplicable. If definition is believed to be necessary, see Wis JI-Criminal 1200B.

2. "Pregnancy" is not defined in the instruction. In the rare case where this offense is charged and causation is in issue, Wis JI-Civil 5001, Paternity, may be helpful.

3. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions

indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

4. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

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1203 FIRST DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT BY USE OR THREAT OF USE OF A DANGEROUS WEAPON — § 940.225(1)(b)

Statutory Definition of the Crime

First degree sexual assault, as defined in § 940.225(1)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with another person without consent and by use or threat of use of [a dangerous weapon] [an article used or fashioned in a manner to lead the other person to reasonably believe it was a dangerous weapon].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. (Name of victim) did not consent to the sexual [contact] [intercourse].
3. The defendant had sexual [contact] [intercourse] with (name of victim) by use or threat of use of [a dangerous weapon] [an article used or fashioned in a manner to lead the other person to reasonably believe[1] it was a dangerous weapon].

This requires that the defendant actually used or threatened to use[2] [the dangerous weapon] [an article which (name of victim) reasonably believed capable of producing death or great bodily harm)[3] to compel (name of victim) to submit[4] to sexual [contact] [intercourse].

[Meaning of "Dangerous Weapon"]

[A dangerous weapon is (any firearm, whether loaded or not) (any device designed as a weapon and capable of producing death or great bodily harm) (any device or instrumentality which in the manner it is used or intended to be used is calculated or likely to produce death or great bodily harm).[5]]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Meaning of "Did Not Consent"[6]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of first degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1202 [for sexual intercourse offenses] and Wis JI-Criminal 1203 [for sexual contact offenses]. Those instructions were revised in 1983 and 1990. A revision combining the instructions as Wis JI-Criminal 1203 was published in 1996. This revision was approved by the Committee in December 2001 and involved adoption of a new format and nonsubstantive changes to the text.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. "Reasonably believe" is defined by § 939.22(32) to mean "that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous."

2. The phrase, "by use or threat of force or violence," as used in subsection (2)(a) of § 940.225 was construed in State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981). The court held that jury agreement is not required on "use" as opposed to "threat" or on "force" as opposed to "violence." Thus instructing the jury in the disjunctive is acceptable in this instance, although the Committee recommends selecting one of the alternatives whenever the evidence supports only one. See Wis JI-Criminal 1207, note 2, regarding the construction of the same phrase used in § 940.225(2)(a).

3. Section 940.225(1)(b) describes this alternative as "an article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon." There are three categories within the definition of dangerous weapon, see § 939.22(10) and note 3, supra. Rather than reiterate the three alternatives of the dangerous weapon definition in the instruction, the Committee determined it was clearer to use a modified statement of the third statutory alternative: "A device likely to produce death or great bodily harm." This alternative goes to the crux of the matter where the victim does not actually see the weapon – what did the victim believe – and is broad enough to cover the other alternatives of the dangerous weapon definition: firearm and a device designed as a weapon.

The "article used or fashioned . . ." alternative is also used in the Wisconsin armed robbery statute, § 943.32(2). The appellate decisions interpreting that provision are discussed in the footnotes to Wis JI-Criminal 1480 and 1480A.

4. Section 940.225(1)(b) states that the defendant must have had sexual intercourse or sexual contact "by use or threat of use of a dangerous weapon. . . ." The nature of the connection between the intercourse or contact and the use of the weapon is left unclear. The Committee feels the intent of the statute is to cover those situations where the defendant used a weapon (or article . . .) to compel the victim to submit to the contact or intercourse and has expressed the connection in those terms in the instructions.

5. The Committee suggests using the part of the statutory definition that applies to the facts of the case. The definition in the instruction does not include all the alternatives provided in § 939.22(10), which defines "dangerous weapon" as follows:

> "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon as defined in § 941.295(4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

See Wis JI-Criminal 910 for suggested instructions for all the statutory alternatives and a discussion of some of the substantive issues relating to "dangerous weapons."

6. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

7. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

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1204 FIRST DEGREE SEXUAL ASSAULT: AGAINST AN INDIVIDUAL WHO IS 60 YEARS OF AGE OR OLDER — § 940.225(1)(d)

Statutory Definition of the Crime

First degree sexual assault, as defined in § 940.225(1)(d) of the Criminal Code of Wisconsin, is committed by [CHOOSE ONE OF THE FOLLOWING][1].

- [one who has sexual (contact) (intercourse) with another person who is 60 years of age or older without consent and by use or threat of force or violence]
- [one who has sexual (contact) (intercourse) with another person who is 60 years of age or older without consent and causes (injury) (illness) (disease or impairment of a sexual or reproductive organ) (mental anguish requiring psychiatric care)]
- [one who has sexual (contact) (intercourse) with a person who is 60 years of age or older who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition]
- [one who has sexual (contact) (intercourse) with a person who is 60 years of age or older who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and has the purpose to have sexual (contact) (intercourse) with the person while the person is incapable of giving consent]
- [one who has sexual (contact) (intercourse) with a person who is 60 years of age

or older who the defendant knows is unconscious]

- [one who has sexual (contact) (intercourse) with another person who is 60 years of age or older without consent and is aided and abetted[2] by one or more other persons]
- [one who is an employee of a (type of facility or program)[3] and has sexual (contact) (intercourse) with a (patient) (resident) of that (facility) (program) who is 60 years of age or older]
- [a correctional staff member who has sexual (contact) (intercourse) with an individual who is 60 years of age or older who is confined in a correctional institution][4]
- [a (probation) (parole) (extended supervision) agent who has sexual (contact) (intercourse) with an individual who is 60 years of age or older on (probation) (parole) (extended supervision), and who supervises that individual in his or her capacity as an agent][5]
- [a licensee, employee, nonclient resident, of an entity, who has sexual (contact) (intercourse) with a client of the entity who is 60 years of age or older]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[6] elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was 60 years of age or older at the time of the offense.

   Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[7]

   [LIST THE ELEMENTS OF THE CRIME CHARGED UNDER § 940.225(2) AS INDICATED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS OF THE UNIFORM INSTRUCTION AS NECESSARY][8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____[9] elements of first degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1204 was approved by the Committee in December 2021.

This instruction is drafted for offenses involving first degree sexual assault of an individual who is 60 years or older as provided in Wis. Stat 940.225(1)(d). § 940.225(1)(d) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Section 940.225(1)(d) recognizes ten grounds for committing first-degree sexual assault against an individual who is 60 years of age or older. The Committee concluded that the best way to address the complexity that has resulted is to provide a single model instruction which can be modified to refer to the appropriate violation provided in subsection 940.225(2). For an example showing how the instruction would read when typical alternatives are selected, see Wis JI-Criminal 1204 EXAMPLE.

1. The applicable definition should be selected. The alternatives are those provided in sub. 940.225(2)(a) through (j).

2. Section 940.225(2)(f) uses the phrase "aided or abetted" (emphasis added). Since traditional criminal statutes have referred to "aiding and abetting," the Committee has used that construction in

the instruction. The Committee feels that this does not change the meaning of the statute or of the aiding and abetting concept. In State v. Thomas, 128 Wis.2d 93, 381 N.W.2d 567 (Ct. App. 1985), the court held that "aided or abetted" in § 940.225(1)(c) has the same meaning as the phrase "aids and abets" in § 939.05 and therefore is not unconstitutionally vague.

3. Section 940.225(2)(g) was amended by 1993 Wisconsin Act 445. The former statute applied to an employee of "an inpatient facility or a state treatment facility." The revised statutes applies to an employee of "a facility or program under s. 940.295(2)(b), (c), (h) or (k)." Those facilities or programs are:

- (2)(b) an adult family home
- (2)(c) a community-based residential facility
- (2)(h) an inpatient health care facility
- (2)(k) a state treatment facility

The Committee recommends naming the type of facility in this paragraph, for example: ". . . an employee of a state treatment facility."

4. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

5. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

6. Insert the appropriate number of elements from the uniform instruction for the crime charged as modified under § 940.225(1)(d).

7. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

8. For comments and footnotes applicable to the predicate offense, refer to the comment section of the specific uniform instruction. See Wis JI-Criminal 1208 – 1217A.

9. Insert the appropriate number of elements from the uniform instruction for the crime charged as modified under § 940.225(1)(d).

1204 EXAMPLE FIRST DEGREE SEXUAL ASSAULT: AGAINST AN INDIVIDUAL WHO IS 60 YEARS OF AGE OR OLDER — § 940.225(1)(d)

THE FOLLOWING ILLUSTRATES HOW WIS JI-CRIMINAL 1204 WOULD BE ADAPTED IF THE PREDICATE SECOND DEGREE SEXUAL ASSAULT IS A VIOLATION OF SEC. 940.225(2)(a)

Statutory Definition of the Crime

First degree sexual assault, as defined in § 940.225(1)(d) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with another person who is 60 years of age or older without consent and by use or threat of force or violence.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was 60 years of age or older at the time of the offense.

   Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[1]

2. The defendant had sexual (contact) (intercourse) with (name of victim).

3. (Name of victim) did not consent to the sexual (contact) (intercourse).

4. The defendant had sexual (contact) (intercourse) with (name of victim) by use or threat of force or violence.

The use or threat of force or violence may occur before or as part of the sexual (contact) (intercourse).

SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE

[This element is satisfied if the use or threat of force or violence compelled (name of victim) to submit.]

[Use or threat of force or violence on one date can carry over to an alleged sexual assault on a later date if the use or threat of force or violence continued to weigh on (name of victim) and caused (him) (her) to cooperate out of fear for (his) (her) safety.]

[The phrase "by use of force" includes forcible sexual contact or force used as the means of making sexual contact.]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Meaning of "Did Not Consent"

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of first degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

Comment

Wis JI-Criminal 1204 EXAMPLE was approved by the Committee in February 2022.

This instruction illustrates how the general model provided in Wis JI-Criminal 1204 would be adapted for a violation based on § 940.225(2)(a): sexual contact or intercourse with another person without consent of that person by use or threat of force or violence. This offense is a Class B felony – see § 940.225(1).

Modification of the language used in this example may be necessary depending on which predicate second degree sexual assault is being prosecuted.

1. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

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1205 FIRST DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT BY USE OR THREAT OF FORCE OR VIOLENCE WHILE AIDED AND ABETTED — § 940.225(1)(c)

Statutory Definition of the Crime

First degree sexual assault, as defined in § 940.225(1)(c) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with another person without consent and by use or threat of force or violence, and is aided and abetted[1] by one or more other persons.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. (Name of victim) did not consent to the sexual [contact] [intercourse].
3. The defendant had sexual [contact] [intercourse] with (name of victim) by use or threat of force or violence.[2]

   The use or threat of force or violence may occur before or as part of the sexual (contact) (intercourse).[3]

   SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE

[This element is satisfied if the use or threat of force or violence compelled (name of victim) to submit.][4]

[Use or threat of force or violence on one date can carry over to an alleged sexual assault on a later date if the use or threat of force or violence continued to weigh on (name of victim) and caused (him) (her) to cooperate out of fear for (his) (her) safety.][5]

[The phrase "by use of force" includes forcible sexual contact or force used as the means of making sexual contact.][6]

4. The defendant was aided and abetted by one or more other persons.[7]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Meaning of "Did Not Consent"[8]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[9]

Meaning of "Aiding and Abetting"

The defendant was aided and abetted if another person knew that the defendant was having or intended to have sexual [contact] [intercourse] without consent and either:

- provided assistance to the defendant; or,
- was willing to assist the defendant if needed and the defendant knew of the willingness to assist.

Assistance may be provided by words, acts, encouragement, or support.[10]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE:[11]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist or encourage the commission of a crime.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of first degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1204 [for sexual intercourse offenses] and Wis JI-Criminal 1205 [for sexual contact offenses]. Those instructions were revised in 1983, 1988, and 1990. A revision combining the instructions as Wis JI-Criminal 1205 was published in 1996 and revised in 2002 and 2005. A nonsubstantive change was made in 2016. This revision was approved by the Committee in 2018; it involved an editorial correction to footnote 10.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

This offense, like the offense defined in sub. (2)(a), has an element requiring the "use or threat of force." The case law interpreting that element has developed in cases under sub. (2)(a), but the Committee concluded that the interpretations apply to this offense as well. See footnotes 2-6.

1. Section 940.225(1)(c) uses the phrase, "aided or abetted," (emphasis added). Since traditional criminal statutes have referred to "aiding and abetting," the Committee has used that construction in this instruction. The Committee feels that this does not change the meaning of the statute or of the aiding and abetting concept. In State v. Thomas, 128 Wis.2d 93, 381 N.W.2d 567 (Ct. App. 1985), the court held that "aided or abetted" in § 940.225(1)(c) has the same meaning as the phrase "aids and abets" in § 939.05 and therefore is not unconstitutionally vague.

2. The phrase, "by use or threat of force or violence," as used in subsection (2)(a) of § 940.225 was construed in State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981). The court held that jury agreement is not required on "use" as opposed to "threat" or on "force" as opposed to "violence." Thus, instructing the jury in the disjunctive is acceptable in this instance, although the Committee recommends selecting one of the alternatives whenever the evidence supports only one.

3. "[T]he use or threat of force or violence element of second degree sexual assault includes forcible contact or force used as a means of making the sexual contact. Thus, the element is satisfied whether the force is used or threatened as part of the sexual contact itself or whether it is used or threatened before the sexual contact." State v. Hayes, 2003 WI App 99, ¶15, 264 Wis.2d 377, 633 N.W.2d 351, citing State v. Bonds, supra. (Affirmed, 2004 WI 80, 273 Wis.2d 1, 681 N.W.2d 203.)

4. State v. Hayes, 2004 WI 80, ¶59, 273 Wis.2d 1, 681 N.W.2d 203:

> The "use or threat of force or violence" element . . . is satisfied if the use or threat of force or violence is directed to compelling the victim's submission. The element is satisfied whether the force is used or threatened as part of the sexual contact or whether it is used or threatened as part of the sexual contact to compel the victim's submission.

5. State v. Jaworski, 135 Wis.2d 235, 239-40, 400 N.W.2d 29 (Ct. App. 1986):

> [W]e reject Jaworski's argument that . . . the state must therefore establish a separate threat for each count charged.
>
> . . . The crucial inquiry is whether on each date sexual intercourse was achieved by threat of violence.
>
> . . .
>
> A reasonable trier of fact could well conclude . . . that the initial threat of violence lingered on the latter dates. . . Part of S.H.'s fear may also have been attributable to Jaworski's alleged threats to tell other inmates as well as S.H.'s family and friends what had happened. However, that fact does not preclude a finding that the original threat of violence continued to weigh upon S.H. and caused him to cooperate out of fear for his safety.

State v. Speese, 191 Wis.2d 205, 213-14, 528 N.W.2d 63 (Ct. App. 1995):

In State v. Jaworski, . . . we held that a reasonable trier of fact could infer that an initial threat of violence, made two to five days earlier than the charged sexual assaults, had lingered on the days the charged assaults occurred, and that the earlier threat had caused the victim to submit out of fear. . . .

Speese . . . asserts that her subjective fear was unreasonable and insufficient to prove the threat or use of force. We disagree.

The jury could infer from the evidence that Teresa had good reason to fear Speese, he having used force on her on at least one prior occasion when she refused to have sexual intercourse with him. The fact finder may take into account the context of the threat. . . The context here is the relationship between Speese and Teresa and their respective ages. The relationship of some ten years' duration is between a stepfather and his juvenile female stepchild whom he has sexually abused throughout the period and beaten.

6. State v. Bonds, 165 Wis.2d 27, 32, 477 N.W.2d 265 (1991):

. . . Section 940.225(2)(a) does not state that the force used or threatened may not be the force employed in the actual nonconsensual contact. Nor does it state that the force must be directed toward compelling the victim's submission. The phrase "by use of force" includes forcible contact or the force used as the means of making contact.

. . . Force used at the time of the contact can compel submission as effectively as force or threat occurring before contact. Regardless of when the force is applied, the victim is forced to submit. When force is used at the time of contact, the victim has no choice at the moment of simultaneous use of force and making of contact. When force is used before contact, the choice is forced. In both cases, the victim does not consent to the contact.

7. Section 940.225(1)(c) states that the defendant must have been aided or abetted and have sexual contact or sexual intercourse without consent by use or threat of force or violence. The nature of the connection between being aided and having intercourse or contact is not clear. The earlier version of this instruction tried to express this connection by stating that the aiding and abetting must have "compelled the victim to submit" to the sexual assault.

This issue was discussed in State v. Thomas, 128 Wis.2d 93, 104-05, 381 N.W.2d 567 (Ct. App. 1985). In Thomas, the 1983 version of Wis JI-Criminal 1204, and relevant footnotes, were cited by the defendant in support of his argument that the statute was intended to apply only to the "gang rape situation." The Thomas court rejected the argument, holding that "aiding and abetting" has the same meaning in § 940.225(1)(c) as it has in § 939.05. Since the Committee had not intended to suggest a different result, the 1988 revision deleted the "compelled the victim to submit" language and revised the aiding and abetting explanation to track closely the one used for purposes of § 939.05.

8. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

"Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual

contact. Consent is not an issue in alleged violations of subs. (2)(c), (cm), (d), (g), (h) and (I). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

9. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

10. The use of the aiding and abetting concept in § 940.225(1)(c) is somewhat different from that of traditional criminal statutes, because this statute provides for increased penalty for the principal actor where the actor is aided by others. The usual situation, for example, Wis. Stat. § 939.05(2)(b), Parties to Crime, involves defining the culpability of the aider and abettor. For further definition of "aiding and abetting," see Wis JI-Criminal 400 and the 1953 Judiciary Committee Report on the Criminal Code, Comment to § 339.05.

The requirement that the aider(s) must have known that the defendant was committing the sexual assault is added to the instruction on the basis of the definition of the aider's culpability in § 939.05. Section 939.05 refers to "intentionally aid and abets," which has been interpreted as "acting with knowledge or belief that another person is committing or intends to commit a crime." The Committee also concluded that the defendant must know of the aider's presence or willingness to assist.

Another question arising under this subsection relates to the liability of the aider. Is the aider guilty of first or second degree sexual assault? If aiding is established, the principal is guilty of the first degree offense. Usually, the aider is guilty of the same offense as the principal. In the sexual assault case, however, the crime the aider intended to aid was arguably a second degree offense, Sexual Contact or Intercourse Without Consent by use or threat of force or violence under § 940.225(2)(a). The aiding is the only factor that elevates the

offense as far as the principal is concerned. Does it also increase the seriousness for the aider? The Wisconsin Court of Appeals so held in State v. Curbello-Rodriguez, 119 Wis.2d 414, 351 N.W.2d 758 (Ct. App. 1984).

11. The sentence in brackets is recommended for use when the evidence raises an issue whether the person actually gave assistance or merely stood by without intending to assist.

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1206 FIRST DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE WITH A PERSON 12 YEARS OF AGE OR YOUNGER — § 940.225(1)(d)

1207 FIRST DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITH A PERSON 12 YEARS OF AGE OR YOUNGER — § 940.225(1)(d)

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1206 and 1207 were originally published in 1980 and were revised in 1983. The instructions were withdrawn in 1989.

These instructions were withdrawn because the statute with which they deal was repealed by 1987 Wisconsin Act 332, effective July 1, 1989. The same legislation recreated essentially the same offenses in § 948.02(1), First Degree Sexual Assault Of A Child. See Wis JI-Criminal 2102 and 2103.

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1208 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT BY USE OR THREAT OF FORCE OR VIOLENCE — § 940.225(2)(a)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(a) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with another person without consent and by use or threat of force or violence.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual (contact) (intercourse) with (name of victim).

2. (Name of victim) did not consent to the sexual (contact) (intercourse).

3. The defendant had sexual (contact) (intercourse) with (name of victim) by use or threat of force or violence.[1]

   The use or threat of force or violence may occur before or as part of the sexual (contact) (intercourse).[2]

   SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE

   [This element is satisfied if the use or threat of force or violence compelled (name of victim) to submit.][3]

[Use or threat of force or violence on one date can carry over to an alleged sexual assault on a later date if the use or threat of force or violence continued to weigh on (name of victim) and caused (him) (her) to cooperate out of fear for (his) (her) safety.][4]

[The phrase "by use of force" includes forcible sexual contact or force used as the means of making sexual contact.][5]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Meaning of "Did Not Consent"[6]

"Did not consent" means that (name of victim) did not freely agree to have sexual (contact) (intercourse) with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1208 [for sexual intercourse offenses] and Wis JI-Criminal 1209 [for sexual contact offenses]. Those instructions were revised in 1983 and 1990. A revision combining the instructions as Wis JI-Criminal 1208 was published in 1996 and revised in 2002, 2004, 2005, and 2016. The 2016 revision involved a nonsubstantive change in the text and an addition to footnote 3. This revision was approved by the Committee in December 2021; it added to the comment.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. The phrase, "by use or threat of force or violence," as used in subsection (2)(a) of § 940.225, was construed in State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981). The court held that jury agreement is not required on "use" as opposed to "threat" or on "force" as opposed to "violence." Thus, instructing the jury in the disjunctive is acceptable in this instance, although the Committee recommends selecting one of the alternatives whenever the evidence supports only one.

2. "[T]he use or threat of force or violence element of second degree sexual assault includes forcible contact or force used as a means of making the sexual contact. Thus, the element is satisfied whether the force is used or threatened as part of the sexual contact itself or whether it is used or threatened before the sexual contact." State v. Hayes, 2003 WI App 99, ¶15, 264 Wis.2d 377, 633 N.W.2d 351, citing State v. Bonds, supra. (Affirmed, 2004 WI 80, 273 Wis.2d 1, 681 N.W.2d 203.)

3. State v. Hayes, 2004 WI 80, ¶59, 273 Wis.2d 1, 681 N.W.2d 203:

The "use or threat of force or violence" element . . . is satisfied if the use or threat of force or violence is directed to compelling the victim's submission. The element is satisfied whether the force is used or threatened as part of the sexual contact or whether it is used or threatened as part of the sexual contact to compel the victim's submission.

Also see, State v. Long, 2009 WI 36, 317 Wis.2d 92, 765 N.W.2d 557, where the court found that the evidence was sufficient to establish the "use of force" element: "force has been used when the victim is compelled to submit." 317 Wis.2d 92, 96.

4. State v. Jaworski, 135 Wis.2d 235, 239 40, 400 N.W.2d 29 (Ct. App. 1986):

[W]e reject Jaworski's argument that . . . the state must therefore establish a separate threat for each count

charged.

. . . The crucial inquiry is whether on each date sexual intercourse was achieved by threat of violence. . . .A reasonable trier of fact could well conclude . . . that the initial threat of violence lingered on the latter dates. . . Part of S.H.'s fear may also have been attributable to Jaworski's alleged threats to tell other inmates as well as S.H.'s family and friends what had happened. However, that fact does not preclude a finding that the original threat of violence continued to weigh upon S.H. and caused him to cooperate out of fear for his safety.

State v. Speese, 191 Wis.2d 205, 213 14, 528 N.W.2d 63 (Ct. App. 1995):

In State v. Jaworski, . . . we held that a reasonable trier of fact could infer that an initial threat of violence, made two to five days earlier than the charged sexual assaults, had lingered on the days the charged assaults occurred, and that the earlier threat had caused the victim to submit out of fear. . . .

Speese . . . asserts that her subjective fear was unreasonable and insufficient to prove the threat or use of force. We disagree.

The jury could infer from the evidence that Teresa had good reason to fear Speese, he having used force on her on at least one prior occasion when she refused to have sexual intercourse with him. The fact finder may take into account the context of the threat. . . The context here is the relationship between Speese and Teresa and their respective ages. The relationship of some ten years' duration is between a stepfather and his juvenile female stepchild whom he has sexually abused throughout the period and beaten.

5. State v. Bonds, 165 Wis.2d 27, 32, 477 N.W.2d 265 (1991):

. . . Section 940.225(2)(a) does not state that the force used or threatened may not be the force employed in the actual nonconsensual contact. Nor does it state that the force must be directed toward compelling the victim's submission. The phrase "by use of force" includes forcible contact or the force used as the means of making contact.

. . . Force used at the time of the contact can compel submission as effectively as force or threat occurring before contact. Regardless of when the force is applied, the victim is forced to submit. When force is used at the time of contact, the victim has no choice at the moment of simultaneous use of force and making of contact. When force is used before contact, the choice is forced. In both cases, the victim does not consent to the contact.

6. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (cm), (d), (g), (h) and (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal

conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

7. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

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1209 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT CAUSING INJURY, ILLNESS, DISEASE OR IMPAIRMENT OF A SEXUAL OR REPRODUCTIVE ORGAN, OR MENTAL ANGUISH REQUIRING PSYCHIATRIC CARE — § 940.225(2)(b)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with another person without consent and causes (injury) (illness) (disease or impairment of a sexual or reproductive organ) (mental anguish requiring psychiatric care).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual (contact) (intercourse) with (name of victim).
2. (Name of victim) did not consent to the sexual (contact) (intercourse).
3. The defendant caused (injury to (name of victim)) (illness to (name of victim)) (disease or impairment of a sexual or reproductive organ of (name of victim)) (mental anguish requiring psychiatric care for (name of victim)).[1]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Meaning of "Did Not Consent"[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[3]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

Comment

This instruction was originally published in 1980 as Wis JI-Criminal 1210 [for sexual intercourse offenses] and Wis JI-Criminal 1211 [for sexual contact offenses]. Those instructions were revised in 1983 and 1990. A revision combining the instructions as Wis JI-Criminal 1209 was published in 1996 and revised in 2001 and 2009. The 2009 revision involved amendments to footnote 1. This revision was approved by the Committee in December 2021; it added to the comment.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing

separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. No further definition is attempted for any of the alternatives for this element. Before the 2008 revision, the text referred to "bodily injury." The Committee decided to delete "bodily" because it does not appear in the definition of the offense and may invite problems in connection with defining "injury." "Injury" is not defined in the sexual assault statute, in the general definitions provided in Chapter 939, or by a published court decision. While the Criminal Code uses the closely related term "bodily harm," caution should be used in equating the two because unpublished decisions of the Wisconsin Court of Appeals have reached conflicting results, focusing on whether "pain" is sufficient to constitute "injury." In a prosecution under § 940.225(2)(b), the court held that the trial court erred in defining "injury" using the Criminal Code definition of "bodily harm" [see § 939.22(4)] because "injury" does not include "pain." State v. Gonzalez, No. 2006AP2977 CR, March 20, 2008. [Ordered not published, April 30, 2008.] However, in a prosecution under § 346.63(2)(a), where "injury" is also used, the court held that the word "injury" encompasses physical pain. State v. Maddox, No. 03 0227 CR, July 8, 2003. [Ordered not published, August 27, 2003.] Neither of these decisions may be cited as authority because they were not published. See § 809.23(3). But they indicate the need for caution in equating "injury" with "bodily harm."

It is not clear what is intended by the reference in the statute to "sexual or reproductive organs." The phrase is not defined in the statutes or by prior case law, although the Sexual Assault Law uses the term "intimate parts" in defining sexual contact (§ 940.225(5)(b)). According to cases from other states, "sexual or reproductive organs" include the immediate vicinity of the genital organs as well as the organs themselves, State v. Nash, 83 N.H. 536, 145 A. 262 (N.H. 1929); and it does not include the breasts, State v. Moore, 194 Ore. 232, 241 P.2d 455 (Ore. 1952).

2. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally

ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

3. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

1211 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON SUFFERING FROM MENTAL ILLNESS — § 940.225(2)(c)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(c) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual (contact) (intercourse) with (name of victim).
2. (Name of victim) suffered from a mental (illness) (deficiency) at the time of the sexual (contact) (intercourse).[1]
3. The mental (illness) (deficiency) rendered (name of victim) temporarily or permanently incapable of appraising (his) (her) conduct. In other words, (name of victim) must have lacked the ability to evaluate the significance of (his) (her) conduct because of (his) (her) mental (illness) (deficiency).[2]

4. The defendant knew that (name of victim) was suffering from a mental (illness) (deficiency) and knew that the mental condition rendered (name of victim) temporarily or permanently incapable of appraising (his) (her) conduct.[3]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR THE DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR THE DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

ADD THE FOLLOWING IF THERE IS EVIDENCE RELATING TO THE VICTIM'S CONDUCT THAT IS RELEVANT TO THE THIRD OR FOURTH ELEMENTS.[4]

[Use of Consent Evidence]

[Consent to sexual (contact) (intercourse) is not a defense. However, you may consider any words or actions of (name of victim) indicating consent in determining (whether (name of victim) was suffering from a mental (illness) (deficiency) that rendered (him) (her) incapable of appraising her conduct) (or) (whether the defendant knew that (name of victim) was suffering from a mental (illness) (deficiency) that rendered (him) (her) incapable of appraising her conduct).]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1212 [for sexual intercourse offenses] and Wis JI-Criminal 1213 [for sexual contact offenses]. Those instructions were revised in 1983, 1990, and 1993. A revision combining the instructions as Wis JI-Criminal 1211 was published in 1996 and revised in 1998, 2002, 2015, and 2021. This revision was approved by the Committee in December 2023; it amended to the comment.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Section 940.225(2)(c) provides that it is second degree sexual assault if one "[h]as sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition." This offense is similar to a violation under § 940.225(3), Third Degree Sexual Assault, which prohibits sexual intercourse without consent, where, in satisfying the consent element, the state relies on the presumption of no consent under § 940.225(4)(b), which applies where the victim "suffers from a mental illness or defect which impairs capacity to appraise personal conduct." This statement in subsection (4)(b) is almost identical to the wording of § 940.225(2)(c) but is not exactly the same.

The distinguishing feature of the more serious offense under subsection (2)(c) is that the defendant must know of the victim's mental illness or deficiency. Such knowledge is not required where the presumption applies under subsection (4)(b), so in this sense, the subsection (2)(c) offense requires greater proof than does the offense under subsection (3). However, "without consent" is not an element of the (2)(c) offense, while it is an element of the (3) offense. Each offense, therefore, requires proof of an element that the other does not, although the victim could be essentially the same under either offense. Therefore, under the strict Wisconsin test (see § 939.66 and Randolph v. State, 83 Wis.2d 630, 266 N.W.2d 334 (1978)), third degree sexual assault apparently cannot be a lesser included offense of a crime charged under subsec. (2)(c).

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. The Committee decided not to define "mental illness or deficiency" in the uniform instruction. Existing statutory definitions did not seem suitable because they are written in the context of determining when treatment is required or when involuntary commitment of the mentally ill person is appropriate. (See, for example, Wis. Stat. § 51.01(13)(a) and (b) and § 51.75(2)(c) and (d).) For the purposes of the Sexual Assault Law, the Committee concluded that the term "mental illness or deficiency" has a meaning within the common understanding of the jury. Additional guidance as to the type of illness or deficiency required is offered by the qualifying phrase in the statute: ". . . which renders that person temporarily or permanently incapable of appraising the person's conduct."

In State v. Perkins, 2004 WI App 213, ¶19, 277 Wis.2d 243, 689 N.W.2d 684, the court of appeals court cited the discussion above with apparent approval. The court held that "[W]hen, as here, there is lay opinion testimony supported by ample testimony as to the victim's behavior, the existence of a mental illness or deficiency that rendered the victim temporarily or permanently incapable of appraising his or her conduct can be established without the presentation of expert testimony." Also see State v. Onyeukwu, 2104AP518 CR, [not published] for an example of a decision finding the evidence sufficient to establish "mental deficiency" based on evidence showing that the 22 year old victim "was probably functioning on a sixth-grade level." ¶16.

2. This is an attempt to elaborate on the meaning of "rendered the person temporarily or permanently incapable of appraising the person's conduct." It is adapted from the discussion in State v. Smith, 215 Wis.2d 84, 94, 572 N.W.2d 496 (Ct. App. 1997).

3. Section 940.225(2)(c) requires that the defendant know of the victim's condition. The Committee concluded that this requires knowledge of the existence of the mental illness or deficiency and knowledge that the illness or deficiency "renders the person temporarily or permanently incapable of appraising the person's conduct."

4. Section 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (d) and (g)." Thus, "without consent" is not an element of this offense, and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

While consent is not a defense as such, evidence of facts indicating that the victim appeared to give consent might be relevant to other elements of the crime: whether the victim was mentally incapable of appraising his or her conduct and whether the defendant knew that the victim was suffering from a mental illness that rendered her incapable of appraising his or her conduct.

1212 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO IS UNDER THE INFLUENCE OF AN INTOXICANT — § 940.225(2)(cm)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(cm) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and has the purpose to have sexual (contact) (intercourse) with the person while the person is incapable of giving consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual (contact) (intercourse) with (name of victim).

2. (Name of victim) was under the influence of an intoxicant at the time of the sexual (contact) (intercourse).

   [_____ is an intoxicant.][1]

   ["Intoxicant" means any alcohol beverage, hazardous inhalant, controlled substance, controlled substance analog or other drug, any combination thereof.][2]

3. (Name of victim) was under the influence of an intoxicant to a degree which rendered (him) (her) incapable of giving consent.

   This requires that (name of victim) was incapable of giving freely given agreement to engage in sexual (intercourse) (contact).[3]

4. The defendant had actual knowledge[4] that (name of victim) was incapable of giving consent.

5. The defendant had the purpose to have sexual (contact) (intercourse) while (name of victim) was incapable of giving consent.[5]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Deciding About Purpose and Actual Knowledge

You cannot look into a person's mind to find purpose and actual knowledge. Purpose and actual knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and actual knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1212 was originally published in 1998 and revised in 2002, 2007, and 2014. This revision was approved by the Committee in December 2021; it added to the comment.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Section 940.225(2)(cm) was created by 1997 Wisconsin Act 220 (effective date: May 14, 1998). It originally provided that it was second degree sexual assault if one "[h]as sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of appraising the person's conduct, and the defendant knows of such condition." Although the statute referred to "intoxicant," alcohol, the most common intoxicant, was excluded from the definition. The original statute was apparently intended to address the so-called date rape drugs such as "gamma hydroxybutyrate" or "GHB," "gamma hydroxybutyrolactone" or "GBL," ketamine, or flunitrazepam, the possession of which was also criminalized by the same legislation creating this sexual assault offense. See § 961.41(3g)(f) as created by 1997 Wisconsin Act 220.

Section 940.225(2)(cm) was amended by 2005 Wisconsin Act 436 (effective date: June 6, 2006). Act 436 made the following changes:

- it included "alcohol beverage" in the definition of "intoxicant" in sub. (5)(ai);
- it changed "incapable of appraising the person's conduct" to "incapable of giving consent";
- it restated the knowledge requirement as "has actual knowledge that the person is incapable of giving consent"; and,
- it added: "and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent."

Section 940.225(2)(cm) was further amended by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013] to add "hazardous inhalant" to the definition of "intoxicant." Act 83 also created a definition of "hazardous inhalant" in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault

"against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. If the charging document specifies one of the substances that qualifies as an "intoxicant" under § 940.225(5)(ai), the Committee suggests simply telling the jury that, for example: "A controlled substance is an intoxicant." If one of the alternatives is not specified or if reading the full statutory definition is believed to be preferable, that definition is provided in the second set of brackets.

2. This is the definition of "intoxicant" in § 940.223(5)(ai). The definition was revised by 2005 Wisconsin Act 436 to include "alcohol beverage" as an "intoxicant." It was further revised by 2013 Wisconsin Act 83 to include "hazardous inhalant."

3. 2005 Wisconsin Act 436 amended s. 940.225(2)(cm) to refer to the victim being under the influence to a degree which renders that person "incapable of giving consent" in place of "rendered the person incapable of appraising the person's conduct." The statement in the instruction incorporates the key parts of the definition of "consent" in s. 940.225(4).

Act 436 did not amend the second sentence of s. 940.225(4), which provides that "consent is not an issue in alleged violations of sub. (2)(c), (cm) . . ." While "without consent" is not an element of this offense, evidence relating to consent may be relevant to the elements that refer to the victim being incapable of giving consent. Thus, the revised instruction does not include the statement found in the prior version that informs the jury that "consent is not a defense." See, for example, Wis JI-Criminal 1211.

4. Section 940.225(2)(cm), as amended by 2005 Wisconsin Act 436, requires that the defendant "has actual knowledge that the person is incapable of giving consent." "Actual knowledge" replaced "knows" used in the prior version of the statute. The Committee interprets this change as emphasizing the subjective nature of the mental element required for this offense.

5. Section 940.225(2)(cm), as amended by 2005 Wisconsin Act 436, requires that the defendant "has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent." The 2006 revision of the instruction added the fifth element to reflect this addition to the statutory definition.

1213 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON THE DEFENDANT KNOWS IS UNCONSCIOUS — § 940.225(2)(d)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(d) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with a person who the defendant knows is unconscious.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual (contact) (intercourse) with (name of victim).
2. (Name of victim) was unconscious[1] at the time of the sexual (contact) (intercourse).
3. The defendant knew that (name of victim) was unconscious at the time of the sexual (contact) (intercourse).[2]

Meaning of ("Sexual Contact") ("Sexual Intercourse")

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

ADD THE FOLLOWING IF THERE IS EVIDENCE RELATING TO THE VICTIM'S CONDUCT THAT IS RELEVANT TO THE SECOND OR THIRD ELEMENTS.[3]

[Use of Consent Evidence]

[Consent to sexual (contact) (intercourse) is not a defense. However, you may consider any words or actions of (name of victim) indicating consent in determining (whether (name of victim) was unconscious) (or) (whether the defendant knew that (name of victim) was unconscious).]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1214 [for sexual intercourse offenses] and Wis JI-Criminal 1215 [for sexual contact offenses]. Those instructions were revised in 1983, 1990, and 1993. A revision combining the instructions as Wis JI-Criminal 1213 was published in 1996 and revised in 1998. This revision was approved by the Committee in April 2022, it amended footnote 1 by revising the term "heavy sleep" to "sleep." It also added to the comment.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Third-degree and fourth-degree sexual assault are not lesser included offenses of this subsection because they require proof of an element that second-degree sexual assault of an unconscious victim does not. Specifically, proof that the victim did not consent to the sexual contact or intercourse.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. The statute does not define "unconscious." The Committee decided not to include a definition in the text of the instruction because a definition would be most helpful if tied to the facts of the case. When a case involves a substantial question about the meaning of "unconscious," the following material may be helpful.

Webster's New Collegiate Dictionary defines "unconscious" as "not knowing or perceiving, or being unaware." The Committee believes the common meaning of unconscious includes the loss of awareness caused by intoxication, the taking of drugs, or sleep. In State v. Curtis, 144 Wis.2d 691, 695 96, 424 N.W.2d 719 (Ct. App. 1988), the court held that "unconscious" under § 940.225(2)(a) includes "a loss of awareness which may be caused by sleep" and that it was proper for the trial court to instruct the jury in those terms.

The constitutionality of § 940.225(2)(d) was upheld in State v. Pittman, 174 Wis.2d 255, 496 N.W.2d 74 (1993). The court held that the statutory standard "provides clear notice that sexual intercourse with a person who is asleep is illegal." 174 Wis.2d 255, 277. Further, the statute "provides an objective standard for those applying the law," id., since sleep is within the common knowledge of the jury. (The jury in Pittman was instructed, in accord with Curtis, supra, that "unconsciousness is a loss of awareness which may be caused by sleep.") Pittman also affirmed the exclusion of expert testimony on the effects of alcohol on sleep and consciousness, holding that it was irrelevant and tended to convey to the jury the expert's belief that the complaining witness was lying.

2. Knowledge that the victim is unconscious is expressly required by § 940.225(2)(d).

3. Section 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d) and (g)." Thus, "without consent" is not an element of this offense and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

While consent is not a defense as such, evidence of facts indicating that the victim appeared to give consent might be relevant to other elements of the crime: whether the victim was incapable of appraising her conduct; and, whether the defendant knew that the victim was under the influence to a degree that rendered her incapable of appraising her conduct.

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1214 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT WHILE AIDED AND ABETTED — § 940.225(2)(f)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(f) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with another person without consent and is aided and abetted[1] by one or more other persons.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual (contact) (intercourse) with (name of victim).

2. (Name of victim) did not consent to the sexual (contact) (intercourse).

3. The defendant was aided and abetted by one or more other persons.

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Meaning of "Did Not Consent"[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual

(contact) (intercourse) with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[3]

Meaning of "Aiding and Abetting"

The defendant was aided and abetted if another person knew that the defendant was having or intended to have sexual [contact] [intercourse] without consent and either:

- provided assistance to the defendant; or,
- was willing to assist the defendant if needed and the defendant knew of the willingness to assist.

Assistance may be provided by words, acts, encouragement, or support.[4]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[5]

[However, a person does not aid and abet if the person is only a bystander or spectator and does nothing to assist or encourage the commission of a crime.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1988 as Wis JI-Criminal 1217.1 [for sexual intercourse offenses] and Wis JI-Criminal 1217.2 [for sexual contact offenses]. Those instructions were revised in 1990. A revision combining the instructions as Wis JI-Criminal 1214 was published in 1996 and 2002. This revision was approved by the Committee in December 2021; it added to the comment.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

This offense was created by 1987 Wisconsin Act 245, effective date: April 21, 1988. A related offense is defined as first degree sexual assault by § 940.225(1)(c); it has the additional element of the "use or threat of force or violence." See Wis JI-Criminal 1205.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. Section 940.225(2)(f) uses the phrase "aided or abetted" (emphasis added). Since traditional criminal statutes have referred to "aiding and abetting," the Committee has used that construction in the instruction. The Committee feels that this does not change the meaning of the statute or of the aiding and abetting concept. In State v. Thomas, 128 Wis.2d 93, 381 N.W.2d 567 (Ct. App. 1985), the court held that "aided or abetted" in § 940.225(1)(c) has the same meaning as the phrase "aids and abets" in § 939.05 and therefore is not unconstitutionally vague.

2. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally

ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

3. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

4. The use of the aiding and abetting concept in § 940.225(1)(c) is somewhat different from that of traditional criminal statutes, because this statute provides for increased penalty for the principal actor where he is aided by others. The usual situation, for example, Wis. Stat. § 939.05(2)(b), Parties to Crime, involves defining the culpability of the aider and abettor. For further definition of "aiding and abetting," see Wis JI-Criminal 400 and the 1953 Judiciary Committee Report on the Criminal Code, Comment to § 339.05.

The requirement that the aider(s) must have known that the defendant was committing the sexual assault is added to the instruction on the basis of the definition of the aider's culpability in § 939.05. Section 939.05 refers to "intentionally aid and abets," which has been interpreted as "acting with knowledge or belief that another person is committing or intends to commit a crime." The Committee also concluded that the defendant must know of the aider's presence or willingness to assist.

Another question arising under this subsection relates to the liability of the aider. Is the aider guilty of second or third degree sexual assault? If aiding is established, the principal is guilty of the second degree offense. Usually, the aider is guilty of the same offense as the principal. In the sexual assault case, however, the crime the aider intended to aid was arguably a third degree offense, Sexual Intercourse Without Consent under § 940.225(3). The aiding is the only factor that elevates the offense as far as the principal is concerned. Does it also increase the seriousness for the aider? The Wisconsin Court of Appeals so held in State v. Curbello Rodriguez, 119 Wis.2d 414, 351 N.W.2d 758 (Ct. App. 1984), with respect to the same situation under § 940.225(1)(c).

5. The sentence in brackets is recommended for use when the evidence raises an issue whether the person actually gave assistance or merely stood by without intending to assist.

1215 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PATIENT OR RESIDENT — § 940.225(2)(g)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(g) of the Criminal Code of Wisconsin, is committed by one who is an employee of a (type of facility or program)[1] and has sexual (contact) (intercourse) with a (patient) (resident) of that (facility) (program).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was an employee of (name of facility or program).[2]
2. (Name of victim) was a (patient)[3] (resident)[4] of (name of facility or program).[5]
3. (Name of facility or program) was (an adult family home) (a community based residential facility) (an inpatient health care facility) (a state treatment facility).[6]

   (Name alternative selected) is (specify the part of the statutory definition that applies).[7]
4. The defendant had sexual (contact) (intercourse) with (name of victim).

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF

"SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Consent to sexual (contact) (intercourse) is not a defense.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1988 as Wis JI-Criminal 1217.3 [for sexual intercourse offenses] and Wis JI-Criminal 1217.4 [for sexual contact offenses]. Those instructions were revised in 1990 and 1994. A revision combining the instructions as Wis JI-Criminal 1215 was published in 1996 and revised in 2002 and 2007. This revision was approved by the Committee December 2021; it added to the comment.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

This instruction is for violations of § 940.225(2)(g), as amended by 1993 Wisconsin Act 445, effective date: May 12, 1994.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. Section 940.225(2)(g) was amended by 1993 Wisconsin Act 445. The former statute applied to an employee of "an inpatient facility or a state treatment facility." The revised statutes applies to an employee of "a facility or program under s. 940.295(2)(b), (c), (h) or (k)." Those facilities or programs are:

- (2)(b) an adult family home
- (2)(c) a community-based residential facility
- (2)(h) an inpatient health care facility
- (2)(k) a state treatment facility

The Committee recommends naming the type of facility in this paragraph, for example: ". . . an employee of a state treatment facility."

2. Here insert the name of the facility or program. For example: "St. Mary's Hospital."
3. "Patient" is defined as follows in § 940.225(5)(am):

"Patient" means any person who does any of the following:

1. Receives care or treatment from a facility or program under s. 940.295(2)(b), (c), (h) or (k), from an employe of a facility or program or from a person providing services under contract with a facility or program.

2. Arrives at a facility or program under s. 940.295(2)(b), (c), (h) or (k) for the purpose of receiving care or treatment from a facility or program under s. 940.295(2)(b), (c), (h) or (k), from an employee of a facility or program under s. 940.295(2)(b), (c), (h) or (k), or from a person providing services under a contract with a facility or program under s. 940.295(2)(b), (c), (h) or (k).

4. "Resident" is defined as follows in § 940.225(ar): ". . . any person who resides in a facility under s. 940.295(2)(b), (c), (h), or (k)."

5. Here insert the name of the facility or program. For example: "St. Mary's Hospital."

6. Here insert the name of the facility or program and select the applicable type of facility or program. For example: "St. Mary's Hospital was an inpatient health care facility."

7. Here name the applicable type of facility or program and select the relevant part of the statutory definition for that type of facility or program. For example: "An inpatient health care facility is any hospital licensed or approved by the Department of Health and Family Services under (specify licensing statute)."

Section 940.225(2)(g) applies to offenses involving employees and patients or residents in facilities or programs "under s. 940.295(2)(b), (c), (h), or (k)." Those subsections of § 940.295 refer to definitions in other statutes, resulting in extensive and complex references. The Committee recommends that care be taken to assure that essential parts of the applicable definitions are included.

The facilities or programs under s. 940.295(2)(b), (c), (h), or (k) and the cross-referenced definitions are as follows:

- (2)(b) adult family home. § 940.295(1)(am) provides that "'adult family home' has the meaning given in s. 50.01(1)."

- (2)(c) community-based residential facility. § 940.295(1)(c) provides that "'community-based

residential facility' has the meaning given in s. 50.01(1g)."

- (2)(h) inpatient health care facility. § 940.295(1)(i) provides that "'inpatient health care facility' has the meaning given in s. 50.135(1)."

- (2)(k) state treatment facility. § 940.295(1)(r) provides that "'state treatment facility' has the meaning given in s. 50.01(15)."

Many of the cross-referenced definitions include their own references to other statutes, sometimes to indicate exceptions. The potential for complexity is illustrated by State v. Powers, 2004 WI App 156, ¶6, 276 Wis.2d 107, 687 N.W.2d 50, where the court of appeals held that an employee of a health care facility operated by the United States Department of Veterans Affairs [the VA Medical Center at Tomah] is not subject to prosecution for an alleged violation of § 940.225(2)(g). As applicable to this situation, sub. (2)(g) requires that the victim of the offense be a patient or resident of a facility or program under § 940.295(2)(h) – an inpatient health care facility. Section 940.295(1)(i) provides that "'inpatient health care facility' has the meaning given in s. 50.135(1)." Section 50.135(1) requires that this type of facility be licensed by the state. The state conceded that as a VA facility, the Tomah Medical Center is not licensed by the state, so the court held that § 940.225(2)(g) does not apply.

While Powers was an appeal of the denial of a pretrial motion, the Committee concluded that the state must prove that the facility or program involved in the case is covered by one of the referenced definitions. If not agreed to by the parties, this will present a factual issue for the jury.

8. Section 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (d) and (g)."

1216 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE BY A CORRECTIONAL STAFF MEMBER — § 940.225(2)(h)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(h) of the Criminal Code of Wisconsin, is committed by a correctional staff member who has sexual (contact) (intercourse) with an individual who is confined in a correctional institution.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a correctional staff member.

   "Correctional staff member" means an individual who works at a correctional institution [and includes a volunteer].[1]

2. The defendant had sexual (contact) (intercourse) with (name of victim).[2]

   Consent to sexual (contact) (intercourse) is not a defense.[3]

3. (Name of victim) was confined in a correctional institution.

   (Name institution) is a correctional institution.[4]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL

CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1216 was originally published in 2004 and revised in 2007, 2012, and 2018. This revision was approved by the Committee in December 2021; it added to the comment.

This instruction is drafted for violations of § 940.225(2)(h), created by 2003 Wisconsin Act 51, effective date: September 5, 2003.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. This is the definition provided in § 940.225(5)(ad). The Committee recommends including the bracketed reference to a volunteer only when there is evidence that the defendant was a volunteer.

A Milwaukee County sheriff's deputy, assigned to work as a bailiff in the courthouse, is not a "correctional staff member" for purposes of § 940.225(2)(h), even though the deputy's duties included escorting inmates from the criminal justice facility to the courthouse holding cell. State v. Terrell, 2006 WI App 166, 295 Wis.2d 619, 721 N.W.2d 527.

2. The definition of the offense in § 940.225(2)(h) includes the following statement:

> This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

It is not clear to the Committee whether this statement presents an issue for the court or for the jury. In addition, it is not clear what "subject to prosecution" means. The legislative history indicates that this language was added to the original bill in response to concerns of the Attorney General that "the bill as [originally] drafted would make a crime any incident in which a correctional officer is a victim of a sexual assault." Letter of February 26, 2003, from Attorney General Lautenschlager to Reps. Bies and Albers, Co-Chairpersons, Assembly Committee on Corrections and the Courts. (Emphasis in original.)

In State v. Blum, an unpublished decision (No. 2010AP2363 CR, decided August 1, 2012), the court of appeals concluded that the "subject to prosecution" issue is a question of law for the court, not an affirmative defense that should be determined by the fact finder at trial. [Cited for informational purposes; see § 809.23(3)(b).]

3. "Without consent" is not an element of this offense because it is not included in the offense definition. Further, § 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g),(h), and (i)." The Committee concluded that it may be helpful to advise the jury of this fact.

4. Section 940.225(5)(acm) provides:

> "Correctional institution" means a jail or correctional facility, as defined in s. 961.01(12m), a juvenile correctional facility, as defined in s. 938.02(10p), or a juvenile detention facility, as defined in s. 938.02(10r).

By following these cross references, one may find a statute that provides that a particular institution or facility is a correctional institution. See, for example, the list of "state prisons" in § 302.01. When a statute so provides, the Committee recommends advising the jury that, for example, "The Waupun Correctional Institution is a correctional institution." It will be for the jury to determine whether, in fact, the victim was confined to that institution.

A "person detained at his or her residence by virtue of participation in the home detention program is 'confined in a correctional institution' for purposes of § 940.225(2)(h)." State v. Hilgers, 2017 WI App 12, ¶17, 373 Wis.2d 756, 893 N.W.2d 261.

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1217 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE BY A PROBATION, PAROLE, OR EXTENDED SUPERVISION AGENT — § 940.225(2)(i)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(i) of the Criminal Code of Wisconsin, is committed by a (probation) (parole) (extended supervision) agent who has sexual (contact) (intercourse) with an individual on (probation) (parole) (extended supervision), and who supervises that individual in his or her capacity as an agent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a (probation) (parole) (extended supervision) agent.[1]

2. The defendant had sexual (contact) (intercourse) with (name of victim).[2]

   Consent to sexual (contact) (intercourse) is not a defense.[3]

3. (Name of victim) was on [probation] [parole] [extended supervision].

4. The defendant supervised (name of victim) in (his) (her) capacity as a (probation) (parole) (extended supervision) agent.[4]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL

CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1217 was originally published in 2004 and revised in 2007 and 2013. This revision was approved by the Committee in December 2021; it updated the comment.

This instruction is drafted for violations of § 940.225(2)(i), created by 2003 Wisconsin Act 51, effective date: September 5, 2003.

The instruction uses a simplified statement of the statutory description of the supervision requirement in sub. (2)(i), which reads in part as follows:

> . . . agent who supervises the individual, either directly or through a subordinate, . . . or who has influenced or has attempted to influence another probation, parole, or extended supervision agent's supervision of the individual.

If a case involves supervising "through a subordinate" or "influencing or attempting to influence" another agent's supervision, the introductory definition of the offense and the fourth element must be modified.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. The statute does not provide a definition of "probation, parole or extended supervision agent." However, another Criminal Code statute, § 940.20(2m)(a)2. provides the following:

> "Probation, extended supervision and parole agent" means any person authorized by the

department of corrections to exercise control over a probationer, parolee or person on extended supervision.

2. The definition of the offense in § 940.225(2)(i) includes the following statement:

This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

It is not clear to the Committee whether this statement presents an issue for the court or for the jury. In addition, it is not clear what "subject to prosecution" means. The legislative history indicates that this language was added to the original bill in response to concerns of the Attorney General that "the bill as [originally] drafted would make a crime any incident in which a correctional officer is a victim of a sexual assault." Letter of February 26, 2003, from Attorney General Lautenschlager to Reps. Bies and Albers, Co-Chairpersons, Assembly Committee on Corrections and the Courts. (Emphasis in original.)

In State v. Blum, an unpublished decision (No. 2010AP2363 CR, decided August 1, 2012), the court of appeals concluded that the "subject to prosecution" issue is a question of law for the court, not an affirmative defense that should be determined by the fact finder at trial. [Cited for informational purposes; see § 809.23(3)(b).] Blum involved a prosecution under § 940.225(2)(h), which has the same statement relating to "subject to prosecution."

3. "Without consent" is not an element of this offense because it is not included in the offense definition. Further, § 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g),(h), and (i)." The Committee concluded that it may be helpful to advise the jury of this fact.

4. This is a simplified statement of the statutory description of the supervision requirement in sub. (2)(i), which reads in part as follows:

. . . agent who supervises the individual, either directly or through a subordinate, . . . or who has influenced or has attempted to influence another probation, parole, or extended supervision agent's supervision of the individual.

The fourth element must be modified if the case involves supervision "through a subordinate" or "influencing or attempting to influence" another agent's supervision.

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1217A SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE BY AN EMPLOYEE OF AN ENTITY — § 940.225(2)(j)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(j) of the Criminal Code of Wisconsin, is committed by a licensee, employee, or nonclient resident of an entity who has sexual (contact) (intercourse) with a client of the entity.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a (licensee) (employee) (nonclient resident)[1] of an entity.

2. The defendant had sexual (contact) (intercourse) with (name of victim).

   Consent to sexual (contact) (intercourse) is not a defense.[2]

3. (Name of victim) was a client of the entity.

   "Client" means an individual who receives direct care or treatment services from an entity.[3]

Meaning of "Entity"

"Entity" means _____.[4]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1217A was approved by the Committee in August 2006. This revision was approved by the Committee in December 2021; it added to the comment.

Section 940.225(2)(j) was created by 1997 Wisconsin Act 388 (effective date: Dec. 1, 2006).

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. Section 940.225(5)(ak), created by 2005 Wisconsin Act 388, defines "nonclient resident" as follows: ". . . an individual who resides, or is expected to reside, at an entity, who is not a client of the entity, and who has, or is expected to have, regular, direct contact with the clients of the entity."

2. "Without consent" is not an element of this offense because it is not included in the offense definition. The Committee concluded that it may be helpful to advise the jury of this fact.

3. This is the definition provided in s. 940.225(5)(abm), which was created by 2005 Wisconsin Act 388.

4. Section 940.225(2)(j) refers to "an entity," as defined in s. 48.685(1)(b) or 50.065(1)(c). The Committee recommends choosing the applicable part of applicable definition and inserting it in the blank.

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1217B SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE BY A LAW ENFORCEMENT OFFICER WITH A PERSON DETAINED OR IN CUSTODY — § 940.225(2)(k)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(k) of the Criminal Code of Wisconsin, is committed by a law enforcement officer who has sexual (contact) (intercourse) with any person who (is detained by any law enforcement officer, as provided under s. 968.24) (is in the custody of any law enforcement officer).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a law enforcement officer.

   "Law enforcement officer" means any person employed by the state or any political subdivision of the state, for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances that the person is employed and sworn to enforce. ["Law enforcement officer" includes a university police officer, as defined in s. 175.42 (1) (b)].[1]

2. The defendant had sexual (contact) (intercourse) with (<u>name of victim</u>).

Consent to sexual (contact) (intercourse) is not a defense.[2]

3. (Name of victim) was (detained by any law enforcement officer, as provided under s. 968.24) (in the custody of any law enforcement officer).

This applies (whether the custody is lawful or unlawful) (whether the detainment or custody is actual or constructive).[3]

[Section 968.24 provides that after having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.][4]

Meaning of ("Sexual Contact") ("Sexual Intercourse")

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1217B was approved by the Committee in June 2022.

This instruction is drafted for violations of § 940.225(2)(k), created by 2021 Wisconsin Act 188 [effective date: March 19, 2022].

1. This is the definition provided in Wis. Stat. § 165.85 (2) (c). The Committee recommends including the bracketed reference to a university police officer only when there is evidence that the defendant was a university police officer.

2. Section 940.225(2)(k) provides in part "Consent is not an issue in an action under this paragraph." Thus, "without consent" is not an element of this offense and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

3. The definition of the offense in § 940.225(2)(k) provides this language. § 940.225 does not define "actual" or "constructive" custody.

4. Section 968.24 concerns the temporary questioning of a person in a public place without arrest. More specifically, the section is the statutory codification of "Terry stop" authority. Because the connection between the statutory offense and an on-the-street detention may be confusing to a jury, the Committee concluded it may be helpful to include the bracketed statement if the facts of the case so require.

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1218A THIRD DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE WITHOUT CONSENT — § 940.225(3)(a)

Statutory Definition of the Crime

Third degree sexual assault, as defined in § 940.225(3)(a) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with another person without consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse with (name of victim).
2. (Name of victim) did not consent to the sexual intercourse.

Meaning of "Sexual Intercourse"

"Sexual intercourse" means any intrusion, however slight, of any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required.[1]

Meaning of "Did Not Consent"[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual intercourse with the defendant. In deciding whether (name of victim) did not consent, you

should consider what [he] [she] said and did, along with all the other facts and circumstances.

This element does not require that (name of victim) offered physical resistance.[3]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of third degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis ll-Criminal 1218 and revised in 1983 and 1990. A revision renumbering it as Wis JI-Criminal 1218A was published in 1996. A revision in 2001 involved adoption of a new format and nonsubstantive changes to the text. This revision was approved by the Committee in June 2018; it reflects changes made by 2017 Wisconsin Act 174 [effective date: March 30, 2018].

This instruction is for violations of § 940.225(3)(a): sexual intercourse without consent, as amended by 2017 Wisconsin Act 174. Act 174 amended former sub.(3) by splitting it into subdivs. (a) and (b). The text and the penalty were not changed.

See Wis JI-Criminal 1218B for violations under sub. (3)(b): sexual contact [as defined in § 940.225(5)(b)2. and 3.] without consent.

1. The alternatives for defining "sexual intercourse" are those found in Wis JI-Criminal l 200B. They are built in to this instruction for the convenience of users and to emphasize that this instruction is for third degree sexual assaults involving sexual intercourse, not third degree sexual assaults involving the new type of sexual contact created by 1995 Wisconsin Act 69. The definition of "sexual intercourse" is explained in the Comment to Wis JI-Criminal 1200R.

2. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code Offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a. freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

3. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

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1218B THIRD DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITHOUT CONSENT INVOLVING EJACULATION, ETC. — § 940.225(3)(b)

Statutory Definition of the Crime

Third degree sexual assault, as defined in § 940.225(3)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with another person without consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual contact with (name of victim) .
2. (Name of victim) did not consent to the sexual contact.

Meaning of "Sexual Contact"

Sexual contact requires

[intentional [penile ejaculation of ejaculate] [emission of (urine) (feces)] by the defendant upon any part of the body clothed or unclothed of (name of victim) .][1]

[that the defendant intentionally caused (name of victim) to [ejaculate] [emit (urine) (feces)] on any part of the defendant's body, whether clothed or unclothed.][2]

Sexual contact also requires that the defendant acted with intent to [become sexually aroused or gratified] [sexually degrade or humiliate (name of victim)] .[3]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent.

Meaning of "Did Not Consent"[4]

"Did not consent" means that (name of victim) did not freely agree to have sexual contact with the defendant. In deciding whether (name of victim) did not consent, you should consider what [he] [she] said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of third degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1218B was originally published in 1996 and revised in 2002 and 2004. The 2004 revision involved a correction of an inadvertent error in the definition of consent. This revision was approved by the Committee in June 2018; it reflects changes made by 2017 Wisconsin Act 174 [effective date: March 30, 2018].

This instruction is for violations of § 940.225(3)(b), as amended by 2017 Wisconsin Act 174. For violations of sub. (3)(a), see Wis JI-Criminal 1218A. Act 174 amended former sub. (3) by splitting it into two subdivs. (a) and (b). The text and the penalty were not changed. This instruction applies only to sexual contact as defined in § 940.225(5)(b)2. and 3. which provide that sexual contact includes:

> Sub. (b)2. Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

> Sub. (b)3. For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

2017 Wisconsin Act 174 amended former sub. (3) by splitting it into subivs. (a) and (b). The text and the penalty were not changed. See Wis JI-Criminal 1218A for violations under sub. (3)(a): sexual intercourse without consent.

Unlike the other instructions for sexual contact offenses, this instruction builds in the applicable alternative specified in subs. (5)(b) 2. and 3. This is to emphasize that this instruction is only for those specific types of sexual contact. For sexual contact offense generally, see Wis JI-Criminal 1219.

1. This definition of "sexual contact" was created by 1995 Wisconsin Act 69 [effective date: December 2, 2095], which also created the offense addressed by this instruction.

2. The instruction phrases the alternatives as requiring that the defendant acted "with intent to" achieve one of the prohibited results. The statute refers to acting with "the purpose of ..." No change in meaning is intended.

Note that only the two identified alternatives apply to sexual contact involving intentional ejaculation or intentional emission of urine or feces. The "intent to cause bodily harm" alternative that applies to other types of sexual contact does not apply to the offense defined by this instruction. See Wis JI-Criminal 1200A.

3. This definition of "sexual contact" was created by 2005 Wisconsin Act 273 [effective date: April 20, 2006.]

4. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code Offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
>
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

5. See State v. Lederer, 99 Wis.2d 430,299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

1219 FOURTH DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITHOUT CONSENT — § 940.225(3m)

Statutory Definition of the Crime

Fourth degree sexual assault, as defined in § 940.225(3m) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with another person without consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual contact with (name of victim).

2. (Name of victim) did not consent to the sexual contact.

Meaning of "Sexual Contact"

FOR SEXUAL CONTACT INVOLVING THE DEFENDANT TOUCHING THE VICTIM:

[Sexual contact is an intentional touching by the defendant of the (name intimate part)[1] of (name of victim). The touching may be of the (name intimate part) directly or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching.

Sexual contact also requires that the defendant acted with intent to (cause bodily harm to (name of victim) .) (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim) .)[2]]

FOR SEXUAL CONTACT INVOLVING THE VICTIM BEING CAUSED OR ALLOWED TO TOUCH THE DEFENDANT:

[Sexual contact is an intentional touching by (name of victim) of the (name intimate part) [3] of the defendant, if the defendant intentionally caused[4] (name of victim) to do that touching. The touching may be of the (name intimate part) directly or it may be through the clothing.

Sexual contact also requires that the defendant acted with intent to (cause bodily harm to (name of victim) .) (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim) .)[5]]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent.

Meaning of "Did Not Consent"[6]

"Did not consent" means that (name of victim) did not freely agree to have sexual contact with the defendant. In deciding whether (name of victim) did not consent, you should consider what she said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of fourth degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1219 was originally published in 1980 and revised in 1983, 1990, 1992, 1996, and 2002. This revision was approved by the Committee in February 2004 and involved correction of an inadvertent error in the consent definition.

This instruction is for fourth degree sexual assault as defined in § 940.225(3m). It applies to cases involving "sexual contact" as defined in § 940.225(5)(b)1. A new type of third degree sexual assault was created by 1995 Wisconsin Act 69, effective date: December 2, 1995. It applies only to sexual contact as defined in § 940.225(5)(b)2., which provides that sexual contact includes:

> Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

See Wis JI-Criminal 1218B for an instruction for third degree sexual assault based on the new definition of "sexual contact."

Unlike the other instructions for sexual contact offenses, this instruction builds in the alternatives for defining "sexual contact" that are found in Wis JI-Criminal 1200A. This was done for the convenience of users and to emphasize that the definition of a new type of sexual contact created by 1995 Wisconsin Act 69 [see above] does not apply to fourth degree sexual assault as defined in § 940.225(3m).

1. Section 939.22(19) defines "intimate parts": "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved in the sexual contact.

In State v. Morse, 126 Wis.2d 1, 374 N.W.2d 388 (Ct, App. 1985), the court of appeals held that a trial court did not improperly broaden the scope of the sexual contact definition in § 939.22(19) by defining "intimate part" to include "the vaginal area."

2. Each alternative definition includes the requirement that the contact be for a prohibited purpose. Earlier versions of the instructions included the purpose as a separate element, but the Committee concluded that it was preferable to deal with at as a second part of the sexual contact definition. The Committee also concluded that including purpose as part of each alternative will reduce the possibility that it would be inadvertently overlooked. Failure to include the purpose of the contact as a part of the jury instruction is

reversible error. State v. Krueger, 2001 WI App 14, 240 Wis.2d 644, 623 N.W.2d 211. Likewise, failure to include reference to purpose when accepting a guilty plea may be grounds for withdrawal of the plea. State v. Bollig, 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199.

The instruction phrases the alternatives as requiring that the defendant acted "with intent to" achieve one of the prohibited results. The statute refers to acting with "the purpose of . . ." No change in meaning is intended.

3. See note 1, supra.

4. The instruction refers to the touching of the defendant by the complainant as a touching which the defendant "causes" the complainant to do. The statute does not expressly provide for the "causing" alternative, but the Committee concluded that the requirement is implicit.

For sexual assault offenses against children, another alternative exists for this type of sexual contact: allowing a child to touch an intimate part of the defendant. This alternative was recognized in State v. Traylor, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992). See the discussion in note 5, Wis JI-Criminal 2101A. Under § 940.225, certain adult victims are in a situation very similar to that of a child victim: persons suffering from mental illness or deficiency [sub. (2)(c)]; persons under the influence of an intoxicant [sub. (2)(cm)]; or, patients or residents [sub. (2)(g)]. However, the Committee decided not to incorporate the "or allowed" alternative in this instruction in the absence of clear authority extending the Traylor decision beyond offenses against children.

Applied literally to a case where the victim is caused to touch the defendant, § 940.225(5)(b) requires an "intentional touching by the complainant . . . of the . . . defendants' intimate parts. . . ." The Committee concluded that it is proper to interpret this definition in a manner that focuses on the defendant's, rather than the victim's, intent. Thus, the instruction refers simply to "a touching" by the victim that the defendant "intentionally caused." This is consistent with the Traylor decision's interpretation of almost identical language in the definition of "sexual contact" in § 948.01(5)(a).

The constitutionality of the sexual contact definition (prior to its amendment by Chapter 309, Laws of 1981) was considered by the Wisconsin courts in several cases. The constitutionality of the basic definition was upheld in State ex rel. Skinkis v. Treffert, 90 Wis.2d 528, 280 N.W.2d 316 (Ct. App. 1979). In State v. Nye, 105 Wis.2d 63, 312 N.W.2d 826 (1981), the Wisconsin Supreme Court summarily affirmed a Wisconsin Court of Appeals decision (101 Wis.2d 398, 302 N.W.2d 83 (Ct. App. 1981)) which held that it was error to include in a jury instruction the former statutory language "if that touching can reasonably be construed to be for the purpose of sexual arousal or gratification." Chapter 309, Laws of 1981, eliminated the phrase from § 940.225(5)(b); the standard instructions had never included it in the definition of sexual contact.

5. See note 2, supra.

6. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

"Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

7. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

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1220 BATTERY — § 940.19(1)

Statutory Definition of the Crime

Battery, as defined in § 940.19(1) of the Criminal Code of Wisconsin, is committed by one who causes bodily harm to another by an act done with the intent to cause bodily harm to that person or another without the consent of the person so harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim) .

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[1]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

   "Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another human being.[4]

3. The defendant caused bodily harm without the consent[5] of (name of victim) .

4. The defendant knew that (name of victim) did not consent.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of battery have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1220 was originally published in 1966 and revised in 1979, 1980, 1986, 1992, 1994, and 2001. This revision was approved by the Committee in June 2014 and involved a nonsubstantive correction in the text.

This instruction is for "simple battery," as defined in § 940.19(1). For an instruction integrating the privilege of self-defense with simple battery, see Wis JI-Criminal 1220A.

Subsection (2m) of § 939.66 provides that a "crime which is a less serious or equally serious type of battery than the one charged" is a lesser included offense. "Or equally serious" was added by 1993 Wisconsin Act 441, effective date: May 10, 1994. This change clarified the confusion resulting from the drafting of the battery statutes in terms that did not satisfy the strict "comparison of the statutory elements" test that the Wisconsin Supreme Court has adopted for lesser included offenses. See State v. Richards, 123 Wis.2d 1, 365 N.W.2d 7 (1985), where the court held that simple battery under § 940.19(1) and "intermediate battery" under § 940.19(1m) are not lesser included offenses of aggravated battery.

The amendment to § 939.66 affects only the legal possibility of submitting the lesser offense; the evidentiary standard for submitting the lesser crime must also be satisfied. See SM-6, Jury Instructions on Lesser Included Offenses.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. This is the definition of "bodily harm" provided in § 939.22(4).

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

5. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

6. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

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1220-1246 BATTERY AND RELATED OFFENSES: INTRODUCTORY COMMENT

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1220-1246 Battery and Related Offenses: Introductory Comment, was published in 1994 and withdrawn by the Committee in 2007.

NOTE: Wis JI-Criminal 1220-1246 was an Introductory Comment, describing a change in the numbering of instructions for battery offenses. The instructions themselves, from Wis JI-Criminal 1220 through Wis JI-Criminal 1246, were not withdrawn.

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1220A BATTERY: SELF-DEFENSE IN ISSUE — § 940.19(1); § 939.48

Statutory Definition of the Crime

Battery, as defined in § 940.19(1) of the Criminal Code of Wisconsin, is committed by one who causes bodily harm to another by an act done with the intent to cause bodily harm to that person or another without the consent of the person so harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[1]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

   "Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another human being.[4]

3. The defendant caused bodily harm without the consent[5] of (name of victim).

4. The defendant knew that (name of victim) did not consent.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[6]

Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:[7]

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[8] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[9] The reasonableness of the defendant's beliefs must

be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of battery have been proved and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1220A was originally published in 1985 and revised in 1994 and 2001. This revision was approved by the Committee in June 2014 and involved a nonsubstantive correction in the text.

This instruction combines the uniform instruction for simple battery (Wis JI-Criminal 1220) with the instruction on the privilege of self-defense (Wis JI-Criminal 800). The Committee concluded that integrating the elements and the privilege provides a clearer statement of all the facts necessary to constitute guilt in a case where self-defense is an issue. This kind of approach was suggested in State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

1. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

2. This is the definition of "bodily harm" provided in § 939.22(4).

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

5. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

6. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

7. The instruction on self-defense is adapted from Wis JI-Criminal 800.

8. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

9. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975).

1221 ABUSE OF CHILDREN

1221A ABUSE OF CHILDREN — EXPOSING A CHILD TO CRUEL MALTREATMENT — § 940.201

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1221 was originally published in 1974 and was revised in 1978, 1981, and 1986.

Wis JI-Criminal 1221A was originally published in 1987.

Both instructions were withdrawn in 1989 because the statute with which they deal was repealed by 1987 Wisconsin Act 332, effective July 1, 1989. The offense formerly known as child abuse is replaced by §§ 948.03, Physical Abuse Of A Child (see Wis JI-Criminal 2108 through 2113) and 948.04, Causing Mental Harm To A Child (see Wis JI-Criminal 2116).

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1221C FAILURE TO REPORT CHILD ABUSE — § 48.981(2), (3), and (6)

[INSTRUCTION RENUMBERED – SEE WIS JI-CRIMINAL 2119]

COMMENT

Wis JI-Criminal 1221C was approved by the Committee in August 1987. It was renumbered Wis JI-Criminal 2119 in June 1992.

This instruction dealt with violations of § 48.981, which requires reporting of child abuse by designated persons. It was originally numbered "1221C" to follow the instruction for the crime of child abuse, then defined in § 940.201. Child abuse offenses are now defined in § § 948.03 and 948.04 and are addressed by Wis JI-Criminal 2108 through 2116. Thus, former Wis JI-Criminal 1221C was renumbered to Wis JI-Criminal 2119 to follow the instructions for the child abuse crimes.

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1222 SUBSTANTIAL BATTERY WITH INTENT TO CAUSE BODILY HARM — § 940.19(2)

Statutory Definition of the Crime

Substantial battery, as defined in § 940.19(2) of the Criminal Code of Wisconsin, is committed by one who causes substantial bodily harm to another by an act done with the intent to cause bodily harm to that person or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused substantial bodily harm to (name of victim) .

   "Cause" means that the defendant's act was a substantial factor in producing the substantial bodily harm.[1]

   "Substantial bodily harm" means bodily injury that causes [a laceration that requires (stitches) (staples) (a tissue adhesive)] [any fracture of a bone] [a broken nose] [a burn] [a petechia] [a temporary loss of consciousness, sight, or hearing] [a concussion] [a loss or fracture of a tooth].[2]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

"Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another human being.[5]

The intent to cause bodily harm must exist at the time of the act causing substantial bodily harm.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1222 was originally published in 1994 and revised in 2000 and 2005. This revision was approved by the Committee in June 2017; it updated the definition of "substantial bodily harm" and added to footnote 2.

Section 940.19(2) was created by 1993 Wisconsin Act 441 (effective date: May 10, 1994). The offense requires the causing of substantial bodily harm with intent to cause bodily harm. The offense is a Class E felony. Note that this offense does not contain a "without consent" element as does "simple battery" under § 940.19(1).

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

See Wis JI-Criminal 1222A for an instruction integrating the privilege of self-defense with the elements of this offense.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. This is the definition of "substantial bodily harm" provided in § 939.22(38). It was revised by 2003 Wisconsin Act 223 [effective date: April 27, 2004] to include reference to a laceration requiring "staples or a tissue adhesive" and "a broken nose." Note that the definition provides only a list of harms that constitute "substantial bodily harm." Compare this with the definitions of "bodily harm" [' 939.22(4)] and "great bodily harm" [' 939.22(14)] which contain a general category in addition to a list of specific harms: in § 939.22(4) – "any impairment of physical condition," in § 939.22(14) – "other serious bodily injury."

2007 Wisconsin Act 127 [effective date: April 4, 2008] amended the definition of "substantial bodily harm" to include "a petechia" and created sec. 939.22(23) defining the term as ". . . a minute colored spot that appears on the skin, eyes, eyelid, or mucous membrane of a person as a result of a localized hemorrhage or rupture to a blood vessel or capillary."

In a decision addressing "great bodily harm," the Wisconsin Court of Appeals concluded: "Just because all fractures meet the definition of substantial bodily harm, that does not imply that a particular fracture . . . cannot be serious enough to qualify as an "other serious bodily injury for purposes of being great bodily harm." State v. Davis, 2016 WI App 73, 371 Wis.2d 737, 885 N.W.2d 807, ¶21.

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

6. The elements of this offense are the causing of substantial bodily harm by an act done with intent to cause bodily harm. Therefore, it differs from simple battery primarily with respect to the degree of harm caused. The Committee concluded that this instruction makes the distinction clear but also that it would be appropriate to emphasize that distinction to the jury in a separate paragraph (where, for example, battery is submitted as a lesser included offense).

7. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

1222A SUBSTANTIAL BATTERY WITH INTENT TO CAUSE BODILY HARM: SELF-DEFENSE IN ISSUE — § 940.19(2); § 939.48

Statutory Definition of the Crime

Substantial battery, as defined in § 940.19(2) of the Criminal Code of Wisconsin, is committed by one who causes substantial bodily harm to another by an act done with the intent to cause bodily harm to that person or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused substantial bodily harm to (name of victim) .

   "Cause" means that the defendant's act was a substantial factor in producing the substantial bodily harm.[1]

   "Substantial bodily harm" means bodily injury that causes [a laceration that requires (stitches) (staples) (a tissue adhesive)] [any fracture of a bone] [a broken nose] [a burn] [a petechia] [a temporary loss of consciousness, sight, or hearing] [a concussion] [a loss or fracture of a tooth].[2]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

"Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another human being.[5]

The intent to cause bodily harm must exist at the time of the act causing substantial bodily harm.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[7]

Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:[8]

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[9] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[10] The reasonableness of the defendant's beliefs

must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1222A was originally published in 2001 and revised 2005. This revision was approved by the Committee in June 2017; it updated the definition of "substantial bodily harm" and added to footnote 2.

This instruction combines the uniform instruction for substantial battery with intent to cause bodily harm (1222) with the instruction on the privilege of self-defense (Wis JI-Criminal 800). The Committee concluded that integrating the elements and the privilege provides a clearer statement of all the facts necessary to constitute guilt in a case where self-defense is an issue. This kind of approach was suggested in State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. This is the definition of "substantial bodily harm" provided in § 939.22(38). It was revised by 2003 Wisconsin Act 223 [effective date: April 27, 2004] to include reference to a laceration requiring "staples or a tissue adhesive" and "a broken nose." Note that the definition provides only a list of harms that constitute "substantial bodily harm." Compare this with the definitions of "bodily harm" [' 939.22(4)] and "great bodily harm" [' 939.22(14)] which contain a general category in addition to a list of specific harms: in § 939.22(4) – "any impairment of physical condition," in § 939.22(14) – "other serious bodily injury."

2007 Wisconsin Act 127 [effective date: April 4, 2008] amended the definition of "substantial bodily harm" to include "a petechia" and created sec. 939.22(23) defining the term as ". . . a minute colored spot that appears on the skin, eyes, eyelid, or mucous membrane of a person as a result of a localized hemorrhage or rupture to a blood vessel or capillary."

In a decision addressing "great bodily harm," the Wisconsin Court of Appeals concluded: "Just because all fractures meet the definition of substantial bodily harm, that does not imply that a particular fracture . . . cannot be serious enough to qualify as an "other serious bodily injury for purposes of being great bodily harm." State v. Davis, 2016 WI App 73, 371 Wis.2d 737, 885 N.W.2d 807, ¶21.

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

6. The elements of this offense are the causing of substantial bodily harm by an act done with intent to cause bodily harm. Therefore, it differs from simple battery primarily with respect to the degree of harm caused. The Committee concluded that this instruction makes the distinction clear but also that it would be appropriate to emphasize that distinction to the jury in a separate paragraph (where, for example, battery is submitted as a lesser included offense).

7. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

8. The instruction on self-defense is adapted from Wis JI-Criminal 800.

9. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

10. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975).

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1223 SUBSTANTIAL BATTERY WITH INTENT TO CAUSE SUBSTANTIAL BODILY HARM — § 940.19(3)

1223A SUBSTANTIAL BATTERY WITH INTENT TO CAUSE SUBSTANTIAL BODILY HARM: SELF-DEFENSE IN ISSUE — §§ 940.19(3); 939.48

INSTRUCTIONS WITHDRAWN

COMMENT

Wis JI-Criminal 1223 and 1223A were drafted for violations of former § 940.19(3), which prohibited causing substantial bodily harm with intent to cause substantial bodily harm. Section 940.19(3) was repealed by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

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1224 AGGRAVATED BATTERY WITH INTENT TO CAUSE BODILY HARM — § 940.19(4)

Statutory Definition of the Crime

Aggravated battery, as defined in § 940.19(4) of the Criminal Code of Wisconsin, is committed by one who causes great bodily harm to another by an act done with the intent to cause bodily harm to that person or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim) .

   "Cause" means that the defendant's act was a substantial factor in producing the great bodily harm.[1]

   "Great bodily harm" means serious bodily injury.[2] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

"Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another human being.[5]

The intent to cause bodily harm must exist at the time of act causing great bodily harm.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1224 was originally published in 1994. The revision approved by the Committee in June 2000 involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment. This revision corrected an inadvertent error in the first element.

See Wis JI-Criminal 1224A for an instruction integrating the privilege of self-defense with the elements of this offense.

This offense was originally defined by § 940.19(1m), which was created by Chapter 111, Laws of 1979. The offense requires the causing of great bodily harm with intent to cause bodily harm and was referred to as

"intermediate battery" during the legislative process. (See the Analysis by the Legislative Reference Bureau to 1979 Assembly Bill 169.) 1993 Wisconsin Act 441 renumbered the statute to § 940.19(4) and increased the penalty to a Class D felony. It also eliminated the requirement that the harm be caused "without consent." (Effective date: May 10, 1994.)

1993 Wisconsin Act 441 also amended subsection (2m) of § 939.66 to provide that a "crime which is a less serious or equally serious type of battery than the one charged" is a lesser included offense. (Emphasis added to highlight the 1994 change.) Section 939.66 is intended to resolve the difficulties resulting from the drafting of the battery statutes in terms that did not satisfy the strict "comparison of the elements" test that the Wisconsin Supreme Court has adopted for lesser included offenses. See State v. Richards, 123 Wis.2d 1, 365 N.W.2d 7 (1985), where the court held that simple battery under § 940.19(1) and "intermediate battery" under § 940.19(1m) [now § 940.19(4)] were not lesser included offenses of aggravated battery.

Section 939.66(2m) affects only the legal possibility of submitting the lesser offense; the evidentiary standard for submitting the lesser crime must also be satisfied. See SM-6, Jury Instructions on Lesser Included Offense.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. See § 939.23(4) and Wis JI-Criminal 923A and 923B [formerly 923.1 and 923.2].

6. The elements of this offense are the causing of great bodily harm by an act done with intent to cause bodily harm. Therefore, it differs from simple battery primarily with respect to the degree of harm caused. The Committee concluded that this instruction makes the distinction clear but also that it would be appropriate to emphasize that distinction to the jury in a separate paragraph (where, for example, battery is submitted as a lesser included offense).

7. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

1224A AGGRAVATED BATTERY WITH INTENT TO CAUSE BODILY HARM: SELF-DEFENSE IN ISSUE — §§ 940.19(4); 939.48

Statutory Definition of the Crime

Aggravated battery, as defined in § 940.19(4) of the Criminal Code of Wisconsin, is committed by one who causes great bodily harm to another by an act done with the intent to cause bodily harm to that person or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim) .

   "Cause" means that the defendant's act was a substantial factor in producing the great bodily harm.[1]

   "Great bodily harm" means serious bodily injury. [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.][2]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

"Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another human being.[5]

The intent to cause bodily harm must exist at the time of act causing great bodily harm.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[7]

Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:[8]

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

[ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.]

[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).][9]

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[10] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[11] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1224A was approved by the Committee in June 2000.

This instruction combines the uniform instruction for aggravated battery with intent to cause bodily harm (Wis JI-Criminal 1224) with the instruction on the privilege of self-defense (Wis JI-Criminal 800). The Committee concluded that integrating the elements and the privilege provides a clearer statement of all the facts necessary to constitute guilt in a case where self-defense is an issue. This kind of approach was suggested in State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

1. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

2. The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. See § 939.23(4) and Wis JI-Criminal 923A and 923B [formerly 923.1 and 923.2].

6. The elements of this offense are the causing of great bodily harm by an act done with intent to cause bodily harm. Therefore, it differs from simple battery primarily with respect to the degree of harm caused. The Committee concluded that this instruction makes the distinction clear but also that it would be appropriate to emphasize that distinction to the jury in a separate paragraph (where, for example, battery is submitted as a lesser included offense). [After the 1994 change in the statute, this offense also differs from simple battery in that this offense no longer requires that the harm be caused "without consent" while simple battery retains a "without consent" element.]

7. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

8. The instruction on self-defense is adapted from Wis JI-Criminal 800.

9. See § 939.48(1).

10. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

11. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975).

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1225 AGGRAVATED BATTERY WITH INTENT TO CAUSE GREAT BODILY HARM — § 940.19(5)

Statutory Definition of the Crime

Aggravated battery, as defined in § 940.19(5) of the Criminal Code of Wisconsin, is committed by one who causes great bodily harm to another by an act done with the intent to cause great bodily harm to that person or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim) .

   "Cause" means that the defendant's act was a substantial factor in producing the great bodily harm.[1]

   "Great bodily harm" means serious bodily injury.[2] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

2. The defendant intended to cause great bodily harm to [(name of victim)] [another person].[3]

"Intent to cause great bodily harm" means that the defendant had the mental purpose to cause great bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause great bodily harm to another human being.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1225 was originally published in 1994 and revised in 2001. This revision was approved by the Committee in February 2003. It reflects changes made in the statute by 2001 Wisconsin Act 109.

See Wis JI-Criminal 1225A for an instruction integrating the privilege of self-defense with the elements of this offense.

Subsection (5) of § 940.19 was amended by 2001 Wisconsin Act 109 (effective date: February 1, 2003) to delete intent to cause "substantial bodily harm." The subsection now prohibits causing great bodily harm with intent to cause great bodily harm.

1993 Wisconsin Act 441 amended subsection (2m) of § 939.66 to provide that a "crime which is a less serious or equally serious type of battery than the one charged" is a lesser included offense. (Emphasis added to highlight the 1994 change.) As a Class E felony, aggravated battery is the most serious type of battery. Thus, all other types of battery are lesser included offenses.

Subsection 939.66(2m) is intended to resolve the difficulties resulting from the drafting of the battery statutes in terms that did not satisfy the strict "comparison of the elements" test that the Wisconsin Supreme

Court has adopted for lesser included offenses. See State v. Richards, 123 Wis.2d 1, 365 N.W.2d 7 (1985), where the court held that simple battery under § 940.19(1) and "intermediate battery" under § 940.19(1m) were not lesser included offenses of aggravated battery.

Subsection 939.66(2m) affects only the legal possibility of submitting the lesser offense; the evidentiary standard for submitting the lesser crime must also be satisfied. See SM-6, Jury Instructions on Lesser Included Offenses.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B [formerly 923.1 and 923.2].

5. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

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1225A AGGRAVATED BATTERY WITH INTENT TO CAUSE GREAT BODILY HARM: SELF-DEFENSE IN ISSUE — § § 940.19(5); 939.48

Statutory Definition of the Crime

Aggravated battery, as defined in § 940.19(5) of the Criminal Code of Wisconsin, is committed by one who causes great bodily harm to another by an act done with the intent to cause great bodily harm to that person or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim) .

   "Cause" means that the defendant's act was a substantial factor in producing the great bodily harm.[1]

   "Great bodily harm" means serious bodily injury.[2] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

2. The defendant intended to cause great bodily harm to [(name of victim)] [another person].[3]

"Intent to cause great bodily harm" means that the defendant had the mental purpose to cause great bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause great bodily harm to another human being.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[5]

Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:[6]

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

[ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.]

[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).][7]

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[8] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[9] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1225A was originally published in 2001. This revision was approved by the Committee in February 2003. It reflects changes made in the statute by 2001 Wisconsin Act 109.

Subsection (5) of § 940.19 was amended by 2001 Wisconsin Act 109 (effective date: February 1, 2003) to delete intent to cause "substantial bodily harm." The subsection now prohibits causing great bodily harm with intent to cause great bodily harm.

This instruction combines the uniform instruction for aggravated battery with intent to cause substantial or great bodily harm (Wis JI-Criminal 1225) with the instruction on the privilege of self-defense (Wis JI-Criminal 800). The Committee concluded that integrating the elements and the privilege provides a clearer statement of all the facts necessary to constitute guilt in a case where self-defense is an issue. This kind of approach was suggested in State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

This instruction assumes the simplest case in that references to instructions on, for example, retreat and provocation are not included. The complete version of Wis JI-Criminal 1225 and Wis JI-Criminal 800, and footnotes, should be reviewed before using this instruction.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B [formerly 923.1 and 923.2].

5. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

6. The instruction on self-defense is adapted from Wis JI-Criminal 800.

7. See § 939.48(1).

8. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

9. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975).

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1226 BATTERY WITH SUBSTANTIAL RISK OF GREAT BODILY HARM — § 940.19(6)

Statutory Definition of the Crime

Battery, as defined in § 940.19(6) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to another by conduct which creates a substantial risk of great bodily harm.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[1]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

   "Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct

was practically certain to cause bodily harm to another human being.[4]

3. The defendant's conduct created a substantial risk of great bodily harm.[5]

"Great bodily harm" means serious bodily injury.[6] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

[IF THERE IS EVIDENCE THAT THE VICTIM HAD A PHYSICAL DISABILITY, ADD THE FOLLOWING.][7]

[If you find that (name of victim) had a physical disability at the time of the offense, and that the disability was discernible by an ordinary person viewing the victim, or was actually known by the defendant,[8] you may find from that fact alone that the defendant's conduct created a substantial risk of great bodily harm. But you are not required to do so, and you must be satisfied beyond a reasonable doubt from all the evidence that the defendant's conduct created a substantial risk of great bodily harm.][9]

4. The defendant knew that (his) (her) conduct created a substantial risk of great bodily harm.[10]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and

knowledge.[11]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1226 was originally published in 1994 and revised in 2001 and 2014. This revision was approved by the Committee in October 2021; it made changes pursuant to 2021 Wisconsin Act 76.

This offense was originally defined in § 940.19(3), created by Chapter 113, Laws of 1979. It was renumbered § 940.19(6) by 1993 Wisconsin Act 441 and the penalty increased to a Class D felony. The law was originally drafted as a straightforward "Battery To Older Persons" provision, with an increased penalty for battery committed against persons 60 years of age or older (see 1979 Assembly Bill 8). The bill was amended to apply to all batteries involving a "high probability of great bodily harm," with the facts that the victim was over age 62 or suffering from physical disability creating "a rebuttable presumption of conduct creating a high probability of great bodily harm." The 1994 revision changed "high probability" to "substantial risk." § 940.19(6), the provision that presumed that a defendant's conduct created a substantial risk of great bodily harm when the victim was 62 years of age or older, was repealed by 2021 Wisconsin Act 76 [effective date: August 8, 2021]. 2021 Act 76 also created various provisions related to crimes and other proceedings involving individuals who are 60 years of age or older. For the new crime of physical abuse to an elder person, see Wis JI-Criminal 1249A through 1249F.

Instructing the jury when the "presumption" is in the case is discussed at notes 7 and 9, below.

The 1994 revision corrected what was probably an inadvertent technical error in the former statute. The introductory section of § 940.19(3), 1991 92 Wis. Stats., reads as follows (emphasis added):

Whoever intentionally causes bodily harm to another by conduct which creates a high probability of great bodily harm is guilty of a Class E felony. A rebuttable presumption of conduct creating a substantial risk of great bodily harm arises . . .

1993 Wisconsin Act 441 preserved the inconsistency when it recreated former sub. (3) as sub. (b), but "high probability" was changed to "substantial risk" by a "revisor's bill," 1994 Wisconsin Act 483.

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. This is the definition of "bodily harm" provided in § 939.22(4).

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

5. For offenses committed before August 8, 2021, include the following language after the definition of "great bodily harm" in element 3.

> [IF THERE IS EVIDENCE THAT THE VICTIM WAS 62 YEARS OF AGE OR OLDER, ADD THE FOLLOWING.]
>
> [If you find that (name of victim) was age 62 or older at the time of the offense, you may find from that fact alone that the defendant's conduct created a substantial risk of great bodily harm, but you are not required to do so, and you must be satisfied beyond a reasonable doubt from all the evidence that the defendant's conduct created a substantial risk of great bodily harm.]

This paragraph on the "rebuttable presumption" established by § 940.19(3) follows the rule set out in § 903.03(3) for instructing the jury on presumptions in criminal cases. See Wis JI-Criminal 225 for a discussion of the Committee's approach to instructing on "presumptions" and "prima facie" cases. See also, footnote 7, regarding the submission of presumptions to the jury.

6. The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

7. See § 903.03(2) regarding the submission of presumptions to the jury. It provides in part:

> When the presumed fact establishes guilt or is an element of the offense or negates a defense, the judge may submit the question of guilt or the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt.

Therefore, there must be sufficient evidence of the "presumed fact" – substantial risk of great bodily harm – to enable a reasonable juror to be convinced of its existence beyond a reasonable doubt, before an instruction on the "presumption" flowing from the "basic facts" of disability may be submitted.

The Wisconsin Supreme Court addressed the "physical disability" presumption in State v. Crowley, 143 Wis.2d 324, 422 N.W.2d 847 (1988). The court dealt with two issues: the general validity of the presumption relating a physical disability to the likelihood of great bodily harm; and the validity of associating physical disability with the condition of the victim in the case before the court.

As to the first issue, the court applied the rule of Ulster County Court v. Allen, 442 U.S. 140 (1979), described as holding that "a presumption may be impermissible if there is no reasonable nexus or relationship between the evidentiary facts and the fact to be presumed." 143 Wis.2d 324, 339. The court concluded that "the relationship, the nexus, between physical disability and the likelihood that violence against one physically disabled will lead to great bodily harm, is unassailable. . . ." 143 Wis.2d 324, 339.

The court also concluded that the victim in the Crowley case, who was 48 years old, weighed 96 lbs., was 4' 9" in height, and was legally blind, was "physically disabled" within the meaning of the statute. The court concluded that disability need not be found as a medical fact but only as a matter discernibly evident to a lay person. Further, the court held that it is not necessary that the victim qualify as a "handicapped person" as that term is used in the Fair Employment laws.

8. The 1994 revision of the statute added the phrase, "or that is actually known by the actor," to sub. (6)(b).

9. This paragraph on the "rebuttable presumption" established by § 940.19(3) follows the rule set out in § 903.03(3) for instructing the jury on presumptions in criminal cases. See Wis JI-Criminal 225 for a discussion of the Committee's approach to instructing on "presumptions" and "prima facie" cases.

10. Subsection 940.19(6) applies to those who "intentionally cause bodily harm by conduct which creates a substantial risk of great bodily harm." Subsection 939.23(3) provides that when "intentionally" is used in a criminal statute, it requires that the actor "have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally'." The Committee concluded that this requires that the defendant charged under § 940.19(6) must have known that his conduct created a substantial risk of great bodily harm. The Committee further concluded that it need not be established that the defendant knew that the victim was over the age of 62 or suffering from a physical disability, because those two factors are essentially treated only as evidence of the fourth element of the crime: that the defendant's conduct has created a substantial risk of great bodily harm. See notes 6 through

10, supra.

11. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

1227 BATTERY TO AN UNBORN CHILD — § 940.195(1), (2), (4), (5)[1]

Statutory Definition of the Crime

Battery to an unborn child, as defined in § 940.195 of the Criminal Code of Wisconsin, is committed by one who causes [(bodily harm) (substantial bodily harm) (great bodily harm)][2] to an unborn child by an act done with the intent to cause [(bodily harm) (or) (great bodily harm)][3] [(to that unborn child) (or) (to the woman who is pregnant with that unborn child) (or) (to another)].[4]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused (bodily harm) (substantial bodily harm) (great bodily harm) to an unborn child.

"Cause" means that the defendant's act was a substantial factor in producing the (bodily harm) (substantial bodily harm) (great bodily harm).[5]

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.][6]

"Substantial bodily harm" means bodily injury that causes [a laceration that requires (stitches) (staples) (a tissue adhesive)] [any fracture of a bone] [a broken

nose] [a burn] [a petechia] [a temporary loss of consciousness, sight, or hearing] [a concussion] [a loss or fracture of a tooth].[7]

["Great bodily harm" means serious bodily injury.[8] (Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.)]

"Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.[9]

2. The defendant intended to cause [(bodily harm) (or) (great bodily harm)] [(to the unborn child) (or) (to the woman who was pregnant with the unborn child) (or) (to another)].

"Intent to cause [(bodily harm) (or) (great bodily harm)]" means that the defendant had the mental purpose to cause [(bodily harm) (or) (great bodily harm)] [(to an unborn child) (or) (to the woman who was pregnant with the unborn child) (or) (to another human being)] or was aware that his or her conduct was practically certain to cause [(bodily harm) (or) (great bodily harm)] [(to an unborn child) (or) (to the woman who was pregnant with the unborn child) (or) (to another human being)].

[DEFINE THE INTENDED HARM IF IT IS DIFFERENT FROM THE HARM CAUSED][10]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1227 was originally published in 1999 and revised in 2003. This revision was approved by the Committee in June 2017; it updated the definition of "substantial bodily harm."

This instruction is drafted to provide a model for the offenses defined in § 940.195, which was created by 1997 Wisconsin Act 295 [effective date: July 1, 1998]. Two changes were made in the statute by 2001 Wisconsin Act 109: sub. (3) – causing substantial bodily harm to an unborn child with intent to cause substantial bodily harm – was repealed; sub. (5) was amended to delete the reference to intent to cause "substantial bodily harm." The effective date of those changes was February 1, 2003.

As amended by 2001 Wisconsin Act 109, there are five subsections of § 940.195, each roughly the same as the subsections of § 940.19, the general battery statute. Act 109 repealed former subsection (3), which applied to causing substantial bodily harm with intent to cause substantial bodily harm. The approach used in this instruction ought to work for all violations except for violations under sub. (6): intentionally causing bodily harm by conduct that creates a substantial risk of great bodily harm. See the discussion in footnote 1, suggesting that Wis JI-Criminal 1226 be used as a model for violations of sub. (6).

Section 939.75, also created by Act 295, defines "unborn child" and sets forth several exceptions to the applicability of the revised statutes. Subsection (2)(b) recognizes the following exceptions:

- induced abortions [subd. 1.]
- acts committed in accordance with usual and customary standards of medical practice during diagnostic testing or therapeutic treatment by a licensed physician [sub. 2.]
- an act by a health care provider that is in accordance with a pregnant woman's power of attorney for health care, etc. [subd. 2h.]
- an act by a woman who is pregnant with an unborn child [subd. 3.]

- the lawful prescription, dispensation or administration, and the use by any a woman of, any medicine, drug or device that is used as a method of birth control or is intended to prevent pregnancy. [subd. 4]

Subsection (3) provides that if any of these exceptions are "placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist . . ." Thus, these exceptions are to be handled in the same manner as, for example, the mitigating circumstance of adequate provocation under the general homicide law: once supported by some evidence, the absence of the exception becomes a fact the state must prove. The Committee decided not to draft instructions for the absence of these exceptions because it appeared to the Committee that their applicability would most likely be determined before charges were filed or at least before trial.

1. As amended by 2001 Wisconsin Act 109, there are five subsections of § 940.195, each roughly the same as the subsections of § 940.19, the general battery statute. Act 109 repealed former subsection (3) which applied to causing substantial bodily harm with intent to cause substantial bodily harm.

The offenses differ from one another depending on three variables: 1) the type of harm caused – whether it was bodily harm, substantial bodily harm, or great bodily harm; 2) the type of harm intended to be caused – whether it was bodily harm or great bodily harm; and, 3) the entity intended to be harmed – the unborn child, the woman who is pregnant with the unborn child, or another. This instruction is set up with these alternatives in brackets throughout, allowing the user to select the alternatives that apply to the offense charged. This approach ought to work for all violations except for violations under sub. (6): intentionally causing bodily harm by conduct that creates a substantial risk of great bodily harm. For that offense, Wis JI-Criminal 1226 can be used as a model and should be modified to refer to causing harm to an unborn child as illustrated by the first element of this instruction.

2. Select the alternative within the bracket that applies. Subs. (1) and (6) of § 940.195 require causing bodily harm; sub. (2) requires causing substantial bodily harm; subs. (4) and (5) require causing great bodily harm.

3. Select the alternative within the bracket that applies. Subs. (1), (2), and (4) of § 940.195 require intent to cause bodily harm; sub. (5) requires intent to cause great bodily harm. The alternatives do not address the offense defined in sub. (6): intentionally causing bodily harm by conduct that creates a substantial risk of great bodily harm. For that offense, Wis JI-Criminal 1226 can be used as a model, modified to refer to causing harm to an unborn child as illustrated by the first element of this instruction.

4. Select the alternative within the bracket that applies. This set of options includes the traditional one of defining the crime as involving intent to harm the victim (here, the unborn child), "or another" (sometimes termed "transferred intent"), and the addition of intent to harm the woman who is pregnant with the unborn child. More than one alternative may be selected if supported by the evidence.

5. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

6. This is the definition of "bodily harm" provided in § 939.22(4).

7. This is the definition of "substantial bodily harm" provided in § 939.22(36). Also see footnote 2, Wis JI-Criminal 1222.

8. The Committee concluded that defining "great bodily harm" as "serious bodily injury" is sufficient in

most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. See Wis JI-Criminal 914 for a complete discussion of "great bodily harm."

9. This is the definition of "unborn child" provided in § 939.75(1).

10. As amended by 2001 Wisconsin Act 109, the statute defines two offenses where the harm caused is different from the harm intended: sub. (2) covers causing substantial bodily harm with intent to cause bodily harm; sub. (4) covers causing great bodily harm with intent to cause bodily harm. For those cases, "bodily harm" should be separately defined here, as part of the "intent to cause bodily harm" element. If the harm caused and harm intended match, the definition of the term in the first element is sufficient.

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1228 BATTERY BY PRISONER — § 940.20(1)

Statutory Definition of the Crime

Battery by prisoner, as defined in § 940.20(1) of the Criminal Code of Wisconsin, is committed by one who is confined to a [state prison] [(state) (county) (municipal) detention facility] and who intentionally causes bodily harm or a soft tissue injury to (an officer) (an employee) (a visitor) (another inmate) of the (prison) (detention facility) without the consent of that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a prisoner confined to a [state prison] [(state) (county) (municipal) detention facility].

   This requires that the defendant was confined to a (prison) (detention facility) as a result of a violation of law.[1]

   (Name of institution) is a [state prison] [(state) (county) (municipal) detention facility].[2]

2. The defendant intentionally caused (bodily harm) (a soft tissue injury) to (name of victim) .

"Cause" means that the defendant's act was a substantial factor in producing (bodily harm) (a soft tissue injury).[3]

"Intentionally" means that the defendant had the mental purpose to cause (bodily harm) (a soft tissue injury) to another human being or was aware that (his) (her) conduct was practically certain to cause (bodily harm) (a soft tissue injury) to another human being.[4]

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[5]]

["Soft tissue injury" means an injury that requires medical attention to a tissue that connects, supports, or surrounds other structures and organs of the body and includes tendons, ligaments, fascia, skin, fibrous tissues, fat, synovial membranes, muscles, nerves, and blood vessels.[6]]

3. (Name of victim) was (an officer) (an employee) (a visitor) (another inmate) of (name of institution).

4. The defendant caused (bodily harm) (a soft tissue injury) without the consent of (name of victim).[7]

5. The defendant knew (name of victim) was (an officer) (an employee) (a visitor) (another inmate) of (name of institution) and knew that (name of victim) did not consent to the causing of (bodily harm) (a soft tissue injury).[8]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1228 was originally published in 1994 and revised in 2001. This revision was approved by the Committee in December 2011; it revised the instruction to reflect changes made by 2011 Wisconsin Act 74.

2011 Wisconsin Act 74 amended § 940.20(1) to add reference to causing "a soft tissue injury" as defined in § 946.41(2)(c). See footnote 6, below. The effective date of Act 74 is December 2, 2011.

1. The defendant's status as a "prisoner" should rarely be in question, but the Committee concluded there should be some definition of the term in the instruction. The definition in the instruction was adapted from that found in Wis. Stat. § 46.011 and from the decision in State v. Brill, 1 Wis.2d 288, 83 N.W.2d 721 (1957), where the court made the following observations:

> So far as we know, the word "prisoner" has not been defined by this court. Black's Law Dictionary (4th ed.), p. 1358, defines the word as follows:
>
> "One who is deprived of his liberty; one who is against his will kept in confinement or custody."
>
> Webster's New International Dictionary (2d ed.) gives the following definition:
>
> "A person under arrest, in custody or in prison; one involuntarily restrained; a captive; as a prisoner of justice, or war or at the bar; to take one prisoner."

State v. Brill, 1 Wis.2d 288, 291.

The Brill definition has been cited with approval in several cases involving § 940.20(1). In C.D.M. v. State, 125 Wis.2d 170, 370 N.W.2d 287 (Ct. App. 1985), the court held that a juvenile confined as a delinquent at the Lincoln Hills School was a "prisoner" under § 940.20(1) because he had violated a criminal law and was confined for a correctional objective. 125 Wis.2d 170, 173.

The Committee concluded that "prisoner" includes all persons who are confined to one of the identified institutions as a result of a violation of the law. "Prisoner" is also defined in § 46.011(2) (for purposes of Chapter 46 to 51, 55, and 58) and in § 301.01(2) (for purposes of Chapters 301 to 304). But the Committee concluded that these definitions are not directly applicable here because they are concerned primarily with defining the authority of state agencies.

A person committed to a state mental health facility (in this case, the Mendota Mental Health Institute) after being found not guilty by reason of mental disease or defect, is a "prisoner" for purposes of § 940.20(1), Battery by prisoners. State v. Skampfer, 176 Wis.2d 304, 500 N.W.2d 369 (Ct. App. 1993). The important fact is that the person's liberty was restrained premised on a finding that the person had violated the criminal law.

A probationer who violates a condition of probation and as a result is taken into custody is a prisoner "confined as a result of a violation of the law" as provided in C.D.M., supra, and this instruction. State v. Fitzgerald, 2000 WI App 55, ¶12, 233 Wis.2d 584, 608 N.W.2d 391 [also involving a charge under § 940.20(1).]

2. The institution's status as one of the designated facilities should not be a contested issue in most cases, and the Committee concluded that it is appropriate for the trial court to so instruct the jury.

The question of what institutions are covered by the statute is arguably difficult only with regard to "state detention facilities." "County detention facility" most likely refers to a county jail (and possibly to the House of Correction in Milwaukee County); "municipal detention facility" most likely refers to city jails. But it is not clear what institutions are included in the term "state detention facility." The Committee concluded that the statute may be applied to persons confined in mental health institutes provided their confinement is a result of criminal charges. This interpretation would include those committed for determination of competency to stand trial, those committed as not competent to stand trial, and those committed as not guilty by reason of mental disease or defect. This conclusion is consistent with the decision in State v. Skampfer, see note 1, supra.

Section 302.01 identifies the institutions which are "state prisons." Also see § 302.02 which defines the "precincts" of the state prisons, that is, those locations that are considered part of the prisons for legal purposes.

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of (bodily harm) (a soft tissue injury). The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

5. This is the definition of "bodily harm" provided in § 939.22(4).

6. 2011 Wisconsin Act 74 amended § 940.20(1) to add as an alternative harm the causing of "a soft tissue injury" as defined in § 946.41(2)(c). The definition in the instruction is the one provided in § 946.41(2)(c).

7. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

8. The knowledge element is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally."

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1228A BATTERY BY A PERSON COMMITTED UNDER § 980.04 or § 980.065 — § 940.20(1g)

Statutory Definition of the Crime

Section 940.20(1g) of the Criminal Code of Wisconsin is violated by a person who is placed in facility under (§ 980.04) (§ 980.065) and who intentionally causes bodily harm to an officer, employee, agent, visitor, or other resident of the facility without (his) (her) consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was placed in a facility under (§ 980.04) (§ 980.065).[1]

   (Name of institution) is a facility under (§ 980.04) (§ 980.065).[2]

2. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.[3]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition[4].

3. (Name of victim) was (an officer) (an employee) (an agent) (a visitor) (a resident) of the facility.

4. The defendant caused bodily harm to (name of victim) without the consent[5] of (name of victim).

5. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to cause bodily harm to (name of victim) and knew that (name of victim) did not consent.[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1228A was approved by the Committee in June 2014. This revision was approved by the Committee in October; it reflects changes made by 2021 Wisconsin Act 13.

This instruction is drafted for violations of § 940.20(1g) which applies to batteries committed by one committed as a "sexually violent person" under Chapter 980. The statute was created by 2005 Wisconsin Act 434 [effective date: August 1, 2006].

2021 Wisconsin Act 13 [effective date: March 28, 2021] amended § 940.20 (1g) to include persons who are not yet formally committed pursuant to § 980.065 and § 980.06 but who are detained in a facility while awaiting a Chapter 980 trial.

1. The offense definition refers to "Any person who is placed in a facility under s. 980.04 or 980.065." Section 980.04 designates the place of placement for a person who has had a finding of probable cause against them that they are "eligible for commitment under s. 980.05 (5)," but who has yet to be adjudicated under § 980.06. A detention order under § 980.04 "remains in effect until the petition is dismissed after a hearing under sub. (3) or after a trial under s. 980.05 (5) or until the effective date of a commitment order under s. 980.06, whichever is applicable." Section 980.065 designates the place of placement for "a person committed under s. 980.06." A commitment under § 980.06 is the final commitment of a person who has been found to be a sexually violent person.

2. The institution's status as one of the designated facilities should not be a contested issue in most cases, and the Committee concluded that it is appropriate for the trial court to so instruct the jury.

The question of what institutions are covered by the statute is arguably difficult only with regard to "state detention facilities." "County detention facility" most likely refers to a county jail (and possibly to the House of Correction in Milwaukee County); "municipal detention facility" most likely refers to city jails. But it is not clear what institutions are included in the term "state detention facility." The Committee concluded that the statute may be applied to persons placed in mental health institutes provided their confinement is a result of criminal charges.

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

4. This is the definition provided in § 939.22(4).

5. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

6. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). Thus, the defendant must know that the victim did not consent to the causing of bodily harm.

1229 BATTERY BY A PERSON SUBJECT TO AN INJUNCTION — § 940.20(1m)

Statutory Definition of the Crime

Section 940.20(1m) of the Criminal Code of Wisconsin is violated by a person who is subject to [a domestic abuse] [an harassment][1] injunction and who intentionally causes bodily harm to the petitioner who sought the injunction by an act done without the consent of that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) petitioned for [a domestic abuse] [an harassment] injunction against the defendant.
2. At the time of the alleged offense, the defendant was subject to the [domestic abuse] [harassment] injunction.
3. The defendant intentionally caused bodily harm to (name of victim).

"Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[2]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

4. (Name of victim) did not consent to the bodily harm.[4]

5. The defendant knew (name of victim) petitioned for the injunction and knew that (name of victim) did not consent to the causing of bodily harm.[5]

Meaning of "Intentionally"

"Intentionally" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that the conduct was practically certain to cause bodily harm to another.[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1229 was originally published in 1997 and revised in 2005. This revision was approved by the Committee in October 2015; it corrected a statutory cross reference in footnote 1 and revised the Comment.

Battery by a person subject to an injunction, as defined in § 940.20(1m), was created by 1995 Wisconsin Act 343. [Effective date: June 4, 1996.] Subsection (a) of § 940.20(1m) addresses injunctions issued under § 813.12 - domestic abuse injunctions - and tribal court injunctions filed under § 806.247(3). Subsection (b) of § 940.20(1m) addresses injunctions issued under § 813.125 - harassment injunctions. The offense definitions in subs. (a) and (b) are otherwise the same and this instruction may be used for any of the violations.

1. While § 940.20(1m) refers to the injunction statutes by number, the Committee concluded that the instruction would be more easily understood if it used the terms "domestic abuse injunction," "harassment injunction," or "tribal injunction filed under § 806.247(3)" to describe the injunction.

Note that child abuse injunctions under § 813.122 and vulnerable adult injunctions under § 813.123 are not covered by § 940.20(1m).

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. Give additional instruction regarding the phrase "without consent" when the evidence warrants it. See § 939.22(48)(a)-(c).

5. The knowledge element is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally."

6. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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1230 BATTERY TO A FIRE FIGHTER OR COMMISSION WARDEN — § 940.20(2)

Statutory Definition of the Crime

Section 940.20(2) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to a (fire fighter) (commission warden) where at the time of the act the defendant knows or has reason to know that the victim is a (fire fighter) (commission warden) acting in an official capacity and there is no consent by the victim.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.[1]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. (Name of victim) was a (fire fighter)[3] (commission warden).[4]

3. (Name of victim) was acting in an official capacity.

   (Fire fighters) (Commission wardens) act in an official capacity when they perform duties that they are employed[5] to perform.[6] [The duties of a (fire fighter) (commission warden) include: _____.][7]

4. The defendant knew or had reason to know that (name of victim) was a (fire fighter) (commission warden) acting in an official capacity.[8]

5. The defendant caused bodily harm to (name of victim) without the consent[9] of (name of victim) .

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to cause bodily harm to (name of victim) and knew that (name of victim) did not consent.[10]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1230 was originally published as Wis JI-Criminal 1225 in 1974 and renumbered Wis JI-Criminal 1230 in 1994. It was revised in 2005 and 2008. This revision was approved by the Committee in December 2015 to reflect changes made by 2015 Wisconsin Act 78.

Section 940.20(2) was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015]. "Law enforcement officer" was deleted and moved to § 940.203 which, as amended, applies to battery or threat to a judge, prosecutor, or law enforcement officer. See Wis JI-Criminal 1240C and 1240D for offenses involving battery and threat to prosecutors or law enforcement officers.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

2. This is the definition of "bodily harm" provided in § 939.22(4).

3. Section 940.20(2) provides that the definition of "fire fighter" in § 102.475(8)(b) applies:

> (b) "Fire fighter" means any person employed by the state or any political subdivision as a member or officer of a fire department or a member of a volunteer department, including the state fire marshal and deputies.

4. 2007 Wisconsin Act 27 [effective date: November 27, 2007] amended § 940.2(2) to include "commission warden" and created § 939.22(5) to define the term: "'Commission warden' means a conservation warden employed by the Great Lakes Indian Fish and Wildlife Commission."

5. "Employed" is used here in the general sense of being engaged in the performance of a duty.

6. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

7. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

8. The "knew or had reason to know" requirement is taken directly from § 940.20(2). It is treated as a separate element rather than being combined with the sixth element where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as a law enforcement and to "acting in official capacity." The statute expressly applies "reason to know" only to status as a law enforcement officer. But the two requirements are so closely connected that the Committee concluded the same knowledge standard has to apply to each.

9. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that

"without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

10. For further definition of "intentionally," including the alternative referring to being "aware that his or her conduct is practically certain to cause the result," see Wis JI-Criminal 923A and 923B.

The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally."

1231 BATTERY OR THREAT TO A PROBATION, EXTENDED SUPERVISION AND PAROLE AGENT, COMMUNITY SUPERVISION AGENT, OR AN AFTERCARE AGENT — § 940.20(2m)

Statutory Definition of the Crime

Section 940.20(2m) of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent) where at the time of the (act) (threat) the defendant knows or has reason to know that the victim is (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent) (a family member of (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent)), the (act) (threat) is in response to an action by the agent acting in (his) (her) official capacity, and there is no consent by the person (harmed) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) bodily harm to (name of victim).

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[1]

IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

["Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.][2]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][3]

2. (Name of victim) was ((a probation, extended supervision and parole agent)[4] (a community supervision agent)[5] (an aftercare agent)[6]) (a family member of (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent)).

[For the purpose of this offense, a (e.g., child) is a family member.][7]

3. At the time of the (act) (threat), the defendant knew, or had reason to know, that (name of victim) was (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent) (a family member of (a probation, extended supervision and parole agent) (a community supervision

agent) (an aftercare agent)).[8]

4. The (act) (threat) was in response to an action taken by the agent acting in (his) (her) official capacity.

(Probation, extended supervision and parole agents) (community supervision agents) (aftercare agents) act in an official capacity when they perform duties that they are employed[9] to perform.[10] [These duties include: _____.][11]

5. The defendant (caused) (threatened to cause) bodily harm without the consent[12] of (name of victim).

6. The defendant acted intentionally.[13] This requires that the defendant intended to (cause) (threaten to cause) bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent to the causing of bodily harm.[14]

Meaning of "Intentionally"

Intent to (cause) (threaten to cause) bodily harm means that the defendant had the mental purpose to (cause) (threaten to cause) bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another.[15]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and

knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1231 was originally published in 1994 and revised in 1996, 2005, 2008, 2019, and 2022. The 2022 revision amended the body of the instruction and the comment based on 2021 Wisconsin Act 187. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.20(2m) was created by 1989 Wisconsin Act 336 and originally applied to battery of probation and parole agents. It was amended by 1995 Wisconsin Act 77 to include battery to "aftercare agents." [Effective date: July 1, 1996]. "Extended supervision agents" were added by 1997 Wisconsin Act 283. [Effective date: June 24, 1998]. 2015 Wisconsin Act 55 added "community supervision agents" [with a delayed effective date of September 24, 2017]. § 940.20 (2m)(b) 2021 was amended by Wisconsin Act 187 to provide that it is a Class H felony to commit, or threaten to commit, battery against an agent or the family member of an agent. The Act also amended the definitions of "aftercare agent" and "community supervision agent" [Effective date: March 19, 2022].

1. This is the definition provided in § 939.22(4).

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also, see Wis JI-Criminal 901 Cause.

3. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats." Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm" to another…

4. Section 940.20(2m)(a)2. provides that "'probation, extended supervision and parole agent' means any person authorized by the department of corrections to exercise control over a probationer, parolee, or person on extended supervision or authorized by a federally recognized American Indian tribe or band to exercise control over a probationer, parolee, or person on extended supervision or a comparable program that is authorized by the tribe or band."

5. "Community supervision agent" is defined as follows in § 940.20(2m)(a)1m.: ". . . any person authorized by the department of corrections to exercise control over a juvenile on community supervision or authorized by a federally recognized American Indian tribe or band to exercise control over a juvenile

on community supervision or a comparable program that is authorized by the tribe or band."

6. "Aftercare agent" is defined as follows in § 940.20(2m)(a)1.: ". . . any person authorized by the department of corrections to exercise control over a juvenile on aftercare or authorized by a federally recognized American Indian tribe or band to exercise control over a juvenile on aftercare or a comparable program that is authorized by the tribe or band."

7. Section 940.20 (2m) (a) 1p. provides:

"Family member" means a spouse, child, stepchild, foster child, parent, sibling, or grandchild.

8. The "knew or had reason to know" requirement is taken directly from § 940.20(2m)(b)1. It is treated as a separate element rather than being combined with the sixth element, where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as a probation, extended supervision and parole agent, a community supervision agent, or an aftercare agent, or a member of the agent's family and the agent "acting in an official capacity." The statute expressly applies "reason to know" only to status as a probation, extended supervision and parole agent, a community supervision agent, or an aftercare agent, or a member of the agent's family. But the two requirements are so closely connected that the Committee concluded the same knowledge standard has to apply to each.

9. "Employed" is used here in the general sense of being engaged in the performance of a duty.

10. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

11. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

Wisconsin Administrative Code, Chapter DOC 328, Community Supervision Of Offenders, provides "rules, services, and programs for offenders who are under the supervision of the department." DOC 328.04(2) extensively describes the duties of agents who provide community supervision. All the agents specified in § 940.20(2m) must be "authorized by the department to exercise control" over specific categories of persons who are being supervised. See the definitions quoted in footnotes 3, 4, and 5 above. Thus, it appears that all would be subject to the standards and grants of authority in DOC 328.

12. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

13. Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.20(2m)(b), which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2m)(b)1., through 2. and 3. Sub. (2m)(b)1. has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2m)(b) proper and the other facts that follow.

14. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

15. See note 12, supra.

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1232 BATTERY TO JUROR [JUROR HAS ASSENTED TO VERDICT] — § 940.20(3)

Statutory Definition of the Crime

Battery to a juror, as defined in § 940.20(3) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to a person without the consent of that person because the person assented to a (verdict) (indictment).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[1]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. The defendant intended to cause bodily harm to (name of victim).

   The phrase "intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that his conduct was practically certain to cause bodily harm to another.[3]

3. The defendant caused bodily harm without the consent of (name of victim).

4. The defendant knew that (name of victim) did not consent to the causing of bodily harm.[4]

5. The defendant caused such bodily harm to (name of victim) because (name of victim) assented to a (verdict) (indictment).

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

The offense covered by this instruction was formerly covered by Wis JI-Criminal 1224 which was originally published in 1979 and revised in 1982 and 1992. It was republished as Wis JI-Criminal 1232 in 1994 and revised in 1998. This revision was approved by the Committee in October 2004.

Section 940.20(3) was amended by 1997 Wisconsin Act 143 (effective date: May 5, 1998) to delete reference to "witnesses," limiting the coverage of the statute to offenses against grand and petit jurors. Offenses against witnesses are addressed by § 940.201, also created by Act 143. See Wis JI-Criminal 1238 and 1239.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. This is the definition of "bodily harm" provided in § 939.22(4).

3. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

4. The knowledge element is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally."

5. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee has concluded that this shorter version is appropriate for most cases. The complete, traditional, statement is found at Wis JI-Criminal 923A.

1233 BATTERY TO WITNESS [WITNESS LIKELY TO BE CALLED TO TESTIFY]

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1233 was originally published as Wis JI-Criminal 1224A in 1979. It was republished as Wis JI-Criminal 1233 in 1994. It was withdrawn by the Committee in August 1998 after § 940.20(3) was revised to delete reference to "witnesses." Battery or threat to witness is now covered by § 940.201; see Wis JI-Criminal 1238.

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1234 BATTERY TO A PUBLIC OFFICER — § 940.20(4)

Statutory Definition of the Crime

Battery to a public officer, as defined in § 940.20(4) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to a public officer, without the consent of that person, in order to influence the action of the officer or as a result of any action taken within the officer's official capacity.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a public officer at the time of the alleged offense.

   "Public officer" means any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.[1]

   (A _____ is a public officer.)[2]

2. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[3]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

3. The defendant intended to cause such bodily harm.

The phrase "intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that his conduct was practically certain to cause bodily harm to another.[5]

4. (Name of victim) did not consent to such bodily harm.

5. The defendant knew (name of victim) did not consent.[6]

6. The defendant caused bodily harm to (name of victim) (in order to influence the official action of (name of victim)) (as a result of action taken within (name of victim) 's official capacity).[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

The offense covered by this instruction was formerly covered by Wis JI-Criminal 1226 which was originally published in 1978 and revised in 1992. It was republished as Wis JI-Criminal 1234 in 1994 and revised in 2004. This revision was approved by the Committee in February 2008; it involved minor revisions to footnotes.

The offense of battery to a public officer, as defined in § 940.20(4), was created by Chapter 173, Laws of 1977.

1. This definition of "public officer" is found in § 939.22(30).

2. Where a statute provides that a person holding a particular position is a public officer, the Committee believes the jury may be told of that fact. It is still for the jury to be satisfied that the victim did hold such a position.

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

6. The knowledge element is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'."

7. For definition of "official capacity," see Wis JI-Criminal 915.

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1235 BATTERY TO A TECHNICAL COLLEGE DISTRICT OR SCHOOL DISTRICT OFFICER OR EMPLOYEE — § 940.20(5)

Statutory Definition of the Crime

Section 940.20(5) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to a school district officer or employee[1] where at the time of the act the defendant knows or has reason to know that the victim is a school district officer or employee acting in that capacity and there is no consent by the victim harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim) .

   "Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[2]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a school district (officer) (employee).[4]

3. (Name of victim) was acting in the capacity of a school district (officer) (employee).[5]

This means the (officer) (employee) was performing duties that (he) (she) was employed[6] to perform.[7]

4. The defendant knew, or had reason to know, that (name of victim) was a school district (officer) (employee) acting in the capacity of a school district (officer) (employee).[8]

5. (Name of victim) did not consent to the causing of bodily harm.

6. The defendant acted intentionally.

This requires that the defendant intended to cause bodily harm to (name of victim) and knew that (name of victim) did not consent to the causing of bodily harm.[9]

Intent to cause bodily harm means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that his conduct was practically certain to cause bodily harm to another.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1235 was originally published in 1994 and revised in 2004. This revision was approved by the Committee in February 2008; it revised the definition of "capacity."

Section 940.20(5) was created by 1993 Wisconsin Act 54 (effective date: November 30, 1993).

1. The instruction is drafted for a case involving a "school district officer or employee." The statute also applies to offenses against "technical college district officers or employees." For that case, the instruction would have to be changed to refer to the appropriate type of victim.

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. Section 940.20(5)(a)1 provides that "school district" has the meaning given in § 115.01(3). That definition reads as follows:

> (3) School Districts. The school district is the territorial unit for school administration. School districts are classified as common, union high, unified and 1st class city school districts. A joint school district is one the territory of which is not wholly in one municipality.

Section 940.20(5)(a)2. Provides that "'technical college district' means a district established under ch. 38."

5. The appropriate alternative should be selected. The Committee concluded that "officer" refers to an appointed or elected position, such as school board member, while "employee" refers to anyone who is paid by the district for performing functions on behalf of the district. See § 939.22(30) for similar distinctions between the terms "public officer" and "public employee."

6. "Employed" is used here in the general sense of being engaged or involved in performing a duty or service. The statute applies to both officer and employees, the former being elected or appointed. See note 5, supra. If the use of "employed" is thought to be confusing if used to refer to "officers," "elected" or "appointed" could be substituted.

7. Unlike statutes dealing with closely related offenses (see subsec. (2), (2m), and (4) of § 940.20), § 940.20(5) refers not to "in an official capacity" but to "acting in that capacity." In defining this element, the Committee concluded that it was appropriate to define the term as "official capacity" is defined for the closely related offenses. The definition is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

8. The "knew or had reason to know" requirement is taken directly from § 940.20(5)(b). It is treated as a separate element rather than being combined with the sixth element where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as a school district officer or employee and to "acting in that capacity." The statute expressly applies "reason to know" only to status as an officer or employee. But the two requirements are so closely connected that the Committee concluded the same knowledge standard has to apply to each.

9. Knowledge that the victim was acting in an official capacity and that the victim did not consent is required because the word "intentionally" is used in the statute. That requires not only intent to cause bodily harm but also "knowledge of those facts necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'." § 939.23(3).

10. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

1236 BATTERY TO A PUBLIC TRANSIT VEHICLE OPERATOR OR PASSENGER — § 940.20(6)

Statutory Definition of the Crime

Section 940.20(6) is violated by one who intentionally causes bodily harm to a public transit vehicle operator or passenger.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause means that the defendant's conduct was a substantial factor in producing the bodily harm.[2]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a public transit vehicle (operator) (passenger).

   "Public transit vehicle" means any vehicle used for providing transportation service to the general public.[4]

3. The defendant acted intentionally.

This requires that the defendant intended to cause bodily harm to (name of victim) and knew that (name of victim) was a public transit vehicle (operator) (passenger).[5]

Intent to cause bodily harm means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that his conduct was practically certain to cause bodily harm to another.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1236 was originally published in 1994 and revised in 2005. This revision corrected a typographical error; it was approved by the Committee in April 2014.

The offense defined in § 940.20(6) was created by 1993 Wisconsin Act 164 (effective date: April 2, 1994). [This statute was originally created as sub. (5) of § 940.20; it was changed to sub. (6) by a later revisor's bill, 1993 Wisconsin Act 491.]

1. This instruction deals with an offense under § 940.20(6)(b)1. That subsection applies to harm that "occurs while the victim is an operator, a driver, or a passenger of, in or on a public transit vehicle." The instruction refers only to "operator or passenger"; the Committee concluded that "operator" includes "driver." Other classes of victims are covered by (b)2. and 3:

> 2. The harm occurs after the offender forces or directs the victim to leave a public transit vehicle.
>
> 3. The harm occurs as the offender prevents, or attempts to prevent the victim from gaining lawful access to a public transit vehicle.

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. This is the definition provided in § 940.20(6)(a).

5. Knowledge that the victim was an operator or passenger is required because the word "intentionally" is used in the statute. That requires not only intent to cause bodily harm but also "knowledge of those facts necessary to make his or her conduct criminal and which are set forth after the word "intentionally." § 939.23(3).

6. See § 939.23(3). Wis JI-Criminal 923A and 923B provide additional definition of "intentionally" which may be incorporated here if felt to be necessary.

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1237 BATTERY TO AN EMERGENCY MEDICAL CARE PROVIDER[1] — § 940.20(7)

INSTRUCTION WITHDRAWN FOR OFFENSES OCCURRING AFTER MARCH 24, 2022, BECAUSE THE STATUTE TO WHICH IT PERTAINED WAS REPEALED BY 2021 WISCONSIN ACT 209. FOR OFFENSES OCCURRING AFTER MARCH 24, 2022, SEE WIS JI-CRIMINAL 1247A AND 1247B.

Statutory Definition of the Crime

Section 940.20(7) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to an (identify appropriate category for the victim)[2], where at the time of the act the defendant knows or has reason to know that the victim is an (identify appropriate category for the victim) acting in an official capacity and there is no consent of the victim harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

"Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[3]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

2. (Name of victim) was a (identify appropriate category for the victim). [A _____ is (identify appropriate category for the victim).][5]

3. (Name of victim) was acting in an official capacity.

   This means (name of victim) was performing duties that (he) (she) was employed[6] to perform.[7] [The duties of a _____ include: _____.][8]

4. The defendant knew, or had reason to know, that (name of victim) was acting in an official capacity.[9]

5. (Name of victim) did not consent to the causing of bodily harm.

6. The defendant acted intentionally.

   This requires that the defendant intended to cause bodily harm to (name of victim) and knew that (name of victim) did not consent to the causing of bodily harm.[10]

   Intent to cause bodily harm means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that his conduct was practically certain to cause bodily harm to another.[11]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements,

if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1237 was originally published in 1996 and revised in 2004, 2008, and 2018. This revision was approved by the Committee in June 2020; it reflects statutory amendments made by 2019 Wisconsin Act 97. Its withdrawal for offenses occurring after the effective date of 2021 Wisconsin Act 209 was approved by the Committee in April 2022.

Section 940.20(7) was created by 1995 Wisconsin Act 145 [effective date: March 20, 1996].

2017 Wisconsin Act 12 [effective date: June 23, 2017] changed the terminology used in the statute from "emergency medical technician" to "emergency medical services practitioner" and from "first responder" to "emergency medical responder."

2019 Wisconsin Act 97 [effective date: February 7, 2020] added the category of "a health care provider who works in a hospital" to the list of applicable victims. The Act also amended the definition of "emergency department."

1. The statute applies to five different categories of person; for each category, the statute provides a full or partial definition. The instruction provides a blank where it is necessary to identify the category applicable to the victim. The category is to be defined, if necessary, in the second element.

2. Identify the appropriate category for the victim in this blank and the other blanks in the instruction: a health care provider who works in a hospital; emergency department worker; emergency medical services practitioner; emergency medical responder; or ambulance driver. The terms will be defined, if necessary, in the second element.

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. If it is believed to be necessary, provide a definition for the type of victim involved. For "emergency department worker," see § 940.20(7)(a)2. For "emergency medical services practitioner," § 940.20(7)(a)2g provides that the definition in § 256.01(5) applies. For "emergency medical responder," § 940.20(7)(a)2d provides that the definition in § 256.01(4p) applies. For "ambulance driver" § 940.20(7)(a)1e provides that the definition of "ambulance" in § 256.01(1t) applies.

§ 940.20(7)(a) provides: "'Emergency department' means a room or area in a hospital that is primarily used to provide emergency care, diagnosis or radiological treatment."

§ 940.20(7)(a)3 provides: "'health care provider' means any person who is licensed, registered, permitted or certified by the department of health services or the department of safety and professional services to provide health care services in this state." For "hospital" § 940.20(7)(a)4 provides that the definition in § 50.33 (2) applies.

6. "Employed" is used here in the general sense of being engaged or involved in performing a duty or service.

7. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

8. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

9. The "knew or had reason to know" requirement is taken directly from § 940.20(7)(b). It is treated as a separate element rather than being combined with the sixth element where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as an emergency medical care provider and to "acting in an official capacity." The statute expressly applies "reason to know" only to status as an officer or employee. But the two requirements are so closely connected that the Committee concluded the same knowledge standard has to apply to each.

10. Knowledge that the victim was acting in an official capacity and that the victim did not consent is required because the word "intentionally" is used in the statute. That requires not only intent to cause

bodily harm but also "knowledge of those facts necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'." § 939.23(3).

11. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

12. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee has concluded that this shorter version is appropriate for most cases. The complete, traditional, statement is found at Wis JI-Criminal 923A.

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1238 BATTERY OR THREAT TO A WITNESS [WITNESS HAS ATTENDED OR TESTIFIED] — § 940.201

Statutory Definition of the Crime

Section 940.201 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to a person who he or she knows or has reason to know is or was a witness by reason of the person having attended or testified as a witness and without the consent of the person harmed or threatened.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) bodily harm to (name of victim).

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[1]

IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

["Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.][2]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated

orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][3]

2. (Name of victim) was a witness.

["Witness" means any person who has attended a proceeding to testify or who has testified.][4]

[A [insert proper term from the definition in § 940.41(3)] is a witness.]

3. The defendant knew [or had reason to know] that (name of victim) was a witness.[5]

4. The defendant (caused) (threatened to cause) bodily harm to (name of victim) because[6] the person attended or testified as a witness.

5. The defendant (caused) (threatened) bodily harm without the consent[7] of (name of victim).

6. The defendant acted intentionally.[8] This requires that the defendant acted with the mental purpose to (cause) (threaten) bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent.[9]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1238 was originally published 1998 and revised in 2004 and 2022. The 2004 revision involved the adoption of a new format, adding a definition of "true threat," and nonsubstantive changes in the text. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

In 1998, this instruction replaced Wis JI-Criminal 1232 for offenses against witnesses. Wis JI-Criminal 1232 has been revised to apply only to battery against a juror.

This instruction is for violations of § 940.201(2)(a), where the alleged battery has taken place after the victim has testified or attended as a witness. In State v. McLeod, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978), the Wisconsin Court of Appeals held that the battery to witness statute also applies where the victim has not yet testified but is expected to be called. For that type of case, the second and fourth elements must be modified. See footnotes 4 and 6 below. Wis JI-Criminal 1239, which formerly provided a separate instruction for that type of case, has been withdrawn. [The withdrawal note for Wis JI-Criminal 1239 contains a summary of McLeod.

Section 940.201 was created by 1997 Wisconsin Act 143, effective date: May 5, 1998. Similar offenses against witnesses were formerly addressed by § 943.20(3). Act 143 expanded the scope of the

statute by including threats to cause bodily harm and, in sub. (2)(b) threats to cause and causing of bodily harm against family members of a witness. If a threat or harm to a family member of a witness is involved, the instruction must be modified.

1. This is the definition of "bodily harm" provided in § 939.22(4).

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

3. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats." Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal

liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The Committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm" to another…

4. The definition of "witness" in the first set of brackets is a simplified version of the definition provided in § 940.41(3), which applies to violations of § 940.201. If that statement does not fit the status of the victim, the definition in the second set of brackets should be used, selecting the proper alternative from the full definition, which reads as follows:

> (3) "Witness" means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under § 885.01 or under the authority of any court of this state or of the United States.

In State v. McLeod, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978), the Wisconsin Court of Appeals held that the predecessor to § 943.201 B § 940.26, 1975 Wis. Stats. B also applied where the victim has not yet attended or testified but is expected to be summoned to testify. For that type of case, the definition of "witness" in the second element should be modified to refer to "a person who is expected to be summoned to testify."

5. The statute includes the requirement that the defendant "knew or had reason to know" that the victim is or was a witness. A strong argument can be made that making an element of this statement is unnecessary because of the element that follows. That is, if the defendant committed the battery against the victim because the victim had testified, the defendant must have known that the victim was a witness. However, because the "knew or had reason to know" requirement is part of the statute, the Committee concluded that it should be retained as an element. In all cases that the Committee could envision, the defendant who caused harm to another person "by reason of" that person having testified would have known that person was a witness. Thus, the "had reason to know" alternative is placed in brackets because it is not expected to be applicable to the typical case under the statute.

6. This element is drafted for a case where the person has attended or testified. If that statement does not fit the status of the victim, the statement must be modified. See note 4, supra.

The instruction uses "because" in place of the statutory language "by reason of . . ." The Committee intended no substantive change and believed the instruction will be easier for a jury to understand if "because" is used.

7. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

8. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.20(2m)(b), which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2m)(b)1., through 2. and 3. Sub. (2m)(b)1. has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2m)(b) proper and the other facts that follow.

9. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally."

1239 BATTERY OR THREAT TO WITNESS [WITNESS LIKELY TO BE CALLED TO TESTIFY] — § 940.201

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1239 was originally published 1998, replacing Wis JI-Criminal 1233 for offenses against persons who have not yet testified as a witness but are likely to do so. It was withdrawn in 2003 because the Committee concluded that an offense of that type could be addressed by making relatively minor adjustments in Wis JI-Criminal 1238.

The separate instruction formerly provided by Wis JI-Criminal 1239 addressed the type of violation recognized by the Wisconsin Court of Appeals in McLeod v. State, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978). McLeod held that the predecessor to § 940.201 applied to a battery against a person who had not yet attended or testified as a witness, but who was expected to do so. McLeod dealt with § 940.206, 1975 Wis. Stats., which was renumbered § 940.20(3) without substantive change by Chapter 173, Laws of 1977. Current § 940.201 replaced § 940.20(3) in 1998.

McLeod dealt with the conflict between the definition of the crime, which refers to "by reason of having attended or testified," and the reference in the definition of "witness" which includes anyone who "is expected to be summoned to testify" or who is "likely to be called as a witness, whether or not any action has as yet been commenced." (As described above, the definition of "witness" in § 940.41(3) now applies. However, the McLeod issue remains the same under the new definition.) In McLeod, the Wisconsin Court of Appeals determined that the statute applies to batteries upon witnesses who have not testified:

> Despite this clear and precise definition of who is a "witness" and protected by this battery-to-a-witness statute, it is here contended that a person who has not already testified from the witness stand is not protected by this statute. Reliance for this contention is based upon a phrase in the sentence in the battery-to-a-witness statute requiring the assault to be "with intent to cause bodily harm to that person [a witness as defined in § 943.30(3)(b)]." As to such intent, the statute states that is to be "by reason of his [the witness] having attended or testified as a witness . . . ." Does this use of the past tense operate to replace or alter the definition of "witness," carefully spelled out in the earlier part of the same section of the same statute? We think not. It is true that the legislature, in its rules of construction of statutes, has prescribed that "[t]he present tense of a verb includes the future when applicable," but not that the past tense include the future. However, in such construction-of-laws statute, the legislature has provided its rules shall be observed "unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature. . . ." In the statute before us here, the manifest intent of the legislature is spelled out by the definition of "witness" to include persons expected to be summoned to testify in the future. The reference to intent to harm "by reason of" the victim having testified, we hold, includes an

> assault intended to prevent the consequences of the victim having testified as well as to punish such witness for testimony already given. Our state Supreme Court has said that "the meaning of a word takes color and expression from the purport of the entire phrase of which it is a part, and it must be construed to harmonize with the context as a whole." Here, dealing with a single sentence statute, with a clear definition by incorporation of who is to be protected by the statute, we hold that "by reason of" reference to include the attacker's fear of future, as well as past consequences, to the attacker of the witness, "having attended or testified as a witness . . . ." No other construction of the "by reason of" reference harmonizes with or carries out the manifest and expressed purpose of the battery-to-a-witness statutes. [footnotes omitted, 85 Wis.2d 787, 791-92]

In cases like McLeod, even though the witness has not testified, there must be a connection between the battery and the victim's status as a witness, and the instruction so requires.

1240 BATTERY OR THREAT TO JUDGE — § 940.203

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 1240 was originally published in 1994 and withdrawn in 2002 when it was divided into two versions: Wis JI-Criminal 1240A, Battery To Judge, and Wis JI-Criminal 1240B, Threat To Judge.

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1240A BATTERY TO A JUDGE — § 940.203(2)

Statutory Definition of the Crime

Section 940.203 of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to the (person) (family member) of any judge where at the time of the act the person knows[1] that the victim is a (judge) (family member of a judge), the act is in response to an action taken in the judge's official capacity,[2] and there is no consent by the person harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.[3]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

2. (Name of victim) was a (judge) (family member of a judge).

   [For the purpose of this offense, a (e.g., circuit court judge) is a judge.][5]

   [For the purpose of this offense, a (e.g., child) is a family member.][6]

3. The defendant knew[7] that (name of victim) was a (judge) (family member of a judge).

4. The defendant caused bodily harm in response to an action taken in the judge's official capacity.

   Judges act in an official capacity when they perform duties that they are employed[8] to perform.[9] [The duties of a judge include: _____].[10]

5. The defendant caused bodily harm to (name of victim) without the consent[11] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to cause bodily harm to (name of victim).[12]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1240A was originally published in 1994. The 2002 revision divided the single instruction into two instructions, WI JI-Criminal 1240A and 1240B. Wis JI-Criminal 1240A was revised in 2008 to change the definition of "official capacity." The 2016 revision updated the Comment to reflect changes made by the 2015 Wisconsin Act 78. The 2018 revision reflected changes made by 2017 Wisconsin Act 272 [effective date: April 13, 2018] and 2017 Wisconsin Act 352 [effective date: April 18, 2018]. This instruction was revised in 2019 to correct a typographical error in element one.

Section 940.203 was created by 1993 Wisconsin Act 50 [effective date: November 25, 1993] and originally applied only to the offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 to include officers of the court. This instruction is drafted for violations under § 940.203 involving battery to a judge; for violations based on threats to a judge, see Wis JI-Criminal 1240B. For battery and threats to prosecutors and law enforcement officers, see Wis JI-Criminal 1240C and 1240D. For battery and threats to a current or former guardian ad litem, corporation counsel, or attorney, see Wis JI-Criminal 1241A and 1241B.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the prosecutor's or law enforcement officer's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. 2015 Wisconsin Act 109 amended § 940.203 to delete what was previously an alternative for this aspect of the offense definition: "… the judge is acting in an official capacity at the time of the act or threat…"

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more person's might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. Section 940.203(1)(b) provides a definition of "judge" for the purpose of this offense. As amended by 2017 Wisconsin Act 352 that definition provides: "'Judge' means a person who currently is or who formerly was a supreme court justice, court of appeals judge, circuit court judge, municipal judge, tribal judge, temporary or permanent reserve judge or circuit, supplemental, or municipal court commissioner."

The applicable term should be inserted in the blank.

6. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

7. See note 1, supra.

8. "Employed" is used here in the general sense of being engaged in the performance of a duty.

9. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

10. The duties of judges may be set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

11. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

12. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

1240B THREAT TO A JUDGE — § 940.203(2)

Statutory Definition of the Crime

Section 940.203 of the Criminal Code of Wisconsin is violated by one who intentionally threatens to cause bodily harm to the (person) (family member) of any judge where, at the time of the act, the person knows[1] that the victim is a (judge) (family member of a judge), the act is in response to an action taken in the judge's official capacity,[2] and there is no consent by the person harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause bodily harm to (name of victim).

   [A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][3]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

2. (Name of victim) was a (judge) (family member of a judge).

   [For the purpose of this offense, a (e.g., circuit court judge) is a judge.][5]

   [For the purpose of this offense, a (e.g., child) is a family member.][6]

3. The defendant knew[7] that (name of victim) was a (judge) (family member of a judge).

4. The threat was in response to an action taken in the judge's official capacity.

   Judges act in an official capacity when they perform duties that they are employed[8] to perform.[9] [The duties of a judge include: _____].[10]

5. The defendant threatened to cause bodily harm to (name of victim) without the consent[11] of (name of victim).

6. The defendant acted intentionally.[12] This requires that the defendant acted with the mental purpose to threaten bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent to the causing of bodily harm.[13]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and

knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1240B was originally published in 1994 and revised in 2002, 2016, 2018, 2019, and 2020. The 2002 revision divided the single instruction into two instructions, WI JI-Criminal 1240A and 1240B. Wis JI-Criminal 1240A was revised in 2008 to change the definition of "official capacity." The 2016 revision updated the Comment to reflect changes made by the 2015 Wisconsin Act 78. The 2018 revision reflected changes made by 2017 Wisconsin Act 272 and 2017 Wisconsin Act 352. The 2020 revision added the definition of "true threat." This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.203 was created by 1993 Wisconsin Act 50 [effective date: November 25, 1993] and originally applied only to offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 [effective date: April 13, 2018] to include officers of the court. 2017 Wisconsin Act 352 [effective date: April 18, 2018] amended the definitions of "judge" and "law enforcement officer." This instruction is drafted for violations under § 940.203 involving threats to a judge; for violations based on battery to a judge, see Wis-JI Criminal 1240A. For battery and threats to prosecutors and law enforcement officers, see Wis JI-Criminal 1240C and 1240D. For battery and threats to a current or former guardian ad litem, corporation counsel, or attorney, see Wis JI-Criminal 1241A and 1241B.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the prosecutor's or law enforcement officer's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. 2015 Wisconsin Act 109 amended § 940.203 to delete what was previously an alternative for this aspect of the offense definition: "… the judge is acting in an official capacity at the time of the act or threat…"

3. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, 28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of the statute criminalizing language is much narrower." 2001 WI 46, 43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, 29.

The Committee concluded that the definition in the instruction is equivalent in context and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, 23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The Committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm to another…"

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. Section 940.203(1)(b) provides a definition of "judge" for the purpose of this offense. As amended by 2017 Wisconsin Act 352, that definition provides: "'Judge' means a person who currently is

or who formerly was a supreme court justice, court of appeals judge, circuit court judge, municipal judge, tribal judge, temporary or permanent reserve judge or circuit, supplemental, or municipal court commissioner."

The applicable term should be inserted in the blank.

6. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

7. See note 1, supra.

8. "Employed" is used here in the general sense of being engaged in the performance of a duty.

9. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

10. The duties of judges may be set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

11. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

12. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

13. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

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1240C BATTERY TO A PROSECUTOR OR LAW ENFORCEMENT OFFICER — § 940.203(2)

Statutory Definition of the Crime

Section 940.203 of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to the (person) (family member) of a (prosecutor) (law enforcement officer) where at the time of the act the person knows[1] that the victim is a [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)], the act is in response to an action taken in the (prosecutor's) (law enforcement officer's) official capacity and there is no consent by the person harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.[2]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)].

[A (e.g., district attorney) is a prosecutor.][4]

[A (insert title, e.g., sheriff) is a law enforcement officer.][5]

[For the purpose of this offense, a (e.g., child) is a family member.][6]

3. The defendant knew[7] that (name of victim) was a [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)].

4. The defendant caused bodily harm in response to an action taken in the (prosecutor's) (law enforcement officer's) official capacity.

   (Prosecutors) (law enforcement officers) act in an official capacity when they perform duties that they are employed[8] to perform.[9] [The duties of a (prosecutor) (law enforcement officer) include: _____].[10]

5. The defendant caused bodily harm to (name of victim) without the consent[11] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to cause bodily harm to (name of victim).[12]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty

COMMENT

Wis JI-Criminal 1240C was originally published in 2016 and revised in 2017, 2018, and 2019. The 2018 revision reflected changes made by 2017 Wisconsin Act 272 [effective date: April 13, 2018] and 2017 Wisconsin Act 352 [effective date: April 18, 2018]. The 2019 revision corrects a typographical error in element one.

Section 940.203 originally applied only to the offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 to include officers of the court. This instruction is drafted for violations under § 940.203 involving battery to a prosecutor or law enforcement officer; for violations based on threats to a prosecutor or law enforcement officer, see Wis-JI Criminal 1240D. For battery and threats to a judge, see Wis JI-Criminal 1240A and 1240B. For battery and threats to a current or former guardian ad litem, corporation counsel, or attorney, see Wis JI-Criminal 1241A and 1241B.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the prosecutor's or law enforcement officer's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more person's might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. In the Committee's judgement, the jury may be told, for example, that district attorney is a prosecutor. It is still for the jury to be satisfied that, in the example, the victim was a district attorney. Section 940.203(d) provides a definition of "prosecutor" for the purposes of this offense:

"Prosecutor" means a person who currently is or formerly was any of the following:

1. A district attorney, a deputy district attorney, an assistant district attorney, or a special prosecutor under s. 978.045 or 978.05(8)(b).
2. The attorney general, a deputy attorney general, or an assistant attorney general.
3. A tribal prosecutor.

The applicable term should be inserted in the blank.

5. In the Committees judgment, the jury may be told, for example, that a sheriff is a law enforcement officer. It is still for the jury to be satisfied that, in the example, the victim was sheriff.

Section 940.203(1)(c) as amended by 2017 Wisconsin Act 352 provides the following definition of "law enforcement officer":

(c) "Law enforcement officer" means any person who currently is or was employed by the state, by any political subdivision, or as a tribal law enforcement officer for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances the person is employed to enforce, whether that enforcement authority extends to all laws or ordinances or is limited to specific laws or ordinances.

6. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

7. See note 1, supra.

8. "Employed" is used here in the general sense of being engaged in the performance of a duty.

9. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

Referring to this offense as defined under § 940.20(2), 2005-2006 Wis. Stats., the Wisconsin Court of Appeals clarified that "acting with lawful authority" – an element of resisting or obstructing an officer under § 946.41 – is not an element of battery to a law enforcement officer: "…a law enforcement officer need not be acting 'lawfully' for what he or she does to be done in the officer's 'official capacity.' Rather the officer need only be acting within his or her jurisdiction as an officer and not on some 'personal frolic' unrelated to the officer's law-enforcement responsibilities." State v. Haywood, 2009 WI App 178, 11, 322 Wis.2d 691, 777 N.W.2d 921.

In State v. Rowan, 2012 WI 60, 341 Wis.2d 281, 814 N.W.2d 854, the supreme court found the evidence sufficient to satisfy the "acting in an official capacity" requirement where a police officer was called to a hospital to assist in restraining a combative suspect who was under arrest.

10. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

11. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

12. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

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1240D THREAT TO A PROSECUTOR OR LAW ENFORCEMENT OFFICER — § 940.203(2)

Statutory Definition of the Crime

Section 940.203 of the Criminal Code of Wisconsin is violated by one who intentionally threatens to cause bodily harm to the (person) (family member) of a (prosecutor) (law enforcement officer) where at the time of the threat the person knows[1] that the victim is a current or former [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)], the threat is in response to an action taken in the (prosecutor's) (law enforcement officer's) official capacity and there is no consent by the person threatened.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause bodily harm to (name of victim).

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary

that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][2]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)].

[A (e.g., district attorney) is a prosecutor.][4]

[A (insert title, e.g., sheriff) is a law enforcement officer.][5]

[For the purpose of this offense, a (e.g., child) is a family member.][6]

3. The defendant knew[7] that (name of victim) was a [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)].

4. The threat was in response to an action taken in the (prosecutor's) (law enforcement officer's) official capacity.

(Prosecutors) (law enforcement officers) act in an official capacity when they perform duties that they are employed[8] to perform.[9] [The duties of a (prosecutor) (law enforcement officer) include: _____].[10]

5. The defendant threatened to cause bodily harm to (name of victim) without the consent[11] of (name of victim).

6. The defendant acted intentionally.[12] This requires that the defendant acted with the mental purpose to threaten bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name

of victim) did not consent to the causing of bodily harm.[13]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1240D was originally published in 2016 and revised in 2017, 2018, and 2019. The 2018 revision reflected changes made by 2017 Wisconsin Act 272 [effective date: April 13, 2018] and 2017 Wisconsin Act 352 [effective date: April 18, 2018]. The 2019 revision corrected a typographical error in element one. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.203 originally applied only to offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 to include officers of the court. This instruction is drafted for violations under § 940.203 involving threats to a prosecutor or law enforcement officer; for violations based on battery to a prosecutor or law enforcement officer, see Wis-JI Criminal 1240AC. For battery and threats to a judge, see Wis JI-Criminal 1240A and 1240B. For battery and threats to a current or former guardian ad litem, corporation counsel, or attorney, see Wis JI-Criminal 1241A and 1241B.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the

phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the prosecutor's or law enforcement officer's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, 28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of the statute criminalizing language is much narrower." 2001 WI 46, 43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, 29.

The Committee concluded that the definition in the instruction is equivalent in context and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, 23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S., 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm to another…"

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. In the Committee's judgment, the jury may be told, for example, that the district attorney is a prosecutor. It is still for the jury to be satisfied that, in the example, the victim was a district attorney. Section 940.203(d) provides a definition of "prosecutor" for the purposes of this offense:

"Prosecutor" means a person who currently is or formerly was any of the following:

1. A district attorney, a deputy district attorney, an assistant district attorney, or a special prosecutor under s. 978.045 or 978.05(8)(b).
2. The attorney general, a deputy attorney general, or an assistant attorney general.
3. A tribal prosecutor.

The applicable term should be inserted in the blank.

5. In the Committee's judgment, the jury may be told, for example, that a sheriff is a law enforcement officer. It is still for the jury to be satisfied that, in the example, the victim was sheriff.

Section 940.203(1)(c), as amended by 2017 Wisconsin Act 352, provides the following definition of "law enforcement officer":

(c) "Law enforcement officer" means any person who currently is or was employed by the state, by any political subdivision, or as a tribal law enforcement officer for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances the person is employed to enforce, whether that enforcement authority extends to all laws or ordinances or is limited to specific laws or ordinances.

6. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

7. See note 1, supra.

8. "Employed" is used here in the general sense of being engaged in the performance of a duty.

9. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

10. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

11. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

12. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

13. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

1241A BATTERY TO GUARDIAN AD LITEM, CORPORATION COUNSEL, TRIBAL COURT ADVOCATE, OR ATTORNEY — § 940.203(3)

Statutory Definition of the Crime

Section 940.203(3) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to the (person) (family member) of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney) where at the time of the act the person knows[1] that the victim is [(a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)] [a family member of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)], the act is in response to an action taken in the (guardian ad litem's) (corporation counsel's) (tribal court advocate's) (attorney's) official capacity and there is no consent by the person harmed.

State's Burden of Poof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

"Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.[2]

"Bodily harm" means physical pain or injury, illness, or any impairment of

physical condition.[3]

2. (Name of victim) was a [current or former (guardian ad litem)[4] (corporation counsel)[5] (tribal court advocate)[6] (attorney)[7]] [family member of a current or former (guardian ad litem) (corporation counsel) (tribal court advocate) (attorney)].

[For the purpose of this offense, a (e.g., child) is a family member.][8]

3. The defendant knew[9] that (name of victim) was [(a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)] [a family member of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)].

4. The defendant caused bodily harm in response to an action taken in the (guardian ad litem's) (corporation counsel's) (tribal court advocate's) (attorney's) official capacity in a [specify the proceeding under Wisconsin statutes chapter _____] [specify the proceeding in a tribal court similar to Wisconsin statutes chapter _____.][10]

(Guardians ad litem) (Corporation counsel) (Tribal court advocates) (Attorneys) act in an official capacity when they perform duties that they are employed[11] to perform.[12] [The duties of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney) include: _____].[13]

[A _____ is a proceeding under chapter (specify the Wisconsin

Statutes chapter)].[14]

[A _____ is a proceeding in a tribal court.][15]

5. The defendant caused bodily harm to (name of victim) without the consent[16] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to cause bodily harm to (name of victim).[17]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1241A was approved by the Committee in July 2018. This revision was approved by the Committee in June 2022; it amended the body of the instruction and the comment based on 2021 Wisconsin Act 191 [effective date: March 19, 2022].

Section 940.203 originally applied only to the offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law

enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 [effective date: April 13, 2018]. The title of § 940.203 was amended to read as "Battery or threat to a judge, prosecutor, an officer of the court or law enforcement officer." "Advocate" was added by 2021 Wisconsin Act 191 [effective date: March 19, 2022].

This instruction is drafted for violations under § 940.203(3) involving battery to a current or former guardian ad litem, corporation counsel, advocate, or attorney; for violations based on threats to a current or former guardian ad litem, corporation counsel, advocate, or attorney, see Wis JI-Criminal 1241B. For battery and threats to a judge, see Wis JI-Criminal 1240A and 1240B. For battery and threats to a prosecutor or law enforcement officer, see Wis JI-Criminal 1240C and 1240D.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and guardian ad litem's, corporation counsel's, advocate's, attorney's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. Section 54.40(2) provides the duties of "guardian ad litem."

5. Section 59.42 provides the duties of "corporation counsel."

6. Section 940.203 (1)(ab) provides that "Advocate" means an individual who is representing the interests of a child, the tribe, or another party in a tribal court proceeding.

7. Section 940.203(1)(ac) provides that "attorney" means a legal professional practicing law as defined in SCR 23.01. The practice of law in in Wisconsin is defined in SCR 23.01 as "[t]he application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) where there is a client relationship of trust or reliance and which require the knowledge, judgment, and skill of a person trained as a lawyer. The practice of law includes but is not limited to:

1. Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
2. Selection, drafting, or completion for another entity or person of legal documents or agreements which affect the legal rights of the other entity or person(s).

3. Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
4. Negotiation of legal rights or responsibilities on behalf of another entity or person(s).
5. Any other activity determined to be the practice of law by the Wisconsin Supreme Court.

8. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

9. See note 1, supra.

10. Section 940.203(3)(b) specifies that the act be in response to "an action taken by the current or former guardian ad litem, corporation counsel, advocate, or attorney in his or her official capacity in a proceeding under ch. 48, 51, 54, 55, 767, 813, or 938 or in a similar proceeding in a tribal court."

11. "Employed" is used here in the general sense of being engaged in the performance of a duty.

12. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

13. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

14. Wisconsin Statutes ch. 48, 51, 54, 55, 767, 813, or 938.

15. One of the alternatives in brackets should be selected.

16. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

17. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203 which divides the facts necessary to constitute the crime among several

subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

1241B THREAT TO GUARDIAN AD LITEM, CORPORATION COUNSEL, TRIBAL COURT ADVOCATE, OR ATTORNEY — § 940.203(3)

Statutory Definition of the Crime

Section 940.203(3) of the Criminal Code of Wisconsin is violated by one who intentionally threatens to cause bodily harm to the (person) (family member) of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney) where at the time of the threat the person knows[1] that the victim is [(a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)] [a family member of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)], the threat is in response to an action taken in the (guardian ad litem's) (corporation counsel's) (tribal court advocate's) (attorney's) official capacity and there is no consent by the person threatened.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause bodily harm to (name of victim).

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression

of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][2]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a [current or former (guardian ad litem)[4] (corporation counsel)[5] (tribal court advocate)[6] (attorney)[7]] [family member of a current or former (guardian ad litem) (corporation counsel) (tribal court advocate) (attorney)].

[For the purpose of this offense, a (e.g., child) is a family member.][8]

3. The defendant knew[9] that (name of victim) was [(a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)] [a family member of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)].

4. The threat was in response to an action taken in the current or former (guardian ad litem's) (corporation counsel's) (tribal court advocate's) (attorney's) official capacity in a

[specify the proceeding under Wisconsin statutes chapter _____] [specify the proceeding in a tribal court similar to Wisconsin statutes chapter _____.][10]

(Guardians ad litem) (Corporation counsel) (Tribal court advocates) (Attorneys) act in an official capacity when they perform duties that they are employed[11] to perform.[12] [The duties of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney) include: _____].[13]

[A _____ is a proceeding under chapter (specify the Wisconsin Statutes chapter)].[14]

[A _____ is a proceeding in a tribal court.][15]

5. The defendant threatened to cause bodily harm to (name of victim) without the consent[16] of (name of victim).

6. The defendant acted intentionally.[17] This requires that the defendant acted with the mental purpose to threaten bodily harm to another human being, or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent to the causing of bodily harm.[18]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in case this bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have

been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1241B was approved by the Committee in July 2018 and revised in 2022. The 2022 revision amended the body of the instruction and the comment based on 2021 Wisconsin Act 191 [effective date: March 19, 2022]. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.203 originally applied only to offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 [effective date: April 13, 2018]. The title of § 940.203 was amended to read as "Battery or threat to a judge, prosecutor, an officer of the court or law enforcement officer." "Advocate" was added by 2021 Wisconsin Act 191 [effective date: March 19, 2022].

This instruction is drafted for violations under § 940.203(3) involving threats to a current or former guardian ad litem, corporation counsel, advocate, or attorney; for violations based on battery to a current or former guardian ad litem, corporation counsel, advocate, or attorney, see Wis JI-Criminal 1241A. For battery and threats to a judge, see Wis JI-Criminal 1240A and 1240B. For battery and threats to a prosecutor or law enforcement officer, see Wis JI-Criminal 1240C and 1240D.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and guardian ad litem's, corporation counsel's, advocate's, or attorney's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of the statute criminalizing language is much narrower." 2001 WI 46,

¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in context and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The Committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm to another…"

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. Section 54.40(2) provides the duties of "guardian ad litem."

5. Section 59.42 provides the duties of "corporation counsel."

6. Section 940.203 (1)(ab) provides that "Advocate" means an individual who is representing the interests of a child, the tribe, or another party in a tribal court proceeding.

7. Section 940.203(1)(ac) provides that "attorney" means a legal professional practicing law as defined in SCR 23.01. The practice of law in Wisconsin is defined in SCR 23.01 as "[t]he application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) where there is a client relationship of trust or reliance and which require the knowledge, judgment, and skill of a person trained as a lawyer. The practice of law includes but is not limited to:

   1. Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.

2. Selection, drafting, or completion for another entity or person of legal documents or agreements which affect the legal rights of the other entity or person(s).
3. Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
4. Negotiation of legal rights or responsibilities on behalf of another entity or person(s).
5. Any other activity determined to be the practice of law by the Wisconsin Supreme Court.

The applicable term should be inserted in the blank.

8. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

9. See note 1, supra.

10. Section 940.203(3)(b) specifies that the act be in response to "an action taken by the current or former guardian ad litem, corporation counsel, advocate, or attorney in his or her official capacity in a proceeding under ch. 48, 51, 54, 55, 767, 813, or 938 or in a similar proceeding in a tribal court."

11. "Employed" is used here in the general sense of being engaged in the performance of a duty.

12. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

13. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

14. Wisconsin Statutes ch. 48, 51, 54, 55, 767, 813, or 938.

15. One of the alternatives in brackets should be selected.

16. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

17. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered

by the drafting style of § 940.203, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

18. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

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1242 BATTERY OR THREAT TO A DEPARTMENT OF REVENUE EMPLOYEE — § 940.205

Statutory Definition of the Crime

Section 940.205 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of any Department of Revenue employee[1] where at the time of the (act) (threat), the person knows[2] that the victim is a (Department of Revenue employee) (family member of a Department of Revenue employee), [the Department of Revenue employee is acting in an official capacity], [the (act) (threat) is in response to an action taken in the Department of Revenue employee's official capacity],[3] and there is no consent by the person (harmed) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) bodily harm to (name of victim).

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

["Cause" means that the defendant's act was a substantial factor in producing the bodily harm.][5]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][6]

2. (Name of victim) was a (Department of Revenue employee) (family member of a Department of Revenue employee).

[For the purpose of this offense, a (e.g., child) is a family member.][7]

3. At the time of the (act) (threat) the defendant knew[8] that (name of victim) was a (Department of Revenue employee) (family member of a Department of Revenue employee).

4. [The Department of Revenue employee was acting in an official capacity at the time of the (act) (threat).] [The (act) (threat) was in response to an action taken in the Department of Revenue employee's official capacity.][9]

Department of Revenue employees act in an official capacity when they

perform duties that they are employed[10] to perform.[11] (The duties of a Department of Revenue employee include: _____.)[12]

5. The defendant (caused) (threatened to cause) bodily harm without the consent[13] of (name of victim).

6. The defendant acted intentionally.[14] This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent to the causing of bodily harm.[15]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1242 was originally published in 1994 and revised in 2004, 2008, and 2022. The 2004 revision added a definition of "true threat." The 2008 revision amended the definition of "official capacity."

This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.205 was created by 1985 Wisconsin Act 29.

1. Section 940.205 applies to offenses against the person or family of any department of revenue "official, employee or agent." The instruction refers to "employee" throughout since that appears to be the most inclusive term.

2. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the Department of Revenue employee's official capacity. That is, the threat or act must be committed either when the Department of Revenue employee is acting in an official capacity or in response to an action taken in the Department of Revenue employee's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

3. One of the alternatives in brackets should be selected.

4. This is the definition provided in § 939.22(4).

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

6. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats." Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected

speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The Committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm" to another…

7. Section 940.205(1) provides:

"In this section, family member" means a parent, spouse, sibling, child, stepchild, foster child or treatment foster child.

The applicable term should be inserted in the blank.

8. See note 2, supra.

9. One of the alternatives in brackets should be selected.

10. "Employed" is used here in the general sense of being engaged in the performance of a duty.

11. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

12. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

13. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

14. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.205, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

15. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

1243 BATTERY TO A NURSE — § 940.20(2r)

INSTRUCTION WITHDRAWN FOR OFFENSES OCCURRING AFTER MARCH 24, 2022, BECAUSE THE STATUTE TO WHICH IT PERTAINED WAS REPEALED BY 2021 WISCONSIN ACT 209. FOR OFFENSES OCCURRING AFTER MARCH 24, 2022, SEE WIS JI-CRIMINAL 1247A AND 1247B.

Statutory Definition of the Crime

Section 940.20(2r) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to (a nurse) (an individual acting under the supervision of a nurse) where at the time of the act the defendant knows or has reason to know that the victim is (a nurse) (an individual acting under the supervision of a nurse) acting in a professional capacity and there is no consent by the victim harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

"Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[1]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. (Name of victim) was (a nurse)[3] (an individual acting under the supervision of a nurse).
3. (Name of victim) was acting in (his) (her) professional capacity.[4]
4. The defendant knew, or had reason to know, that (name of victim) was (a nurse acting in a professional capacity) (an individual acting under the supervision of a nurse acting in a professional capacity).[5]
5. The defendant caused bodily harm without the consent of (Name of victim).
6. The defendant acted intentionally.

   This requires that the defendant intended to cause bodily harm to (name of victim) and knew that (name of victim) did not consent to the causing of bodily harm.[6]

Meaning of "Intentionally"

Intent to cause bodily harm means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another.[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1243 was approved by the Committee in August 2020. Its withdrawal for offenses occurring after the effective date of 2021 Wisconsin Act 209 was approved by the Committee in April 2022.

Section 940.20(2r) was created by 2019 Wisconsin Act 97 [effective date: February 7, 2020].

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901 Cause.

2. This is the definition of "bodily harm" provided in § 939.22(4).

3. § 940.20(2r)(a) provides that "nurse" means an individual who is licensed (as a registered nurse) pursuant to § 441.06 or (as a practical nurse) pursuant to 441.10.

4. If further instruction on "professional capacity" is necessary, see secs. 441.001(3) and (4), which define practical and professional nursing.

5. The "knew or had reason to know" requirement is taken directly from § 940.20(2r). It is treated as a separate element rather than being combined with the sixth element where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as a nurse or an individual acting under the supervision of a nurse and to "acting in official capacity."

6. Knowledge that the victim was acting in a professional capacity and that the victim did not consent is required because the word "intentionally" is used in the statute. That requires not only intent to cause bodily harm but also "knowledge of those facts necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'." § 939.23(3).

7. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

1244 BATTERY OR THREAT TO A DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES OR DEPARTMENT OF WORKFORCE DEVELOPMENT EMPLOYEE — § 940.207

Statutory Definition of the Crime

Section 940.207 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of any Department of (Safety and Professional Services) (Workforce Development) employee[1] where at the time of the (act) (threat), the person knows[2] that the victim is a (department employee) (family member of a department employee), [the employee is acting in an official capacity], [the (act) (threat) is in response to an action taken in the employee's official capacity],[3] and there is no consent by the person (harmed) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) bodily harm to (name of victim).

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

   IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

["Cause" means that the defendant's act was a substantial factor in producing the bodily harm.][5]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][6]

2. (Name of victim) was (an employee of) (a family member of an employee of) the Department of (Safety and Professional Services) (Workforce Development).

[For the purpose of this offense, a (e.g., child) is a family member.][7]

3. At the time of the (act) (threat), the defendant knew[8] that (name of victim) was (an employee of) (a family member of an employee of) the Department of (Commerce) (Workforce Development).

4. [The employee was acting in an official capacity at the time of the (act) (threat).] [The (act) (threat) was in response to an action taken in the employee's official capacity.][9]

Employees act in an official capacity when they perform duties that they are

employed[10] to perform.[11] [The duties of a Department of (Safety and Professional Services) (Workforce Development) employee include:_____.][12]

5. The defendant (caused) (threatened to cause) bodily harm without the consent[13] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent to the causing of bodily harm.[15]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1244 was originally published in 1994 and revised in 1998, 2004, 2008, 2012, and 2022. The 2012 revision changed the reference from the Department of Commerce to the Department of Safety and Professional Services. This revision was approved by the Committee in October 2023. It

amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.207 was created by 1993 Wisconsin Act 86. A series of legislative changes affected the types of employees covered by the statute. As amended by 1997 Wisconsin Act 3, the statute applies to battery or threat to employees and family members of employees of the Department of Commerce and the Department of Workforce Development. 2011 Wisconsin Act 32 changed "Department of Commerce" to "Department of Safety and Professional Services."

1. Section 940.207 applies to offenses against the person or family of any department "official, employee or agent." The instruction refers to "employee" throughout since that appears to be the most inclusive term.

2. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the employee's official capacity. That is, the threat or act must be committed either when the employee is acting in an official capacity or in response to an action taken in the employee's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

3. One of the alternatives in brackets should be selected.

4. This is the definition provided in § 939.22(4).

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

6. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats." Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

A true threat is a statement that a speaker would reasonably foresee that a listener would

> reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The Committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm" to another…

7. Section 940.207(1) provides:

> "In this section, family member" means a parent, spouse, sibling, child, stepchild, foster child or treatment foster child.

The applicable term should be inserted in the blank.

8. See note 2, supra.

9. One of the alternatives in brackets should be selected.

10. "Employed" is used here in the general sense of being engaged in the performance of a duty.

11. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

12. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743

N.W.2d 468; and State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

General powers and duties of the Department of Commerce are set forth in § 101.02, Wis. Stats.; those of the Department of Workforce Development are set forth in § 103.005, Wis. Stats.

13. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

14. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.207, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

15. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

1245 BATTERY TO A COUNTY, CITY, VILLAGE, OR TOWN EMPLOYEE — § 940.208

Statutory Definition of the Crime

Section 940.208 of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to an employee of a city[1] where at the time of the act, the person knows[2] that the victim is a city employee, the employee is enforcing[3] a city[4] zoning ordinance, building code, or other construction law, rule, standard, or plan at the time of the act, the enforcement activity complies with any applicable law, ordinance, rule or notice requirement, and there is no consent by the person harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following seven elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim) .

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[5]

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[6]

2. (Name of victim) was an employee of a city.

3. At the time of the act the defendant knew[7] that (name of victim) was an employee of a city.

4. (Name of victim) was enforcing a city zoning ordinance, building code, or other construction law, rule, standard, or plan.

5. The enforcement complied with any applicable law, ordinance, rule or notice requirement.

6. The defendant caused bodily harm without the consent[8] of (name of victim).

7. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to cause bodily harm.[9]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all seven elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1245 was approved by the Committee in July 2008.

Section 940.208 was created by 2007 Wisconsin Act 193 [effective date: April 11, 2008].

The statute applies to harm caused to an employee of a county, city, village, or town, but the instruction is drafted for offenses against city employees in an effort to make a very long statute more manageable. The statute also applies where the act is in response to activity undertaken to enforce, or to inspect for the purpose of enforcing, a state, county, city, village, or town zoning ordinance, building code, or other construction law, rule, standard, or plan. Again, the instruction is drafted for offenses related to enforcement activities. If any of the other options are involved, the standard instruction will need to be modified.

1. The instruction is drafted for offenses against city employees, but the statute also applies to harm caused to an employee of a county, village, or town. If any of the other options are involved, the standard instruction will need to be modified.

2. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see sec. 940.208(1)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act and the employee being engaged in enforcement or inspection activity. That is, the act must be committed either when the employee is engaged in enforcement or inspection activity or in response to enforcement or inspection activity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

3. The instruction is drafted for cases involving bodily harm caused during enforcement activity, but the statute also applies where the harm is caused during an inspection for the purpose of enforcement or where harm is caused in response to activity undertaken to enforce. If any of the other options are involved, the standard instruction will need to be modified.

4. The instruction is drafted for enforcement of a city zoning ordinance, building code, etc., but the statute also applies to a state, county, village, or town zoning ordinance, building code, or other construction law, rule, standard, or plan. If any of the other options are involved, the standard instruction will need to be modified.

5. This is the definition provided in § 939.22(4).

6. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

7. See note 2, supra.

8. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

9. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.208 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the element set forth in (1). Sub. (1) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in the introductory sentence of the statute.

1246 MAYHEM — § 940.21

Statutory Definition of the Crime

Mayhem, as defined in § 940.21 of the Criminal Code of Wisconsin, is committed by one who cuts or mutilates the tongue, eye, ear, nose, lip, limb, or other bodily member of another with intent to disable or disfigure that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant cut or mutilated (the tongue) (the eye) (the ear) (the nose) (the lip) (a limb) (any bodily part)[1] of (name of victim) .
2. The cutting or mutilation caused great bodily harm to (name of victim) .[2]

   "Cause" means that the defendant's conduct was a substantial factor[3] in producing great bodily harm.

   "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.[4]
3. The defendant intended to disable or disfigure (name of victim) .

This requires that the defendant had the mental purpose to disable or disfigure (name of victim) or was aware that (his) (her) conduct was practically certain to disable or disfigure (name of victim).

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of mayhem have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Until 1994, violations of § 940.21, Mayhem, were addressed by Wis JI-Criminal 1230, which was originally published in 1969 and revised in 1982, 1987, and 1992. That instruction was revised and republished as Wis JI-Criminal 1246 in 1994 and revised in 2005. This revision was approved by the Committee in June 2008 and involved revising the definition of the first element and adding footnote 1.

The second element of the instruction, requiring the causing of great bodily harm, was added in 1982 and reflects the holding in State v. Kirby, 86 Wis.2d 292, 272 N.W.2d 113 (Ct. App. 1978). Kirby held that "causing great bodily harm" was an element of mayhem, even thought it was not expressly stated in the statute. Kirby also held that injury by conduct regardless of life [which would be "reckless injury" under § 940.23 under current law] and endangering safety by conduct regardless of life [which would be "recklessly endangering safety" under § 941.30 under current law] were lesser included offenses of mayhem. The Committee revised the instruction in September 1982 to comply with the Kirby decision.

In July 1982, the Wisconsin Court of Appeals (District I) decided State v. Cole (not published) and held that the 1969 version of Wis JI-Criminal 1230, without "great bodily harm," was a proper statement of the law. Though written by the author of Kirby, the Cole decision did not mention that case or acknowledge the great bodily harm issue.

On January 27, 1987, the Wisconsin Court of Appeals (District IV) decided State v. Webie. The defendant appealed his conviction for endangering safety by conduct regardless of life. The conviction was reversed because the court found that "endangering safety. . ." was not a lesser included offense of mayhem, the crime with which Webie was originally charged. This result required expressly overruling Kirby on the lesser included offense issue. Webie also noted that "we need not consider whether mayhem continues to incorporate the unexpressed great bodily harm requirement." Though it reversed a previous decision and was recommended for publication, Webie was ordered not published on April 2, 1987.

In the meantime, Cole (see State v. Cole, above) had gone to federal court, claiming that the failure to instruct on an element (great bodily harm) of the crime (mayhem) deprived him of due process. The U.S. Court of Appeals for the 7th Circuit granted habeas corpus relief in Cole v. Young, 817 F.2d 412 (7th Cir. 1987). The court reviewed Kirby, Cole, and Webie and decided that state law made great bodily harm an element of mayhem. That being the case, the court found a constitutional violation in the failure to instruct on that element.

Since it is the only published opinion, Kirby remains the law of the state. While at least one district of the Wisconsin Court of Appeals disagrees with it, that disagreement did not manifest itself in a published opinion. Thus, Kirby must be followed until it is officially overruled.

In State v. Quintana, 2008 WI 33, ¶73, 308 Wis.2d 615, 748 N.W.2d 447, (see note 1, below) the court acknowledged the above discussion but noted that "the legislature has not acted to correct any possible misinterpretation that arose out of the 1978 Kirby decision or its progeny. The inclusion of great bodily harm as an element supports our conclusion that the legislature sought a broad definition of 'other bodily member' as great bodily harm is not limited to specific parts of the body."

1. In State v. Quintana, 2008 WI 33, 308 Wis.2d 615, 748 N.W.2d 447, the court held that the term "other bodily member" in the mayhem statute is to be broadly construed and includes the forehead:

> ¶90 . . . . We conclude that the forehead qualifies as an "other bodily member" under Wis. Stat. § 940.21, Mayhem. Wisconsin's mayhem statute seeks to punish those who intentionally disable or disfigure another person's bodily member. The manner in which the legislature used the phrase, "other bodily member," requires that we give that phrase a broad construction. If "other bodily member" were to be narrowly construed, the construction would produce absurd results, and the purpose of the statute would easily be defeated. Because the legislature intended the phrase "other bodily member" to be construed broadly rather than narrowly, the phrase "other bodily member" in the mayhem statute encompasses all bodily parts, including a person's forehead. The application of the mayhem statute is limited by the need to prove that a person specifically intended to disable or disfigure.

In light of this decision, the Committee decided that list of alternatives in the first element should be revised to include a general reference to "any bodily part." In addition to the paragraph quoted above, see ¶33: "In short, 'other bodily member' encompasses all bodily parts."

2. Kirby v. State, 86 Wis.2d 292, 301, 272 N.W.2d 113 (Ct. App. 1978):

> Although at common law mayhem required proof of mutilation or dismemberment that affected one's combat ability, the statutory enactments creating the crime have not required such extensive mutilation or disfigurement. Nonetheless, "cuts or mutilates" as used in the statute requires proof of

an act of greater severity than a mere nick with a knife. We believe that "cutting or mutilation," a statutory element of mayhem, requires an injury that constitutes "great bodily harm" as interpreted in LaBarge [74 Wis.2d 327, 246 N.W.2d 794 (1976)] and required as an element of injury by conduct regardless of life.

Also see LaFave and Scott, Criminal Law (1972) at 614-17.

3. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

4. See Wis JI-Criminal 914 for a complete discussion of "great bodily harm."

1247A BATTERY OR THREAT TO A STAFF MEMBER OF A HEALTH CARE FACILITY — § 940.204(2)

Statutory Definition of the Crime

Section 940.204(2) of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of any health care facility worker[1] where at the time of the (act) (threat), the person knows[2] that the victim ((works) (formerly worked) in a health care facility) (is a family member of a person who (works) (formerly worked) in a health care facility), [the (act) (threat) is in response to an action occurring at the health care facility], [the (act) (threat) is in response to an action taken in the employee's official capacity],[3] and there is no consent by the person (harmed) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) bodily harm to (name of victim).

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

   IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

["Cause" means that the defendant's act was a substantial factor in producing the bodily harm.][5]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][6]

2. (Name of victim) was ((a worker at) (a former worker at)) (a family member of (a worker at) (a former worker at)) a health care facility.[7]

[For the purpose of this offense, a (e.g., child) is a family member.][8]

3. At the time of the (act) (threat), the defendant knew or should have known[9] that (name of victim) was ((a worker at) (a former worker at)) (a family member of (a worker at) (a former worker at)) a health care facility.

4. [The (act) (threat) was in response to an action occurring at the health care facility.] [The (act) (threat) was in response to an action taken by the official, employee, or agent of a health care facility acting in their official capacity.][10]

IF THE CASE INVOLVES AN OFFICIAL, EMPLOYEE, OR AGENT OF THE HEALTH CARE FACILITY ACTING IN AN OFFICIAL CAPACITY, ADD THE FOLLOWING:

Officials, employees, or agents of the health care facility act in an official capacity when they perform duties that they are authorized to perform.

5. The defendant (caused) (threatened to cause) bodily harm without the consent[11] of (name of victim).

6. The defendant acted intentionally.[12] This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent to the causing of bodily harm.[13]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[14]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal was 1247A approved by the Committee in April 2022. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.204(2) was created by 2022 Wisconsin Act 209 [effective date: March 25, 2022]. This instruction applies to battery or threat to a staff member of a health care facility and family members of a staff member of a health care facility. For battery or threat to a health care provider, see Wis JI-Criminal 1247B.

1. Section 940.204(2) applies to offenses against the person or family of anyone "who works in a health care facility." The instruction refers to "worker" throughout since that appears to be the most inclusive term.

2. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the employee's official capacity. That is, the act or threat must be committed either in response to an action occurring at the healthcare facility or in response to an action taken in the employee's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

3. One of the alternatives in brackets should be selected.

4. This is the definition provided in § 939.22(4).

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

6. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats." Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing

threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The Committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm" to another…

7. Section 940.204(1)(b) provides:

"In this section: 'health care facility' means any of the following:

1. A hospital, as defined in s. 50.33 (2).
2. A clinic, which is a location with the primary purpose of providing outpatient diagnosis, treatment, or management of health conditions.
3. A pharmacy that is licensed under s. 450.06.
4. An adult day care center, as defined in s. 49.45(47).
5. An adult family home, as defined in s. 50.01 (1).
6. A community−based residential facility, as defined in s. 50.01 (1g).
7. A residential care apartment complex, as defined in s. 50.01 (6d).
8. A nursing home, as defined in s. 50.01 (3).
9. A mental health or substance use disorder facility, which is a location that provides diagnosis, treatment, or management of mental health or substance use disorders.
10. An ambulatory surgical center, as defined in 42 CFR 416.2."

8. Section 940.204(1)(a) provides:

"In this section: 'family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

9. See note 2, supra.

10. Based on the evidence, one or both of the alternatives in brackets should be selected. If the evidence supports selecting both, the alternatives should be separated by the disjunctive "or."

11. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

12. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.204(2), which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

13. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

14. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For a longer description of the intent-finding process, see Wis JI-Criminal 923A.

1247B BATTERY OR THREAT TO A HEALTH CARE PROVIDER — § 940.204(3)

Statutory Definition of the Crime

Section 940.204(3) of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of any health care provider where at the time of the (act) (threat), the person knows[1] that the victim is a (health care provider) (family member of a health care provider), the (act) (threat) is in response to an action by the health care provider acting in their official capacity, and there is no consent by the person (harmed) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) bodily harm to (name of victim).

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

   IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

   ["Cause" means that the defendant's act was a substantial factor in producing the bodily harm.][3]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][4]

2. (Name of victim) was a (health care provider) (family member of a health care provider).

[a (e.g., nurse) is a health care provider.][5]

[a (e.g., child) is a family member.][6]

3. At the time of the (act) (threat) the defendant knew or should have known[7] that (name of victim) was a (health care provider) (family member of a healthcare provider).

4. The (act) (threat) was in response to an action by the health care provider acting in their official capacity.

Health care providers act in an official capacity when they perform duties that they are authorized to perform.

5. The defendant (caused) (threatened to cause) bodily harm without the consent[8] of

(name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) bodily harm.[9]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1247B was approved by the Committee in April 2022.

Section 940.204(3) was created by 2022 Wisconsin Act 209 [effective date: March 25, 2022]. This instruction applies to battery or threat to a health care provider and family members of a health care provider. For battery or threat to a staff member of a health care facility, see Wis JI-Criminal 1247A.

1. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see subsec. (3)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the health care provider's official capacity. That is, the act or threat must be committed in response to an action

by the health care provider acting in his or her capacity as a health care provider. In this situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. This is the definition provided in § 939.22(4).

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

4. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats." Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental

state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6 which requires that "the defendant acted with the mental purpose to threaten bodily harm" to another…

5. In the Committee's judgement, the jury may be told, for example, that a nurse is a health care provider. It is still for the jury to be satisfied that, in the example, the victim was a nurse. Section 940.204(1)(c) provides a definition of "health care provider" for the purposes of this offense:

"Health care provider" means any of the following:

1. A nurse licensed under ch. 441.
2. A chiropractor licensed under ch. 446.
3. A dentist licensed under ch. 447.
4. A physician, perfusionist, or respiratory care practitioner licensed or certified under subch. II of ch. 448.
5. A naturopathic doctor or limited-scope naturopathic doctor licensed under ch. 466.
6. A physical therapist or physical therapist assistant who is licensed under subch. III of ch. 448 or who holds a compact privilege under subch. X of ch. 448.
7. A podiatrist licensed under subch. IV of ch. 448.
8. A dietitian certified under subch. V of ch. 448.
9. An athletic trainer licensed under subch. VI of ch. 448.
10. An occupational therapist or occupational therapy assistant who is licensed under subch. VII of ch. 448 or who holds a compact privilege under subch. XI of ch. 448.
11. A physician assistant licensed under subch. VIII of ch. 448.
12. An optometrist licensed under ch. 449.
13. A pharmacist or pharmacy technician licensed or registered under ch. 450.
14. An acupuncturist certified under ch. 451.
15. A psychologist who is licensed under ch. 455, who is exercising the temporary authorization to practice, as defined in s. 455.50 (2) (o), in this state, or who is practicing under the authority to practice interjurisdictional telepsychology, as defined in s. 455.50 (2) (b).
16. A social worker, marriage and family therapist, or professional counselor certified or licensed under ch. 457.
17. A speech-language pathologist or audiologist licensed under subch. II of ch. 459 or a speech and language pathologist licensed by the department of public instruction.
18. A massage therapist or bodywork therapist licensed under ch. 460.
19. An ambulance service provider, as defined in s. 256.01 (3).
20. An emergency medical services practitioner, as defined in s. 256.01 (5).
21. An emergency medical responder, as defined in s. 256.01 (4p).
22. A radiographer or limited X−ray machine operator licensed or permitted under ch. 462.
23. A driver of an ambulance, as defined in s. 256.01(1t)."

The applicable term should be inserted in the blank.

6. Section 940.204(1)(a) provides:

"In this section: 'family member' means a parent, spouse, sibling, child, stepchild, or foster

child."

The applicable term should be inserted in the blank.

7. See note 2, supra.

8. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

9. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.204(3) which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (3)(a), through (b) and (c). Sub. (3)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (3) proper and the other facts that follow.

10. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

1249A PHYSICAL ABUSE OF AN ELDER PERSON: INTENTIONAL CAUSATION OF GREAT BODILY HARM — § 940.198(2)(a)

Statutory Definition of the Crime

Physical abuse of an elder person[1], as defined in § 940.198(2)(a) of the Criminal Code of Wisconsin, is committed by one who intentionally causes great bodily harm to an elder person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[2]

   "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[3]

2. The defendant intentionally[4] caused great bodily harm to (name of victim).

This requires that the defendant had the mental purpose to cause great bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

3. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[5]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1249A was approved by the Committee in October 2021.

This instruction is drafted for offenses involving intentional physical abuse of an elder person causing great bodily harm as provided in Wis. Stat 940.198(2)(a). § 940.198(2)(a) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Prior to the enactment of § 940.198, battery committed against persons 62 years of age or older was covered by WI JI-Criminal 1226 Battery With Substantial Risk of Great Bodily Harm. That instruction

applied to all batteries involving a "substantial risk of great bodily harm," with the fact that the victim was over age 62 creating "a rebuttable presumption of conduct creating a substantial risk of great bodily harm."

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The definition of "elder person" is the one provided in § 940.198(1)(a) which provides: "'Elder person' means any individual who is 60 years of age or older."

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

3. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976). The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

4. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and B.

5. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

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1249B PHYSICAL ABUSE OF AN ELDER PERSON: INTENTIONAL CAUSATION OF BODILY HARM — § 940.198(2)(b)

Statutory Definition of the Crime

Physical abuse of an elder person[1], as defined in § 940.198(2)(b) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to an elder person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[2]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. The defendant intentionally[4] caused bodily harm to (name of victim).

   This requires that the defendant had the mental purpose to cause bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

3. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[5]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1249B was approved by the Committee in October 2021.

This instruction is drafted for offenses involving intentional physical abuse of an elder person causing bodily harm as provided in Wis. Stat 940.198(2)(b). § 940.198(2)(b) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Prior to the enactment of § 940.198, battery committed against persons 62 years of age or older was covered by WI JI-Criminal 1226 Battery With Substantial Risk of Great Bodily Harm. That instruction applied to all batteries involving a "substantial risk of great bodily harm," with the fact that the victim was over age 62 creating "a rebuttable presumption of conduct creating a substantial risk of great bodily harm."

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The definition of "elder person" is the one provided in § 940.198(1)(a) which provides: "'Elder

person' means any individual who is 60 years of age or older."

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and B.

5. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

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1249C PHYSICAL ABUSE OF AN ELDER PERSON: INTENTIONAL CAUSATION OF BODILY HARM TO AN ELDER PERSON UNDER CIRCUMSTANCES OR CONDITIONS THAT ARE LIKELY TO PRODUCE GREAT BODILY HARM — § 940.198(2)(c)

Statutory Definition of the Crime

Physical abuse of an elder person[1], as defined in § 940.198(2)(c) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to an elder person under circumstances or conditions that are likely to produce great bodily harm.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[2]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. The defendant intentionally[4] caused bodily harm to (name of victim).

   This requires that the defendant had the mental purpose to cause bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain

to cause that result.

3. The circumstances or conditions under which the defendant caused bodily harm were likely to produce great bodily harm.

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[5]

4. The defendant knew that the circumstances or conditions under which (he) (she) caused bodily harm were likely to produce great bodily harm.[6]

5. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[7]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1249C was approved by the Committee in October 2021.

This instruction is drafted for offenses involving intentional physical abuse of an elder person causing bodily harm under circumstances or conditions that are likely to produce great bodily harm as provided in Wis. Stat 940.198(2)(c). § 940.198(2)(c) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Prior to the enactment of § 940.198, battery committed against persons 62 years of age or older was covered by WI JI-Criminal 1226 Battery With Substantial Risk of Great Bodily Harm. That instruction applied to all batteries involving a "substantial risk of great bodily harm," with the fact that the victim was over age 62 creating "a rebuttable presumption of conduct creating a substantial risk of great bodily harm."

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The definition of "elder person" is the one provided in § 940.198(1)(a) which provides: "'Elder person' means any individual who is 60 years of age or older."

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and B.

5. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976). The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

6. Section 940.198(2)(c) applies to those who "intentionally cause bodily harm to an elder person under circumstances or conditions that are likely to produce great bodily harm," Section 939.23(3) provides

that when "intentionally" is used in a criminal statute, it requires that the actor "have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally'." The Committee concluded that this requires that the defendant charged under § 940.198(2)(c) must have known that the circumstances or conditions under which the he or she caused bodily harm were likely to produce great bodily harm.

7. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

1249D PHYSICAL ABUSE OF AN ELDER PERSON: RECKLESS CAUSATION OF GREAT BODILY HARM — § 940.198(3)(a)

Statutory Definition of the Crime

Physical abuse of an elder person[1], as defined in § 940.198(3)(a) of the Criminal Code of Wisconsin, is committed by one who recklessly causes great bodily harm to an elder person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[2]

   "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[3]

2. The defendant recklessly caused great bodily harm to (name of victim).

This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).[4]

In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim).[5]

3. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1249D was approved by the Committee in October 2021.

This instruction is drafted for offenses involving reckless physical abuse of an elder person causing great bodily harm as provided in Wis. Stat 940.198(3)(a). § 940.198(3)(a) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Prior to the enactment of § 940.198, battery committed against persons 62 years of age or older was covered by WI JI-Criminal 1226 Battery With Substantial Risk of Great Bodily Harm. That instruction applied to all batteries involving a "substantial risk of great bodily harm," with the fact that the victim was over age 62 creating "a rebuttable presumption of conduct creating a substantial risk of great bodily harm."

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The definition of "elder person" is the one provided in § 940.198(1)(a) which provides: "'Elder person' means any individual who is 60 years of age or older."

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

3. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976). The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

4. The definition of "recklessly" is the one provided in § 940.198(1)(b). Note that this definition is different from the definition of "criminal recklessness" in § 939.24.

5. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though "recklessly" is defined differently in § 940.198(1)(b), the basic concept is the same – all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

6. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the rule stated in § 939.43(2). Although that statute refers to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is

clearer; no change in meaning is intended.

1249E PHYSICAL ABUSE OF AN ELDER PERSON: RECKLESS CAUSATION OF BODILY HARM — § 940.198(3)(b)

Statutory Definition of the Crime

Physical abuse of an elder person[1], as defined in § 940.198(3)(b) of the Criminal Code of Wisconsin, is committed by one who recklessly causes bodily harm to an elder person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[2]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. The defendant recklessly caused bodily harm to (name of victim).

   This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).[4]

In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim).[5]

3. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1249E was approved by the Committee in October 2021.

This instruction is drafted for offenses involving reckless physical abuse of an elder person causing bodily harm as provided in Wis. Stat 940.198(3)(b). § 940.198(3)(b) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Prior to the enactment of § 940.198, battery committed against persons 62 years of age or older was covered by WI JI-Criminal 1226 Battery With Substantial Risk of Great Bodily Harm. That instruction

applied to all batteries involving a "substantial risk of great bodily harm," with the fact that the victim was over age 62 creating "a rebuttable presumption of conduct creating a substantial risk of great bodily harm."

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The definition of "elder person" is the one provided in § 940.198(1)(a) which provides: "'Elder person' means any individual who is 60 years of age or older."

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. The definition of "recklessly" is the one provided in § 940.198(1)(b). Note that this definition is different from the definition of "criminal recklessness" in § 939.24.

5. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though "recklessly" is defined differently in § 940.198(1)(b), the basic concept is the same – all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

6. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the rule stated in § 939.43(2). Although that statute refers to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

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1249F PHYSICAL ABUSE OF AN ELDER PERSON: RECKLESS CAUSATION OF BODILY HARM TO AN ELDER PERSON UNDER CIRCUMSTANCES OR CONDITIONS THAT ARE LIKELY TO PRODUCE GREAT BODILY HARM — § 940.198(3)(c)

Statutory Definition of the Crime

Physical abuse of an elder person[1], as defined in § 940.198(3)(c) of the Criminal Code of Wisconsin, is committed by one who recklessly causes bodily harm to an elder person under circumstances or conditions that are likely to produce great bodily harm.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[2]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. The defendant recklessly caused bodily harm to (name of victim).

This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).[4]

In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim).[5]

3. The circumstances or conditions under which the defendant caused bodily harm were likely to produce great bodily harm.

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[6]

4. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1249F was approved by the Committee in October 2021.

This instruction is drafted for offenses involving reckless physical abuse of an elder person causing great bodily harm as provided in Wis. Stat 940.198(3)(a). § 940.198(3)(c) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Prior to the enactment of § 940.198, battery committed against persons 62 years of age or older was covered by WI JI-Criminal 1226 Battery With Substantial Risk of Great Bodily Harm. That instruction applied to all batteries involving a "substantial risk of great bodily harm," with the fact that the victim was over age 62 creating "a rebuttable presumption of conduct creating a substantial risk of great bodily harm."

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The definition of "elder person" is the one provided in § 940.198(1)(a) which provides: "'Elder person' means any individual who is 60 years of age or older."

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. The definition of "recklessly" is the one provided in § 940.198(1)(b). Note that this definition is different from the definition of "criminal recklessness" in § 939.24.

5. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though "recklessly" is defined differently in § 940.198(1)(b), the basic concept is the same – all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

6. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976). The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

7. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the rule stated in § 939.43(2). Although that statute refers to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

1248 SEXUAL EXPLOITATION BY THERAPIST — § 940.22

Statutory Definition of the Crime

Sexual exploitation by a therapist, as defined in § 940.22 of the Criminal Code of Wisconsin, is committed by one who is or holds himself or herself out to be a therapist and who intentionally has sexual contact with a patient or client during any ongoing therapist-patient or therapist-client relationship.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four[1] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (was) (held (himself) (herself) out to be) a therapist.

   "Therapist"[2] means a person who performs or purports to perform psychotherapy.[3]

   To be considered a therapist, it is not necessary that a person be licensed or certified by the state.

   ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE DEFENDANT IS A MEMBER OF A PROFESSION LISTED IN § 940.22(1)(I):

   ["Therapist" may include a _____ if that person performs or purports to perform psychotherapy.][4]

2. (Name of victim) was a (patient) (client) of the defendant.

3. The defendant intentionally had sexual contact with (name of victim).

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND INSERT THE APPROPRIATE DEFINITION HERE.

4. The sexual contact occurred during an ongoing therapist-patient or therapist-client relationship.

It is not required that the sexual contact took place during an actual treatment session, consultation, interview, or examination.[5] It is sufficient if a therapist-patient or therapist-client relationship existed between the defendant and (name of victim) when the sexual contact occurred.

You should consider all the circumstances in determining whether a therapist-patient or therapist-client relationship existed.[6]

Whether or not (name of victim) consented to sexual contact is not an issue in this case.[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1248 was originally published in 1987 and revised in 1992, 1996 and 2005. This revision was approved by the Committee in October 2005.

The 2006 revision changed the definition of "therapist" in the first element, in part to reflect the decision in State v. Draughon, 2005 WI App 162, 285 Wis.2d 633, 702 N.W.2d 412. The court of appeals held that "the jury instruction addressing Draughon's status as a 'therapist' under § 940.22(1)(I) was error." The trial court followed the format recommended by Wis JI-Criminal 1248 [8 1996], which provided as follows for the first element: "'Therapist'" means a person who performs psychotherapy. It includes a (identify type of therapist) ." The court of appeals concluded that stating "It includes a member of the clergy" as called for by Wis JI-Criminal 1248 "lead[s] to the faulty conclusion that by definition, clergy members perform psychotherapy." Because "the instruction given never directed the jury to make an independent, beyond-a-reasonable-doubt decision as to whether Draughon performed or purported to perform psychotherapy . . . its omission is constitutional error." Draughon, ¶14.

This instruction was revised in 2005 to reflect the decision of the Wisconsin Supreme Court in State v. DeLain, 2005 WI 52, 280 Wis.2d 51, 695 N.W.2d 484. The court held "that it is the totality of the circumstances . . . that determines whether there was an ongoing therapist-patient relationship when sexual contact occurred." DeLain, ¶24. See footnote 5, below. The DeLain decision also "disavow[ed] the court of appeals discussion of 'intentionally.'" Id. at ¶24. The court of appeals had concluded that because § 940.22 used the word "intentionally" it required that the defendant know that the victim was a patient and know that the defendant and the victim had an ongoing therapist-patient relationship. State v. DeLain, 2004 WI App 79, 272 Wis.2d 356, 679 N.W.2d 562, ¶¶10-11, citing § 939.23(3). The Committee had revised the instruction to add an element embodying this knowledge requirement but deleted it in response to the supreme court decision.

This instruction provides for inserting a definition of "sexual contact" as provided in Wis JI-Criminal 1200A. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing a separate instruction that included all alternatives for definition of the term. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. State v. DeLain, 2005 WI 52, 280 Wis.2d 51, 695 N.W.2d 484, the Wisconsin Supreme Court stated that this offense has three elements. ¶9. The instruction provides for four elements, using a separate element for the victim's status as a patient or client of the defendant. See element 2. No change in substance is intended.

2. Section 940.22(1)(I) provides the following definition of "therapist":

> "Therapist" means a physician, psychologist, social worker, marriage and family therapist, professional counselor, nurse, chemical dependency counselor, member of the clergy or other person, whether or not licensed or certified by the state, who performs or purports to perform psychotherapy.

The Committee concluded that the instruction would be more clear if it provided a general definition of the term ("a person who performs or purports to perform psychotherapy") and then provided for a statement, to be used where applicable, that one of the professions named in subsec. (1)(I) may be included in the definition. See State v. Draughon, 2005 WI App 162, discussed in the first paragraph of the Comment, and note 4, below.

3. "Psychotherapy" should be defined if necessary. Section 940.22(1)(d) refers to the definition in § 455.01(6), which reads as follows:

> "Psychotherapy" means the use of learning, conditioning methods and emotional reactions in a professional relationship to assist persons to modify feelings, attitudes and behaviors which are intellectually, socially or emotionally maladjustive or ineffectual.

4. If the case involves one of the "therapists" listed in § 940.22(1)(I), insert the name in the blank provided. See note 2, supra.

5. The requirement that the sexual contact occur "during an ongoing therapist-patient or therapist-client relationship" was added by 1985 Wisconsin Act 275. The same act eliminated the requirement that the contact occur during any particular examination, interview, etc.

A teacher who engages in informal counseling with students is not engaged as a professional therapist, even if the teacher has a psychology degree. "[T]he only reasonable meaning of the requirement for an ongoing therapist-patient/client relationship in the criminal statute is that of a professional therapist-patient/client relationship." State v. Ambrose, 196 Wis.2d 768, 777, 540 N.W.2d 208 (Ct. App. 1995).

6. This statement is based on State v. DeLain, 2005 WI 52, 280 Wis.2d 51, 695 N.W.2d 484, where the Wisconsin Supreme Court held "that it is the totality of the circumstances . . . that determines whether there was an ongoing therapist-patient relationship when sexual contact occurred." DeLain, ¶24. The decision then refers to factors that may be relevant to this determination, though not dispositive: a defendant's state of mind; a secret unilateral action of a patient; the explicit remarks of one party to the other regarding the status of the relationship; how much time has gone by since the last therapy session; how close together the therapy sessions had been to each other; the age of the patient; the particular vulnerabilities experienced by the patient as a result of his or her mental health issues; and, the ethical obligations of the therapist's profession [referring to sections in the Wisconsin Administrative Code: § Psy 5.01(31), § MPSW 20.02(21), and § Psy 5.01(14)(a)-(b) and (c)1-7]. DeLain, ¶24.

The DeLain decision also "disavow[ed] the court of appeals discussion of 'intentionally.'" Id. at ¶24. The court of appeals had concluded that because § 940.22 used the word "intentionally" it required that the defendant know that the victim was a patient and know that the defendant and the victim had an ongoing therapist-patient relationship. State v. DeLain, 2004 WI App 79, 272 Wis.2d 356, 679 N.W.2d 562, ¶¶10-11, citing § 939.23(3).

7. "Without consent" is not included as an element in the statute. To avoid possible speculation or confusion, the Committee concluded that the jury should be specifically informed that consent is not an issue.

1250 FIRST DEGREE RECKLESS INJURY — § 940.23(1)

Statutory Definition of the Crime

First degree reckless injury, as defined in § 940.23(1) of the Criminal Code of Wisconsin, is committed by one who recklessly causes great bodily harm to another human being under circumstances that show utter disregard for human life.

State's Burden of Proof

Before you may find the defendant guilty of first degree reckless injury, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing great bodily harm.[1]

   "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.[2]

2. The defendant caused great bodily harm by criminally reckless conduct.

   "Criminally reckless conduct" means:[3]

   - the conduct created a risk of death or great bodily harm to another person; and

- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[4]

3. The circumstances of the defendant's conduct showed utter disregard[5] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[6] and, all other facts and circumstances relating to the conduct.

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[7]

[Consider also the defendant's conduct after the great bodily harm to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the great bodily harm occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense were present, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1250 was originally published in 1962 and revised in 1989, 2002, and 2012 and 2015. The 2012 revision added the material at footnote 7. The 2015 revision revised footnote 4 to reflect

2013 Wisconsin Act 307. The Comment was updated in April 2019. A "Reporter's Note" was removed in 2020.

This instruction is for a violation of § 940.23(1), as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The amended statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

First degree reckless injury replaces what was called "injury by conduct regardless of life" under prior law.

The homicide revision also created § 940.23(2), Second Degree Reckless Injury. See Wis JI Criminal 1252.

In State v. Kloss, 2019 WI App 13, 386 Wis.2d 314, 925 N.W.2d 563, the court of appeals held that solicitation of first-degree reckless injury is a crime and that solicitation of first degree recklessly endangering safety is a lesser included offense thereof.

1. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

2. See § 939.22(14) and Wis JI-Criminal 914.

3. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

4. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been

aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information."

5. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

First-degree reckless homicide is analogous to the prior offense of 2nd-degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness, is required for liability. See s. 939.24, stats. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).

Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to aggravated reckless homicide offense.

A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further clarified." Attempts to explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978); Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); and Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15, 339 Wis.2d 170, 810 N.W.2d 226, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

6. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

> Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). Under this revision, the analogs of those crimes, i.e., first-degree reckless and 2nd-degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01(3), stats., are inapplicable.
>
> Judicial Council Note to § 940.02, 1987 Senate Bill 191.

7. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

> ¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

> ¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The committee decided it was not necessary to include a reference to conduct before or

during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.

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1252 SECOND DEGREE RECKLESS INJURY — § 940.23(2)

Statutory Definition of the Crime

Second degree reckless injury, as defined in § 940.23(2) of the Criminal Code of Wisconsin, is committed by one who recklessly causes great bodily harm to another human being.

State's Burden of Proof

Before you may find the defendant guilty of second degree reckless injury, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim) .

   "Cause" means that the defendant's act was a substantial factor in producing great bodily harm.[1]

   "Great bodily harm" means serious bodily injury.[2] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

2. The defendant caused great bodily harm by criminally reckless conduct.

   "Criminally reckless conduct" means:[3]

   - the conduct created a risk of death or great bodily harm to another person; and

- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[4]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense were present, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1252 was originally published in 1989 and revised in 2002. This revision was approved by the Committee in March 2015; it revised footnote 4 to reflect 2013 Wisconsin Act 307.

This instruction is for a violation of § 940.23(2), created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

1. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

2. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

3. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

4. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.
>
> The Judicial Council Note to subsection (3) explains it as follows:
>
> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

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1255 STRANGULATION AND SUFFOCATION — § 940.235

Statutory Definition of the Crime

Section 940.235 of the Criminal Code of Wisconsin is violated by one who intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant impeded the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of (name of victim).

2. The defendant did so intentionally.

   This requires that the defendant acted with the mental purpose to impede normal breathing or circulation of blood or was aware that (his) (her) conduct was practically certain to cause that result.[1]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

> ADD THE FOLLOWING QUESTION IF THE DEFENDANT HAS A PREVIOUS CONVICTION UNDER § 939.632(1)(e)1 AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACTOR IS ESTABLISHED[2]

If you find the defendant guilty, you must answer the following question(s):

[Did the defendant have a previous conviction for (identify the crime)[3] ?]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1255 was originally published in 2009. The comment was revised in 2014. This revision was approved by the Committee in October 2021; it added the penalty-increasing special question. It also added to the Comment.

This instruction addresses violations of § 940.235, created by 2007 Wisconsin Act 127 [effective date: April 4, 2008].

1. Section 939.23(3). Also see Wis JI-Criminal 923A and B.

2. Section 940.235(2) provides that this offense is a Class G felony if "the actor has a previous conviction under this section or a previous conviction for a violent crime, as defined in § 939.632(1)(e)1." Violent crimes defined in s. 939.632(1)(e)1. are felonies under 34 specified statutes.

The statutorily-authorized penalty-increasing provision in subsection (2) requires proof of a prior conviction. Therefore, the fact that the defendant was convicted of a "violent crime" under § 939.632(1)(e)1. must be found by the jury. For example, in State v. Warbelton, 2009 WI 6, ¶3, 315 Wis.2d 253, 759 N.W.2d 557, the Wisconsin Supreme Court held that a prior conviction for a violent crime under § 940.32(2m)(a) "is an element of the stalking crime, rather than a penalty enhancer." The Committee concluded that presenting the penalty-increasing fact as a special question, as done in this instruction, is not inconsistent with its status as an element of the crime.

Warbelton also held that if a defendant stipulates to the existence of the prior conviction, the prior conviction element is still to be presented to the jury in the absence of a jury trial waiver on that element. In the Warbelton case, the parties stipulated to the fact of prior conviction. The stipulation was accepted, but the state refused to consent to a jury trial waiver on the prior conviction element. The Wisconsin Supreme Court held the trial court did not err in submitting the element to the jury. The Court held that State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997), which allows withdrawal of the "status element" in a case involving a charge of operating with a prohibited alcohol concentration, is limited to prosecutions for driving while under the influence of an intoxicant or with a prohibited alcohol concentration. For a discussion of stipulations that go to elements of the crime and jury trial waivers in that context, see Wis JI-Criminal 162A, Law Note: Stipulations.

3. The applicable crimes are: a "violent crime" as defined in § 939.632(1)(e)1.

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1260 INJURY BY NEGLIGENT HANDLING OF A DANGEROUS WEAPON — § 940.24[1]

Statutory Definition of the Crime

Injury by negligent handling of a dangerous weapon, as defined in § 940.24 of the Criminal Code of Wisconsin, is committed by one who causes bodily harm to another human being by the negligent operation or handling of a dangerous weapon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated or handled a dangerous weapon.
2. The defendant operated or handled[2] a dangerous weapon in a manner constituting criminal negligence.
3. The defendant's operation or handling of a dangerous weapon caused bodily harm to (name of victim).

"Cause" means that criminal negligence by the defendant was a substantial factor in producing bodily harm.[3]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

Meaning of "Dangerous Weapon"

"Dangerous weapon" means[5]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.[6]]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.[7]][8]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Meaning of "Criminal Negligence"

"Criminal negligence" means:[9]

- the defendant's operation or handling of a dangerous weapon created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) operation or handling of a dangerous weapon created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1260 was originally published in 1963 and revised in 1986, 1988 and 2000. This revision was approved the Committee in February 2011 and involved adding reference to 2011 Wisconsin Act 2 to the Comment and reorganizing the definitions in the text.

This instruction is for a violation of § 940.24, as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The amended statute applies to offenses committed on or after January 1, 1989, and this instruction replaces Wis JI-Criminal 1260 (8 1989) for offenses committed after that date. For a discussion of the homicide revision generally, and of the offense covered by this instruction, see the Introductory Comment at Wis JI-Criminal 1000.

2011 Wisconsin Act 2 amended § 940.24 to add an exception by creating subsection (3) to read:

> (3) Subsection (1) does not apply to a health care provider acting within the scope of his or her practice or employment.

"Health care provider" is defined in one other Criminal Code statute. Section 940.20(7)(a)3. provides: "'Health care provider' means any person who is licensed, registered, permitted or certified by the department of health services or the department of regulation and licensing to provide health care services in this state." Note that § 940.24 applies only to criminal negligence in the "operation or handling of a dangerous weapon, explosives, or fire . . ." It is not obvious to the Committee how the exception for health care providers would relate to the elements of this offense.

The usual practice in Wisconsin is to treat statutory exceptions like affirmative defenses: If there is some evidence of the exception, the burden is on the state to prove that the exception does not apply. See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon, which recommends adding an element where there is a claim that the defendant was a peace officer; peace officers are subject to an exception from the ban on carrying concealed weapon in § 941.23.

1. The 1988 homicide revision amended the list of instrumentalities in § 940.24 by striking "firearm, airgun, knife or bow and arrow" and replacing those terms with "dangerous weapons, explosives or fire."

The Judicial Council Note to § 940.24 (1987 Senate Bill 191) indicates that the intent was not to eliminate any of the previously mentioned instrumentalities:

> The definition of the offense is broadened to include highly negligent handling of fire, explosives and dangerous weapons other than a firearm, airgun, knife or bow and arrow. See s. 939.22(10), stats.

2. In State v. Bodoh, 226 Wis.2d 718, 595 N.W.2d 330 (1999), the Wisconsin Supreme Court concluded that § 940.24 could apply to a case where the defendant's dogs caused injury to a fourteen-year-old boy who was riding a bicycle. The decision resorted to the dictionary to conclude that Bodoh did not "operate" his dogs because a person normally has to be present to "perform a function with a dog or to control the functioning of a dog." However, the court found that a person need not be physically present to "handle" a dog: Bodoh handled the dogs because he "was responsible for supervising, directing, and controlling his dogs." 226 Wis.2d 718, 731.

3. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient in most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in s. 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

6. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

7. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

8. A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, ¶62.

In light of Tomlinson, the Committee concluded that the definition of "dangerous weapon" in the instructions should be revised to include all the statutory alternatives in the text of the instruction. The alternative to be used in a case like Tomlinson would be the following:

"Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

9. The instruction on criminal negligence is based on the definition provided in § 939.25. The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

10. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

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1261 INJURY (GREAT BODILY HARM) BY NEGLIGENT USE OF A VEHICLE — § 940.245

[INSTRUCTION RENUMBERED – SEE WIS JI-CRIMINAL 2654]

COMMENT

Wis JI-Criminal 1261 was originally published in 1986. It was renumbered Wis JI-Criminal 2654 in 1988.

Section 940.245 was repealed by 1987 Wisconsin Act 399 and recreated as subsection (4) of 346.62, Reckless Driving. The change was made as part of the revision of the homicide and related statutes which had an effective date of January 1, 1989. Wis JI-Criminal 2654 is to be used in place of Wis JI-Criminal 1261 for offenses committed on or after that date.

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1262 INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE — § 940.25(1)(a)

Statutory Definition of the Crime

Section 940.25(1)(a) of the Criminal Code of Wisconsin is violated by one who causes great bodily harm to another by the operation of a vehicle while under the influence of an intoxicant.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle.[3]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[4]

2. The defendant's operation of a vehicle caused great bodily harm to (name of victim) .

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[5] in producing great bodily harm.

   "Great bodily harm" means serious bodily injury.[6] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which

causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

3. The defendant was under the influence of an intoxicant at the time the defendant operated a vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was materially impaired because of consumption of an alcoholic beverage.[7]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be materially impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[8]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[9]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[10] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[11] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[12]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2), USE THE FOLLOWING CLOSING:[13]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2),[14] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the great bodily harm would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[15] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[16]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[17] does not by itself provide a defense to the crime charged against the defendant.[18] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the great

bodily harm would have occurred even if the defendant had not been under the influence of an intoxicant and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[19]]

COMMENT

Wis JI-Criminal 1262 was originally published in 1978 and revised in 1982, 1986, 1988, 1993, 2004, and 2006. This revision was approved by the Committee in February 2014.

This instruction is drafted for violations of § 940.25(1)(a), causing great bodily harm while operating under the influence an intoxicant. For cases involving great bodily harm to an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

See Wis JI-Criminal 1263 for the related offense involving a prohibited alcohol concentration [PAC] of .08 or more. For persons with three or more priors, the PAC level is .02. See Wis JI-Criminal 1263A. For cases involving two charges – under the influence and PAC – Wis JI-Criminal 1189 can be used as a model.

Section 940.25(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and he or she had not been under the influence . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 14 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 1188, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. This instruction is drafted for cases involving the influence of an intoxicant, which is defined to include "an alcohol beverage, hazardous inhalant, . . . a controlled substance or controlled substance analog under ch. 961, . . . any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or . . . any other drug, or . . . an alcohol beverage and any other drug." See § 939.22(42) in note 7, below. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

2. Section 940.25 refers only to "operation" of a vehicle. It does not include "handling" as the statute defining the otherwise identical homicide offense does. [Compare § 940.09.]

3. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

4. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

6. The Committee concluded that defining "great bodily harm" as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. See Wis JI-Criminal 914 for a complete discussion of "great bodily harm."

7. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. The definition in the instruction paraphrases the full definition provided in § 939.22(42):

> "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.

Note: "hazardous inhalant" was added to the definition in § 939.22(42) by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013]. Act 83 also created a definition of "hazardous inhalant" in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

8. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. It may be that cases will be charged under § 940.09(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

10. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

14. See note 13, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

15. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

16. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

17. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's

conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

18. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 16, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

19. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

1263 INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.08 GRAMS OR MORE — § 940.25(1)(b)

Statutory Definition of the Crime

Section 940.25(1)(b) of the Criminal Code of Wisconsin is violated by one who causes great bodily harm to another by the operation of a vehicle while that person has a prohibited alcohol concentration.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle.[3]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[4]

2. The defendant's operation of a vehicle caused great bodily harm to (name of victim) .

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[5] in producing the great bodily harm.

   "Great bodily harm" means serious bodily injury.[6] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which

causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

3. The defendant had a prohibited alcohol concentration at the time the defendant operated a vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[7]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[8]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[9] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[10] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of

all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[11]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2), USE THE FOLLOWING CLOSING:[12]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2),[13] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the great bodily harm would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[14] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[15]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[16] does not by itself provide a defense to the crime charged against the defendant.[17] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the great bodily harm would have occurred even if the defendant had not had a prohibited alcohol concentration and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[18]]

COMMENT

Wis JI-Criminal 1263 was originally published in 1982 and revised in 1986, 1988, 1993, and 2004. This revision was approved by the Committee in June 2005.

This instruction is drafted for violations of § 940.25(1)(b) involving a prohibited alcohol concentration [PAC] of .08 or more. The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003. For persons with three or more priors, the PAC level is .02. See Wis JI-Criminal 1263A.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

For cases involving great bodily harm to an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

See Wis JI-Criminal 1262 for the related offense of causing great bodily harm while operating under the influence, as defined in § 940.25(1)(a). For cases involving two charges – operating under the influence and with a PAC – Wis JI-Criminal 1189 can be used as a model.

Section 940.25(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 13 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 1188, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Section 940.25(1)(b) defines this offense as causing death by operation or handling a vehicle "while the person has a prohibited alcohol concentration as defined in s. 340.01(46m)." Section 340.01(46m), as amended by 2003 Wisconsin Act 30 [effective date: September 30, 2003], provides as follows:

(46m) "Prohibited alcohol concentration" means one of the following:
(a) If the person has 2 or fewer prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of 0.08 or more.
[(b) – repealed]

(c) If the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of more than 0.02.

Section 340.01(1v) defines "alcohol concentration" as follows:

(1v) "Alcohol concentration" means any of the following:

(a) The number of grams of alcohol per 100 milliliters of a person's blood.
(b) The number of grams of alcohol per 210 liters of a persons's breath.

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the third element. It then provides for using the appropriate measure of alcohol concentration – blood alcohol or alcohol in the breath – in the definition of the third element. For cases involving 0.02 level, see Wis JI-Criminal 1263A.

2. Section 940.25 refers only to "operation" of a vehicle. It does not include "handling" as the statute defining the otherwise identical homicide offense does. [Compare § 940.09.]

3. Section 939.22(44) defines "vehicle" as follows:

"Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

4. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

6. The Committee concluded that defining "great bodily harm" as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. See Wis JI-Criminal 914 for a complete discussion of "great bodily harm."

7. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

8. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

13. See note 12, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

14. Section 940.25(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

15. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See JI 2600 Introductory Comment, Sec. X.

16. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

17. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 15, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

18. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1263A INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.02 GRAMS OR MORE — § 940.09(1)(b)

Statutory Definition of the Crime

Section 940.25(1)(b) of the Criminal Code of Wisconsin is violated by one who causes great bodily harm to another by the operation of a vehicle while that person has a prohibited alcohol concentration.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [three] [four][2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[3] a vehicle.[4]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[5]

2. The defendant's operation of a vehicle caused great bodily harm to (name of victim) .

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[6] in producing great bodily harm.

   "Great bodily harm" means serious bodily injury.[7] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which

causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

3. The defendant had a prohibited alcohol concentration at the time the defendant operated a vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[8]

[.02 grams or more of alcohol in 210 liters of the person's breath].

[.02 grams or more of alcohol in 100 milliliters of the person's blood].

NOTE: THE DEFENDANT'S ADMISSION OF THREE OR MORE PRIOR CONVICTIONS DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THIS ELEMENT AND PROCEED TO THE PARAGRAPH CAPTIONED "HOW TO USE THE TEST RESULT EVIDENCE."[9]

[4. The defendant had three or more convictions, suspensions, or revocations, as counted under § 343.307(1).][10]

IF THE FOURTH ELEMENT IS INCLUDED AND IF REQUESTED BY THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:[11]

[Evidence has been received that the defendant had prior convictions, suspensions, or revocations. This evidence was received as relevant to the status of the defendant's driving record, which is an issue in this case. It must not be used for any other purpose and, particularly, you should bear in mind that conviction,

suspension, or revocation at some previous time is not proof that the defendant operated a motor vehicle with a prohibited alcohol concentration on this occasion.]

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[12]

IF AN APPROVED TESTING DEVICE TEST IS INVOLVED, THE FOLLOWING MAY BE ADDED:[13]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2), USE THE FOLLOWING CLOSING:[14]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2),[15] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the great bodily harm would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[16] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[17]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[18] does not by itself provide a defense to the crime charged against the defendant.[19] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the great bodily harm would have occurred even if the defendant had not had a prohibited alcohol concentration and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[20]]

COMMENT

This instruction was originally published as Wis JI-Criminal 1263.1 in 1992. In 1998, it was revised and renumbered Wis JI-Criminal 1263A. This revision was approved by the Committee in February 2004.

This instruction has been revised for use for violations of § 940.25(1)(b) involving a prohibited alcohol concentration level [PAC] of .02 or more, which applies to persons with three or more priors. See § 340.01(46m)(c), created by 1999 Wisconsin Act 109. [Effective date: January 1, 2001.]

The fact of having three or more priors is included as a bracketed fourth element in this instruction. It is an element because the existence of priors changes the substantive definition of the crime from an alcohol concentration of .08 or more to one of .02 or more. It is in brackets because it is not to be submitted to the jury if the defendant admits having the priors. See footnotes 2 and 9, below. When priors change the offense from a forfeiture to a crime or increase the criminal penalty, they need not be submitted to the jury. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

The instruction previously published as Wis JI-Criminal 1263A dealt with a PAC of .08 or more. 2003 Wisconsin Act 30 changed the generally applicable PAC level to .08 or more for persons with 2 or fewer prior convictions, suspensions or revocations, as counted under § 343.307(1). [Effective date: September 30, 2003.] Wis JI-Criminal 1263 has been revised to apply to those cases.

See Wis JI-Criminal 1262 for the related offense of causing great bodily harm while operating under the influence, as defined in § 940.25(1)(a). For cases involving two charges – operating under the influence and with a PAC – Wis JI-Criminal 1189 can be used as a model.

For cases involving great bodily harm to an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

Section 940.25(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 15 and following. Regarding the defense, see Wis JI-Criminal 2600 Introductory Comment, Sec. X.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the statutory definition of "prohibited alcohol concentration," see note 1, Wis JI-Criminal 1263.

2. The instruction is drafted to allow for use with either three or four elements, depending on whether the fourth element, relating to the defendant having three or more prior convictions, suspensions or revocations, is submitted to the jury. See discussion at note 9, below.

3. Section 940.25 refers only to "operation" of a vehicle. It does not include "handling" as the statute defining the otherwise identical homicide offense does. [Compare § 940.09.]

4. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

7. The Committee concluded that defining "great bodily harm" as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. See Wis JI-Criminal 914 for a complete discussion of "great bodily harm."

8. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

9. The fourth element has been placed in brackets because the Committee concluded that the "status element" of this offense must be addressed in the same manner as for .08 offenses under the version of the law addressed in State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997). In Alexander, the Wisconsin Supreme Court referred to this element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions or revocations [the relevant number under prior law], the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 628, 646. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 628, 651. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 628, 649-50.

The court gave explicit direction to the trial courts as to how to handle this situation:

> "When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant

was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The 'prohibited alcohol concentration' means 0.08 . . ." 214 Wis.2d 628, 651-52.

By placing the "status element" in brackets, the Committee intends to implement the approach approved in Alexander. If the defendant admits the "status element", the instruction should be given with three elements: causing death, by operating a vehicle, and, having an alcohol concentration of more than .02. If the defendant does not admit the "status element", the instruction should be given with a fourth element: having three or more prior convictions, suspensions or revocations as counted under § 343.307(1).

Because the defendant's admission removes an element from the jury's consideration, the record should reflect the defendant's acknowledgment that a jury determination is, in effect, being waived on the "status element."

10. This element is not to be included if the defendant admits the priors. See note 9, supra.

The text of the fourth element is based on the definition of "prohibited alcohol concentration" in § 340.01(46m)(b). The types of convictions, suspensions, and revocations that are counted under § 343.307(1) are convictions for operating while intoxicated or suspensions or revocations for refusal to submit to chemical tests for alcohol. The priors may include offenses in other jurisdictions. The text of § 343.307(1) is provided in Wis JI-Criminal 2600 Introductory Comment.

The Committee concluded that the instruction should use the statutory language "as counted under § 343.307(1)" because evidence of the defendant's driving record will usually be submitted with testimony that the prior offenses are those that are counted under the statute.

11. Making the fact of prior convictions, etc., an issue for the jury creates the possibility that a jury may make improper use of the evidence relating to the defendant's driving record. Therefore, upon request, an instruction should be given on the limited use to be made of the driving record evidence. In State v. Ludeking, 195 Wis.2d 132, 536 N.W.2d 119 (Ct. App. 1995), the court pointed to this cautionary paragraph as a way to offset the inevitable prejudicial impact of presenting this evidence to the jury.

12. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

14. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

15. See note 14, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

16. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

17. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

18. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

19. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 17, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

20. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

1264 FAILURE TO SUPPORT — § 940.27

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1264 was originally published in 1985. It was withdrawn in 1989.

This instruction is withdrawn because the statute with which it deals was renumbered by 1987 Wisconsin Act 332, effective July 1, 1989. For offenses occurring on or after July 1, 1989, see Wis JI-Criminal 2152 which applies to violations of § 948.22.

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1265 ABANDONMENT OF A YOUNG CHILD — § 940.28

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1265 was originally published in 1969 and was revised in 1980. It was withdrawn in 1989.

This instruction was withdrawn because the statute with which it deals was renumbered and revised by 1987 Wisconsin Act 332, effective July 1, 1989. The offense was recreated as § 948.20. See Wis JI-Criminal 2148.

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1266 INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE — § 940.25(1)(am)

Statutory Definition of the Crime

Section 940.25(1)(am) of the Criminal Code of Wisconsin is violated by one who causes great bodily harm to another by the operation of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a vehicle.[1]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[2]

2. The defendant's operation of a vehicle caused great bodily harm to (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[3] in producing great bodily harm.

   "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or

protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[4]

3. The defendant had a detectable amount of a restricted controlled substance[5] in his or her blood at the time the defendant operated a vehicle.

(Name restricted controlled substance) is a restricted controlled substance.[6]

GIVE THE FOLLOWING IF DELTA-9-TETRAHYDROCANNABINOL IS THE ALLEGED RESTRICTED CONTROLLED SUBSTANCE.

[Delta 9 tetrahydrocannabinol is considered a restricted controlled substance if it is at a concentration of one or more nanograms per milliliter of a person's blood.]

How to Use the Test Result Evidence

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the operating.[7]

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied beyond a reasonable doubt that there was a detectable amount of (name restricted controlled substance) in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the operating but you are not required to do so. You the jury are here to decide this question on the basis of

all the evidence in this case, and you should not find that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the alleged operating unless you are satisfied of that fact beyond a reasonable doubt.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2), USE THE FOLLOWING CLOSING:[8]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2),[9] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the great bodily harm would have occurred even if the defendant had been exercising due care and had not had a detectable amount of (name restricted controlled substance) in his or her blood.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[10] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[11]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[12] does not by itself provide a defense to the crime charged against the defendant.[13] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the great bodily harm would have occurred even if the defendant had not had a detectable amount of (name restricted controlled substance) in his or her blood.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[14]]

COMMENT

Wis JI-Criminal 1266 was approved by the Committee in June 2010. This revision was approve by the Committee in August 2020; it added an alternative element to the instruction and to footnotes 6 and 7 based on 2019 Wisconsin Act 68.

This instruction is drafted for violations of § 940.25(1)(am), causing great bodily harm while operating a vehicle with a detectable amount of a restricted controlled substance. The statute was created by 2003

Wisconsin Act 97 and applies to offenses committed on or after the Act's effective date: December 19, 2003. For a general discussion of Act 97, see Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

Section 940.25(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and . . . he or she did not have a detectable amount of a restricted controlled substance in his or her blood . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 8 and following. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Section 939.22(44) defines "vehicle" as follows:

"Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

2. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

There may be more than one cause of great bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 8, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause as required by the second element. If the defendant's operation caused the great bodily harm, the defense allows the defendant to avoid liability if it is established that the great bodily harm would have occurred even if the defendant had not been operating "with a detectable amount" and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI Criminal 2600 Introductory Comment, Sec. X.

4. See § 939.22(14) and Wis JI Criminal 914.

5. The Committee suggests that the name of the restricted controlled substance be used throughout the instruction. See note 1, supra.

6. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a detectable amount of the substance in his or her blood remains a jury question.

Section 340.01(50m) defines "restricted controlled substance" as follows:

(50m) 'Restricted controlled substance' means any of the following:

(a) A controlled substance included in schedule I other than tetrahydrocannabinol.
(b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
(c) Cocaine or any of its metabolites.
(d) Methamphetamine.
(e) Delta 9 tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person's blood.

2019 Act 68 amended the definition of delta-9-tetrahydrocannabinol to require that delta-9-tetrahydrocannabinol be at a concentration of one or more nanograms per milliliter of a person's blood. Prior to Act 68, the statute required only a detectable amount of delta-9-tetrahydrocannabinol.

7. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI-Criminal 2663. [The Committee's general approach to instructing on test results is discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper to use it for tests in "restricted controlled substance" cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for "detectable amount of a restricted controlled substance" cases is not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

As for the admissibility of evidence concerning the concentration of delta-9- tetrahydrocannabinol in a person's blood, sec. 885.235(5), created by 2019 Wisconsin Act 68, reads as follows:

> [t]he only form of chemical analysis of a sample of human biological material that is admissible as evidence bearing on the question of whether or not the person had delta-9-tetrahydrocannabinol at a concentration of one or more nanograms per milliliter of the person's blood is a chemical analysis of a sample of the person's blood.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests, reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of driving;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test

with having a detectable amount at the time of driving.

As to the second difference – admissibility – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence" strongly implies that the analysis is admissible. As to the third difference – connection with the time of driving – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence on the issue of the person having . . ." may express a legislative intent that the analysis be admissible to prove the material issue "that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . ." as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the "prima facie" effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue which it is offered to prove.

8. Section 940.25(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI Criminal 2600 Introductory Comment, Sec. X.

9. See note 8, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

10. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

11. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

12. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

13. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the

bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 11, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

14. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

1268 ABUSE OF INDIVIDUALS AT RISK — § 940.285

Statutory Definition of the Crime

Abuse of individuals at risk, as defined in § 940.285 of the Criminal Code of Wisconsin, is committed by one[1] who [(intentionally) (recklessly) (negligently)] subjects an individual at risk to abuse under circumstances that (are likely to) cause [death] [great bodily harm] [(bodily harm)].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was an individual at risk at the time of the alleged offense.

   CHOOSE ONE OF THE FOLLOWING DEFINITIONS

   ["Individual at risk" means a person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.][2]

   ["Individual at risk" means an adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.][3]

2. The defendant subjected (name of victim) to [physical abuse] [emotional abuse] [sexual abuse] [treatment without consent] [unreasonable confinement or restraint] [deprivation of a basic need].[4]

CHOOSE ONE OF THE FOLLOWING DEFINITIONS

["Physical abuse" means the intentional or reckless infliction of bodily harm.[5] "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[6]]

["Emotional abuse" means language or behavior that serves no legitimate purpose and is intended to be intimidating, humiliating, threatening, frightening, or otherwise harassing, and that does or reasonably could intimidate, humiliate, threaten, frighten, or otherwise harass the individual to whom the conduct or language is directed.][7]

["Sexual abuse" means sexual assault as defined in section 940.225 of the Wisconsin Statutes.][8]

["Treatment without consent" means the administration of medication to an individual who has not provided informed consent, or the performance of psychosurgery, electroconvulsive therapy, or experimental research on an individual who has not provided informed consent, with the knowledge that no lawful authority exists for the administration or performance."][9]

["Unreasonable confinement or restraint" includes the intentional and unreasonable confinement of an individual in a locked room, involuntary separation of an individual from his or her living area, use on an individual of physical restraining devices, or the provision of unnecessary or excessive medication to an individual, but does not include the use of these methods or devices in entities regulated by the department if the methods or devices are employed in conformance with state and federal standards governing confinement and restraint.][10]

["Deprivation of a basic need" means deprivation of a basic need for food, shelter, clothing, or personal or health care, including deprivation resulting from the failure to provide or arrange for a basic need by a person who has assumed responsibility for meeting the need voluntarily or by contract, agreement, or court order.][11]

3. The defendant acted (intentionally) (recklessly) (negligently).

["Intentionally" means that the defendant acted with the mental purpose to subject (name of victim) to abuse or was aware that (his)(her) conduct was practically certain to cause that result. "Intentionally" also requires that the defendant knew that (name of victim) was an individual at risk .][12]

["Recklessly" means conduct that creates a situation of unreasonable risk of harm and demonstrates a conscious disregard for the safety of the individual at risk.][13]

["Negligently" means that the defendant acted in a manner constituting criminal negligence. (ADD WIS JI-CRIMINAL 925 CRIMINAL NEGLIGENCE).][14]

4. The defendant (intentionally) (recklessly) (negligently) subjected an individual at risk to abuse under circumstances that [(were likely to cause) (caused)] [(death) (great bodily harm) (bodily harm)].[15]

["Cause" means that the defendant's conduct was a substantial factor in producing (death) (great bodily harm) (bodily harm).][16]

["Great bodily harm" means serious bodily injury.][17]

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.][18]

[ADD THE FOLLOWING FOR CASES INVOLVING INTENTIONAL ABUSE]

[Deciding About Intent and Knowledge]

[You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1268 was originally published in 1986 and revised in 1998 and 2003. This revision was approved by the Committee in December 2006; it reflects changes made by 2005 Wisconsin Acts 264 and 388.

The 2007 revision reflected changes made to §940.285 by 2005 Wisconsin Acts 264 and 388. The primary changes were to replace "vulnerable adult" with "individual at risk" and "maltreatment" with "abuse," adding new definitions for the latter. Act 388 also created an exception in sub. (1m): "Nothing in this section may be construed to mean that a vulnerable adult [sic] is abused solely because he or she consistently relies upon treatment by spiritual means through prayer for healing, in lieu of medical care, in accordance with his or her religious traditions."

Section 940.285 recognizes a variety of harms and a variety of mental states. The Committee concluded that the best way to address the considerable complexity that has resulted is to provide a single model instruction which can be modified to refer to the appropriate mental state and degree of harm. This has resulted in the use of many brackets and parentheses. To illustrate that the instruction becomes simpler when proper selection of alternatives is made, an example is provided at Wis JI-Criminal 1268 EXAMPLE.

Section 940.285, as amended by 2005 Wisconsin Acts 264 and 388, defines the following offenses.

Offense	Penalty
Intentionally or recklessly subject an individual at risk to abuse and cause death	Class C felony [sub. (2)(b)1g.]
Negligently subject an individual at risk to abuse and cause death	Class D felony [sub. (2)(b)1g.]
Intentionally, recklessly, or negligently subject an individual at risk to abuse and cause great bodily harm	Class F felony [sub. (2)(b)1m.]
Intentionally subject an individual at risk to abuse under circumstances likely to cause great bodily harm	Class G felony [sub.(2)(b)1r.]
Recklessly or negligently subject an individual at risk to abuse under circumstances likely to cause great bodily harm	Class I felony [sub.(2)(b)1r.]
Intentionally subject an individual at risk to abuse under circumstances that cause bodily harm	Class H felony [sub. (2)(b)2.]
Intentionally subject an individual at risk to abuse under circumstances likely to cause bodily harm	Class I felony [sub. (2)(b)2.]

Recklessly or negligently subject an individual at risk to abuse under circumstances that cause or are likely to cause bodily harm	Class A misdr. [sub. (2)(b)4.]
Intentionally, recklessly, or negligently subject an individual at risk to abuse under circumstances not causing and not likely to cause bodily harm	Class B misdr. [sub. (2)(b)5.]

Because the statute defines so many different offenses, there is the potential for a variety of lesser included offense questions.

One potential question is easily resolved: a special subsection of § 939.66 provides that all less serious violations of § 940.285 are included offenses of more serious violations. See § 939.66(6c).

Two general categories of variables govern the lesser included offense possibilities. First, there may be a different mental state: the statute provides three alternatives: subjecting an individual at risk to abuse intentionally, recklessly, or negligently. Second, the abuse may have occurred under circumstances involving different levels of harm: causing death, great bodily harm, or bodily harm; likely to cause great bodily harm or bodily harm; and not causing and not likely to cause bodily harm.

Presenting lesser included offenses in a way that will be understandable to the jury is a challenge. One approach would be the traditional long form, whereby a complete instruction on the charged offense would be followed by a complete instruction on each applicable lesser included offense. This has the serious disadvantage of resulting in a set of instructions that might be very long and repetitious. However, depending on the lessers and the complexity of their relationship to the charged crime, this may be the most effective way to approach the problem.

The other approach would be take the shorter approach described in Wis JI-Criminal 112A: specifying the difference between the charged crime and the lesser included crime and instructing the jury on that difference.

1. Before being amended by 2005 Wisconsin Act 264, section 940.285 applied to "any person, other than a person in charge of or employed in any facility enumerated in § 940.29 or in a facility or program under s. 940.295(2). . . ." The amended statute lacks any reference to the persons to whom it applies, except for the reference to "any person " in sub. (2)(b).

2. Section 940.285(1)(dg) provides: "'Individual at risk' means an elder adult at risk or an adult at risk" and cross references the definition of "elder adult at risk" in s. 46.90(1)(br). The definition in the instruction is the definition provided in s. 46.90(1)(br) without change.

3. Section 940.285(1)(dg) provides: "'Individual at risk' means an elder adult at risk or an adult at risk" and cross references the definition of "adult at risk" in s. 55.01(1e). The definition in the instruction is the definition provided in s. 55.01(1e) without change.

4. Section 940.285(1)(ag) provides that "abuse" means any of the alternatives listed in subds. 1. - 6. Of that statute and provides cross references to other statutes for definitions of those alternatives. The applicable alternative should be selected and the appropriate definition used.

5. The definition of "physical abuse" is the one provided in § 46.90(1)(fg), which applies because cross referenced in § 940.285(1)(ag)1.

6. This is the definition provided in § 939.22(4) and in § 46.90(1)(aj). The term may also be used as part of the fourth element.

7. The definition of "emotional abuse" is the one provided in § 46.90(1)(cm), which applies because cross referenced in § 940.285(1)(ag)2.

8. The definition of "sexual abuse" is a paraphrase of the one provided in § 46.90(1)(gd), which applies because cross referenced in § 940.285(1)(ag)3. Section 46.90(1)(gd) states: "'Sexual abuse' means a violation of s. 940.225(1), (2), (3), or (3m)." Definition of the applicable sexual assault offense should be included.

9. The definition of "treatment without consent" is the one provided in § 46.90(1)(h), which applies because cross referenced in § 940.285(1)(ag)4. Select the part of the definition that applies to the case.

10. The definition of "unreasonable confinement or restraint" is the one provided in § 46.90(1)(I), which applies because cross referenced in § 940.285(1)(ag)5. Select the part of the definition that applies to the case.

11. This is definition provided in subd. 6. of s. 940.285(1)(ag).

12. This is based on the general definition of "intentionally" provided in § 939.23(3).

13. This definition of "recklessly" is the one provided in § 940.285(1)(dm). It differs from the general definition of "recklessness" in § 939.24 in several respects. First, it refers to risk of harm; the § 939.24 definition is limited to risks of great bodily harm or death. Second, it refers only to an "unreasonable" risk; § 939.24 requires an unreasonable "and substantial" risk. Third, it refers to "conscious disregard for the safety"; § 939.24 refers to being "aware of the risk." The latter is not believed to be a substantive difference – "conscious disregard" was used in the definition of reckless homicide before the revision in 1989 when it was changed to clarify that a subjective mental state was required.

Note: The definition in § 940.285(1)(dm) continues to refer to "vulnerable adult." That term was replaced by "individual at risk" elsewhere in the statute.

14. Wis JI-Criminal 925 provides a standard definition of "criminal negligence" based on the one provided in § 939.25. That definition applies whenever a criminal statute uses the term "negligent" or "negligently." [See § 939.25(2).] Section 940.285(2)(a)3. contains the phrase: "negligently subjects an individual at risk to abuse."

15. Here insert the appropriate level of harm from the options provided in § 940.285(2)(b). The different levels and the associated penalties are summarized in the Comment preceding footnote 1.

16. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

17. See § 939.22(14) and Wis JI-Criminal 914.

18. This is the definition provided in § 939.22(4). There is no need to repeat the definition here if it has already been given as part of the second element.

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1268 EXAMPLE ABUSE OF INDIVIDUALS AT RISK: RECKLESSLY SUBJECTING AN INDIVIDUAL AT RISK TO ABUSE UNDER CIRCUMSTANCES THAT CAUSE GREAT BODILY HARM — § 940.285(2)(b)1.m.

Statutory Definition of the Crime

Abuse of individuals at risk, as defined in § 940.285 of the Criminal Code of Wisconsin, is committed by one who recklessly subjects an individual at risk to abuse under circumstances that cause great bodily harm.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was an individual at risk at the time of the alleged offense.

   "Individual at risk" means a person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.

2. The defendant subjected (name of victim) to physical abuse.

   "Physical abuse" means the intentional or reckless infliction of bodily harm. "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

3. The defendant acted recklessly.

"Recklessly" means conduct that creates a situation of unreasonable risk of harm and demonstrates a conscious disregard for the safety of the individual at risk.

4. The defendant recklessly subjected (name of victim) to abuse under circumstances that caused great bodily harm.

"Cause" means that the defendant's conduct was a substantial factor in producing great bodily harm.

"Great bodily harm" means serious bodily injury.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1268 EXAMPLE was originally published in 199 and revised in 2003. This revision was approved by the Committee in December 2006; it reflects changes made by 2005 Wisconsin Acts 264 and 388.

This instruction attempts to illustrate how the general model provided in Wis JI-Criminal 1268 would be applied to a violation of § 940.285 involving recklessly subjecting an individual at risk to abuse under circumstances causing great bodily harm. Reducing the general model to this example required electing the appropriate material from the many alternatives set forth in brackets and parentheses in Wis JI-Criminal 1268.

1269 RECKLESS ABUSE OF VULNERABLE ADULTS — § 940.285(2)(b)3

[INSTRUCTION WITHDRAWN]

COMMENT

This instruction was originally published in 1995. It was withdrawn in 1998 when § 940.285 was revised by 1997 Wisconsin Act 180. All violations of § 940.285 are now addressed by Wis JI-Criminal 1268.

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1270 ABUSE OF RESIDENTS OF PENAL FACILITIES — § 940.29

Statutory Definition of the Crime

Abuse of residents of penal facilities, as defined in § 940.29 of the Criminal Code of Wisconsin, is committed by one in charge of or employed in a penal or correctional institution or other place of confinement who abuses, neglects, or ill-treats a person confined in or a resident of that institution or place, or who knowingly permits another person to do so.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was (in charge of) (employed in) a facility.

2. (Name of victim) was (a resident of) (confined in) a facility.

3. The facility was a [(penal) (correctional) institution] [place of confinement].

   IF A STATUTE IDENTIFIES THE NATURE OF THE FACILITY, ADD THE FOLLOWING.[1]

   [(Name of facility) is a (penal) (correctional) institution.]

4. The defendant (did knowingly) (knowingly permitted[2] another person to) abuse, neglect, or ill-treat (name of victim) .

   The phrase "abuse, neglect, or ill-treat"[3] means any act or failure to act which causes unreasonable[4] suffering, misery, or physical harm to a resident.

[Reasonable conduct necessary for treatment or maintenance of order and discipline in the facility and deprivation incidental to confinement reasonably required by a sentence or commitment are not abuse, neglect, or ill treatment.][5]

Deciding About Knowledge

You cannot look into a person's mind to find out knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1270 was originally published in 1974 and revised in 1980, 1991, and 1994. This revision was approved by the Committee in April 2006 and involved adoption of a new format and nonsubstantive changes to the text.

Section 940.29 was amended by 1993 Wisconsin Act 445 (effective date: May 12, 1994) to apply only to "a penal or correctional institution or other place of confinement." The statute had applied to a long list of institutions and facilities. Those places are now covered by § 940.295, created by Act 445. See Wis JI-Criminal 1271, 1271 EXAMPLE, and 1272.

1. The Committee has concluded that the sentence in brackets is permissible as long as there is a statute providing that, for example, a county jail is a penal or correctional institution. See, for example, sec. 801.02(7)(a): ". . . A correctional institution includes a Type 1 prison, . . . , a Type 2 prison, . . ., a county jail and a house of correction." Thus, the element would read: "The Jones County Jail is a correctional institution."

2. A case involving the pre-1984 version of this statute was State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984). Serebin was charged under the "knowingly permitted" alternative. There was evidence in that case that staff members of a nursing home had advised the defendant of the various deficiencies in staffing

and food that were causing harm to the patients. The court found a sufficient causal connection between the failure to remedy the staff shortages and the harm to the patients to sustain the administrator's conviction.

3. The phrase "abuse, neglect, or ill-treat" is, in the Committee's judgment, intended to refer to a single concept involving the causing of unjustified harm to another rather than to state three different ways of committing the offense.

The definition of "abuse, neglect, or ill-treat" is adapted from the one found in the earlier version of Wis JI-Criminal 1270 (8 1974) which was used by the Wisconsin Supreme Court in State v. Serebin, supra, note 2, though not expressly approved. Serebin reviewed the sufficiency of the evidence in a case where the administrator of a nursing home was charged with knowingly permitting the abuse of nursing home residents. The court found that bedsores (which could have been prevented) constituted physical harm and weight loss caused by inadequate diet constituted suffering.

Also see s. 940.295(1)(k), which defines Aneglect@ for purposes of a related offense.

4. Some discomfort is likely to be unavoidable in any situation where a person is confined in one of the institutions covered by § 940.29. What is prohibited is the causing of harm that is unreasonable under the circumstances.

5. This paragraph is to be used when the evidence provides a basis for it. It is intended to give some explanation of the word "unreasonable" used in the preceding paragraph. It explains that some deprivation may be inherent in confinement in the facilities covered by the statute and that what is prohibited is the causing of suffering or physical harm that goes beyond that level.

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1271 ABUSE OF PATIENTS AND RESIDENTS — § 940.295

Statutory Definition of the Crime

Abuse of patients and residents, as defined in § 940.295 of the Criminal Code of Wisconsin, is committed by one [(in charge of) (employed in)] (name type of facility) [1] who [(intentionally) (recklessly) (negligently)] abuses a [(patient) (resident)] of that [(facility) (program)] (or who knowingly permits another person to do so)[2] under circumstances that (are likely to) cause [death] [great bodily harm] [bodily harm].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was (in charge of) (employed in) (name of facility) .[3]

2. (Name of victim) was a (patient)[4] (resident)[5] of (name of facility) .[6]

3. (Name of facility) was a (type of facility) .[7]

   [(Type of facility) means (use the applicable statutory definition, if any) .]

4. The defendant subjected[8] (name of victim) to [physical abuse] [emotional abuse] [sexual abuse] [treatment without consent] [unreasonable confinement or restraint].[9]

   CHOOSE ONE OF THE FOLLOWING DEFINITIONS

["Physical abuse" means the intentional or reckless infliction of bodily harm.[10] "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[11]]

["Emotional abuse" means language or behavior that serves no legitimate purpose and is intended to be intimidating, humiliating, threatening, frightening, or otherwise harassing, and that does or reasonably could intimidate, humiliate, threaten, frighten, or otherwise harass the individual to whom the conduct or language is directed.][12]

["Sexual abuse" means sexual assault as defined in section 940.225 of the Wisconsin Statutes.][13]

["Treatment without consent" means the administration of medication to an individual who has not provided informed consent, or the performance of psychosurgery, electroconvulsive therapy, or experimental research on an individual who has not provided informed consent, with the knowledge that no lawful authority exists for the administration or performance.][14]

["Unreasonable confinement or restraint" includes the intentional and unreasonable confinement of an individual in a locked room, involuntary separation of an individual from his or her living area, use on an individual of physical restraining devices, or the provision of unnecessary or excessive medication to an individual, but does not include the use of these methods or devices in entities

regulated by the department if the methods or devices are employed in conformance with state and federal standards governing confinement and restraint.][15]

5. The defendant acted (intentionally) (recklessly) (negligently).

["Intentionally" means that the defendant acted with the mental purpose to subject (name of victim) to abuse or was aware that (his)(her) conduct was practically certain to cause that result. "Intentionally" also requires that the defendant knew that (name of victim) was a (patient) (resident) (individual at risk).][16]

["Recklessly" means conduct that creates a situation of unreasonable risk of death or harm to and demonstrates a conscious disregard for the safety of the (patient) (resident).][17]

["Negligently" means that the defendant acted in a manner constituting criminal negligence. (ADD WIS JI-CRIMINAL 925 CRIMINAL NEGLIGENCE).][18]

6. The defendant [intentionally] [recklessly] [negligently] abused (name of victim) under circumstances that [(were likely to cause) (caused)] [death] [great bodily harm] [bodily harm].[19]

["Cause" means that the defendant's conduct was a substantial factor in producing (death) (great bodily harm) (bodily harm)].[20]

["Great bodily harm" means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.][21]

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.][22]

ADD THE FOLLOWING FOR CASES INVOLVING INTENTIONAL ABUSE

[Deciding About Intent and Knowledge]

[You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE DEFENDANT IS CHARGED WITH ABUSE OF A PATIENT OR RESIDENT WHO IS AN "INDIVIDUAL AT RISK":[23]

If you find the defendant guilty, you must answer the following question:

Was (name of victim) an individual at risk?

CHOOSE ONE OF THE FOLLOWING DEFINITIONS

["Individual at risk" means a person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.][24]

["Individual at risk" means an adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has

experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.][25]

If you are satisfied beyond a reasonable doubt that (name of victim) was an individual at risk, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1271 was originally published in 1995 and revised in 1999, 2003, 2007 and 2008. The 2007 revision reflected changes made by 2005 Wisconsin Acts 264 and 388. The 2008 revision updated statutory references in footnotes 23, 24, and 25 to reflect changes made by 2007 Wisconsin Act 45. This revision was approved by the Committee in February 2011 and involved adding reference to 2011 Wisconsin Act 2 to the Comment.

This instruction is drafted for offenses involving intentional, reckless or negligent abuse of patients or residents. The statute also prohibits intentional, reckless or simple neglect. If a case involves a charge of neglect as opposed to abuse, use Wis JI-Criminal 1272.

Section 940.295 recognizes a variety of harms and a variety of mental states. The Committee concluded that the best way to address the considerable complexity that has resulted is to provide a single model instruction which can be modified to refer to the appropriate mental state and degree of harm. This has resulted in the use of many brackets and parentheses. To illustrate that the instruction becomes simpler when proper selection of alternatives is made, an example is provided at Wis JI-Criminal 1271 EXAMPLE.

Section 940.295, as amended by 2005 Wisconsin Acts 264 and 388, defines the following offenses involving abuse of patients or residents.

Offense	Penalty
Intentionally or recklessly abuse a patient or resident and cause death to an individual at risk	Class C felony
Negligently abuse a patient or resident and cause death to an individual at risk	Class D felony [sub. (3)(b)1g.]
Intentionally, recklessly, or negligently abuse a patient or resident and cause great bodily harm to an individual at risk	Class E felony [sub. (3)(b)1m.]
Intentionally abuse a patient or resident under circumstances that cause great bodily harm [to other than an individual at risk]	Class F felony [sub. (3)(b)1r.]

Intentionally abuse a patient or resident under circumstances that are likely to cause great bodily harm	Class G felony [sub. (3)(b)1r.]
Intentionally abuse a patient or resident under circumstances that cause bodily harm	Class H felony [sub. (3)(b)2.]
Intentionally abuse a patient or resident under circumstances that are likely to cause bodily harm	Class I felony [sub. (3)(b)2.]
Recklessly or negligently abuse a patient or resident under circumstances that cause great bodily harm [to other than an individual at risk]	Class H felony [sub. (3)(b)3.]
Recklessly or negligently abuse a patient or resident under circumstances that are likely to cause bodily harm	Class A misdr. [sub. (3)(b)4.]
Intentionally, recklessly, or negligently abuse a patient or resident under circumstances not causing and not likely to cause bodily harm	Class B misdr. [sub. (3)(b)5.]

Because the statute defines so many different offenses, there is the potential for a variety of lesser included offense questions. One potential question is easily resolved: a special subsection of § 939.66 provides that all less serious violations of § 940.295 are included offenses of more serious violations. See § 939.66(6e).

Two general categories of variables govern the lesser included offense possibilities. First, there may be a different mental state. The statute provides three alternatives: intentionally, recklessly, or simply neglecting a patient or resident. Second, the abuse may have occurred under circumstances involving different levels of harm. Causing death, great bodily harm or bodily harm; likely to cause great bodily harm or bodily harm; and, not causing and not likely to cause bodily harm.

Presenting lesser included offenses in a way that will be understandable to the jury is a challenge. One approach would be the traditional long form, whereby a complete instruction on the charged offense would be followed by a complete instruction on each applicable lesser included offense. This has the serious disadvantage of resulting in a set of instructions that might be very long and repetitious. However, depending on the lessers and the complexity of their relationship to the charged crime, this may be the most effective way to approach the problem. The other approach would be use the shorter form described in Wis JI-Criminal 112A: specifying the difference between the charged crime and the lesser included crime and instructing the jury on that difference.

2011 Wisconsin Act 2 amended § 940.295 to add an exception to the version of the offense defined in sub. (3)(a)3.: abuses, with negligence, or neglects a patient or resident. Subsection (3)(am) is created to read:

> (3)(am) Paragraph (a)3. does not apply to a health care provider acting within the scope of his or her practice or employment who commits an act or omission of mere inefficiency, unsatisfactory conduct, or failure in good performance as the result of inability, incapacity, inadvertency, ordinary negligence, or good faith error in judgment or discretion.

"Health care provider" is defined in one other Criminal Code statute. Section 940.20(7)(a)3. provides: "'Health care provider' means any person who is licensed, registered, permitted or certified by the department of health services or the department of regulation and licensing to provide health care services in this state." The usual practice in Wisconsin is to treat statutory exceptions like affirmative defenses: If there is some evidence of the exception, the burden is on the state to prove that the exception does not apply. See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon, which recommends adding an element where there is a claim that the defendant was a peace officer; peace officers are subject to an exception from the ban on carrying concealed weapon in § 941.23.

1. Here specify the type of facility involved, such as "an adult day care center." The facilities covered by the statute are listed in sub. (2) of § 940.295:

(2) Applicability. This section applies to any of the following types of facilities or programs:
(a) An adult day care center.
(b) An adult family home.
(c) A community-based residential facility.
(d) A foster home.
(e) A group home.
(f) A home health agency.
(g) A hospice.
(h) A inpatient health care facility.
(i) A program under § 51.42(2).
(j) The Wisconsin Educational Services Program for the Deaf and Hard of Hearing under § 115.52 and the Wisconsin Center for the Blind and Visually Impaired under § 115.525.
(k) A state treatment facility.
(L) A treatment facility.
(m) A residential care center for children and youth operated by a child welfare agency licensed under § 48.60 or an institution operated by a public agency for the care of neglected, dependent, or delinquent children.
(n) Any other health facility or care-related facility or home, whether publicly or privately owned.

2. Read the phrase in parentheses if the case is based on the defendant permitting another to abuse a patient or resident. In that case, the fourth and sixth elements must be modified. Footnote 8 suggests a modification of the fourth element for "knowingly permits" case. Footnote 19 suggests a modification of the sixth element.

3. Here specify the name of the facility, for example: "The Fairview Care Center."

4. An extensive definition of "patient" is provided in § 940.295(1)(L). If a definition of that term is believed to be necessary, the applicable part of the statutory definition should be added to the instruction.

5. "Resident" is defined as follows in § 940.295(1)(p): "'Resident' means any person who resides in a facility under sub. (2)."

6. Here specify the name of the facility, for example: "The Fairview Care Center."

7. The name of the facility should be used in the first blank; the type of facility listed in sub. (2) should be used in the second blank. For example: "3. The Fairview Care Center was an adult day care center."

The second sentence allows for providing a definition of the type of facility involved. Cross-references to statutory definitions for many of the types of facilities are provided in sub. (1) of § 940.295:

Facility	Definition
- adult family home	§ 50.01(1)
- community-based residential facility	§ 50.01(1g)
- foster home	§ 48.02(6)
- group home	§ 48.02(7)
- home health agency	§ 50.49(1)(a)
- hospice	§ 50.90(1)
- inpatient health care facility	§ 50.135(1)
- state treatment facility	§ 51.01(15)
- treatment facility	§ 51.01(19)

"Adult day care center" is defined in § 49.45(4), although that definition is not cross-referenced in § 940.295.

8. If the case is based on the defendant knowingly permitting another to abuse a patient or resident, the fourth element should be changed to read as follows:

> 4. The defendant knowingly permitted another person to subject (name of victim) to [physical abuse] [emotional abuse] [sexual abuse] [treatment without consent] [unreasonable confinement or restraint].

9. The statement of this element is a paraphrase of the statute. The statute refers to one who "abuses" a patient or resident, then defines "abuse" by reference to s. 46.90(1)(a). Section 46.90(1)(a) then lists five categories that constitute "abuse." The instruction states the element in the same way that it appears in Wis JI-Criminal 1268 by referring to "subjects to abuse" and then providing definitions for each alternative. No change in meaning is intended.

10. The definition of "physical abuse" is the one provided in § 46.90(1)(fg), which applies because § 940.295(1)(ad) provides: "'Abuse' has the meaning given in s. 46.90(1)(a)." "Physical abuse" is listed in s. 46.90(1(a)1. and defined in s. 46.90(1)(fg).

11. This is the definition provided in § 939.22(4) and in § 46.90(1)(aj). The term may also be used as part of the fourth element.

12. The definition of "emotional abuse" is the one provided in § 46.90(1)(cm), which applies because § 940.295(1)(ad) provides: "'Abuse' has the meaning given in s. 46.90(1)(a)." "Emotional abuse" is listed in s.

46.90(1(a)2. and defined in s. 46.90(1)(cm).

13. The definition of "sexual abuse" is a paraphrase of the one provided in § 46.90(1)(gd), which applies because cross referenced in § 940.285(1)(ag)3. Section 46.90(1)(gd) states: "'Sexual abuse' means a violation of s. 940.225(1), (2), (3), or (3m)." Definition of the applicable sexual assault offense should be included.

14. The definition of "treatment without consent" is the one provided in § 46.90(1)(h), which applies because § 940.295(1)(ad) provides: "'Abuse' has the meaning given in s. 46.90(1)(a)." "Treatment without consent" is listed in s. 46.90(1(a)4. and defined in s. 46.90(1)(h). Select the part of the definition that applies to the case.

15. The definition of "unreasonable confinement or restraint" is the one provided in § 46.90(1)(i), which applies because § 940.295(1)(ad) provides: "'Abuse' has the meaning given in s. 46.90(1)(a)." "Unreasonable confinement or restraint" is listed in s. 46.90(1(a)5. and defined in s. 46.90(1)(i). Select the part of the definition that applies to the case.

16. This is based on the general definition of "intentionally" provided in § 939.23(3).

17. This definition of "recklessly" is the one provided in § 940.295(1)(o). It differs from the general definition of "recklessness" in § 939.24 in two respects. First, it refers only to an "unreasonable" risk; § 939.24 requires an unreasonable "and substantial" risk. Second, it refers to "conscious disregard for the safety . . ."; § 939.24 refers to being "aware of the risk." The latter is not believed to be a substantive difference – "conscious disregard" was used in the definition of reckless homicide before the revision in 1989 when it was changed to clarify that a subjective mental state was required.

18. The instruction paraphrases s. 940.295(3)(a)3. which refers to the negligence alternative as "abuses, with negligence." "Negligence" is then defined in sub. (1)(km) in manner that is consistent with the regular Criminal Code definition of "criminal negligence." The approach used in the instruction is the same as that used in Wis JI-Criminal 1268. No change in meaning is intended.

19. Here insert the appropriate level of harm from the options provided in § 940.295(3)(b). The different levels and the associated penalties are summarized in the Comment preceding footnote 1.

If the case is based on the defendant knowingly permitting another to abuse a patient or resident, the sixth element should be changed to read as follows:

> 6. The defendant knowingly permitted another person to [intentionally] [recklessly] [negligently] abuse <u>(name of victim)</u> under circumstances that [caused death] [(caused) (were likely to cause) great bodily harm] [(caused) (were likely to cause) bodily harm].

20. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

21. See § 939.22(14) and Wis JI-Criminal 914.

22. This is the definition provided in § 939.22(4) and in § 46.90(1)(aj).

23. The penalties set forth in subs. (3)(b)1g. and 1m. apply where death or great bodily harm is caused to an "individual at risk." The Committee concluded that this could be most efficiently handled by presenting the

issue as a special question for the jury to consider if they find the defendant guilty of the basic offense. The definitions of "individual at risk" are those provided in sub. (1)(ag), (cr), and (hr) of § 940.295.

24. Section 940.295(1)(hr) provides: "'Individual at risk' means an elder adult at risk or an adult at risk." Section 940.295(1)(cr) provides that "'elder adult at risk' has the meaning in s. 46.90(1)(br)." The definition in the instruction is the definition provided in s. 46.90(1)(br) without change.

25. Section 940.295(1)(hr) provides: "'Individual at risk' means an elder adult at risk or an adult at risk." Section 940.295(1)(ag) provides that "'adult at risk' has the meaning given in s. 55.01(1e)." The definition in the instruction is the definition provided in s. 55.01(1e) without change.

1271 EXAMPLE ABUSE OF PATIENTS AND RESIDENTS: RECKLESS PHYSICAL ABUSE CAUSING GREAT BODILY HARM TO AN INDIVIDUAL AT RISK — § 940.295(3)(b)1m.

Statutory Definition of the Crime

Abuse of patients and residents, as defined in § 940.295 of the Criminal Code of Wisconsin, is committed by one employed in an adult care center who recklessly abuses a resident of that facility under circumstances that cause great bodily harm.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was employed in The Fairview Care Center.
2. (Name of victim) was a resident The Fairview Care Center.
3. The Fairview Care Center was an adult day care center.[1]
4. The defendant subjected (name of victim) to physical abuse.

   "Physical abuse" means the intentional or reckless infliction of bodily harm. "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.
5. The defendant acted recklessly.

"Recklessly" means conduct that creates a situation of unreasonable risk of death or harm to and demonstrates a conscious disregard for the safety of the resident.

6. The defendant recklessly abused (name of victim) under circumstances that caused great bodily harm.

"Cause" means that the defendant's conduct was a substantial factor in producing great bodily harm.

"Great bodily harm" means serious bodily injury.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

If you find the defendant guilty, you must answer the following question:

Was (name of victim) an individual at risk?

"Individual at risk" means an adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.

COMMENT

Wis JI-Criminal 1271 EXAMPLE was originally published in 1999 and revised in 2003. This revision was approved by the Committee in December 2006; it reflected changes made by 2005 Wisconsin Acts 264 and 388.

This instruction attempts to illustrate how the general model provided in Wis JI-Criminal 1271 would be applied to a violation of § 940.295 involving reckless abuse under circumstances causing great bodily harm to an individual at risk. This offense is a Class E felony – see § 940.295(3)(a)2. and (3)(b)1m. Reducing the general model to this example required electing the appropriate material from the many alternatives set forth in brackets and parentheses in the model instruction.

1. There is not a cross-reference in s. 940.295 to a definition of "adult day care center." However, a definition of that term is provided in s. 49.45(4).

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1272 NEGLECT OF PATIENTS AND RESIDENTS — § 940.295

Statutory Definition of the Crime

Neglect of patients and residents, as defined in § 940.295 of the Criminal Code of Wisconsin, is committed by one [(in charge of) (employed in)] (name type of facility)[1] who [intentionally neglects] [recklessly neglects] [neglects][2] a [(patient) (resident)] of that [(facility) (program)] (or who knowingly permits another person to do so)[3] under circumstances that (are likely to) cause [death] [great bodily harm] [bodily harm].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was (in charge of) (employed in) (name of facility).[4]

2. (Name of victim) was a (patient)[5] (resident)[6] of (name of facility).[7]

3. (Name of facility) was a (type of facility)[8].

   [(Type of facility) means (use the applicable statutory definition, if any).]

4. The defendant [intentionally neglected] [recklessly neglected] [neglected] (name of victim).[9]

   "Neglect" means creating significant risk to the physical or mental health of an individual by the failure of a caregiver to endeavor to secure or maintain[10] adequate care, services, or supervision for that individual.

IF INTENTIONAL NEGLECT IS ALLEGED, ADD THE FOLLOWING:

["Intentionally" means that the defendant acted with the mental purpose to neglect (name of victim).[11]

IF RECKLESS NEGLECT IS ALLEGED, ADD THE FOLLOWING:

["Recklessly" means that the defendant's conduct created a situation of unreasonable risk of harm to, and demonstrated a conscious disregard for the safety of, the (patient) (resident).][12]

5. The defendant [intentionally neglected] [recklessly neglected] [neglected] (name of victim) under circumstances that [(were likely to cause) (caused)] [death] [great bodily harm] [bodily harm].[13]

["Cause" means that the defendant's conduct was a substantial factor in producing (death) (great bodily harm) (bodily harm)].[14]

["Great bodily harm" means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.][15]

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.][16]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE DEFENDANT IS CHARGED WITH ABUSE OF A PATIENT OR RESIDENT WHO IS AN "INDIVIDUAL AT RISK":[17]

If you find the defendant guilty, you must answer the following question:

Was (name of victim) an individual at risk?

CHOOSE ONE OF THE FOLLOWING DEFINITIONS

["Individual at risk" means a person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.][18]

["Individual at risk" means an adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.][19]

If you are satisfied beyond a reasonable doubt that (name of victim) was an individual at risk, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1272 was originally published in 1999 and revised in 2003, 2007, 2008 and 2011. The 2007 revision reflected changes made by 2005 Wisconsin Acts 264 and 388. The 2008 revision updated statutory references in footnotes 17-19 to reflect changes made by 2007 Wisconsin Act 45. The 2011 revision added reference to 2011 Wisconsin Act 2 to the Comment. This revision was approved by the Committee in February 2021; it amended the definition of "neglect" under element four to mirror § 46.90(1)(f).

This instruction is drafted for offenses involving intentional, reckless or neglect of patients or residents. The statute also prohibits intentional, reckless or negligent abuse. If a case involves a charge of abuse as opposed to neglect, use Wis JI-Criminal 1271.

Section 940.295 recognizes a variety of harms and a variety of mental states. The Committee concluded that the best way to address the considerable complexity that has resulted is to provide a single model instruction which can be modified to refer to the appropriate mental state and degree of harm. This has resulted in the use of many brackets and parentheses. To illustrate that the instruction becomes simpler when proper selection of alternatives is made, an example is provided at Wis JI-Criminal 1271 EXAMPLE.

Section 940.295, as amended by 2005 Wisconsin Acts 264 and 388, defines the following offenses involving neglect of patients or residents.

Offense	Penalty
Intentionally or recklessly neglect a patient or resident and cause death to an individual at risk	Class C felony
Simply* neglect a patient or resident and cause death to an individual at risk	Class D felony [sub. (3)(b)1g.]
Intentionally, recklessly, or simply* neglect a patient or resident and cause great bodily harm to an individual at risk	Class E felony [sub. (3)(b)1m.]
Intentionally neglect a patient or resident under circumstances that cause great bodily harm [to other than an individual at risk]	Class F felony [sub. (3)(b)1r.]
Intentionally neglect a patient or resident under circumstances that are likely to cause great bodily harm	Class G felony [sub. (3)(b)1r.]
Intentionally neglect a patient or resident under circumstances that cause bodily harm	Class H felony [sub. (3)(b)2.]
Intentionally neglect a patient or resident under circumstances that are likely to cause bodily harm	Class I felony [sub. (3)(b)2.]
Recklessly or simply* neglect a patient or resident under circumstances that cause great bodily harm [to other than an individual at risk]	Class H felony [sub. (3)(b)3.]
Recklessly or simply* neglect a patient or resident under circumstances that are likely to cause bodily harm	Class A misdr. [sub. (3)(b)4.]
Intentionally, recklessly, or simply* neglect a patient or resident under circumstances not causing and not likely to cause bodily harm	Class B misdr. [sub. (3)(b)5.]

* "Simply" is used to refer to offenses under sub. (3)(a)3. alleging only "neglect" in order to distinguish them from offenses requiring "intentional neglect" or "reckless neglect." This approach is based on reading sub. (3)(a)3. with "negligently" modifying only "abuses," not "neglects." Thus, the instruction presents three options: "intentionally neglects"; "recklessly neglects"; or, "neglects."

Because the statute defines so many different offenses, there is the potential for a variety of lesser included offense questions. One potential question is easily resolved: a special subsection of § 939.66 provides that all less serious violations of § 940.295 are included offenses of more serious violations. See § 939.66(6e).

Two general categories of variables govern the lesser included offense possibilities. First, there may be a different mental state. The statute provides three alternatives: intentionally, recklessly, or simply neglecting a patient or resident. Second, the abuse may have occurred under circumstances involving different levels of harm. Causing death, great bodily harm or bodily harm; likely to cause great bodily harm or bodily harm; and, not causing and not likely to cause bodily harm.

Presenting lesser included offenses in a way that will be understandable to the jury is a challenge. One approach would be the traditional long form, whereby a complete instruction on the charged offense would be followed by a complete instruction on each applicable lesser included offense. This has the serious disadvantage of resulting in a set of instructions that might be very long and repetitious. However, depending on the lessers and the complexity of their relationship to the charged crime, this may be the most effective way to approach the problem. The other approach would be use the shorter form described in Wis JI-Criminal 112A: specifying the difference between the charged crime and the lesser included crime and instructing the jury on that difference.

2011 Wisconsin Act 2 amended § 940.295 to add an exception to the version of the offense defined in sub. (3)(a)3.: abuses, with negligence, or neglects a patient or resident. Subsection (3)(am) is created to read:

(3)(am) Paragraph (a)3. does not apply to a health care provider acting within the scope of his or her practice or employment who commits an act or omission of mere inefficiency, unsatisfactory conduct, or failure in good performance as the result of inability, incapacity, inadvertency, ordinary negligence, or good faith error in judgment or discretion.

"Health care provider" is defined in one other Criminal Code statute. Section 940.20(7)(a)3. provides: "'Health care provider' means any person who is licensed, registered, permitted or certified by the department of health services or the department of regulation and licensing to provide health care services in this state." The usual practice in Wisconsin is to treat statutory exceptions like affirmative defenses: If there is some evidence of the exception, the burden is on the state to prove that the exception does not apply. See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon, which recommends adding an element where there is a claim that the defendant was a peace officer; peace officers are subject to an exception from the ban on carrying concealed weapon in § 941.23.

1. Here specify the type of facility involved, such as "an adult day care center." The facilities covered by the statute are listed in sub. (2) of § 940.295:

(2) Applicability. This section applies to any of the following types of facilities or programs:

(a) An adult day care center.
(b) An adult family home.
(c) A community-based residential facility.
(d) A foster home.
(e) A group home.
(f) A home health agency.
(g) A hospice.
(h) A inpatient health care facility.
(I) A program under § 51.42(2).
(j) The Wisconsin Educational Services Program for the Deaf and Hard of Hearing under § 115.52 and the Wisconsin Center for the Blind and Visually Impaired under § 115.525.
(k) A state treatment facility.
(l) A treatment facility.
(m) A residential care center for children and youth operated by a child welfare agency licensed under § 48.60 or an institution operated by a public agency for the care of neglected, dependent, or delinquent children.
(n) Any other health facility or care-related facility or home, whether publicly or privately owned.

2. The bracketed material is intended to allow choice of the relevant alternatives which are described as follows in sub. (3)(a):

- intentionally abuses or intentionally neglects [(a)1.]
- recklessly abuses or recklessly neglects [(a)2.]
- negligently abuses or neglects [(a)3.]

This approach is based on reading the last alternative with "negligently" modifying only "abuses," not "neglects." Thus, the instruction presents three options: "intentionally neglects"; "recklessly neglects"; or, "neglects."

3. Read the phrase in parentheses if the case is based on the defendant permitting another to neglect a patient or resident. In that case, the fourth and fifth elements must be modified. Footnote 9 suggests a modification of the fourth element for "knowingly permits" case. Footnote 13 suggests a modification for the fifth element.

4. Here specify the name of the facility, for example: "The Fairview Care Center."

5. An extensive definition of "patient" is provided in § 940.295(1)(L). If a definition of that term is believed to be necessary, the applicable part of the statutory definition should be added to the instruction.

6. "Resident" is defined as follows in § 940.295(1)(p): "'Resident' means any person who resides in a facility under sub. (2)."

7. Here specify the name of the facility, for example: "The Fairview Care Center."

8. The name of the facility should be used in the first blank; the type of facility listed in sub. (2) should be used in the second blank. For example: "3. The Fairview Care Center was an adult day care center."

The second sentence allows for providing a definition of the type of facility involved. Cross-references to statutory definitions for many of the types of facilities are provided in sub. (1) of § 940.295:

Facility	Definition
- adult family home	§ 50.01(1)
- community-based residential facility	§ 50.01(1g)
- foster home	§ 48.02(6)
- group home	§ 48.02(7)
- home health agency	§ 50.49(1)(a)
- hospice	§ 50.90(1)
- inpatient health care facility	§ 50.135(1)
- state treatment facility	§ 51.01(15)
- treatment facility	§ 51.01(19)

"Adult day care center" is defined in § 49.45(4), although that definition is not cross-referenced in § 940.295.

9. If the case is based on the defendant knowingly permitting another to neglect a patient or resident, the fourth element should be changed to read as follows:

> 4. The defendant knowingly permitted another person to [intentionally neglect] [recklessly neglect] [neglect] (name of victim).

10. This definition is based on the one provided in s. 46.90(1)(f), which applies because it is cross referenced in s. 940.295(1)(k). Section 46.90(1)(f) provides:

> (f) "Neglect" means the failure of a caregiver, as evidenced by an act, omission, or course of conduct, to endeavor to secure or maintain adequate care, services, or supervision for an individual, including food, clothing, shelter, or physical or mental health care, and creating significant risk or danger to the individual's physical or mental health. "Neglect" does not include a decision that is made to not seek medical care for an individual, if that decision is consistent with the individual's previously executed declaration or do not resuscitate order under ch. 154, a power of attorney for health care under ch. 155, or as otherwise authorized by law.

This definition was addressed in an unpublished single-judge opinion concluding that the term "neglect," as provided in s. 940.295(3)(a)3. does not contain a mens rea requirement. State v. Murphy, 2020 WI App 70, 394 Wis.2d 523, ¶18, 950 N.W.2d 691.

11. This applies the common definition of criminal intent – mental purpose to cause the result – to the potentially confusing concept of "intentional neglect." The Committee interpreted this to mean that the defendant must act with the purpose to neglect a patient or resident, with "neglect" given its statutory meaning.

12. This definition of "recklessly" is the one provided in § 940.295(1)(o). It differs from the general definition of "recklessness" in § 939.24 in two respects. First, it refers only to an "unreasonable" risk; § 939.24 requires an unreasonable "and substantial" risk. Second, it refers to "conscious disregard for the safety . . ."; § 939.24 refers to being "aware of the risk." The latter is not believed to be a substantive

difference – "conscious disregard" was used in the definition of reckless homicide before the revision in 1989 when it was changed to clarify that a subjective mental state was required.

13. Here insert the appropriate level of harm from the options provided in § 940.295(3)(b). The different levels and the associated penalties are summarized in the Comment preceding footnote 1.

If the case is based on the defendant knowingly permitting another to abuse a patient or resident, the fifth element should be changed to read as follows:

> 5. The defendant knowingly permitted another person to [intentionally] [recklessly] [negligently] abuse (name of victim) under circumstances that [caused death] [(caused) (were likely to cause) great bodily harm] [(caused) (were likely to cause) bodily harm].

14. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

15. See § 939.22(14) and Wis JI-Criminal 914.

16. This is the definition provided in § 939.22(4) and in § 46.90(1)(aj).

17. The penalties set forth in subs. (3)(b)1g. and 1m. apply where death or great bodily harm is caused to an "individual at risk." The Committee concluded that this could be most efficiently handled by presenting the issue as a special question for the jury to consider if they find the defendant guilty of the basic offense. The definitions of "individual at risk" are those provided in sub. (1)(ag), (cr), and (hr) of § 940.295.

18. Section 940.295(1)(hr) provides: "'Individual at risk' means an elder adult at risk or an adult at risk." Section 940.295(1)(cr) provides that "'elder adult at risk' has the meaning given in s. 46.90(1)(br)." The definition in the instruction is the definition provided in s. 46.90(1)(br) without change.

19. Section 940.295(1)(cr) provides: "'Individual at risk' means an elder adult at risk or an adult at risk." Section 940.295(1)(ag) provides that "'adult at risk' has the meaning given in s. 55.01(1e)." The definition in the instruction is the definition provided in s. 55.01(1e) without change.

1273 LAW ENFORCEMENT OFFICER[1] — FAILURE TO RENDER AID — § 940.291

Statutory Definition of the Crime

Failure to render aid by a law enforcement officer, as defined in § 940.291 of the Criminal Code of Wisconsin, is committed by a peace officer[2] who, while acting in the course of employment or under the authority of employment, [intentionally fails to render or make arrangements for any necessary first aid[3]] [knowingly permits another person to intentionally fail to render or make arrangements for any necessary first aid] for any person in his or her actual custody if bodily harm results from the failure.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a peace officer acting (in the course of) (under the authority of) employment.
2. The defendant had (name of victim) in his or her actual custody. [4]

   "Custody" means that a person's freedom of movement is restricted either by the use of physical force by a peace officer or by the assertion of authority by a peace officer to which the person has submitted. [5]

3. The defendant [intentionally failed to (render) (make arrangements for) any necessary first aid] [knowingly permitted another person to intentionally fail to (render) (make arrangements for) any necessary first aid] to (name of victim).[6]

The term "intentionally" means that the defendant knew (name of victim) had a need for first aid and purposely failed to (render) (make arrangements for) the necessary first aid.[7]

IF FAILURE TO RENDER AID IS ALLEGED, USE THE FOLLOWING:

["Intentionally failed to render aid" requires that the defendant had the knowledge and the ability to render the first aid that was necessary.]

4. The failure to render or make arrangements for first aid resulted in bodily harm to (name of victim).

"Bodily harm" means physical pain or injury, illness, or any impairment or physical condition. [8]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1273 was approved by the Committee in February 2020.

Section 940.291 was created by 1983 Wisconsin Act 27 (effective date: July 13, 1983).

1. Although the title of the statute uses the term "law enforcement officer," the Committee concluded that the term "peace officer" more accurately reflects the intent of the legislature as it is the term utilized within the actual text of the statute. Section 990.001(6) provides: **"**The titles to subchapters, sections, subsections, paragraphs and subdivisions of the statutes and history notes are not part of the statutes."

2. "Peace officer" is defined in Wis. Stat. § 939.22(22) as follows:

"'Peace officer' means any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes."

3. "A violation for intentionally failing to render first aid under this subsection applies only to first aid which the officer has the knowledge and ability to render." Wis. Stat. § 940.291(1).

4. "This subsection applies whether the custody is lawful or unlawful and whether the custody is actual or constructive." Wis. Stat. § 940.291(1).

5. The definition of "custody" is adapted from decisions of the Wisconsin Supreme Court and Court of Appeals. These decisions held that the proper definition of custody was broader than being in the "physical control" of a police officer or institution guard. Rather, it is enough if freedom of movement has been restricted. State v. Adams, 152 Wis.2d 68, 447 N.W.2d 90 (Ct. App. 1989); State v. Hoffman, 163 Wis.2d 752, 472 N.W.2d 558 (Ct. App. 1991); State v. Swanson, 164 Wis.2d 437, 475 N.W.2d 437 (1991). See footnote 4, Wis JI-Criminal 1772 for complete discussion of these cases.

6. This offense is essentially based on a failure to act, i.e., an omission. The offense definition incorporates the equivalents of the common law requirements for omission liability: a legal duty, knowledge of facts giving rise to the duty, ability to act, and failure to act as the duty requires. For a full discussion, see Wis JI-Criminal 905.

7. The word "intentionally" is defined to include two aspects: knowledge and purpose. The knowledge requirement is based on § 939.23(3) which provides that when the word "intentionally" is used, it requires that the actor must have knowledge of those facts which apply to make his or her conduct criminal and which are set forth after the word "intentionally." The purpose requirement is based on one of the two definitions of intent provided in § 939.23(3). The first is mental purpose to cause the result. The other is being aware that one's conduct is practically certain to cause the result. See Wis Criminal JI 923A.

The Committee concluded that the mental purpose alternative is most likely to apply in situations consisting of purposeful dereliction of duty. However, there may be scenarios that require the practically certain to cause the result alternative. See Wis JI-Criminal 923A and 923B.

8. This is the definition of "bodily harm" provided in § 939.22(4).

1275 FALSE IMPRISONMENT — § 940.30

Statutory Definition of the Crime

False imprisonment, as defined in § 940.30 of the Criminal Code of Wisconsin, is committed by one who intentionally confines or restrains another without the person's consent and with knowledge that (he) (she) has no lawful authority to do so.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant confined or restrained (name of victim).
2. The defendant confined or restrained (name of victim) intentionally.

   This requires that the defendant had the mental purpose to confine or restrain (name of victim).[1]
3. (Name of victim) was confined or restrained without (his) (her) consent.[2]
4. The defendant had no lawful authority to confine or restrain (name of victim).[3]
5. The defendant knew that (name of victim) did not consent and knew that (he) (she) did not have lawful authority to confine or restrain (name of victim).[4]

Meaning of "Confined" or "Restrained"

Although this requires genuine restraint or confinement, it does not require that it be in a jail or prison. If the defendant deprived (name of victim) of freedom of movement,[5] or compelled (him) (her) to remain where (he) (she) did not wish to remain, then (name of victim) was confined or restrained. The use of physical force is not required. One may be confined or restrained by acts or words or both.[6]

ADD THE FOLLOWING IF THE ISSUE OF "ESCAPE" IS RAISED BY THE EVIDENCE:[7]

[A person is not confined or restrained if (he) (she) knew (he) (she) could have avoided it by taking reasonable action.]

[A reasonable opportunity to escape does not change confinement or restraint that has occurred.]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE:[8]

[Meaning of "Without Consent"]

["Without consent" means that there was no consent in fact or that consent was given by (name of victim) because of fear caused by the defendant's use or threat of imminent use of physical violence on ((name of victim)) (on another person in the presence of (name of victim)) (on a member of (name of victim) 's immediate family).]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find out intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1275 was originally published in 1971 and revised in 1990 and 2006. This revision was approved by the Committee in April 2014; it added to footnote 8.

In State v. Baldwin, 62 Wis.2d 521, 215 N.W.2d 541 (1974), the Wisconsin Supreme Court declared that false imprisonment is "a crime of a continuous nature and exists so long as the confinement of the person without his consent continues uninterrupted." 62 Wis.2d 521, 526. The court upheld a conviction for false imprisonment in Milwaukee County after a previous conviction for the same offense in Waukesha County based on the same course of conduct. The court stated that it did not "hold that a continuous imprisonment in an automobile by the same actor constitutes a separate crime in each county through which the auto passes. Here, the actor's participation changed [from aider to principal], the cars changed, and the restraint changed." 62 Wis.2d 521, 525.

In Geitner v. State, 59 Wis.2d 128, 207 N.W.2d 837 (1973), the Wisconsin Supreme Court held that false imprisonment was not a lesser included offense of kidnapping under § 940.31 because it requires proof of a fact which that more serious crime does not: that the defendant knew he had no lawful authority for the confinement or restraint.

1. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "with intent to." It is the other alternative that changed from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

2. This offense requires that the confining or restraint was without the consent of the person confined or restrained. Compare § 948.31, which applies to interference with the custody of a child where there may be similar restraint of a child but requires lack of consent by the legal custodian. See Wis JI-Criminal 2166-2168.

3. Several statutes recognize privileges that may be relevant to a claim of lawful authority to restrain or to confine another. See, for example, § 939.48, self-defense, and § 939.49, defense of property. Subsections 939.49(2) and § 943.50(3) specifically address the restraint of persons suspected of retail theft. Where there is evidence of a privilege, its absence is something the state must prove. The Committee recommends integrating the absence of the privilege into the instruction on the false imprisonment. See Wis JI-Criminal 1220A for an example combining battery and self-defense.

Other statutes, such as those defining the authority of police, may also be relevant. See, for example, §§ 968.24 and 968.25 defining the authority to "stop and question," and § 968.07, dealing with arrest.

Privileges or authority not specifically recognized in statutes may also be relevant. In State v. Teynor, 141 Wis.2d 187, 414 N.W.2d 76 (Ct. App. 1987), the court held that the false imprisonment statute could be applied to a parent charged with restraint of his children. The court found that

> . . . the legislature did not intend that the lawful authority which a parent has to confine or restrain his or her child makes the parent immune from prosecution under the statute for the nonconsensual restraint or confinement of the child. . . . The parental status affords only a privilege which may be asserted as a defense . . . if the conduct is reasonable discipline of a child.

141 Wis.2d 187, 199-200.

The Teynor court concluded that the entry of an order granting temporary custody of the children to his wife deprived Teynor of the lawful authority a parent has to direct the activities of his children, except when exercising lawful visitation.

4. The basis for the knowledge requirement in the fifth element is the provision in § 939.23(3) which states that when the word "intentionally" is used in a criminal statute, it requires "knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'."

5. The original version of the instruction (8 1971) used "liberty" instead of "freedom of movement." The Committee concluded that the latter term better describes the nature of the offense because it is less abstract. The "essence of false imprisonment" has been referred to as protection of the "interest in freedom from restraint of movement" and "restraint by one person of the physical liberty of another." Herbst v. Wuennenberg, 83 Wis.2d 768, 774, 266 N.W.2d 391 (1978).

6. The reference to "acts or words or both" has been in the instruction since its original publication in 1971, with citation to Am Jur. The current citation is to 32 Am Jur.2d False Imprisonment, § 17 (1982). Also see Hammer and Donohoo, Substantive Criminal Law in Wisconsin, p. 397 (PESI 1988): "mere words could be sufficient if they actually impose a restraint upon the person to whom they are directed." (Citing, R. Perkins and R. Boyce, Criminal Law, 225 (3rd ed. 1982).)

7. One or both of the bracketed paragraphs should be used only when the issue of "escape" is raised by the evidence. They replace a statement in the 1971 version of the instruction to the effect that "if there is some reasonable means of escape, there is no confinement or restraint." The Committee concluded that this statement was potentially confusing if literally applied. The word "escape" implies leaving a situation of confinement or restraint. Yet once there is confinement or restraint, that aspect of the crime of false imprisonment is complete, and a later escape would not affect it. This is the concept expressed in the second

bracketed paragraph.

In the Committee's judgment, the relevance of escape is more accurately expressed in terms of actions that could reasonably have been taken to avoid confinement or restraint. This is the concept expressed in the first bracketed paragraph.

The "reasonable means of escape" issue was discussed in State v. C.V.C., 153 Wis.2d 145, 450 N.W.2d 463 (Ct. App. 1989). The court relied on a standard from the Restatement of Torts to determine whether a victim had a "reasonable means of escape":

> Since the actor has intended to imprison the other, the other is not required to run any risk of harm to his person or to his chattels or of subjecting himself to any substantial liability to a third person in order to relieve the actor from a liability to which his intentional misconduct has subjected him. So too, even though there may be a perfectly safe avenue of escape, the other is not required to take it if the circumstances are such as to make it offensive to a reasonable sense of decency or personal dignity.

Restatement (Second) of Torts, sec. 36 comment a. (1978).

The standard had previously been applied in a civil case. Herbst v. Wuennenberg, 83 Wis.2d 768, 778-79, 266 N.W.2d 391 (1978). In C.V.C., the court concluded that "the victim was not required to take steps dangerous to herself or offensive to a reasonable sense of decency or personal dignity to free herself in order for the state to prove restraint or confinement. . . ." 153 Wis.2d 145, 150. Also see the Comment to § 340.25 in Volume V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 71 (February 1953).

8. "Without consent" is defined in § 939.22(48). The material in brackets reflects the rule stated in § 939.22(48)(a) and has been included because the use of force, often involved in the crime of false imprisonment, may be relevant to the consent issue as well. When the bracketed material is used, additional explanation is recommended, especially where consent was given because of threats to a third person or family member. Subsections (b) through (d) of § 939.22(48) identify other situations where consent in fact is not to be considered as "consent" under the Criminal Code.

In State v. Long, 2009 WI 36, 317 Wis.2d 92, 765 N.W.2d 557, ¶¶31 and 32, the Wisconsin Supreme Court suggested that the definition of "without consent" in § 940.225(4) should be applied to the false imprisonment statute. Because the decision did not acknowledge that "without consent" is defined in § 939.22(48) – a definition that generally applies to Chapters 939 to 948 "unless the context of a specific section manifestly requires a different construction" § 939.22(48) intro. – the Committee concluded that the definition used in the instruction need not be changed.

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1276 HUMAN TRAFFICKING — § 940.302(2)(a)

Statutory Definition of the Crime

Human trafficking, as defined in § 940.302 of the Criminal Code of Wisconsin, is committed by one who knowingly engages in trafficking for the purpose of [labor or services] [a commercial sex act] and does so by [CHOOSE ONE OF THE FOLLOWING][1]

[causing or threatening to cause bodily harm to any individual.]

[causing or threatening to cause financial harm to any individual.]

[restraining or threatening to restrain any individual.]

[violating or threatening to violate a law.]

[destroying, concealing, removing, confiscating, or possessing, or threatening to destroy, conceal, remove, confiscate, or possess, any actual or purported passport or any other actual or purported official identification document of any individual.]

[extortion.]

[fraud or deception.]

[debt bondage.][2]

[controlling or threatening to control any individual's access to an addictive controlled substance.]

[using any scheme or pattern or other means to directly or indirectly coerce, threaten, or intimidate any individual.]

[using or threatening to use force or violence on any individual.]

[causing or threatening to cause any individual to do any act against the individual's will or without the individual's consent.]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly engaged in trafficking.

   "Trafficking" means that the defendant [(recruited) (enticed) (harbored) (transported) (provided) (obtained)] [attempted to (recruit) (entice) (harbor) (transport) (provide) (obtain)] (name of victim) .[3]

2. The defendant (use the term selected in element 1.) (name of victim) for the purpose of [labor or services] [a commercial sex act].[4]

   ["Services" means activities performed by one individual at the request, under the supervision, or for the benefit of another person.][5]

   ["Commercial sex act" means (sexual contact) (sexual intercourse) (sexually explicit performance) (any conduct done for the purpose of sexual humiliation, degradation, arousal, or gratification) for which anything of value is given to, promised, or received, directly or indirectly, by any person.][6]

3. The defendant engaged in trafficking by (use the term or terms selected in the introductory paragraph).[7]

Deciding About Knowledge and Purpose

You cannot look into a person's mind to find out knowledge and purpose. Knowledge and purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1276 was originally published in 2011. This revision was approved by the Committee in October 2014; it reflects changes made by 2013 Wisconsin Act 362.

This instruction is drafted for violations of § 940.302, Human trafficking, which was created by 2007 Wisconsin Act 116 [effective date: April 3, 2008]. The statute was amended by 2013 Wisconsin Act 362 [effective date April 25, 2014]. For an example showing how the instruction would read when typical alternatives are selected, see Wis JI-Criminal 1276 EXAMPLE.

Subsection (2)(b) of § 940.302 provides: "Whoever benefits in any manner from a violation of par. (a) is guilty of a Class D felony if the person knows or reasonably should have known that the benefits come from or are derived from an act or scheme described in par. (a)." This instruction does not address this means of violating the statute.

Subsection (2)(c) of sec. § 940.302 was created by 2013 Wisconsin Act 362, by renumbering and revising what formerly was sub. (2) of § 944.33. An instruction is being drafted for violations of sub. (2)(c).

2007 Wisconsin Act 116 also created § 939.46(1m) which provides an affirmative defense for any offense committed by a trafficking victim as a direct result of the violation of the trafficking statute.

2007 Wisconsin Act 116 also created § 948.051, Trafficking of a child – see Wis JI-Criminal 2124.

1. The applicable term should be selected. The alternatives are those provided in sub. (2)(a)2.a. - L. of § 940.302.

2. Section 940.302(1)(b) defines "debt bondage" as follows: "the condition of a debtor arising from the debtor's pledge of services as a security for debt if the reasonable value of those services is not applied toward repaying the debt or if the length and nature of the services are not defined."

3. The Committee recommends selecting the applicable alternative from the choices in the brackets and parentheses. The choices are those provided in the definition of "trafficking" provided in § 940.302(1)(d).

4. For example, if element 1. involved selecting the "entice" alternative, the second element should read as follows: "The defendant enticed (name of victim) for the purpose of labor or services."

5. This is the definition of "services" provided in § 940.302(1)(c).

6. This is the definition provided in § 940.302(1)(a), as amended by 2013 Wisconsin Act 362. For a definition of "sexual contact" see Wis JI-Criminal 934 and § 939.22(34). The definition in § 939.22(34) applies to this offense; the other "sexual contact" definitions in § 940.225(5)(c) and § 948.01(5) apply to violations of § 940.225 and Chapter 948, respectively.

7. The applicable term should be selected. The alternatives are those provided in sub. (2)(a)2.a. - L. of § 940.302.

1276 EXAMPLE HUMAN TRAFFICKING — § 940.302(2)(a)

Statutory Definition of the Crime

Human trafficking, as defined in § 940.302 of the Criminal Code of Wisconsin, is committed by one who knowingly engages in trafficking for the purpose of a commercial sex act and does so by causing or threatening to cause bodily harm to any individual.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly engaged in trafficking.

   "Trafficking" means that the defendant recruited (name of victim).

2. The defendant recruited (name of victim) for the purpose of a commercial sex act.

   "Commercial sex act" means sexual contact for which anything of value is given to, promised, or received, directly or indirectly, by any person.

3. The defendant engaged in trafficking by causing or threatening to cause bodily harm to any individual.

Deciding About Knowledge and Purpose

You cannot look into a person's mind to find out knowledge and purpose. Knowledge and purpose must be found, if found at all, from the defendant's acts, words, and statements,

if any, and from all the facts and circumstances in this case bearing upon knowledge and purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1276 EXAMPLE was originally published in 2011. This revision was approved by the Committee in October 2014.

This instruction provides an example showing how Wis JI-Criminal 1276, which applies to violations of § 940.302, Human trafficking, would read when typical alternatives are selected:

- trafficking by recruiting a person;
- for the purpose of a commercial sex act;
- trafficking by causing or threatening to cause bodily harm.

1277 HUMAN TRAFFICKING — § 940.302(2)(c)

Statutory Definition of the Crime

Human trafficking, as defined in § 940.302(2)(c) of the Criminal Code of Wisconsin, is committed by one who knowingly receives compensation from the earnings of debt bondage, a prostitute, or a commercial sex act.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant received compensation from the earnings of [debt bondage] [a prostitute] [a commercial sex act].

   ["Debt bondage" means the condition of a debtor arising from the debtor's pledge of services as a security for debt if the reasonable value of those services is not applied toward repaying the debt or if the length and nature of the services are not defined.][1]

   ["Prostitute" means a person who intentionally engages in sexual intercourse or other sexual acts for anything of value.][2]

["Commercial sex act" means (sexual contact) (sexual intercourse) for which anything of value is given to, promised, or received, directly or indirectly, by any person.][3]

2. The defendant received that compensation knowingly. This requires that the defendant knew that the compensation was from the earnings of [debt bondage] [a prostitute] [a commercial sex act].

Deciding About Knowledge

You cannot look into a person's mind to find out knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1277 was approved by the Committee in June 2015.

This instruction is drafted for violations of sub. (2)(c) of § 940.302, Human trafficking, which are Class F felonies. The substance of subsection (2)(c) formerly appeared at § 944.30(2); it was amended and moved to § 940.302 by 2013 Wisconsin Act 362 [effective date: April 25, 2014].

For violations of sub. (2)(a) of § 940.302 see Wis JI-Criminal 1276 and Wis JI-Criminal 1276 EXAMPLE.

Subsection (2)(b) of § 940.302 provides: "Whoever benefits in any manner from a violation of par. (a) is guilty of a Class D felony if the person knows or reasonably should have known that the benefits come from or

are derived from an act or scheme described in par. (a)." An instruction has not been drafted to address this means of violating the statute.

Section 939.46(1m) provides an affirmative defense for any offense committed by a trafficking victim as a direct result of the violation of the trafficking statute.

For violations of § 948.051, Trafficking of a child, see Wis JI-Criminal 2124.

1. This is the definition provided in § 940.302(1)(b).

2. This is based on part of the definition of "practice prostitution" in Wis JI-Criminal 1562.

3. This is based on the definition provided in § 940.302(1)(a), as amended by 2013 Wisconsin Act 362. The portions of that definition relating to "sexually explicit performance" and "any conduct done for the purpose of sexual humiliation, degradation, arousal, or gratification" are excluded – see § 940.302(1)(a)3. For a definition of "sexual contact" see Wis JI-Criminal 934 and § 939.22(34). The definition in § 939.22(34) applies to this offense; the other "sexual contact" definitions in § 940.225(5)(c) and § 948.01(5) apply to violations of § 940.225 and Chapter 948, respectively.

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1278 TAKING A HOSTAGE — § 940.305

Statutory Definition of the Crime

Taking a hostage, as defined in § 940.305 of the Criminal Code of Wisconsin, is committed by one who, by force or threat of imminent force, seizes, confines, or restrains a person without the person's consent and with intent to use the person as a hostage in order to influence another person to perform or not to perform some action demanded by the defendant [and does not release the person held as a hostage without bodily harm prior to the time of arrest].[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following (five) (six)[2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (seized) (confined) (restrained)[3] (name of victim) .
2. The defendant (seized) (confined) (restrained) (name of victim) without (his) (her) consent.
3. The defendant (seized) (confined) (restrained) (name of victim) forcibly.
4. The defendant (seized) (confined) (restrained) (name of victim) with intent to use[4] (name of victim) as a hostage in order to influence a person to perform (or not to perform) some action demanded by the defendant.

5. The defendant demanded by conduct or statements that another person (not) perform some action.[5]

[6. The defendant did not release (name of victim) without bodily harm prior to the defendant's arrest. Bodily harm means physical pain or injury, illness, or any impairment of physical condition.[6]][7]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[8]

[Meaning of "Without Consent"]

["Without consent," as used here, means that there was no consent in fact or that consent was given by (name of victim) because of fear caused by the defendant's use or threat of imminent use of physical violence on ((name of victim)) (on another person in the presence of (name of victim)) (on a member of (name of victim) 's immediate family).]

Meaning of "Forcibly"

"Forcibly" means that the defendant actually used force or threatened the use of imminent force to overcome or to prevent (name of victim) 's resistance to being (seized) (confined) (restrained).[9] "Imminent" means "near at hand" or "on the point of happening."[10]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[11]

["Forcibly" includes the (use of) (threat to use) force directed at a (third person in the presence of) (member of the immediate family of) (name of victim) if that (use of) (threat to use) force results in the (seizing) (confining) (restraining) of (name of victim) .]

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all [five] [six] elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.[12]

COMMENT

Wis JI-Criminal 1278 was originally published in 1981 and revised in 1990 and 2006. This revision was approved by the Committee in June 2015; it involved a nonsubstantive change to the text.

Section 940.305 was created by Chapter 118, Laws of 1979, and was intended to fill a gap in the kidnapping statute, § 940.31, which fails to cover the situation where a person is kidnapped and held not for money ransom but for the purpose of making someone else do something.

The offense defined by § 940.305 is punishable as a Class B felony if the defendant does not release the hostage without bodily harm prior to his arrest. If this aggravating factor is not present, the crime is a Class C felony. The instruction is drafted for use with either crime; the material in brackets constituting the sixth element is to be included if the Class B felony is charged.

The constitutionality of § 940.305 was upheld in the face of a variety of challenges in State v. Bertrand, 162 Wis.2d 411, 469 N.W.2d 873 (Ct. App. 1991).

1. Read this bracketed material if the defendant is charged with a Class B felony, which involves the additional element of failing to release the hostage without injury prior to the defendant's arrest. If this aggravating factor is not present, the offense is punished as a Class C felony. If the Class B felony is charged, it may often be appropriate to submit the Class C felony as a lesser included offense. In that event, the Committee suggests that the procedure described in footnote 12, below, be followed.

2. Read "five elements" if the Class C felony is charged; read "six elements" if the Class B felony is charged. See note 1, supra.

3. The Committee recommends that one of the alternatives be elected but does not conclude that an instruction joining the three alternatives in the disjunctive would be error. See Clark v. State, 92 Wis.2d 617, 642, 286 N.W.2d 344 (1979), and discussion at note 9, below.

4. Under § 939.23(4), "with intent that" is defined to mean "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B for further discussion.

5. Whether this element is required is open to question because the statute is ambiguous. Section 940.305, in relevant part, reads as follows:

> Whoever by force or threat of imminent force seizes, confines or restrains a person without the person's consent and with intent to use the person as a hostage in order to influence a person to perform or not to perform some action demanded by the actor is guilty. . . .
> (Emphasis added.)

Is the underlined phrase intended to mean "some action to be demanded" or does it mean "some action that has been demanded?" It can be argued that the underlined phrase is superfluous since the statute would make sense without it: the defendant must have the intent to influence another to perform or not to perform some action. On the other hand, it is a standard rule of statutory construction that a law should be so construed that no word or phrase is rendered surplusage or superfluous. Donaldson v. State, 93 Wis.2d 306, 286 N.W.2d 817 (1980); State v. Wacksmuth, 73 Wis.2d 318, 243 N.W.2d 410 (1976). Further, "taking hostages" is a serious crime, constituting a Class B felony if the hostage is not released without injury.

Given the ambiguity of the statute and the seriousness of the offense, the Committee determined that the ambiguity must be resolved in favor of the defendant. Thus, the fifth element of the instruction requires that an actual demand must have been made by the defendant. Like all other facts, however, the making of a demand may be established circumstantially by consideration of all the conduct and statements of the defendant.

6. This is the definition of "bodily harm" provided in § 939.22(4).

7. Read the sixth element only if the Class B felony is charged. See notes 1 and 2, supra.

8. "Without consent" is defined in § 939.22(48). The material in brackets reflects the rule stated in § 939.22(48)(a) and has been included because the use of force, required as an element of the crime of taking a hostage, will often be relevant to the consent issue as well. When the bracketed material is used, additional explanation is recommended, especially where consent was given because of threats to a third person or family member.

9. This paragraph restates the statutory requirements that the defendant act "by force or threat of imminent force" by phrasing them as alternative ways of satisfying the core requirement that the defendant act "forcibly." The Committee has concluded that this properly emphasizes the intent of the statute to require a link between the seizing or confining of the victim and the defendant's use of force. The Committee has concluded that it is not necessary to elect between the "use of force" and "threat of imminent force" alternatives, although in the usual case election would clarify the issue for the jury and should be done where possible. In support of the proposition that election is not necessary, see Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979), and Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

10. The definition of "imminent" is adapted from the one provided in Black's Law Dictionary, p. 884 (4th ed., 1981).

11. The seizing, confining, or restraining of the victim must be accomplished by force or threat of imminent force. The Committee has concluded that this element may be satisfied when the use or threat of force is directed at a third person or family member as well as if it is directed at the victim. This is based on analogy with the definition of "without consent" in § 939.22(48), see note 8, supra.

12. If the Class B felony is submitted to the jury and an instruction on the Class C felony is appropriate as a lesser included offense, the Committee suggests using the alternative approach for submitting a lesser included offense illustrated in Wis JI-Criminal 112A. That approach highlights the difference between the greater and the lesser offense by focusing on the single element that is different. Here that element is the sixth, requiring that the defendant did not release the victim without bodily harm prior to arrest.

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1280 KIDNAPPING — § 940.31(1)(a)

Statutory Definition of the Crime

Kidnapping, as defined in § 940.31(1)(a) of the Criminal Code of Wisconsin, is committed by one who, by force or threat of imminent force, carries another person from one place to another without consent and with intent to cause (him) (her) to be secretly confined or imprisoned or to be carried out of this state or to be held to service against (his) (her) will.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant transported[1] (name of victim) from one place to another.[2]
2. The defendant transported (name of victim) without (his) (her) consent.
3. The defendant transported (name of victim) from one place to another forcibly.
4. The defendant transported (name of victim) from one place to another with intent that[3] (name of victim) be (secretly confined) (secretly imprisoned) (transported out of this state) (held to service against (his) (her) will).[4]

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[5]

[Meaning of "Without Consent"]

["Without consent," as used here, means that there was no consent in fact or that consent was given by (name of victim) because of fear caused by the defendant's use or threat of imminent use of physical violence on ((name of victim)) (on another person in the presence of (name of victim)) (on a member of (name of victim) 's immediate family).]

Meaning of "Forcibly"

"Forcibly" means that the defendant actually used force or threatened the use of imminent force to overcome or to prevent (name of victim) 's resistance to being transported.[6] "Imminent" means "near at hand" or "on the point of happening."[7]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[8]

["Forcibly" includes the (use of) (threat to use) force directed at a (third person in the presence of) (member of the immediate family of) (name of victim) if that (use of) (threat to use) force results in the transporting of (name of victim) from one place to another.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING[9] IF DEFENDANT HAS BEEN CHARGED UNDER § 940.31(2): COMMITTING THE OFFENSE WITH INTENT TO CAUSE

ANOTHER TO TRANSFER PROPERTY TO OBTAIN THE VICTIM'S RELEASE.

If you find the defendant guilty of kidnapping, you must consider the following question:

"Did the defendant commit this offense with intent to cause another person to transfer money or other form of property[10] in order to obtain the release of (name of victim) ?"

Before you may answer this question "yes," the State must satisfy you beyond a reasonable doubt that the defendant committed this offense with the intent to cause another person to transfer money or other form of property in order to obtain the release of (name of victim) . You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts and words and statements, if any, bearing on his intent.

If you are satisfied beyond a reasonable doubt that the defendant committed this offense with the intent to cause another person to transfer money or other form of property in order to obtain the release of (name of victim) , you should answer this question "yes."

If you are not so satisfied, you must answer this question "no."

ADD THE FOLLOWING[11] IF THERE IS SOME EVIDENCE IN THE CASE THAT THE VICTIM WAS RELEASED WITHOUT PERMANENT PHYSICAL INJURY.

If you answer the first question "yes," you must consider the following question:

"Did the defendant fail to release (name of victim) without permanent physical injury (prior to the time the first witness was sworn at trial)?"[12]

The burden is on the State to satisfy you beyond a reasonable doubt that the defendant did not release (name of victim) without permanent physical injury (prior to the first witness being sworn at trial).[13] If you are so satisfied, you should answer this question "yes."

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 1280 was originally published in 1980 and revised in 1990 and 2006. This revision was approved by the Committee in June 2012; it involved nonsubstantive changes to the text and an addition to footnote 4.

Section 940.31 defines the offense of kidnapping and provides that it may be committed in three ways, see subsections (1)(a), (1)(b), and (1)(c). This instruction deals with an offense under subsection (1)(a). For violations of subsection (1)(b), see Wis JI-Criminal 1281. For violations of subsection (1)(c), see Wis JI-Criminal 1282.

Basic violations of § 940.31 are Class C felonies. This instruction also deals with the aggravating and mitigating factors provided for in subsection (2). The penalty classification for the offense is increased to a Class B felony if committed for ransom. The penalty classification for the aggravated offense is reduced back to a Class C felony if the victim is released without injury prior to trial. The Committee recommends handling both the aggravating and mitigating factors by submitting separate questions to the jury, see notes 9 and 11, below.

In State v. Simplot, 180 Wis.2d 383, 509 N.W.2d 338 (Ct. App. 1993), the court addressed the application of the kidnapping statute to a defendant who claimed to be acting as an agent of the parent of the child who was kidnapped. The defendant claimed he had a defense because a parent is immune from prosecution for kidnapping and he shared the same immunity when acting as the parents' agent. The Wisconsin Court of Appeals rejected this argument, adopting what the court characterized as the minority view which refuses to extend the parent's immunity to an agent.

Although kidnapping is sometimes referred to as "aggravated false imprisonment" (see, for example, 1953 Judiciary Committee Report on the Criminal Code, page 72), false imprisonment is not a lesser included offense of kidnapping. Geitner v. State, 59 Wis.2d 128, 207 N.W.2d 837 (1973).

1. The Committee believes the word "transport" is preferable to "carries" used in § 940.31.

2. Section 940.31(1)(a) requires that the victim be carried "from one place to another." One question that may arise is, how far must the victim be moved to sustain a charge of kidnapping? The question arises in at least two situations: 1) in determining whether an attempt or a completed crime has been committed; and 2) in determining whether the crime of kidnapping has been committed in addition to another offense which involved some movement of the victim. Most of the attention has focused on the latter situation, as where a robbery victim is forced to move from one place to another during the course of the robbery. The problem may not be as difficult in Wisconsin as it appears to be elsewhere, because the Wisconsin statute requires that the

carrying "from one place to another" be done with intent that the victim be "secretly confined or imprisoned or to be carried out of his state or to be held to service . . . ." It may be that movement incidental to another criminal offense would not meet the intent requirements under our statute. However, the same questions may arise with regard to the nature of the confinement or imprisonment as with the movement: Is it extensive enough to constitute "kidnapping" or is it just a natural incident of the commission of another crime?

The Wisconsin Court of Appeals addressed this issue in State v. Simpson, 118 Wis.2d 454, 347 N.W.2d 920 (Ct. App. 1984). (Simpson was remanded on other grounds which were addressed in a decision reported at 125 Wis.2d 575, 373 N.W.2d 673 (Ct. App. 1985).) The case involved the defendant getting into the victim's car and driving into the country where a sexual assault was committed. Simpson appealed his convictions for kidnapping under § 940.31(1)(a) and sexual assault. One of his contentions was that the evidence was insufficient to support the kidnapping charge because any movement of the victim was "incidental" to the acts constituting the sexual assault.

Simpson based his argument on case law from several other states requiring that the "asportation of a kidnapping victim be non-incidental to any offense other than kidnapping." See 118 Wis.2d 454, 458, and cases cited. The court of appeals rejected the argument, finding that the Wisconsin Supreme Court had rejected it earlier in a case involving charges of abduction and sexual perversion. See Harris v. State, 78 Wis.2d 357, 254 N.W.2d 291 (1977). Rather than apply a special rule about "incidental" movement, the Wisconsin approach treats this problem like any other involving acts which form the basis for violation of more than one statute. Kidnapping and sexual assault are separate crimes for purposes of charging and conviction under §§ 939.65 and 939.71. So the test is whether the evidence establishes the facts necessary to constitute each crime. The court in Simpson found the evidence sufficient to establish the facts necessary to constitute kidnapping. 118 Wis.2d 454, 462-63.

The 1980 version of this instruction included the suggestion that a statement be added which in effect adopted the rule requiring "non-incidental" movement of the kidnapping victim. In light of Simpson and Harris, this suggestion was removed in the 1990 revision.

Also see, State v. Wagner, 191 Wis.2d 322, 328, 528 N.W.2d 85 (Ct. App. 1995), for a summary of cases discussing the "from one place to another" requirement.

3. Under § 939.23(4), "with intent that" is defined to mean "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B for further discussion.

4. In State v. Clement, 153 Wis.2d 287, 450 N.W.2d 789 (Ct. App. 1989), the court held that the word "service" in the phrase "hold to service against his will" is unambiguous on its face: it "includes acts done at the command of another. It clearly embraces sexual acts performed at the command of another." 153 Wis.2d 287, 293. Also see, State v. Wagner, 191 Wis.2d 322, 329, 528 N.W.2d 85 (Ct. App. 1995). In State v. Denton, 2009 WI App 78, 319 Wis.2d 718, 768 N.W.2d 250, the court applied the Clement standard in rejecting the defendant's argument that "held to service" for purposes of kidnapping should be limited to "forced labor or involuntary servitude." The word "service" includes "acts done at the command of another." 319 Wis.2d 718, 739.

5. "Without consent" is defined in § 939.22(48). The material in brackets reflects the rule stated in § 939.22(48)(a) and has been included because the use of force, required as an element of the crime of kidnapping, will often be relevant to the consent issue as well. When the bracketed material is used, additional

explanation is recommended, especially where consent was given because of threats to a third person or family member.

6. This paragraph restates the statutory requirement that the defendant act "by force or threat of imminent force" by phrasing them as alternative ways of satisfying the core requirement that the defendant act "forcibly." The Committee has concluded that this properly emphasizes the intent of the statute to require a link between the transporting of the victim and the defendant's use of force. The Committee has concluded that it is not necessary to elect between "use of force" and "threat of imminent force" alternatives, although in the usual case election would clarify the issue for the jury and should be done where possible. In support of the proposition that election is not necessary, see Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979), and Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

7. The definition of "imminent" is adapted from the one provided in Black's Law Dictionary, p. 884 (4th ed., 1981).

8. The seizing, confining, or restraining of the victim must be accomplished by force or threat of imminent force. The Committee has concluded that this element may be satisfied when the use or threat of force is directed at a third person or family member as well as if it is directed at the victim. This is based on analogy with the definition of "without consent" in § 939.22(48), see note 5, supra.

9. Section 940.31(2) provides for an increased penalty (from a Class C to a Class B felony) if the offense is committed for ransom. Where the aggravated offense is charged, the Committee recommends that a separate question be submitted to the jury if they find the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Did the defendant commit this offense with intent to cause another to transfer money or other form or property in order to obtain the release of (name of victim) ?

10. The statute refers simply to the transfer of "property"; the Committee concluded that since money will be involved in most cases, it is proper to refer directly to "money" in the instruction. If further definition of "property" is required, see §§ 943.20(2) and 990.01(27) and (31).

11. Section 940.31(2) provides that where the defendant committed the offense for ransom (see note 9, supra), the penalty may be reduced back to the penalty for simple kidnapping (Class C felony) if the victim was released without permanent physical injury prior to the first witness being sworn at trial. This mitigating circumstance operates only if the defendant is found guilty of committing the offense for ransom.

The Committee recommends that the issue be handled by submitting a separate question to the jury if they find the defendant guilty of the aggravated offense of kidnapping for ransom. The following should be added to the verdict form (as amended, see note 9, supra):

If you answer this question "yes," answer the following question "yes" or "no":

Did the defendant fail to release (name of victim) without permanent physical injury (prior to the time the first witness was sworn at trial)?

The Committee recommends the phrase in parentheses should be included only when the time of the release is an issue in the case, see note 12, below.

The additional instruction on the mitigating factor should be given whenever there is some evidence in the case that the victim was released without permanent physical injury. This evidence may be part of the state's case or may be presented by the defendant. The question is phrased in terms of the defendant's failure to release the victim in order to avoid any problems in shifting the burden of proof to the defendant. Once there is some evidence of a mitigating factor, the burden is on the state to prove the absence of that factor.

12. The Committee believes that the precise time of release of the victim will seldom be an issue and that the phrase in parentheses need not be read to the jury in most cases.

13. See note 12, supra.

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1281 KIDNAPPING — § 940.31(1)(b)

Statutory Definition of the Crime

Kidnapping, as defined in § 940.31(1)(b) of the Criminal Code of Wisconsin, is committed by one who, by force or threat of imminent force, seizes or confines another person without consent and with intent to cause (him) (her) to be secretly confined or imprisoned or to be carried out of this state or to be held to service against (his) (her) will.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (seized) (confined)[1] (name of victim) .
2. The defendant (seized) (confined) (name of victim) without (his) (her) consent.
3. The defendant (seized) (confined) (name of victim) forcibly.
4. The defendant (seized) (confined) (name of victim) with intent that[2] (name of victim) be (secretly confined) (secretly imprisoned) (transported out of this state) (held to service against (his) (her) will).[3]

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.[4]

Meaning of "Confined" or "Restrained"[5]

Although this requires genuine restraint or confinement, it does not require that it be in a jail or prison. If the defendant deprived (name of victim) of freedom of movement, or compelled (him) (her) to remain where (he) (she) did not wish to remain, then (name of victim) was confined or restrained. The use of physical force is not required. One may be confined or restrained by acts or words or both.

ADD THE FOLLOWING IF THE ISSUE OF "ESCAPE" IS RAISED BY THE EVIDENCE:[6]

[A person is not confined or restrained if (he) (she) knew (he) (she) could have avoided it by taking reasonable action.]

[A reasonable opportunity to escape does not change confinement or restraint that has occurred.]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[7]

[Meaning of "Without Consent"]

["Without consent," as used here, means that there was no consent in fact or that consent was given by (name of victim) because of fear caused by the defendant's use or threat of imminent use of physical violence on ((name of victim)) (on another person in the presence of (name of victim)) (on a member of (name of victim) 's immediate family).]

Meaning of "Forcibly"

"Forcibly" means that the defendant actually used force or threatened the use of imminent force to overcome or to prevent (name of victim) 's resistance to being (seized) (confined).[8] "Imminent" means "near at hand" or "on the point of happening."[9]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[10]

["Forcibly" includes the (use of) (threat to use) force directed at a (third person in the presence of) (member of the immediate family of) (name of victim) if that (use of) (threat to use) force results in the (seizing) (confining) of (name of victim) .

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING[11] IF DEFENDANT HAS BEEN CHARGED UNDER § 940.31(2): COMMITTING THE OFFENSE WITH INTENT TO CAUSE ANOTHER TO TRANSFER PROPERTY TO OBTAIN THE VICTIM'S RELEASE.

If you find the defendant guilty of kidnapping, you must consider the following question:

"Did the defendant commit this offense with intent to cause another person to transfer money or other form of property[12] in order to obtain the release of (name of victim) ?"

Before you may answer this question "yes," the State must satisfy you beyond a reasonable doubt that the defendant committed this offense with the intent to cause another

person to transfer money or other form of property in order to obtain the release of (name of victim) . You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts and words and statements, if any, bearing on his intent.

If you are satisfied beyond a reasonable doubt that the defendant committed this offense with the intent to cause another person to transfer money or other form of property in order to obtain the release of (name of victim) , you should answer this question "yes."

If you are not so satisfied, you must answer this question "no."

ADD THE FOLLOWING[13] IF THERE IS SOME EVIDENCE IN THE CASE THAT THE VICTIM WAS RELEASED WITHOUT PERMANENT PHYSICAL INJURY.

If you answer the first question "yes," you must consider the following question:

"Did the defendant fail to release (name of victim) without permanent physical injury (prior to the time the first witness was sworn at trial)?"[14]

The burden is on the State to satisfy you beyond a reasonable doubt that the defendant did not release (name of victim) without permanent physical injury (prior to the first witness being sworn at trial).[15] If you are so satisfied, you should answer this question "yes."

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 1281 was originally published in 1980 and revised in 1990 and 2006. This revision was approved by the Committee in June 2015; it involved a nonsubstantive change to the text and additions to footnotes 3 and 6.

Section 940.31 defines the offense of kidnapping and provides that it may be committed in three ways, see subsections (1)(a), (1)(b), and (1)(c). This instruction deals with an offense under subsection (1)(b). For violations of subsection (1)(a), see Wis JI-Criminal 1280. For violations of subsection (1)(c), see Wis JI-Criminal 1282.

Basic violations of §940.31 are Class C felonies. This instruction also deals with the aggravating and mitigating factors provided for in subsection (2). The penalty classification for the offense is increased to a Class B felony if committed for ransom. The penalty classification for the aggravated offense is reduced back to a Class C felony if the victim is released without injury prior to trial. The Committee recommends handling both the aggravating and mitigating factors by submitting separate questions to the jury, see notes 11 and 13, below.

In State v. Simplot, 180 Wis.2d 383, 509 N.W.2d 338 (Ct. App. 1993), the court addressed the application of the kidnapping statute to a defendant who claimed to be acting as an agent of the parent of the child who was kidnapped. The defendant claimed he had a defense because a parent is immune from prosecution for kidnapping and he shared the same immunity when acting as the parents' agent. The Wisconsin Court of Appeals rejected this argument, adopting what the court characterized as the minority view which refuses to extend the parent's immunity to an agent.

Although kidnapping is sometimes referred to as "aggravated false imprisonment" (see, for example, 1953 Judiciary Committee Report on the Criminal Code, page 72), false imprisonment is not a lesser included offense of kidnapping. Geitner v. State, 59 Wis.2d 128, 207 N.W.2d 837 (1973).

1. The Committee recommends that one of the alternatives be elected but does not conclude that an instruction joining the two alternatives in the disjunctive would be error. See Clark v. State, 92 Wis.2d 617, 642, 286 N.W.2d 344 (1979), and discussion at note 8, below.

2. Under § 939.23(4), "with intent that" is defined to mean "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B for further discussion.

3. In State v. Clement, 153 Wis.2d 287, 450 N.W.2d 789 (Ct. App. 1989), the court held that the word "service" in the phrase "hold to service against his will" is unambiguous on its face: it "includes acts done at the command of another. It clearly embraces sexual acts performed at the command of another." 153 Wis.2d 287, 293. Also see, State v. Wagner, 191 Wis.2d 322, 329, 528 N.W.2d 85 (Ct. App. 1995). In State v. Denton, 2009 WI App 78, 319 Wis.2d 718, 768 N.W.2d 250, the court applied the Clement standard in rejecting the defendant's argument that "held to service" for purposes of kidnapping should be limited to "forced labor or involuntary servitude." The word "service" includes "acts done at the command of another." 319 Wis.2d 718, 739.

4. The basis for the knowledge requirement in the fifth element is the provision in § 939.23(3) which states that when the word "intentionally" is used in a criminal statute, it requires "knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'."

5. The definition of "confined or restrained" is the one used in Wis JI-Criminal 1275 False Imprisonment. In State v. Burroughs, 2002 WI App 18, 250 Wis.2d 180, 640 N.W.2d 190, the court viewed "the false imprisonment statute as a cousin to Wis. Stat. s. 940.31(1), the kidnapping statute. . . . We therefore are satisfied that the definition of 'confine' as set forth in Wis JI-Criminal 1275 is also appropriate for cases alleging kidnapping pursuant to s. 940.31." ¶19.

6. As with the definition of "confined or restrained" – see footnote 5, supra – the bracketed paragraphs are based on Wis JI-Criminal 1275, False Imprisonment. One or both should be used only when the issue of "escape" is raised by the evidence. They replace a statement in the 1971 version of Wis JI-Criminal 1275 to the effect that "if there is some reasonable means of escape, there is no confinement or restraint." The Committee concluded that this statement was potentially confusing if literally applied. The word "escape" implies leaving a situation of confinement or restraint. Yet once there is confinement or restraint, that aspect of the crime of false imprisonment – or kidnapping – is complete, and a later escape would not affect it. This is the concept expressed in the second bracketed paragraph.

In the Committee's judgment, the relevance of escape is more accurately expressed in terms of actions that could reasonably have been taken to avoid confinement or restraint. This is the concept expressed in the first bracketed paragraph.

The "reasonable means of escape" issue as it applies to false imprisonment was discussed in State v. C.V.C., 153 Wis.2d 145, 450 N.W.2d 463 (Ct. App. 1989). The court relied on a standard from the Restatement of Torts to determine whether a victim had a "reasonable means of escape":

> Since the actor has intended to imprison the other, the other is not required to run any risk of harm to his person or to his chattels or of subjecting himself to any substantial liability to a third person in order to relieve the actor from a liability to which his intentional misconduct has subjected him. So too, even though there may be a perfectly safe avenue of escape, the other is not required to take it if the circumstances are such as to make it offensive to a reasonable sense of decency or personal dignity.

Restatement (Second) of Torts, sec. 36 comment a. (1978).

The standard had previously been applied in a civil false imprisonment case. Herbst v. Wuennenberg, 83 Wis.2d 768, 778-79, 266 N.W.2d 391 (1978). In C.V.C., the court concluded that "the victim was not required to take steps dangerous to herself or offensive to a reasonable sense of decency or personal dignity to free herself in order for the state to prove restraint or confinement. . . ." 153 Wis.2d 145, 150. Also see the Comment to § 340.25 in Volume V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 71 (February 1953).

7. "Without consent" is defined in § 939.22(48). The material in brackets reflects the rule stated in § 939.22(48)(a) and has been included because the use of force, required as an element of the crime of kidnapping, will often be relevant to the consent issue as well. When the bracketed material is used, additional explanation is recommended, especially where consent was given because of threats to a third person or family member.

8. This paragraph restates the statutory requirement that the defendant act "by force or threat of imminent force" by phrasing them as alternative ways of satisfying the core requirement that the defendant act "forcibly." The Committee has concluded that this properly emphasizes the intent of the statute to require a link between the transporting of the victim and the defendant's use of force. The Committee has concluded that it is not necessary to elect between "use of force" and "threat of imminent force" alternatives, although in the usual case election would clarify the issue for the jury and should be done where possible. In support of the proposition that election is not necessary, see Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979), and Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

9. The definition of "imminent" is adapted from the one provided in Black's Law Dictionary, p. 884 (4th ed., 1981).

10. The seizing, confining, or restraining of the victim must be accomplished by force or threat of imminent force. The Committee has concluded that this element may be satisfied when the use or threat of force is directed at a third person or family member as well as if it is directed at the victim. This is based on analogy with the definition of "without consent" in § 939.22(48), see note 7, supra.

11. Section 940.31(2) provides for an increased penalty (from a Class C to a Class B felony) if the offense is committed for ransom. Where the aggravated offense is charged, the Committee recommends that a separate question be submitted to the jury if they find the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Did the defendant commit this offense with intent to cause another to transfer money or other form or property in order to obtain the release of (name of victim) ?

12. The statute refers simply to the transfer of "property"; the Committee concluded that since money will be involved in most cases, it is proper to refer directly to "money" in the instruction. If further definition of "property" is required, see §§ 943.20(2) and 990.01(27) and (31).

13. Section 940.31(2) provides that where the defendant committed the offense for ransom (see note 11, supra), the penalty may be reduced back to the penalty for simple kidnapping (Class C felony) if the victim was released without permanent physical injury prior to the first witness being sworn at trial. This mitigating circumstance operates only if the defendant is found guilty of committing the offense for ransom.

The Committee recommends that the issue be handled by submitting a separate question to the jury if they find the defendant guilty of the aggravated offense of kidnapping for ransom. The following should be added to the verdict form (as amended, see note 11, supra):

If you answer this question "yes," answer the following question "yes" or "no":

Did the defendant fail to release (name of victim) without permanent physical injury (prior to the time the first witness was sworn at trial)?

The Committee recommends the phrase in parentheses should be included only when the time of the release is an issue in the case, see note 14, below.

The additional instruction on the mitigating factor should be given whenever there is some evidence in the case that the victim was released without permanent physical injury. This evidence may be part of the state's case or may be presented by the defendant. The question is phrased in terms of the defendant's failure to release the victim in order to avoid any problems in shifting the burden of proof to the defendant. Once there is some evidence of a mitigating factor, the burden is on the state to prove the absence of that factor.

14. The Committee believes that the precise time of release of the victim will seldom be an issue and that the phrase in parentheses need not be read to the jury in most cases.

15. See note 14, supra.

1282 KIDNAPPING — § 940.31(1)(c)

Statutory Definition of the Crime

Kidnapping, as defined in § 940.31(1)(c) of the Criminal Code of Wisconsin, is committed by one who by deceit induces another person to go from one place to another with intent to cause (him) (her) to be secretly confined or imprisoned or to be carried out of this state or to be held to service against (his) (her) will.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant induced (name of victim) to go from one place to another.[1]

2. The defendant induced (name of victim) to go from one place to another by deceit.

   ["By deceit" requires that the defendant induced (name of victim) to go from one place to another by (making a false statement) (giving a false impression).][2]

3. The defendant induced (name of victim) to go from one place to another with intent that[3] (name of victim) be (secretly confined) (secretly imprisoned) (transported out of this state) (held to service against (his) (her) will).[4]

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING[5] IF DEFENDANT HAS BEEN CHARGED UNDER § 940.31(2): COMMITTING THE OFFENSE WITH INTENT TO CAUSE ANOTHER TO TRANSFER PROPERTY TO OBTAIN THE VICTIM'S RELEASE.

If you find the defendant guilty of kidnapping, you must consider the following question:

"Did the defendant commit this offense with intent to cause another person to transfer money or other form of property[6] in order to obtain the release of (name of victim) ?"

Before you may answer this question "yes," the State must satisfy you beyond a reasonable doubt that the defendant committed this offense with the intent to cause another person to transfer money or other form of property in order to obtain the release of (name of victim) . You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts and words and statements, if any, bearing on his intent.

If you are satisfied beyond a reasonable doubt that the defendant committed this offense with the intent to cause another person to transfer money or other form of property in order to obtain the release of (name of victim), you should answer this question "yes."

If you are not so satisfied, you must answer this question "no."

ADD THE FOLLOWING[7] IF THERE IS SOME EVIDENCE IN THE CASE THAT THE VICTIM WAS RELEASED WITHOUT PERMANENT PHYSICAL INJURY.

If you answer the first question "yes," you must consider the following question:

"Did the defendant fail to release (name of victim) without permanent physical injury (prior to the time the first witness was sworn at trial)?"[8]

The burden is on the State to satisfy you beyond a reasonable doubt that the defendant did not release (name of victim) without permanent physical injury (prior to the first witness being sworn at trial).[9] If you are so satisfied, you should answer this question "yes."

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 1282 was originally published in 1980 and revised in 1990. This revision was approved by the Committee in April 2006 and involved adoption of a new format and nonsubstantive changes to the text.

Section 940.31 defines the offense of kidnapping and provides that it may be committed in three ways, see subsections (1)(a), (1)(b), and (1)(c). This instruction deals with an offense under subsection (1)(c). For violations of subsection (1)(a), see Wis JI-Criminal 1280. For violations of subsection (1)(b), see Wis JI-Criminal 1281.

Basic violations of §940.31 are Class C felonies. This instruction also deals with the aggravating and mitigating factors provided for in subsection (2). The penalty classification for the offense is increased to a Class B felony if committed for ransom. The penalty classification for the aggravated offense is reduced back to a Class C felony if the victim is released without injury prior to trial. The Committee recommends handling both the aggravating and mitigating factors by submitting separate questions to the jury, see notes 9 and 11, below.

In State v. Simplot, 180 Wis.2d 383, 509 N.W.2d 338 (Ct. App. 1993), the court addressed the application of the kidnapping statute to a defendant who claimed to be acting as an agent of the parent of the child who was kidnapped. The defendant claimed he had a defense because a parent is immune from prosecution for kidnapping and he shared the same immunity when acting as the parents' agent. The Wisconsin Court of Appeals rejected this argument, adopting what the court characterized as the minority view which refuses to extend the parent's immunity to an agent.

Although kidnapping is sometimes referred to as "aggravated false imprisonment" (see, for example, 1953 Judiciary Committee Report on the Criminal Code, page 72), false imprisonment is not a lesser included offense of kidnapping. Geitner v. State, 59 Wis.2d 128, 207 N.W.2d 837 (1973).

1. Section 940.31(1)(c) requires that the victim be induced to move "from one place to another." A question may arise as to how far the victim must be moved to sustain a charge of kidnapping. See discussion of this issue at note 2, Wis JI-Criminal 1280.

2. The term "deceit" as used in sec. 940.31(1)(c) was discussed in State v. Dalton, 98 Wis.2d 725, 298 N.W.2d 398 (Ct. App. 1980). Dalton appealed his conviction, claiming that he could not be convicted absent proof of express or implied misrepresentations. The court rejected his argument, holding that the use of "deceit," without further statutory definition shows legislative intent to avoid limiting it to express or implied misrepresentations. Rather, the legislature intended to proscribe "wily and cunning stratagems that are contrived to delude the victim and conceal the violator's intent to effectuate the crime" of kidnapping. 98 Wis.2d 725, 741.

At common law, "deceit" was generally used as an equivalent of "fraud" and typically had the following elements: a false representation; made with intent to induce another to act; relied on by another person; to the damage of that person. In general, see Wis JI-Civil 2401 and cases cited therein. Also see 37 Am.Jur.2d Fraud and Deceit (1968). This amounts to using a false representation or other deceptive practice. The Committee concluded the two alternatives in parentheses adequately cover the likely application of "by means of deceit." Garner, A Dictionary of Modern Legal Usage, 2d Edition (Oxford University Press 1995), defines deceit as the "act of giving a false impression."

3. Under § 939.23(4), "with intent that" is defined to mean "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B for further discussion.

4. In State v. Clement, 153 Wis.2d 287, 450 N.W.2d 789 (Ct. App. 1989), the court held that the word "service" in the phrase "hold to service against his will" is unambiguous on its face: it "includes acts done at the command of another. It clearly embraces sexual acts performed at the command of another." 153 Wis.2d 287, 293. Also see, State v. Wagner, 191 Wis.2d 322, 329, 528 N.W.2d 85 (Ct. App. 1995).

5. Section 940.31(2) provides for an increased penalty (from a Class C to a Class B felony) if the offense is committed for ransom. Where the aggravated offense is charged, the Committee recommends that a

separate question be submitted to the jury if they find the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Did the defendant commit this offense with intent to cause another to transfer money or other form or property in order to obtain the release of (name of victim) ?

6. The statute refers simply to the transfer of "property"; the Committee concluded that since money will be involved in most cases, it is proper to refer directly to "money" in the instruction. If further definition of "property" is required, see §§ 943.20(2) and 990.01(27) and (31).

7. Section 940.31(2) provides that where the defendant committed the offense for ransom (see note 5, supra), the penalty may be reduced back to the penalty for simple kidnapping (Class C felony) if the victim was released without permanent physical injury prior to the first witness being sworn at trial. This mitigating circumstance operates only if the defendant is found guilty of committing the offense for ransom.

The Committee recommends that the issue be handled by submitting a separate question to the jury if they find the defendant guilty of the aggravated offense of kidnapping for ransom. The following should be added to the verdict form (as amended, see note 5, supra):

If you answer this question "yes," answer the following question "yes" or "no":

Did the defendant fail to release (name of victim) without permanent physical injury (prior to the time the first witness was sworn at trial)?

The Committee recommends the phrase in parentheses should be included only when the time of the release is an issue in the case, see note 8, below.

The additional instruction on the mitigating factor should be given whenever there is some evidence in the case that the victim was released without permanent physical injury. This evidence may be part of the state's case or may be presented by the defendant. The question is phrased in terms of the defendant's failure to release the victim in order to avoid any problems in shifting the burden of proof to the defendant. Once there is some evidence of a mitigating factor, the burden is on the state to prove the absence of that factor.

8. The Committee believes that the precise time of release of the victim will seldom be an issue and that the phrase in parentheses need not be read to the jury in most cases.

9. See note 8, supra.

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1283A PLACING A GLOBAL POSITIONING DEVICE — § 940.315(1)(a)

Statutory Definition of the Crime

Section 940.315(1)(a) of the Criminal Code of Wisconsin is violated by a person who places a global positioning device or a device equipped with global positioning technology on a vehicle owned or leased by another person without that person's consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant placed [a global positioning device[1]] [a device equipped with global positioning technology] on a vehicle owned or leased by another person.
2. The defendant placed that device without the person's consent.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1283A was approved by the Committee in October 2015.

Wis JI-Criminal 1283A is drafted for a violation of § 940.315(1)(a) – a Class A misdemeanor. For violations of § 940.315(1)(b) see Wis JI-Criminal 1283B.

Section 940.315 was created by 2015 Wisconsin Act 45 [effective date: July 3, 2015].

Subsection (2) of § 940.315 sets forth several situations where the prohibition of sub. (1) does not apply: installation of a device by a manufacturer, by law enforcement officers acting in an official capacity, parents tracking the location or movement of a minor child, etc. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89,92, 250 N.W.2d 38 (1951). Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595(1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. Section 940.315 does not define "global positioning device." A definition of "global positioning system tracking" is provided at sub.(1)(b) of §§ 301.48 and 301.49.

2. For a definition of "without consent" see § 939.22(48) and Wis JI-Criminal 948.

1283B OBTAINING INFORMATION GENERATED BY A GLOBAL POSITIONING DEVICE — § 940.315(1)(b)

Statutory Definition of the Crime

Section 940.315(1)(b) of the Criminal Code of Wisconsin is violated by a person who intentionally obtains information regarding another person's movement or location generated by a global positioning device or a device equipped with global positioning technology that has been placed without that person's consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained information regarding another person's movement or location generated by [a global positioning device[1]] [a device equipped with global positioning technology].
2. The device was placed without the person's consent.[2]
3. The defendant knew that the device was placed without the other person's consent.[3]
4. The defendant acted intentionally.[4]

   This requires that the defendant acted with the purpose to obtain information regarding another person's movement or location generated by [a

global positioning device] [a device equipped with global positioning technology].

Deciding About Purpose and Knowledge

You cannot look into a person's mind to find purpose or knowledge. Purpose and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1283B was approved by the Committee in October 2015.

Wis JI-Criminal 1283B is drafted for a violation of § 940.315(1)(b) – a Class A misdemeanor. For violations of § 940.315(1)(a) see Wis JI-Criminal 1283A.

Section 940.315 was created by 2015 Wisconsin Act 45 [effective date: July 3, 2015].

Subsection (2) of § 940.315 sets forth several situations where the prohibition of sub. (1) does not apply: installation of a device by a manufacturer, by law enforcement officers acting in an official capacity, parents tracking the location or movement of a minor child, etc. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89,92, 250 N.W.2d 38 (1951). Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595(1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. Section 940.315 does not define "global positioning device." A definition of "global positioning system tracking" is provided at sub.(1)(b) of §§ 301.48 and 301.49.

2. For a definition of "without consent" see § 939.22(48) and Wis JI-Criminal 948.

3. "Intentionally" is defined in § 939.23(3) to require "knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" Here, this requires knowledge that the other person did not consent. Regarding the meaning of "intentionally" see Wis JI-Criminal 923A and B.

4. "Intentionally" is defined in § 939.23(3) to require "a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." The Committee believes that the "mental purpose" alternative is most likely to apply in the context of this offense.

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1284 STALKING — § 940.32(2)

Statutory Definition of the Crime

Stalking, as defined in § 940.32(2) of the Criminal Code of Wisconsin, is committed by one who intentionally engages in a course of conduct directed at a specific person that causes that person [to suffer serious emotional distress] [to fear bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)] and that would cause a reasonable person [to suffer serious emotional distress] [to fear bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)] and where the actor knows or should know that the conduct will [cause the person to suffer serious emotional distress] [place the person in reasonable fear of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)].[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally engaged in a course of conduct directed at (name of person).

   "Intentionally" requires that the defendant acted with the purpose[2] to engage in a course of conduct directed at (name of person).

   "Course of conduct" means a series of two or more acts carried out over time,

however short or long, that show a continuity of purpose.[3] Acts that you may find constitute a course of conduct are limited to: (identify acts listed in § 940.32(1)(a)1. 10 that are supported by the evidence.).[4]

2. The course of conduct would have caused a reasonable person [to suffer serious emotional distress] [to fear bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)].

["Suffer serious emotional distress" means to feel terrified, intimidated, threatened, harassed, or tormented. This does not require that (name of person) received treatment from a mental health professional.][5]

["Member of a family" means a spouse, parent, child, sibling, or any other person who is related by blood or adoption to another.][6]

["Member of a household" means a person (who regularly resides in the household of another) (who within the previous 6 months regularly resided in the household of another).][7]

To determine whether this element is established, the standard is what effect the course of conduct would have had on a person of ordinary intelligence and prudence in the position of (name of person) under the circumstances that existed at the time of the course of conduct.

3. The defendant's acts[8] [caused (name of person) to suffer serious emotional distress] [induced fear in (name of person) of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)].

4. The defendant knew or should have known that at least one of the acts constituting the course of conduct would [cause (name of person) to suffer serious emotional distress] [place (name of person) in reasonable fear of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)].[9]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 1284 was originally published in 1994 and revised in 1999, 2003, 2004, 2010, 2011, and 2013. The 2013 revision added reference to State v. Hemmingway to the comment. This revision was approved by the Committee in June 2021; it revised footnote 4 to reflect changes made by 2021 Wisconsin Act 28.

2003 Wisconsin Act 222 [effective date: April 27, 2004] amended § 940.32(2) to add causing a person to "suffer serious emotional distress" and changing the mental state requirement addressed in the fourth element from "intends" to "knows or should know."

Section 940.32 was created by 1993 Wisconsin Act 96 [effective date: December 25, 1993]. As originally enacted, it was adapted from a model "anti-stalking code for the states" prepared by the National Institute of Justice (NIJ) and the National Criminal Justice Association. The model and its development are described in an NIJ Research Report, "Project To Develop a Model Anti-Stalking Code for the States," October 1993 (NCJ 144477).

Section 940.32 was extensively amended by 2001 Wisconsin Act 109, [effective date: July 30, 2002]. The revised statute defines two offenses: violations of sub. (2) are addressed by this instruction; violations of sub. (2e) are addressed by Wis JI Criminal 1284B. Subsections (2m) and (3) provide for an increase in the penalty if specified facts accompany a violation of sub. (2). See Wis JI Criminal 1284A.

The constitutionality of § 940.32 as originally enacted was upheld in State v. Ruesch, 214 Wis.2d 548, 571 N.W.2d 898 (Ct. App. 1997), the first published decision dealing with the stalking statute. Claims based on overbreadth, vagueness, and equal protection were all rejected.

The defendant in Ruesch also claimed that sub. (4) of § 940.32, which states that "[t]his section does not apply to conduct that is or acts that are protected by the person's right to freedom of speech or to peaceably assemble with others under the state and U.S. constitutions . . .," creates an element of the crime. The court disagreed, holding that "[b]ecause subsection (4) provides no elements of the crime of stalking, it plays no role in the State's burden of proof at trial." 214 Wis.2d 547, 555.

In State v. Hemmingway, 2012 WI App 133, 345 Wis.2d 297, 825 N.W.2d 303, the court of appeals addressed how freedom of speech relates to stalking charges. The court reversed a trial court order that had dismissed a stalking charge on the ground that the statute was overbroad. The court of appeals held: "The First Amendment does not protect intentional conduct designed to cause serious emotional distress or fear of bodily harm or death in a targeted victim." ¶1.

Section 947.013 defines similar offenses by penalizing violations of harassment restraining orders. See Wis JI Criminal 1910, 1911, and 1912.

1. The statement of the offense in the first paragraph of the instruction is a paraphrase of the statute, which begins: "whoever meets all the following criteria . . ." Those criteria are redundant and overlapping. In the Committee's judgment, the statute requires:

(a) a course of conduct directed at a specific person;
(b) the course of conduct would cause serious emotional distress or fear of bodily injury or death in a reasonable person;
(c) the acts caused serious emotional distress or fear of bodily injury or death in a specific person; and
(d) the defendant knew or should have known that at least one of the acts would cause that person to suffer serious emotional distress or place that person in reasonable fear.

2. "Intentionally" requires either mental purpose to cause the result specified or awareness that one's conduct is practically certain to cause the result. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI Criminal 923A and 923B for elaboration on the two alternatives.

3. The definition of "course of conduct" is the one provided in § 940.32(1)(a). 2001 Wisconsin Act 109 revised the definition to provide a list of different types of actions that the course of conduct "may include." Before the revision, "course of conduct" was defined as "maintaining a visual or physical proximity," an alternative that is retained in § 940.32(1)(a)1. For a case reviewing the sufficiency of the evidence on this factor, see State v. Sveum, 220 Wis.2d 396, 584 N.W.2d 137 (Ct. App. 1998).

4. Here specify the type of conduct alleged to be involved in the case and supported by the evidence, based on the list provided in subd. 1. through 9. of § 940.32(1)(a). The list of types of conduct is preceded by the statement: ". . . including any of the following: . . ." The Committee concluded that this means that

acts constituting the course of conduct are limited to the types listed. Subdivision 10. of § 940.32(1)(a) extends the coverage of the statute to "causing a person to engage in any of the acts described in subds. 1. to 9."

2003 Wisconsin Act 222 added to the list in subds. 1. through 10 by creating subd. 6m.:

6m. Photographing, videotaping, audiotaping, or through any other electronic means, monitoring or recording the activities of the victim. This subdivision applies regardless of where the act occurs.

2021 Wisconsin Act 28 [effective date: April 25, 2021] amended subds. 6., 7., and 7m. It confirmed that electronic stalking is a violation of the statute. Specifically:

> (1)(a)6. Contacting the victim by telephone, text message, electronic message, electronic mail, or other means of electronic communication or causing the victim's telephone or electronic device or any other person's telephone or electronic device to ring or generate notifications repeatedly or continuously, regardless of whether a conversation ensues.
>
> (1)(a)7. Sending to the victim any physical or electronic material or contacting the victim by any means, including any message, comment, or other content posted on any Internet site or web application.
>
> (1)(a)7m. Sending to a member of the victim's family or household, or any current or former employer of the victim, or any current or former coworker of the victim, or any friend of the victim any physical or electronic material or contacting such person by any means, including any message, comment, or other content posted on any Internet site or web application for the purpose of obtaining information about, disseminating information about, or communicating with the victim.

In 2010, the Committee reviewed its conclusion that acts constituting the course of conduct were limited to the types listed. Usually, when a statute introduces a list with "including," that indicates that the list is non-exhaustive. But in this statute the meaning appeared to be ambiguous, especially in light of the overall introduction to the crime definition which begins "whoever meets all of the following criteria." The Committee reviewed the legislative history and found that it did not resolve the ambiguity; while it showed an intent to broaden the coverage of the statute it also showed that some options were considered and not included. Further, two sections of the statute clearly appear to be limited to acts enumerated in the list. Subdivision 10. of § 940.32(1)(a) extends liability to "causing a person to engage in any of the acts described in subds. 1. to 9." Subsection (2e) is also limited to one who "engages in any of the acts listed in sub. (1)(a)1. to 10." The review convinced the Committee to reaffirm the original conclusion.

5. The definition of "suffer serious emotional distress" is provided in § 940.32(1)(d), which was created by 2003 Wisconsin Act 222. The statement that receiving treatment is not required is based on § 940.32(3m), was also created by Act 222, which reads as follows:

> (3m) A prosecutor need not need [sic] show that a victim received or will receive treatment from a mental health professional in order to prove that the victim suffered serious emotional distress under sub. (2)(c) or (2e)(c).

6. This is the definition provided in § 940.32(1)(cb).

7. This is the definition provided in § 940.32(1)(cd).

8. This element is based on § 940.32(2)(c) and thus refers to the defendant's "acts" rather than to "course of conduct," the phrase used in the other elements. Because the legislature used different terms in the different subsections, they are assumed to have different meanings. "[T]he evidence is sufficient to support a stalking conviction if the victim's knowledge of one of the actor's acts induces fear in the victim." State v. Sveum, 220 Wis.2d 396, 413 414, 584 N.W.2d 137 (Ct. App. 1998).

9. 2003 Wisconsin Act 222 amended § 940.32(2)(b) to require that the actor "knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear . . ." Before that amendment, the statute had required that "the actor intends . . ." This restores § 940.32 to the way it read when originally enacted; it required that the defendant "knew or should have known . . ." 2001 Wisconsin Act 109 had amended § 940.32(2)(b) to substitute "intends."

1284A STALKING: PENALTY FACTORS — § 940.32(2m) and (3)

ADD ONE OF THE FOLLOWING QUESTIONS TO WIS JI-CRIMINAL 1284 IF ONE OF THE PENALTY FACTORS SET FORTH IN SUBS. (2m) OR (3) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACTOR IS ESTABLISHED.[1]

If you find the defendant guilty, you must answer the following question(s):

FOR CHARGES UNDER SUB. (2m)(a)

[Did the defendant have a previous conviction for (identify the crime)[2]?]

FOR CHARGES UNDER SUB. (2m)(b)

[Did the defendant have a previous conviction for a crime?

Was the victim of that crime the victim of the crime in this case?

Did the crime in this case occur within 7 years after the previous conviction?][3]

FOR CHARGES UNDER SUB. (2m)(c)

[Did the defendant intentionally (gain access to) (cause another person to gain access to) a record in electronic format that contained personally identifiable information regarding the victim in order to facilitate the crime in this case?][3]

FOR CHARGES UNDER SUB. (2m)(d)

[Did the defendant violate [§ 968.31(1)] [§ 968.34(1)] in order to facilitate the crime in this case? Section [968.31(1)] [968.34(1)] is violated by one who (define the alleged crime).][4]

FOR CHARGES UNDER SUB. (2m)(e)

[Was (name of victim) under the age of 18 years at the time of the crime?]

FOR CHARGES UNDER SUB. (3)(a)

[Did the act result in bodily harm to [(name of victim)] [a member of (name of victim)'s (family)[5] (household)[6]]?

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[7]]

FOR CHARGES UNDER SUB. (3)(b)

[Did the defendant have a previous conviction for (identify the crime)[8]?]

Was the victim of that crime the victim of the crime in this case?

Did the crime in this case occur within 7 years after the previous conviction?]

FOR CHARGES UNDER SUB. (3)(c)

[Did the defendant use a dangerous weapon in carrying out an act of (identify act listed in sub. (1)(a)1. to 9.)?

"Dangerous weapon" means (see Wis JI-Criminal 910).]

CONTINUE WITH THE FOLLOWING IN ALL CASES

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1284A was originally published in 2003 and revised in 2010. This revision was approved by the Committee in February 2011; it involved updating the Comment and footnote 3.

This instruction addresses the penalty-increasing factors set forth in subs. (2m) and (3) of § 940.32. Both subsections were created by 2001 Wisconsin Act 109, effective date: July 30, 2001. Application of the penalty factors depends on a finding of guilt for a violation of sub. (2), the offense addressed by Wis JI-Criminal 1284.

A violation of § 940.32(2) is a Class I felony. The facts listed in sub. (2m) increase the penalty to a Class H felony. The facts listed in sub. (3) increase the penalty to a Class F felony. These penalty classifications take effect February 1, 2003.

Penalty-increasing provisions in subsections (2m)(a), (2m)(b), and (3)(b) require proof of a prior conviction. In State v. Warbelton, 2009 WI 6, ¶3, 315 Wis.2d 253, 759 N.W.2d 557, the court held that the penalty-increasing provision in sub. (2m)(a) "is an element of the stalking crime, rather than a penalty enhancer." The Committee concluded that presenting the penalty-increasing fact as a special question, as done in this instruction, is not inconsistent with its status as an element of the crime. Warbelton also held that if a defendant stipulates to the existence of the prior conviction, the prior conviction element is still to be presented to the jury in the absence of a jury trial waiver on that element. In the Warbelton case, the parties stipulated to the fact of prior conviction. The stipulation was accepted, but the state refused to consent to a jury trial waiver on the prior conviction element. The supreme court held the trial court did not err in submitting the element to the jury. The court held that State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997), which allows withdrawal of the "status element" in a case involving a charge of operating with a prohibited alcohol concentration, is limited to prosecutions for driving while under the influence of an intoxicant or with a prohibited alcohol concentration. For a discussion of stipulations that go to elements of the crime and jury trial waivers in that context, see Wis JI-Criminal 162A, Law Note: Stipulations.

The facts must be found by the jury because they increase the statutorily-authorized penalty range. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of stalking under Wis. Stat. § 940.32, at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> [State the applicable question.]

1. The penalty-increasing facts set forth in sub. (2m) and (3) of § 940.32 apply to violations of § 940.32(2).

2. The applicable crimes are: a violent crime as defined in § 939.632(1)(e)1.; stalking under § 940.32; or, harassment under § 947.013(1r), (1t), (1v), or (1x).

3. In State v. Conner, 2009 WI App 143, 321 Wis.2d 449, 775 N.W.2d 105, the court addressed the defendant's challenges to a conviction for stalking under § 940.32(2m)(b) – a Class H felony for the second violation within 7 years. As to the 7-year time period, the court concluded:

> . . . the seven year time restriction specified in § 940.32(2m)(b) requires that only the final act charged as part of a course of conduct occur within seven years of the previous conviction, and does not restrict by time the other acts used to establish the underlying course of conduct element of sub. (2).

2009 WI App 143, ¶19.

The Wisconsin Supreme Court affirmed. State v. Conner, 2011 WI 8, ¶47, 331 Wis.2d 352, 795 N.W.2d 750, holding that the statute "was properly applied in this case because, in this case, the 'present violation' was a continuing course of conduct that included the acts on November 30, 2005, and that occurred within seven years after the 2003 convictions for crimes involving the same victim."

4. Sub. (1)(cg) of § 940.32 provides: "'Personally identifiable information' has the meaning given in s. 19.62(5)."

Sub. (1)(cr) of § 940.32 provides: "'Record' has the meaning given in s. 19.32(2)."

5. Section 968.31(1) provides a criminal penalty for violating the "wiretap" statute. Sections 968.34(1) does the same for unauthorized use of a "pen register." A definition of the alleged crime should be included in the penalty question. There are no uniform instructions for these violations.

6. "Member of a family" is defined in § 940.32(1)(cb).

7. "Member of a household" is defined in § 940.32(1)(cd).

8. This is the definition of "bodily harm" provided in § 939.22(4).

9. The applicable crimes are: a violent crime as defined in § 939.632(1)(e)1.; stalking under § 940.32; or, harassment under § 947.013(1r), (1t), (1v), or (1x).

1284B STALKING — § 940.32(2e)

Statutory Definition of the Crime

Stalking, as defined in § 940.32(2e) of the Criminal Code of Wisconsin, is committed by one who has been convicted of (specify applicable sexual assault or domestic abuse offense),[1] directs an act of (specify applicable act listed in § 940.32(1)(a)1. to 10.)[2] at the victim of that offense, causes that person [to suffer serious emotional distress] [to fear bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)] and where the actor knows or should know that the act will [cause the person to suffer serious emotional distress] [place the person in reasonable fear of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was convicted of (specify applicable sexual assault or domestic abuse offense).[3]

2. (Name of person) was the victim of that offense.

3. The defendant directed an act of (specify applicable act listed in § 940.32(1)(a)1. to 10.)[4] at (name of person).

4. The act [caused (name of person) to suffer serious emotional distress] [induced

fear in (name of person) of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)].

["Suffer serious emotional distress" means to feel terrified, intimidated, threatened, harassed, or tormented. This does not require that (name of person) received treatment from a mental health professional.][5]

["Member of a family" means a spouse, parent, child, sibling, or any other person who is related by blood or adoption to another.][6]

["Member of a household" means a person (who regularly resides in the household of another) (who within the previous 6 months regularly resided in the household of another).][7]

5. The defendant knew or should have known that the act would [cause (name of person) to suffer serious emotional distress] [place (name of person) in reasonable fear of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)].[8]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense

have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1284B was originally published in 2003 and revised in 2004 and 2006. The 2006 revision revised footnote 1 to reflect changes made by 2005 Wisconsin Act 277. This revision was approved by the Committee in June 2021; it revised footnote 2 to reflect changes made by 2021 Wisconsin Act 28.

2003 Wisconsin Act 222 [effective date: April 27, 2004] amended § 940.32(2e) to add causing a person to "suffer serious emotional distress" and changing the mental state requirement addressed in the fifth element from "intends" to "knows or should know."

Section 940.32(2e) was created by 2001 Wisconsin Act 109, [effective date: July 30, 2002]. Section 940.32, as revised by Act 109, defines two related offenses: violations of sub. (2e) are addressed by this instruction. Violations of sub. (2) are addressed by Wis JI-Criminal 1284. Subsections (2m) and (3) provide for increase in the penalty for violations of sub. (2) if specified facts are established. See Wis JI-Criminal 1284A.

1. Sub. (2e)(a) identifies the applicable prior offenses: sexual assault under § 940.225, sexual assault of a child under § 948.02, repeated sexual assault of a child under § 948.025, sexual assault of a child placed in substitute care under § 948.085, or a domestic abuse offense. § 940.32(1)(ap) provides: "'Domestic abuse offense' means an act of domestic abuse that constitutes a crime." § 940.32(1)(am) provides: "'Domestic abuse' has the meaning given in s. 813.12(1)(am)." That definition was amended by 2001 Wisconsin Act 109 to add reference to crimes committed "by an adult caregiver against an adult who is under the caregiver's care" and "by an adult against an adult with whom the individual has or had a dating relationship." 2005 Wisconsin Act 277 [effective date: April 20, 2006] amended the list of offenses in § 940.32(2e)(a) to include § 948.085, an offense created by Act 277.

2. Here specify the type of conduct alleged to be involved in the case and supported by the evidence, based on the list provided in subd. 1. through 10. of § 940.32(1)(a). The list of types of conduct is preceded by the statement: ". . . including any of the following: . . ." The Committee concluded that this means that acts constituting the course of conduct are limited to the types listed.

2003 Wisconsin Act 222 added to the list in subds. 1. through 10 by creating subd. 6m.:

> 6m. Photographing, videotaping, audiotaping, or through any other electronic means, monitoring or recording the activities of the victim. This subdivision applies regardless of where the act occurs.

2021 Wisconsin Act 28 [effective date: April 25, 2021] amended subds. 6., 7., and 7m. It confirmed that electronic stalking is a violation of the statute. Specifically:

> (1)(a)6. Contacting the victim by telephone, text message, electronic message, electronic mail, or other means of electronic communication or causing the victim's telephone or electronic device

or any other person's telephone or electronic device to ring or generate notifications repeatedly or continuously, regardless of whether a conversation ensues.

(1)(a)7. Sending to the victim any physical or electronic material or contacting the victim by any means, including any message, comment, or other content posted on any Internet site or web application.

(1)(a)7m. Sending to a member of the victim's family or household, or any current or former employer of the victim, or any current or former coworker of the victim, or any friend of the victim any physical or electronic material or contacting such person by any means, including any message, comment, or other content posted on any Internet site or web application for the purpose of obtaining information about, disseminating information about, or communicating with the victim.

In 2010, the Committee reviewed its conclusion that acts constituting the course of conduct were limited to the types listed. Usually, when a statute introduces a list with "including," that indicates that the list is non-exhaustive. But in this statute the meaning appeared to be ambiguous, especially in light of the overall introduction to the crime definition which begins "whoever meets all of the following criteria." The Committee reviewed the legislative history and found that it did not resolve the ambiguity; while it showed an intent to broaden the coverage of the statute it also showed that some options were considered and not included. Further, two sections of the statute clearly appear to be limited to acts enumerated in the list. Subdivision 10. of § 940.32(1)(a) extends liability to "causing a person to engage in any of the acts described in subds. 1. to 9." Subsection (2e) is also limited to one who "engages in any of the acts listed in sub. (1)(a)1. to 10." The review convinced the Committee to reaffirm the original conclusion.

3. See note 1, supra. If the case involves a "domestic abuse offense" the state must prove that the defendant was convicted of a crime that involved "domestic abuse" as defined in § 813.12(1)(am). The conviction itself will be a matter of record, but that conviction must be shown to have involved "domestic abuse," which is not likely to be established by the mere fact of the conviction.

4. See note 2, supra.

5. The definition of "suffer serious emotional distress" is provided in § 940.32(1)(d), which was created by 2003 Wisconsin Act 222. The statement that receiving treatment is not required is based on § 940.32(3m), was also created by Act 22, which reads as follows:

(3m) A prosecutor need not need [sic] show that a victim received or will receive treatment from a mental health professional in order to prove that the victim suffered serious emotional distress under sub. (2)(c) or (2e)(c).

6. This is the definition provided in § 940.32(1)(cb).

7. This is the definition provided in § 940.32(1)(cd).

8. 2003 Wisconsin Act 222 amended § 940.32(2e)(b) to require that the actor "knows or should know that the act will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear . . ." Before that amendment, the statute had required that "the actor intends . . ."

1285 ABDUCTION — § 940.32(1)

1286 ABDUCTION — § 940.32(2)

1287 ABDUCTION — § 940.32(3)

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1285 was originally published in 1974 and was revised in 1985.

Wis JI-Criminal 1286 and 1287 were originally published in 1985.

The instructions were withdrawn in 1989 because the statute with which they deal was renumbered and revised by 1987 Wisconsin Act 332, effective July 1, 1989. Roughly equivalent offenses are defined in § 948.30, Abduction Of Another's Child. See Wis JI-Criminal 2160 through 2163.

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1290 INTIMIDATION OF A WITNESS: MISDEMEANOR — § 940.42

INSTRUCTION WITHDRAWN

SEE WIS JI-CRIMINAL 1292

COMMENT

Wis JI-Criminal 1290 was originally published in 1982 and revised in 1987 and 1994. It was withdrawn in 2000 when Wis JI-Criminal 1292 was revised to apply to both misdemeanor and felony violations of §§ 940.42 and 940.43.

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1292 INTIMIDATION OF A WITNESS — §§ 940.42 and 940.43

Statutory Definition of the Crime

Intimidation of a witness, as defined in § 940.42 of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] any witness from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a witness.

   "Witness" means any person who has been called to testify or who is expected to be called to testify.[2]

2. The defendant (prevented) (dissuaded)[3] (attempted to prevent) (attempted to dissuade) (name of victim) from attending or giving testimony at a proceeding authorized by law.

   (A (name of proceeding) is a proceeding authorized by law.)[4]

3. The defendant acted knowingly and maliciously.[5]

This requires that the defendant knew (name of victim) was a witness and that the defendant acted with the purpose to prevent (name of victim) from (attending) (testifying).

Deciding About Knowledge and Purpose

You cannot look into a person's mind to find knowledge and purpose. Knowledge and purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and purpose.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].[7]

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.43 IS ESTABLISHED:[8]

If you find the defendant guilty, you must answer the following question:

[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of witness)] [(identify relative)[9] of (name of witness)]?"]

[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of witness)] [(identify relative)[10] of (name of witness)]?"]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.43)?"][11]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][12]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

[FOR CHARGES UNDER SUB. (7)][13]

[Did the defendant commit the act in connection with a trial, proceeding, or inquiry in a felony case in which he was charged?]

[FOR CHARGES UNDER SUB. (8)][14]

[Was the proceeding a criminal trial where the crime charged was an act of domestic abuse[15] or one subject to a domestic abuse surcharge?][16]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1292 was originally published in 1982 and revised in 1987, 1994, 1998, 2001, 2006, and 2010. The 2001 revision changed the instruction to apply to both misdemeanor and felony offenses; it also replaced Wis JI-Criminal 1290 and 1292A. The 2006 revision added reference to sub. (7) of § 940.43, which was created by 2005 Wisconsin Act 280. See footnote 13. The 2020 revision added reference to sub. (8) of § 940.43, which was created by 2019 Wisconsin Act 112. See footnote 14.

This instruction is drafted for use in both misdemeanor and felony charges under §§ 940.42 and 940.43. The definition of the three basic elements is based on § 940.42 and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in subs. (1)-(8) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

Several other statutes define criminal offenses directed against a witness:

§ 940.201 Battery of Threat to Witness (See Wis JI-Criminal 1238 and 1239)
§ 943.011 Damage or Threat to Property of a Witness (See Wis JI-Criminal 1400B)
§ 946.61 Bribery of Witnesses

In State v. Moore, 2006 WI App 61, 292 Wis.2d 101, 713 N.W.2d 131, the court affirmed convictions for 14 counts of intimidating a witness. The evidence was sufficient to prove Moore attempted to intimidate the second witness/victim by letters written to the first witness/victim. Charging 14 counts based on 7 letters attempting to dissuade two witnesses did not violate the rules against multiplicity – there is no evidence of legislative intent to limit the number of charges.

1. Section 940.42 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from attending or giving testimony and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from attending or giving testimony except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The definition of "witness" in the instruction is a simplified version of the definition provided in § 940.41(3):

> (3) "Witness" means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who has provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under s. 885.01 or under the authority of any court of this state or of the United States.

Subsection 940.41(1g) provides that "law enforcement agency" has the meaning specified in § 165.83(1)(b).

Reading the statutory definition of "witness" in the context of the required elements of the crime led the Committee to conclude that the simplified version would be suitable for most cases. The facts of a particular situation may require more complete incorporation of the provisions of § 940.41(3).

3. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

4. The Committee concluded that using the phrase "proceeding authorized by law" would cover the longer phrase used in the statute: "trial, proceeding or inquiry authorized by law." The broader term, "proceeding," would clearly include "trial" and "inquiry."

Most "proceedings authorized by law" will be authorized by a specific section of the statutes. When there is specific statutory authority, the Committee believes this may be communicated to the jury by stating, for example: "A John Doe hearing is a proceeding authorized by law."

5. Section 940.42 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and

"maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

6. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

7. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

8. Section 940.43 specifies eight different facts that increase the penalty for the basic misdemeanor offense to that for a Class G felony. A bracketed question is provided for each statutory option.

9. The penalty increase provided by § 940.43(1) applies to the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

10. The same relatives are covered as under sub. (1) of the statute. See note 9, supra.

11. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

12. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

13. This option was added to reflect the alternative created by 2005 Wisconsin Act 280. [Effective date: April 20, 2006.] The question is a paraphrase of the statute, which reads as follows: "(7) Where the act is committed by a person who is charged with a felony in connection with a trial, proceeding, or inquiry for that felony."

14. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: "(8) If the proceeding is a criminal trial, where the crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following conviction, is subject to the surcharge in s. 973.055."

15. Subsection 968.075(1)(a) defines "domestic abuse" as follows:

> "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:
>
> 1. Intentional infliction of physical pain, physical injury or illness.
> 2. Intentional impairment of physical condition.
> 3. A violation of s. 940.225 (1), (2) or (3).
> 4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

16. A person is subject to a domestic abuse surcharge of $100 if a person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain specified crimes and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.

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1292A INTIMIDATION OF A WITNESS: FELONY: FORCE THREATENED AGAINST A RELATIVE OF THE WITNESS — § 940.43(3)

INSTRUCTION WITHDRAWN

SEE WIS JI-CRIMINAL 1292

COMMENT

Wis JI-Criminal 1292A was originally published in 1982 and revised in 1987 and 1994. It was withdrawn in 2000 when Wis JI-Criminal 1292 was revised to apply to both misdemeanor and felony violations of §§ 940.42 and 940.43.

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1294 INTIMIDATION OF A VICTIM: MISDEMEANOR — § 940.44

INSTRUCTION WITHDRAWN

SEE WIS JI-CRIMINAL 1296

COMMENT

Wis JI-Criminal 1294 was originally published in 1987 and revised in 1991 and 1994. It was withdrawn in 2000 when Wis JI-Criminal 1296 was revised to apply to both misdemeanor and felony violations of §§ 940.44 and 940.45.

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1296 INTIMIDATION OF A VICTIM — §§ 940.44 and 940.45

Statutory Definition of the Crime

Intimidation of a victim, as defined in § 940.44 of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] another person who has been the victim of any crime from making any report of the victimization to any peace officer or law enforcement agency.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a victim of a crime.

   "Victim" means a person against whom a crime has been committed or attempted in this state.[3]

   In this case, it is alleged that (name of victim) was a victim of (name of crime). (Name of crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).[4] Before you may find the defendant guilty of intimidation of a victim, you must be satisfied beyond a reasonable doubt that (name of victim) was the victim of (name of crime).

2. The defendant (prevented) (dissuaded)[5] (attempted to prevent) (attempted to dissuade) (name of victim) from reporting the crime to any law enforcement agency.[6]

3. The defendant acted knowingly and maliciously.[7]

This requires that the defendant knew (name of victim) was a victim of a crime and that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].[9]

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:[10]

If you find the defendant guilty, you must answer the following question:

[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative)[11] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of victim)] [(identify relative)[21] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45)?"][13]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][14]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

[FOR CHARGES UNDER SUB. (7)][15]

["Was the underlying crime an act of domestic abuse[16] or one subject to a domestic

abuse surcharge?"[17]]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1296 was originally published in 1987 and revised in 1991, 1994, 1998, 2001, 2010, and 2020. The 2001 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment. The revised instruction applies to both misdemeanor and felony offenses; it also replaces Wis JI-Criminal 1294. The Committee approved revisions in February 2022 and October 2022. The February 2022 revision corrected an inadvertent error in sub. (7) of § 940.45, which was created by 2019 Wisconsin Act 112. See footnote 15. The October 2022 revision removed a "Reporter's Note" concerning issues relating to instructing the jury on a domestic abuse surcharge pursuant to s. 973.055(4).

This instruction is drafted for use in both misdemeanor and felony charges under §§ 940.44 and 940.45. A separate instruction is drafted for cases involving intimidation of a person acting on behalf of a victim. See Wis JI-Criminal 1296A.

The definition of the three basic elements is based on § 940.44 and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in subs. (1)-(7) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

1. Section 940.44 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact

that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The concluding phrase of this paragraph, ". . . from making any report of the victimization to any peace officer or law enforcement agency," is a simplified paraphrasing of subsec. (1) of 940.44. There are two other subsections that are not addressed by the instruction. The three subsections read as follows:

> (1) Making any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency, or to any judge.
> (2) Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof. [See Wis JI-Criminal 1297.]
> (3) Arresting or causing or seeking the arrest of any person in connection with the victimization.

3. The definition of "victim" in the instruction is a simplified version of the definition provided in § 940.41(2):

> (2) "Victim" means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

4. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

> The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime

against the victim as well as with trying to intimidate that victim. In those situations, Wis JI-Criminal 1294 would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI-Criminal 1294. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, supra.

5. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

6. This statement substitutes "reporting the crime" for the statute's "report of the victimization" on the grounds that it means the same thing and will be more understandable. The second element reflects one alternative of several that are possible under the statute. See note 2, supra.

7. Section 940.44 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and "maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

8. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly JI 923.1].

9. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

10. Section 940.45 specifies seven different facts that increase the penalty for the basic misdemeanor offense to that for a Class G felony. A bracketed question is provided for each statutory option.

11. The penalty increase provided by § 940.45(1) applies to the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

12. The same relatives are covered as under sub. (1) of the statute. See note 11, supra.

13. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage

described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

14. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

15. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: "(7) Where the underlying crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following a conviction, is subject to the surcharge in s. 973.055."

16. Subsection 968.075(1)(a) defines "domestic abuse" as follows:

> "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:
>
> 1. Intentional infliction of physical pain, physical injury or illness.
> 2. Intentional impairment of physical condition.
> 3. A violation of s. 940.225 (1), (2) or (3).
> 4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3..

For an instruction on committing a domestic abuse crime, see Wis JI-Criminal 984.

17. A person is subject to a domestic abuse surcharge if that person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain criminal offenses or municipal ordinances specified under § 973.055(a)1 and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.

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1296A INTIMIDATION OF A PERSON ACTING ON BEHALF OF A VICTIM — §§ 940.44 and 940.45

Statutory Definition of the Crime

Intimidation of a person acting on behalf of a victim, as defined in § 940.44 of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] a person who is acting on the behalf of the victim of any crime from making any report of the victimization to any peace officer or law enforcement agency.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim)[3] was a victim of a crime.

   "Victim" means a person against whom a crime has been committed or attempted in this state.[4]

   In this case, it is alleged that (name of crime victim) was a victim of (name of crime). (Name of crime), as defined in § ____ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).[5] Before you may find the defendant guilty of intimidation

of a person acting on behalf of a victim, you must be satisfied beyond a reasonable doubt that (name of crime victim) was the victim of (name of crime).

2. (Name of person acting on behalf of crime victim)[6] was acting on behalf of (name of crime victim).

3. The defendant (prevented) (dissuaded)[7] (attempted to prevent) (attempted to dissuade) (name of person acting on behalf of crime victim) from reporting the crime to any law enforcement agency.[8]

4. The defendant acted knowingly and maliciously.[9]

This requires that the defendant knew (name of crime victim) was a victim of a crime and knew that (name of person acting on behalf of crime victim) was acting on behalf of (name of crime victim). This also requires that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense

have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].[11]

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:[12]

If you find the defendant guilty, you must answer the following question:

[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative)[13] of (name of victim)]?"][14]

[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of victim)] [(identify relative)[15] of (name of victim)]?"][16]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45)?"][17]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][18]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to

940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

[FOR CHARGES UNDER SUB. (7)][19]

["Was the underlying crime an act of domestic abuse[20] or one subject to a domestic abuse surcharge?"[21]]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1296A was originally published in 2001 and revised in 2010 and 2020. The Committee approved revisions in February 2022 and October 2022. The February 2022 revision corrected an inadvertent error in sub. (7) of § 940.45, which was created by 2019 Wisconsin Act 112. See footnote 19. The October 2022 revision removed a "Reporter's Note" concerning issues relating to instructing the jury on a domestic abuse surcharge pursuant to s. 973.055(4).

This instruction adapts Wis JI-Criminal 1296 for charges alleging intimidation of a person acting on behalf of a crime victim. It is drafted for use in both misdemeanor and felony charges under §§ 940.44 and 940.45. The definition of the four basic elements is to be used in both situations; for felony offenses, a question is to be added so that the jury makes a finding as to whether the fact embodied in the question is proved. Each of the facts increases the penalty to that for a Class G felony.

See the Comment to Wis JI-Criminal 1296 for general information about §§ 940.41 940.49.

1. Section 940.44 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The concluding phrase of this paragraph, ". . . from making any report of the victimization to any peace officer or law enforcement agency," is a simplified paraphrasing of subsec. (1) of 940.44. There are two other subsections that are not addressed by the instruction. The three subsections read as follows:

(1) Making any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency, or to any judge.
(2) Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof. [See Wis JI-Criminal 1297.]
(3) Arresting or causing or seeking the arrest of any person in connection with the victimization.

3. Where the instruction calls for the "name of crime victim" use the name of the person who is alleged to be the victim of the underlying crime. The victim of the offense defined in this instruction is indicated by blanks labeled "name of person acting on behalf of the crime victim." See note 4, below.

4. The definition of "victim" in the instruction is a simplified version of the definition provided in § 940.41(2):

> (2) "Victim" means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

5. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

> The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI-Criminal 1296A would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI-Criminal 1296A. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, supra.

6. Where the instruction calls for the "name of person acting on behalf of crime victim" use the name of the person who is alleged to be the victim of the crime defined by this instruction. The victim of the underlying crime is referred to in the instruction as the "crime victim." See note 3, supra.

7. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

8. This statement substitutes "reporting the crime" for the statute's "report of the victimization" on the grounds that it means the same thing and will be more understandable. The second element reflects one alternative of several that are possible under the statute. See note 2, supra.

9. Section 940.44 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and "maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

10. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly JI 923.1].

11. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you

are not so satisfied . . ."

12. Section 940.45 specifies seven different facts that increase the penalty for the basic misdemeanor offense to that for a Class G felony. A bracketed question is provided for each statutory option.

13. The penalty increase provided by § 940.45(1) applies the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

14. The Committee concluded that the aggravating factors described in subs. (1), (2), and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

15. The same relatives are covered as under sub. (1) of the statute. See note 13, supra.

16. The Committee concluded that the aggravating factors described in subs. (1), (2), and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

17. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

The Committee concluded that the aggravating factors described in subs. (1), (2) and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

18. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

19. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: "(7) Where the underlying crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following a conviction, is subject to the surcharge in s. 973.055."

20. Subsection 968.075(1)(a) defines "domestic abuse" as follows:

"Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225 (1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

For an instruction on committing a domestic abuse crime, see Wis JI-Criminal 984.

21. A person is subject to a domestic abuse surcharge if that person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain criminal offenses or municipal ordinances specified under § 973.055(a)1 and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.

1297 INTIMIDATION OF A VICTIM — §§ 940.44(2) and 940.45

Statutory Definition of the Crime

Intimidation of a victim, as defined in § 940.44(2) of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] another person who has been the victim of any crime from causing a complaint, indictment, or information to be sought and prosecuted and assisting in the prosecution thereof.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a victim of a crime.

   "Victim" means a person against whom a crime has been committed or attempted in this state.[2]

   In this case, it is alleged that (name of victim) was a victim of (name of crime). (Name of crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).[3] Before you may find the defendant guilty of intimidation

of a victim, you must be satisfied beyond a reasonable doubt that (name of victim) was the victim of (name of crime).

2. The defendant (prevented) (dissuaded)[4] (attempted to prevent) (attempted to dissuade) (name of victim) from [causing a (complaint) (indictment) (information) to be sought] (or) [causing a (complaint) (indictment) (information) to be prosecuted] (or) [assisting in the prosecution of a (complaint) (indictment) (information)].[5]

3. The defendant acted knowingly and maliciously.[6]

This requires that the defendant knew (name of victim) was a victim of a crime and that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. They must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].[8]

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:[9]

If you find the defendant guilty, you must answer the following question:

[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative)[10] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of victim)] [(identify relative)[11] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45)?"][12]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][13]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

[FOR CHARGES UNDER SUB. (7)][14]

["Was the underlying crime an act of domestic abuse[15] or one subject to a domestic abuse surcharge?"[16]]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1297 was originally published in 2010 and revised in 2016 and 2020. The Committee approved revisions in February 2022 and October 2022. The February 2022 revision corrected an inadvertent error in sub. (7) of § 940.45, which was created by 2019 Wisconsin Act 112. See footnote 14. The October 2022 revision removed a "Reporter's Note" concerning issues relating to instructing the jury on a domestic abuse surcharge pursuant to s. 973.055(4).

This instruction is drafted for use for both misdemeanor and felony charges under §§ 940.44(2) and 940.45. For violations of § 940.44(1) see Wis JI-Criminal 1296. A separate instruction is drafted for cases involving intimidation of a person acting on behalf of a victim. See Wis JI-Criminal 1296A.

Section 940.44(2) was amended by 2013 Wisconsin Act 14 [effective date: April 10, 2015] to codify the interpretation of the statute in State v. Freer, 2010 WI App 9, 323 Wis.2d 29, 779 N.W.2d 12. The text of the instruction already reflected the Freer interpretation so it was not affected by Act 14. See footnote 5, below.

The definition of the three basic elements is based on § 940.44(2) and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in subs. (1)-(6) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

1. Section 940.44 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The definition of "victim" in the instruction is a simplified version of the definition provided in § 940.41(2):

> (2) "Victim" means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

3. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

> The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI-Criminal 1294 would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI-Criminal 1294. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, supra.

4. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

5. Subsection (2) of § 940.44 reads as follows: "Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof." The instruction provides for three alternatives as set forth in State v. Freer, 2010 WI App 9, 323 Wis.2d 29, 779 N.W.2d 12, which concluded that the statute was ambiguous because "'and' in the statutes is not always interpreted as a conjunctive term." The court relied on an LRB analysis of the bill to interpret the statute as though it read "or" instead of "and":

> In light of the LRB analysis, we conclude that the legislature intended the victim intimidation statute to prohibit any act of intimidation that seeks to prevent or dissuade a crime victim from assisting in the prosecution. Accordingly, we read "and" in the phrase "causing a complaint . . . to be sought and prosecuted and assisting in the prosecution thereof" in the disjunctive, and thereby conclude that Wis. Stat. § 940.44(2) prohibits knowingly or maliciously preventing or dissuading a crime victim from providing any one or more of the following forms of assistance to prosecutors: (1) causing a complaint, indictment or information to be sought; (2) causing a complaint to be prosecuted; or (3) assisting in the prosecution.
> 2010 WI App 9, ¶24.

Section 940.44(2) was amended by 2013 Wisconsin Act 14 [effective date: April 10, 2015] to codify the interpretation of the statute in Freer. The text of the instruction already reflected the Freer interpretation so it was not affected by Act 14.

6. Section 940.44 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and "maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

7. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

8. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

9. Section 940.45 specifies seven different facts that increase the penalty for the basic misdemeanor offense to that for a Class D felony. A bracketed question is provided for each statutory option.

10. The penalty increase provided by § 940.45(1) applies to the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

11. The same relatives are covered as under sub. (1) of the statute. See note 10, supra.

12. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

13. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

14. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: "(7) Where the underlying crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following a conviction, is subject to the surcharge in s. 973.055."

15. Subsection 968.075(1)(a) defines "domestic abuse" as follows:

> "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:
> 1. Intentional infliction of physical pain, physical injury or illness.
> 2. Intentional impairment of physical condition.
> 3. A violation of s. 940.225 (1), (2) or (3).

4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

For an instruction on committing a domestic abuse crime, see Wis JI-Criminal 984.

16. A person is subject to a domestic abuse surcharge if that person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain criminal offenses or municipal ordinances specified under § 973.055(a)1 and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.

OFFICE OF JUDICIAL EDUCATION
1/2024

WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME IIA

Wisconsin Criminal Jury Instructions Committee

[Cite as Wis JI-Criminal]

- Includes 1/2024 Supplement (Release No. 63)

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CRIMINAL SPECIAL MATERIALS

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1300 NEGLIGENT OPERATION OF A VEHICLE — § 941.01

Statutory Definition of the Crime

Negligent operation of a vehicle, as defined in § 941.01 of the Criminal Code of Wisconsin, is committed by one who endangers another's safety by a high degree of negligence in the operation of a vehicle, not upon a highway.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a vehicle,[2] not upon a highway.[3]

   A vehicle is operated when it is set in motion[4]

2. The defendant operated a vehicle in a manner constituting a high degree of negligence.

3. The defendant's high degree of negligence endangered the safety of another person.

The Meaning of "High Degree of Negligence"

"High degree of negligence" means:[5]

- the defendant's operation of a vehicle created a risk of death or great bodily harm; and

- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[6]

IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE THAT APPLIES TO VEHICLES "NOT ON A HIGHWAY" HAS BEEN RECEIVED, ADD THE FOLLOWING:[7]

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that (summarize the statute). Violating this statute does not necessarily constitute a high degree of negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted a high degree of negligence.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1300 was originally published in 1969 and revised in 1986, 1988, 1995, and 2007. The 2007 revision involved adoption of a new format and nonsubstantive changes to the text. This revision was approved by the Committee in February 2022; it added a definition of "operated" to the instructions and amended footnote 4 of the comment.

Section 941.01 was modified by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. Former subsection (2) was repealed. It had defined the term "high degree of negligence." It was apparently intended that the definition of "criminal negligence" in § 939.25, also created by the homicide revision, apply to violations of § 941.01, although no specific cross reference was included. The Judicial Council Note to § 941.01 in 1987 Senate Bill 191 provided: "See s. 939.25, stats., and the NOTE thereto." Section 939.25 is the statute defining "criminal negligence."

Since the statute continues to use "high degree of negligence," the instruction follows the statutory language. The definition of the term is essentially the same as the definition used for "criminal negligence," since it appears clear that the use of the definition was intended. In any event, the change is not believed to be a substantively significant one. The only difference between the definition for "criminal negligence" under the revised statute and "high degree of negligence" under prior law is the substitution of "substantial" for "high probability of" in the phrase, "substantial and unreasonable risk of death or great bodily harm."

Related offenses are defined in § 346.62, Reckless Driving. They apply to offenses committed on a highway. See Wis JI-Criminal 2650 2654.

1. Section 941.01 applies to "the operation of a vehicle, not upon a highway as defined in § 340.01." This distinguishes the offense from reckless driving under § 346.62, which requires that the vehicle be operated "on a highway" or on "premises held out to the public for use of their vehicles. . . ." See § 346.61 and Wis JI-Criminal 2600, Sec. I.

"Highway" includes the entire platted or dedicated right of way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983).

2. If there is a question whether a device is a "vehicle," add the following which is adapted from § 939.22(44):

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

3. Regarding the "not upon a highway" requirement, see note 1, supra.

4. This instruction uses "set in motion" as the definition of "operated." This same definition was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because this definition is prefaced by the phrase "in this section," the Committee determined that it applies only to matters covered under section 346.63, "Operating under influence of intoxicant or other drug."

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. The definition of "high degree of negligence" uses the definition of "criminal negligence" provided in § 939.25. See the Comment preceding note 1, supra.

The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

6. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

7. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). See note 6, Wis JI-Criminal 1170. To be applicable to this offense, it must be established that the safety statute does apply to operating "not on a highway."

1302 HIGHWAY OBSTRUCTION — § 941.03

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1302 was originally published in 1974 and revised in 1980. It was withdrawn in 1988.

This instruction is withdrawn because § 941.03 was repealed by 1987 Wisconsin Act 399 as part of the revision of the homicide and related statutes. The effective date of the repeal is January 1, 1989.

The conduct prohibited by § 941.03 is now covered by § 941.30, Recklessly Endangering Safety. (Judicial Council Note to § 941.03, 1987 Senate Bill 191.) Wis JI-Criminal 1345 and 1347 apply to violations of § 941.30.

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1305 ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON: OPERATING OR GOING ARMED WITH A FIREARM WHILE UNDER THE INFLUENCE OF AN INTOXICANT — § 941.20(1)(b)

[INSTRUCTION RENUMBERED B SEE WIS JI-CRIMINAL 1321.]

COMMENT

Wis JI-Criminal 1305 was renumbered to Wis JI-Criminal 1321 in August 1995.

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1310 NEGLIGENT HANDLING OF BURNING MATERIAL — § 941.10

Statutory Definition of the Crime

Negligent handling of burning material, as defined in § 941.10 of the Criminal Code of Wisconsin, is committed by one who handles burning material in a highly negligent manner.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant handled burning material.
2. The defendant did so in a manner constituting criminal negligence.[1]

The Meaning of "Criminal Negligence"

"Criminal negligence" means:

- the defendant's handling of burning material created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) handling of burning material created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[2]

IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED, ADD THE FOLLOWING:[3]

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that (summarize the statute) . Violating this statute does not necessarily constitute a criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1310 was originally published in 1974 and revised in 1989 and 1995. This revision was approved by the Committee in December 2006 and involved adoption of a new format and nonsubstantive changes to the text.

Section 941.01 was amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The offense was redefined to require either "criminal negligence" or the creation of a substantial and unreasonable risk of serious damage to property. "Criminal negligence" is defined in new § 939.25 in essentially the same way as "high degree of negligence" was defined under prior law. The only change was the substitution of "substantial" for "high probability of" in the phrase "substantial and unreasonable risk of death or great bodily harm."

1. The instruction defines the offense in terms of "criminal negligence" being the conduct alleged. The statute provides an alternative: "or under circumstances in which the person should realize that a substantial and unreasonable risk of serious damage to another's property is created." If that alternative is used, the second element should be rephrased as follows:

2. The defendant did so under circumstances in which the defendant should have realized that a substantial and unreasonable risk of serious damage to another's property is created.

2. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

3. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). See note 6, Wis JI-Criminal 1170.

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1316 GIVING A FALSE ALARM — § 941.13

Statutory Definition of the Crime

Giving a false alarm, as defined in § 941.13 of the Criminal Code of Wisconsin, is committed by one who intentionally gives a false alarm to any public officer or employee, whether by means of a fire alarm system or otherwise.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant gave an alarm to a public (officer) (employee) by means of fire alarm system or otherwise.[1]
2. The alarm was false.
3. The defendant intentionally gave the false alarm.

   "Intentionally" requires that the defendant acted with the mental purpose[2] to give a false alarm to a public (officer) (employee). It further requires that the defendant knew that the person was a public (officer) (employee) and knew the alarm was a false alarm.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1316 was originally published in 1974 and revised in 1977 and 1995. This revision was approved by the Committee in December 2006 and involved adoption of a new format and nonsubstantive changes to the text.

1. If a definition of "public officer" or "public employee" is needed, see § 939.23(30) which provides definitions of those terms.

2. When appropriate add: "or was aware that his conduct was practically certain to cause that result." See § 939.23(3) and Wis JI-Criminal 923B.

1317 INTERFERING WITH A FIRE ALARM SYSTEM — § 941.12(1)

Statutory Definition of the Crime

Interfering with a fire alarm system, as defined in § 941.12(1) of the Criminal Code of Wisconsin, is committed by one who intentionally interferes with the proper functioning of a fire alarm system.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant interfered with the proper functioning of a fire alarm system.
2. The defendant intentionally interfered with the proper functioning of a fire alarm system.

"Intentionally" requires that the defendant acted with the mental purpose[1] to interfere with the proper functioning of a fire alarm system.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1317 was originally published in 1974 and revised in 1977 and 1995. This revision was approved by the Committee in December 2006 and involved adoption of a new format and nonsubstantive changes to the text.

Section 941.12(1) also prohibits interference with the efforts of the fire fighters. See Wis JI-Criminal 1318.

1. When appropriate add: "or was aware that his conduct was practically certain to cause that result. See § 939.23(3) and Wis JI-Criminal 923B.

1318 INTERFERENCE WITH FIRE FIGHTING — § 941.12(1)

Statutory Definition of the Crime

Interference with fire fighting, as defined in § 941.12(1) of the Criminal Code of Wisconsin, is committed by one who intentionally interferes with the lawful efforts of fire fighters to extinguish a fire.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant interfered with the lawful efforts of fire fighters to extinguish a fire.
2. The defendant intentionally interfered with the lawful efforts of fire fighters to extinguish a fire.

   "Intentionally" requires that the defendant acted with the mental purpose[1] to interfere with the lawful efforts of fire fighters to extinguish a fire.
3. The defendant knew that (he) (she) was interfering with the lawful efforts of fire fighters to extinguish a fire.[2]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1318 was originally published in 1974 and revised in 1977 and 1995. This revision was approved by the Committee in December 2006 and involved adoption of a new format and nonsubstantive changes to the text.

Section 941.12(1) also prohibits interference with the proper functioning of a fire alarm system.. See Wis JI-Criminal 1317.

1. When appropriate add: "or was aware that his conduct was practically certain to cause that result." See § 939.23(3) and Wis JI-Criminal 923B.

2. Section 939.23(3) provides that when the word "intentionally" is used in a criminal statute, it requires knowledge of those facts necessary to make the conduct criminal and which follow the word "intentionally" in the statute. Here, this requires knowledge that those with whom the defendant interfered were fire fighters and knew that they were engaged in lawful efforts to extinguish a fire.

1319 INTERFERENCE WITH FIRE FIGHTING EQUIPMENT — § 941.12(2)

Statutory Definition of the Crime

Interference with fire fighting equipment, as defined in § 941.12(2) of the Criminal Code of Wisconsin, is committed by one who intentionally[1] (interferes with) (tampers with) (removes)[2] any (fire extinguisher) (fire hose) (fire fighting equipment)[3] without authorization.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (interfered with) (tampered with) (removed) (a fire extinguisher) (a fire hose) (fire fighting equipment).
2. The defendant did so without authorization.
3. The defendant intentionally[4] (interfered with) (tampered with) (removed) (a fire extinguisher) (a fire hose) (fire fighting equipment).

"Intentionally" requires that the defendant acted with the mental purpose to (interfere with) (tamper with) (remove) (a fire extinguisher) (a fire hose) (fire fighting equipment).

4. The defendant knew that (he) (she) was (interfering with) (tampering with) (removing) (a fire extinguisher) (a fire hose) (fire fighting equipment) without authorization.[5]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1319 was originally published in 1974 and revised in 1977 and 1995. This revision was approved by the Committee in February 2007 and involved adoption of a new format and nonsubstantive changes to the text.

1. The statement of the definition of the offense includes "intentionally" even though sec. 941.12(2) does not include the word. When the instruction was reviewed in 2007, the Committee decided not to delete the reference to "intentionally" – and its definition in element 4. – because it had been included in the instruction since its original publication in 1974.

2. Use only the term which appropriately describes the form of action alleged or indicated by the evidence. Continue to do so throughout the instruction.

3. Use only the description which appropriately describes the item involved. Continue to do so throughout the instruction.

4. The instruction includes an element defining "intentionally" even though sec. 941.12(2) does not include the word. See sec. 939.23(3) and note 1, supra.

5. The knowledge element flows from the Committee's conclusion that "intentionally" should be included in the offense definition despite its absence from the offense definition. See sec. 939.23(3) and note 1, supra.

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1320 ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON: NEGLIGENT OPERATION OR HANDLING — § 941.20(1)(a)

Statutory Definition of the Crime

Endangering safety by use of a dangerous weapon, as defined in § 941.20(1)(a) of the Criminal Code of Wisconsin, is committed by one who endangers another's safety by the negligent operation or handling of a dangerous weapon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated or handled a dangerous weapon.
2. The defendant operated or handled a dangerous weapon in a manner constituting criminal negligence.
3. The defendant's operation or handling of a dangerous weapon in a criminally negligent manner endangered the safety of another.

Meaning of "Dangerous Weapon"

"Dangerous weapon" means[1]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.[2]]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm.[3] "Great bodily harm" means serious bodily injury.[4]]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Meaning of "Criminal Negligence"

"Criminal negligence" means:[5]

- the defendant's operation or handling of a dangerous weapon created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) operation or handling of a dangerous weapon created the unreasonable and substantial risk of death or great bodily harm.

[IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.][6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1321 in 1969 and revised in 1988. It was republished as Wis JI-Criminal 1320 in 1995. This revision was approved by the Committee in August 2004 and involved adoption of a new format and a change in the definition of "criminal negligence."

This instruction is for a violation of § 941.20(l)(a), as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The amended statute applies to offenses committed on or after January 1, 1989, and this instruction replaced Wis JI-Criminal 1321 (8 1969) for offenses committed on or after that date. For a discussion of the homicide revision generally, and of the offense covered by this instruction, see the Introductory Comment at Wis JI-Criminal 1000.

In addition to changing the title of § 941.20 from "reckless use of weapons" to "endangering safety by the use of a dangerous weapon," the homicide revision made two substantive changes in subsection (l)(a):

1) it changed the culpability requirement from reckless conduct to criminal negligence; and,
2) it amended the list of instrumentalities by striking "firearm, airgun, knife or bow and arrow" and replacing those terms with "dangerous weapon."

1. Choose the alternative supported by the evidence. They are based in the definition of "dangerous weapon" provided in § 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

2. The Committee concluded that defining "great bodily harm" as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete definition of "great bodily harm."

3. A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, ¶62.

In light of Tomlinson, the Committee concluded that the definition of "dangerous weapon" in the instructions should be revised to include all the statutory alternatives in the text of the instruction. The alternative to be used in a case like Tomlinson would be the following:

> "Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

> The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

4. The Committee concluded that defining "great bodily harm" as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete definition of "great bodily harm."

5. The definition of "criminal negligence" is based on the one provided in § 939.25. The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

6. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs. It also includes material relating to violation of a safety statute.

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1321 ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON: OPERATING OR GOING ARMED WITH A FIREARM WHILE UNDER THE INFLUENCE OF AN INTOXICANT — § 941.20(1)(b)

Statutory Definition of the Crime

Endangering safety by use of a dangerous weapon, as defined in § 941.20(1)(b) of the Criminal Code of Wisconsin, is committed by one who operates or goes armed with a firearm while (he) (she) is under the influence of an intoxicant.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (operated) (went armed with) a firearm.

   The term "firearm" means a weapon that acts by the force of gunpowder.[1]

   The phrase "went armed" means that a firearm must have been on the defendant's person or that a firearm must have been within the defendant's reach.[2] In addition, the defendant must have been aware of the presence of the firearm.[3]

2. The defendant was under the influence of an intoxicant at the time (he) (she) (operated) (went armed with) a firearm.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to handle a firearm was materially impaired because of consumption of an alcoholic beverage.[4]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle a firearm.

It is not required that impaired ability to operate be demonstrated by particular unsafe acts. What is required is that the person's ability to safely handle the firearm be materially impaired.

[IF APPROPRIATE, INSTRUCT ON THE EVIDENTIARY SIGNIFICANCE OF ALCOHOL TEST RESULTS. SEE WIS JI CRIMINAL 230 AND 232.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1305 in 1971 and revised in 1988. It was republished as Wis JI-Criminal 1321 in 1995 and revised in 2005, 2014 and 2019. [Former Wis JI-Criminal 1321 was republished as Wis JI-Criminal 1320.] This revision was approved by the Committee in August 2021; it added to the Comment.

Section 941.20 was amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The title of the statute was changed from "reckless use of weapons" to "endangering safety by use of a dangerous weapon." That is the only change that affected the subsection addressed by the instruction. The effective date of the statutory change is January 1, 1989, and this instruction replaced Wis JI-Criminal 1305 (© 1971) for offenses committed on or after that date.

This instruction is drafted for cases involving the influence of an intoxicant. For models tailored to Motor Vehicle Code offenses involving the influence of a controlled substance or the combined influence

of an intoxicant and a controlled substance, see Wis JI-Criminal 2664 and 2664A. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

2003 Wisconsin Act 97 created § 941.20(1)(bm) to provide that no person may operate or go armed with a firearm "while he or she has a detectable amount of a restricted controlled substance in his or her blood." The statute applies to offenses committed on or after the Act's effective date: December 19, 2003. Wis JI Criminal 2664B is drafted for operating a motor vehicle with a "detectable amount . . . ." and should provide a model for violations of sub. (l)(bm).

The original version of this instruction included language in element number one, that "one is not armed with a firearm unless it is loaded." After the instruction was originally published, the Committee received several inquiries asking why the offense, unlike those for other violations of § 941.20 (see Wis JI-Criminal 1322 through 1324), required that the firearm be loaded. The footnote addressing this point in the original version of this instruction (© 1971) provided:

> The use of the term "firearm" in § 941.20(1)(b) of the Criminal Code distinguishes it from the Criminal Code definition of a "dangerous weapon," which includes an unloaded firearm. Wis Criminal Code § 939.22(10) (1969). The danger at which § 941.20(1)(b) is directed is the highly dangerous combination of an intoxicated person operating or going armed with a loaded weapon. If the individual is not intoxicated or the weapon is not loaded, the statute is not violated.

A review of the Committee's records indicated that the last two sentences of the original footnote were added at the specific request of Assistant Attorney General William Platz. As a member of the committee that drafted Wisconsin's Criminal Code, his interpretation of the Code was given great weight. Other members of the Criminal Jury Instructions Committee in 1971 had also been members of the Criminal Code Advisory Committee, making it likely that the instruction would have accurately reflected the intent of the legislature. Furthermore, the Wisconsin Supreme Court recognized that views of Mr. Platz (see State v. Hoyt, 21 Wis.2d 284, 299-300, 124 N.W.2d 47, 128 N.W.2d 645 (1964)) and of other members of the Criminal Code Advisory Committee "can properly be considered as 'an authoritative statement of legislative intention.'" State v. Genova, 77 Wis.2d 141, 151,252 N.W.2d 380 (1977), citation omitted.

In 2019, the Committee conducted a review of updated case law pertaining to the definition of "firearm" in order to reassess the requirement that the firearm be loaded. It was determined that at the time the instruction was published, no statutory definition of the term "firearm" existed, nor does one currently exist. However, in State v. Rardon, 185 Wis. 2d 701, 518 N.W.2d 330 (Ct. App. 1994) the court of appeals did provide its own definition of the term "firearm" as "a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to disassembly. This conclusion furthers the legislature's intention that those convicted of a felony not be allowed to possess any firearms -- operable, inoperable, assembled or disassembled." Although Rardon concerned Wis. Stat § 941.29(2) "Possession of a firearm," the Committee determined that decision provided persuasive authority as to the defined term. Therefore, the Committee concluded that the requirement that the firearm be loaded be removed from the first element of the instruction.

The Wisconsin Supreme Court, applying intermediate scrutiny, refused to recognize a Second Amendment right to go armed with a firearm while intoxicated in one's home. State v. Christen, 2021 WI 39, 396 Wis. 2d 705, 958 N.W.2d 746. "The State has important governmental interests in public safety, preventing gun violence, protecting human life, and protecting people from the harm the combination of

firearms and alcohol causes." Id. ¶ 60. The means the legislature chose to further these important objectives is substantially related to the important governmental objectives. Id.

1. Harris v. Cameron, 81 Wis 239, 51 N.W. 437 (1892).

2. This is the definition of "went armed" used in Wis JI Criminal 1335, Carrying A Concealed Weapon. See note 2 of that instruction for cases discussing "went armed."

3. The "aware of the presence" requirement was approved as a correct statement of the law in State v. Asfoor, where the court stated that "[c]oncealing or hiding a weapon precludes inadvertence." 75 Wis.2d 411, 415, 249 N.W.2d 529 (1976). The concept is similar to that involved for offenses requiring "possession." See Wis JI Criminal 920. For cases identifying "aware of the presence" as an element of the crime, see note 3 of Wis JI-Criminal 1335. The 1995 revision of that instruction added "aware of the presence" as a separate element.

4. The definition in the instruction paraphrases the full definition provided in § 939.22(42):

> "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, or of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of an alcohol beverage and any other drug.

Note: "hazardous inhalant" was added to the definition in § 939.22(42) by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013]. Act 83 also created a definition of "hazardous inhalant" in § 939.22(15).

1322 ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON: INTENTIONALLY POINTING A FIREARM AT ANOTHER — § 941.20(1)(c)

Statutory Definition of the Crime

Endangering safety by use of a dangerous weapon, as defined in § 941.20(1)(c) of the Criminal Code of Wisconsin, is committed by one who intentionally points a firearm at or toward another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant pointed a firearm at or toward another.

   The term "firearm" means a weapon that acts by the force of gunpowder.[1] It is not necessary that the firearm was loaded or capable of being fired.[2]

2. The defendant pointed the firearm at or toward another intentionally.

   "Intentionally" means that the defendant was aware that (he) (she) was holding a firearm and was aware that (he) (she) was pointing it at or toward another person.[3]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1323 in 1979 and revised in 1983 and 1988. It was renumbered Wis JI-Criminal 1322 in 1995. This revision was approved by the Committee in August 2004.

As revised by 2003 Wisconsin Act 190 [effective date: April 22, 2004], § 940.21(1)(c) begins: "Except as provided in sub. (1m) . . ." Subsection (1m) was created by Act 190 and applies to pointing a firearm at a law enforcement officer, firefighter, etc. See Wis JI-Criminal 1322A.

Section 941.20 was amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The title of the statute was changed from "reckless use of weapons" to "endangering safety by use of a dangerous weapon." That is the only change that affected the subsection addressed by the instruction. The effective date of the statutory change was January 1, 1989, and this instruction replaced Wis JI-Criminal 1323 (© 1983) for offenses committed on or after that date.

In State v. Smith, 55 Wis.2d 304, 198 N.W.2d 630 (1972), the Wisconsin Supreme Court held that reckless use of a weapon, pointing a firearm, under § 941.20(1)(c), is not a lesser included offense of armed robbery.

1. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes air guns.

2. Volume V. 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 83 (February 1953).

3. This is the explanation of the meaning of "intentionally" in the context of this offense provided in the 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 83 (February 1953). For a discussion of the word "intentionally" as defined in § 939.23, see Wis JI-Criminal 923A and 923B.

1322A ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON: INTENTIONALLY POINTING A FIREARM AT A LAW ENFORCEMENT OFFICER, FIRE FIGHTER, ETC. — § 941.20(lm)

THIS INSTRUCTION IS DRAFTED FOR A CASE WHERE THE ALLEGED VICTIM IS A LAW ENFORCEMENT OFFICER. THE STATUTE ALSO APPLIES TO OFFENSES AGAINST FIRE FIGHTERS, EMERGENCY MEDICAL SERVICES PRACTITIONERS,[1] EMERGENCY MEDICAL RESPONDERS,[2] AMBULANCE DRIVERS,[3] AND COMMISSION WARDENS.[4] SUBSTITUTE THE APPROPRIATE TERM AS REQUIRED.

Statutory Definition of the Crime

Endangering safety by use of a dangerous weapon, as defined in § 941.20(1m) of the Criminal Code of Wisconsin, is committed by one who intentionally points a firearm at or toward a law enforcement officer who is acting in an official capacity and who the person knows or has reason to know is a law enforcement officer.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant pointed a firearm at or toward (name of victim) .

   The term "firearm" means a weapon that acts by the force of gunpowder.[5] It is not necessary that the firearm was loaded or capable of being fired.[6]

2. The defendant pointed the firearm at or toward (name of victim) intentionally.

"Intentionally" means that the defendant was aware that (he) (she) was holding a firearm and was aware that (he) (she) was pointing it at or toward another person.[7]

3. (Name of victim) was a law enforcement officer.

[A (insert title, e.g., sheriff) is a law enforcement officer.][8]

4. (Name of victim) was acting in an official capacity.

(Insert title, e.g., sheriffs) act in an official capacity if they perform duties that they are employed to perform. A (insert title, e.g., sheriff) who performs acts for personal reasons that are not within the responsibilities of a (insert title, e.g., sheriff) does not act in an official capacity.[9] (The responsibilities of a (insert title, e.g., sheriff) include: _____.)[10]

5. The defendant knew or had reason to know that (name of victim) was a law enforcement officer.[11]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent or knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1322A was originally published in 2005. This revision was approved by the Committee in December 2017; it reflects changes in terminology made by 2017 Wisconsin Act 12.

This instruction is for the felony offense defined by § 941.20(1m), which was created by 2003 Wisconsin Act 190. [Effective date: April 22, 2004.]

2017 Wisconsin Act 12 [effective date: June 23, 2017] changed the terminology used in the statute from "emergency medical technician" to "emergency medical services practitioner" and from "first responder" to "emergency medical responder."

The instruction is drafted for a case where a law enforcement officer is the alleged victim. The statute also applies to offenses against fire fighters, emergency medical services practitioners, emergency medical responders, ambulance drivers, and commission wardens. For cases involving alleged victims other than law enforcement officers, the appropriate term should be substituted throughout.

1. Section 941.20(1m)(a)2. provides: "'Emergency medical services practitioner' has the meaning given in s. 256.01(5)."

2. Section 941.20(1m)(a)1t. provides: "'Emergency medical responder' has the meaning given in s. 256.01(4p)."

3. Section 941.20(1m)(a)1. provides: "'Ambulance' has the meaning given in s. 256.01(1t)."

4. Section 939.22(5) provides: "'Commission warden' means a conservation warden employed by the Great Lakes Indian Fish and Wildlife Commission."

5. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes air guns.

6. Volume V. 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 83 (February 1953).

7. This is the explanation of the meaning of "intentionally" with regard to the offense defined in § 941.20(1)(c). See note 3, Wis JI-Criminal 1322.

8. The bracketed sentence is to be used only when a law enforcement officer is the alleged victim.

In the Committee's judgment, the jury may be told, for example, that a sheriff is a law enforcement officer. It is still for the jury to be satisfied that, for example, the victim was a sheriff.

"Law enforcement officer" is defined in § 102.475(8)(c):

> (c) "Law enforcement officer" means any person employed by the state or any political subdivision for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances the person is employed to enforce, whether that enforcement authority extends to all laws or ordinances or is limited to specific laws or ordinances.

See notes 1-3, supra, for references to statutory definitions for victims other than law enforcement officers.

9. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

10. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

11. The mental element – "knows or has reason to know" – is set forth in the definition of the offense in § 941.20(1m)(b).

1323 ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON: DISCHARGING A FIREARM WITHIN 100 YARDS OF BUILDING — § 941.20(1)(d)

Statutory Definition of the Crime

Endangering safety by use of a dangerous weapon, as defined in § 941.20(1)(d) of the Criminal Code of Wisconsin, is committed by one who while on the lands of another discharges a firearm within 100 yards of any building devoted to human occupancy situated on and attached to the lands of another without the express permission of the owner or occupant of the building.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant discharged a firearm.

   The term "firearm" means a weapon that acts by the force of gunpowder.[1] To "discharge a firearm" simply means to shoot a gun.
2. The defendant shot the gun while on lands belonging to someone else.
3. The defendant shot the gun within 100 yards of a building[2] devoted to human occupancy and situated on and attached to the lands of another.
4. The defendant shot the gun without the express permission of the (owner) (occupant) of the building.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1322 in 1983 and revised in 1988 and 1990. It was renumbered Wis JI-Criminal 1323 in 1995. This revision was approved by the Committee in August 2004 and involved adoption of a new format.

Section 941.20 was amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The title of the statute was changed from "reckless use of weapons" to "endangering safety by use of a dangerous weapon." That is the only change that affected the subsection addressed by the instruction. The effective date of the statutory change was January 1, 1989, and this instruction replaced Wis JI-Criminal 1322 (© 1983) for offenses committed on or after that date.

1. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes air guns.

2. Section 941.20(1)(d) was revised by 1989 Wisconsin Act 131 (effective date: March 31, 1990) to include "house trailer or mobile home" within the definition of "building." The revised definition provides: "'Building' as used in this paragraph includes any house trailer or mobile home, but does not include any tent, bus, truck, vehicle or similar portable unit."

1324 ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON: DISCHARGING A FIREARM INTO A VEHICLE OR BUILDING — § 941.20(2)(a)

Statutory Definition of the Crime

Endangering safety by use of a dangerous weapon, as defined in § 941.20(2)(a) of the Criminal Code of Wisconsin, is committed by one who intentionally discharges a firearm into a vehicle or building under circumstances in which (he) (she) should realize there might be a human being present therein.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant discharged a firearm into[1] a (building)[2] (vehicle).

   The term "firearm" means a weapon that acts by the force of gunpowder.[3] To "discharge a firearm" simply means to shoot a gun.

2. The defendant did so intentionally.

   "Intentionally" means that the defendant acted with the purpose to shoot the gun and to shoot it into the (building) (vehicle).[4]

3. Under the circumstances, the defendant should have realized that there might be a human being present in the (building) (vehicle).

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1324 was originally published in 1983 and revised in 1988, 1995, and 2005. This revision made non-substantive editorial corrections.

Section 941.20 was amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The title of the statute was changed from "reckless use of weapons" to "endangering safety by use of a dangerous weapon." That is the only change that affected the subsection addressed by the instruction. The effective date of the statutory change was January 1, 1989, and this instruction replaced Wis JI-Criminal 1322 (© 1983) for offenses committed on or after that date.

1. In State v. Grady, 175 Wis.2d 553, 558, 499 N.W.2d 285 (Ct. App. 1993), the court approved the following trial court instruction on the meaning of "into":

> "Into" means from the outside to the inside of, advancing or continuing forward.
>
> A shooting into a house occurs when a bullet penetrates the outside of the house or building, however slight the penetration. It does not require that there be any set distance of penetration.

Grady's conviction was affirmed where the evidence showed that bullets he fired were embedded in the house's outside wall.

2. Section 941.20(1)(d), which defines an offense very much like this one, includes the following: "'Building' as used in this paragraph includes any house trailer or mobile home, but does not include any tent, bus, truck, vehicle or similar portable unit."

3. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes air guns.

4. Under the Criminal Code, the word "intentionally" means that the defendant either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

1325 POSSESSION OF PISTOL BY MINOR: MINOR GOING ARMED WITH A PISTOL — § 941.22

1326 SALE, LOAN, OR GIFT OF PISTOL TO MINOR — § 941.22

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1325 was originally published in 1974.

Wis JI-Criminal 1326 was originally published in 1974 and was revised in 1980.

Both instructions were withdrawn in 1989 because the statute with which they deal was repealed by 1987 Wisconsin Act 332, effective July 1, 1989. Roughly equivalent offenses are defined in § 948.60. See Wis JI-Criminal 2176 and 2177.

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1327 ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON: INTENTIONALLY DISCHARGING A FIREARM FROM A VEHICLE — § 941.20(3)

Statutory Definition of the Crime

Endangering safety by use of a dangerous weapon, as defined in § 941.20(3) of the Criminal Code of Wisconsin, is committed by one who intentionally discharges a firearm from a vehicle while on a highway[1] at or toward (another person) (any building) (another vehicle).[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements are present.

Elements of the Crime That the State Must Prove

1. The defendant discharged a firearm from a vehicle[3] while on a highway.[4]

   The term "firearm" means a weapon that acts by the force of gunpowder. To "discharge a firearm" simply means to shoot a gun.[5]

2. The defendant shot the gun at or toward (another person) (a building) (another vehicle).[6]

3. The defendant shot the gun intentionally.

   This requires that the defendant acted with the purpose to discharge the firearm at or toward (another person) (a building) (another vehicle).

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 1327 was originally published in 1994. This revision was approved by the Committee in August 2004.

Sub. (3) of § 941.20 was created by 1993 Wisconsin Act 94 (effective date: Dec. 25, 1993). Violations of sub. (3), referred to as "drive-by shootings," are closely related to offenses defined in § 941.20(1)(d), discharging a firearm within 100 yards of a building devoted to human occupancy, and in § 941.20(2), discharging a firearm into a vehicle or building.

1. The statute also applies to the discharge of a firearm "on a vehicle parking lot that is open to the public." If a parking lot is involved, the instruction would have to be modified to substitute that phrase wherever "on a highway" appears.

2. The phrases in parentheses are adapted from the alternatives found in sub. (3)(a)1. and 2. Sub. (3)(a) refers to discharging a firearm "under any of the following circumstances . . . : 1. The person discharges the firearm at or toward another. 2. The person discharges the firearm at or toward any building or other vehicle." Thus, the firearm must be discharged at or toward another person, any building, or another vehicle, as reflected in the instruction.

3. "Vehicle" is defined in § 939.22(44).

4. The statutory definition of the offense explicitly refers to "a highway, as defined in s. 340.01(22)." The Committee concluded that it was not necessary to include that definition in the instruction for the usual case. If definition of "highway" is needed, obviously the one provided in § 340.01(22) should be used.

The statute also applies to violations that take place "on a vehicle parking lot that is open to the public." See note 1, supra.

5. These definitions are those used for other violations of § 941.20. See Wis JI-Criminal 1322.

6. See note 2, supra.

1328 DISARMING A PEACE OFFICER — § 941.21

Statutory Definition of the Crime

Disarming a peace officer, as defined in § 941.21 of the Criminal Code of Wisconsin, is committed by one who intentionally disarms a peace officer who is acting in an official capacity by taking a dangerous weapon[1] from the officer without consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a peace officer.

   [A (insert title, e.g., – "sheriff ") is a peace officer.][2]

2. (Name of victim) was acting in an official capacity.

   (Insert title, e.g., – "sheriffs")[3] act in an official capacity when they perform duties that they are employed to perform.[4] [The duties of a (insert title, e.g., – "sheriff") include: _____.][5]

3. The defendant disarmed (name of victim) by taking a dangerous weapon from (him) (her).

   (This applies to any dangerous weapon that the officer was carrying or that was in an area within the officer's immediate presence.)[6]

4. (Name of victim) did not consent to the taking of the dangerous weapon.

5. The defendant committed the acts intentionally.

"Intentionally" requires that the defendant acted with the mental purpose of taking the dangerous weapon from a peace officer.[7] It further requires that the defendant knew that (name of victim) was a peace officer acting in an official capacity and knew that (name of victim) did not consent to the taking of the dangerous weapon.[8]

Meaning of "Dangerous Weapon"

"Dangerous weapon" means[9]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.[10]]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.[11]][12]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1328 was originally published in 1988 and revised in 1994, 1996, and 2007. This revision was approved by the Committee in February 2008; it revised the definition of "official capacity."

1. Section 941.21 was amended by 1995 Wisconsin Act 339 (effective date: June 1, 1996) to refer not only to any dangerous weapon but also to "any device or container described under s. 941.26(1)(b) or (4)(a)." The reference to § 941.26(1)(b) is to containers of tear gas. The reference to § 941.26(4)(a) is to containers of oleoresin of capsicum, commonly referred to as "pepper spray." If either of these options is presented, the instruction must be modified. The Committee suggests simply substituting "tear gas container" or "container of oleoresin of capsicum" for "dangerous weapon" and not defining the term further. This is the approach used in the instructions for "pepper spray" offenses defined by § 941.26(4); see Wis JI-Criminal 1341, 1341A, and 1341B.

2. "Peace officer" is defined in § 939.22(22) as follows:

> 'Peace officer' means any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.

In the Committee's judgment, the jury may be told, for example, that a sheriff is a peace officer. It is still for the jury to be satisfied that, in the particular case, the victim was a sheriff.

3. Use the plural form in the blank, e.g., "sheriffs," "police officers," etc.

4. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

5. The duties, powers, or responsibilities of some peace officers are set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, ___ Wis.2d ___, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, ___ Wis.2d ___, 743 N.W.2d 823.

6. The statement "that the officer was carrying or that was in an area within the officer's immediate presence" is taken verbatim from § 941.21.

7. "Intentionally" is defined in § 939.23(3) as having the mental purpose to cause the result or being "aware that his or her conduct is practically certain to cause that result." The Committee believes that the mental purpose alternative is most likely to apply to this offense. Also see Wis JI-Criminal 923A and 923B.

8. When "intentionally" is used in a criminal statute, it requires knowledge of all facts necessary to make the conduct criminal and which follow the word "intentionally" in the statute. § 939.23(3).

9. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in s. 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

10. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

11. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

12. A potential problem in instructing on this part of the definition of "dangerous weapon" is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. The supreme court found that the trial court erred in instructing that "Dangerous weapon means a baseball bat." A baseball bat may be a dangerous weapon, if used in a manner likely to produce death or great bodily harm. See the discussion in note 5, Wis JI-Criminal 910.

1335 CARRYING A CONCEALED WEAPON — § 941.23

USE THIS INSTRUCTION FOR CASES IN WHICH THERE IS NO EVIDENCE OF ANY EXCEPTION TO THE APPLICABILITY OF SEC. 941.23. IF THERE IS EVIDENCE OF AN EXCEPTION, SEE WIS JI-CRIMINAL 1335B.[1]

Statutory Definition of the Crime

Carrying a concealed weapon, as defined in § 941.23 of the Criminal Code of Wisconsin, is committed by any person who carries a concealed and dangerous weapon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant carried[2] a dangerous weapon.

   "Carried" means went armed with.

2. The defendant was aware of the presence of the weapon.[3]

3. The weapon was concealed.

Meaning of "Went Armed"

The phrase "went armed" means that the weapon must have been either on the defendant's person or that the weapon must have been within the defendant's reach.[4]

Meaning of "Dangerous Weapon"

"Dangerous weapon" means[5]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.]

[any device or instrumentality which in the manner it is used or intended to be used is calculated or likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Meaning of "Concealed"

"Concealed" means hidden from ordinary observation. The weapon does not have to be completely hidden.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal JI-Criminal 1335 was originally published in 1966 and revised in 1989, 1996, 2003, 2006, 2012, and 2016. This revision was approved by the Committee in April 2018; it added to the Comment and footnote 4.

The 2012 revision addressed changes made by 2011 Wisconsin Act 35. The previously published instruction included reference to exceptions to the applicability of § 941.23, which are eliminated here; see Wis JI-Criminal 1335B for an instruction to use when evidence of an exception is in the case.

In State v. Cole, 2003 WI 112, 264 Wis.2d 520, 665 N.W.2d 328, the Wisconsin Supreme Court held that § 941.23 remains constitutional on its face despite the adoption of a state constitutional amendment guaranteeing "the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." Wis. Const. art. I, § 25. However, whether the statute is constitutional as applied must be determined on a case-by-case basis: ". . . only if the public benefit in this exercise of the police power is substantially outweighed by an individual's need to conceal a weapon in the exercise of the right to bear arms will an otherwise valid restriction on that right be unconstitutional as applied." State v. Hamdan, 2003 WI 113, ¶46. For cases involving this "constitutional defense," see Wis JI-Criminal 1335A which provides a separate instruction.

Hamdan also held that prior case law interpreting § 941.23 continues to be viable authority after the adoption of the constitutional amendment, specifically endorsing the interpretations of the "going armed" element. 2003 WI 113, ¶¶21-28. See footnote 2, below.

Hamdan also reaffirmed the decisions in cases considering generally applicable privileges or defenses. 2003 WI 113, ¶37. While a privilege like self-defense may potentially apply to charges under § 941.23, as a practical matter it may be difficult for the facts of a particular case to support them. State v. Dundon, 226 Wis.2d 654, 594 N.W.2d 780 (1999); and, State v. Nollie, 2002 WI 4, 249 Wis.2d 538, 638 N.W.2d 280. Dundon also declined to adopt a special privilege, like the one recognized for possession of a firearm by a felon in State v. Coleman, 206 Wis.2d 199, 556 N.W.2d 701 (1996).

In a decision that preceded the "right to bear arms amendment" the court of appeals had concluded that the creation of an exception for tavern owners in § 941.237, Carrying handgun where alcohol beverages may be sold and consumed, does not preclude the application of § 941.23 to a tavern owner who carries a concealed handgun on the tavern premises. State v. Mata, 199 Wis.2d 315, 544 N.W.2d 528 (Ct. App. 1996). In Hamdan, the court noted that "[i]n light of Article I, Section 25, this analysis in Mata is suspect." Hamdan, supra, at footnote 32.

In 2005, the Committee received an inquiry about the relationship between carrying a concealed weapon in violation of § 941.23 and the rules relating to carrying cased guns. At that time § 167.31(2)(b) provided that "no person may place, possess, or transport a firearm . . . in or on a vehicle unless the firearm is unloaded and encased . . ." This implied that a person may possess a firearm in a vehicle if it is unloaded and encased, but that may conflict with the interpretation of § 941.23 in State v. Walls, 190 Wis.2d 65, 71-72, 526 N.W.2d 765 (Ct. App. 1994), where the court held that:

> A person is guilty of carrying a concealed weapon in an automobile where: (1) the weapon is located inside a vehicle and is within the defendant's reach; (2) the defendant is aware of the presence of the weapon; and (3) the weapon is concealed, or hidden from ordinary view – meaning it

is indiscernible from ordinary observation of a person located outside and within the immediate vicinity of the vehicle.

The Committee concluded that resolving this conflict was beyond the scope of the jury instructions. The Wisconsin Supreme Court addressed this issue in State v. Grandberry, 2018 WI 29, 380 Wis.2d 541, 910 N.W.2d 214, concluding that there is no conflict. During a traffic stop, Grandberry disclosed to police that he had a handgun in the glove compartment of his vehicle. He was charged with and convicted of carrying a concealed weapon. He appealed on the ground that was in compliance with § 167.31. The supreme court affirmed the conviction: "We hold that the Concealed Carry Statute and the Safe Harbor Statute are not in conflict because Grandberry could have complied with both by either obtaining a license to carry a concealed weapon pursuant to Wis. Stat. § 175.60 . . . or by placing his loaded handgun out of reach." 2018 WI 29, ¶3. The court also held that the alleged conflict between the two statute did not make the prohibition on carrying a concealed weapon unconstitutionally vague: " . . . a person of ordinary intelligence has sufficient notice that carrying a concealed and dangerous weapon is unlawful unless one of the exceptions in the Concealed Carry Statute applies." ¶4.

Section 167.31 was amended by 2011 Wisconsin Acts 35 and 51. An exception was created that applies where "the firearm is unloaded or is a handgun." § 167.31(2)(b)1.

1. This instruction is drafted for a case where there is no evidence of an exception to the applicability of § 941.23. The statute has always had an exception for peace officers. 2011 Wisconsin Act 35 created four additional exceptions – see § 941.23(2)(a)-(e):

- a peace officer – sub. (a)
- a qualified out-of-state law enforcement officer – sub. (b)
- a former officer – sub. (c)
- a licensee or out-of-state licensee – sub. (d)
- an individual who carries in his or her own dwelling or place of business or on land that he or she owns, leases, or legally occupies – sub. (e).

See Wis JI-Criminal 1335B for a model to use where there is evidence that an exception may apply.

2. 2011 Wisconsin Act 35 changed the definition of this offense from "goes armed with" a dangerous weapon to "carries" a dangerous weapon. Section 941.23(1)(ag) provides that "'carry' has the meaning given in s. 175.60(1)(ag)." Section 175.60(1)(ag) defines "carry" as "to go armed with."

3. The original version of Wis JI-Criminal 1335, published in 1966, included the "aware of the presence" requirement. An instruction including that statement was approved as a correct statement of the law in State v. Asfoor, where the court stated that "[c]oncealing or hiding a weapon precludes inadvertence." 75 Wis.2d 411, 415, 249 N.W.2d 529 (1976). The concept is similar to that involved for offenses requiring "possession." See Wis JI-Criminal 920. For cases identifying "aware of the presence" as an element of the crime, see State v. Fry and State v. Keith, note 3, below. The 1995 revision of the instruction added "aware of the presence" as a separate element.

4. In Mularkey v. State, 201 Wis. 429, 230 N.W. 76 (1930), the court affirmed the conviction of a driver who had a revolver within his reach on a shelf back of the seat of his automobile but did not have the weapon on his person.

The Mularkey "within his reach" test was reaffirmed by the Wisconsin Supreme Court in State v. Fry, 131 Wis.2d 153, 388 N.W.2d 565 (1986). In Fry, the court found sufficient evidence to support a conviction for carrying a concealed weapon where the gun was in the glove compartment of the vehicle the defendant was driving.

In State v. Walls, 190 Wis.2d 65, 526 N.W.2d 765 (Ct. App. 1994), the court affirmed a conviction for carrying a concealed weapon where a handgun was lying on the front seat of an automobile. The court held that:

> . . . the statute evinces a strong rationale to prevent the carrying of weapons in automobiles, as well as on a person. . . . A person is guilty of carrying a concealed weapon in an automobile where: (1) the weapon is located inside a vehicle and is within the defendant's reach; (2) the defendant is aware of the presence of the weapon; and (3) the weapon is concealed, or hidden from ordinary view – meaning it is indiscernible from ordinary observation of a person located outside and within the immediate vicinity of the vehicle.

190 Wis.2d 65, 71-72.

In State v. Keith, 175 Wis.2d 75, 498 N.W.2d 865 (Ct. App. 1993), the court affirmed a conviction where the defendant had a gun in her purse on the porch of her home. The court rejected Keith's argument that to "go armed, you have to go somewhere." The court held that "there is no separate element requiring that a person actually go somewhere." 175 Wis.2d 75, 79.

In State v. Hamdan, the court rejected the argument that Keith was wrongly decided, stating that "[we] continue to adhere to prior interpretations of the 'goes armed' language." 2003 WI 113, ¶24.

The definition of "went armed" was discussed in State v. Grandberry, 2018 WI 29, 380 Wis.2d 541, 910 N.W.2d 214, but no change was adopted.

5. Choose the alternative supported by the evidence. They are based in the definition of "dangerous weapon" provided in § 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

2015 Wisconsin Act 109 [effective date: February 8, 2016] created § 941.23(1)(ap): "Notwithstanding s. 939.22(10), 'dangerous weapon' does not include a knife."

6. The "hidden from ordinary observation" requirement is adapted from State v. Mularkey, 201 Wis. 429, 230 N.W.2d 76 (1930). Also see, State v. Asfoor, 75 Wis.2d 411, 433, 249 N.W.2d 529 (1976), which approved an instruction that included this requirement.

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1335A CARRYING A CONCEALED WEAPON: UNLAWFUL PURPOSE — § 941.23

USE THIS INSTRUCTION FOR CASES IN WHICH THE COURT HAS DETERMINED THAT THE DEFENSE BASED ON THE STATE CONSTITUTIONAL RIGHT TO BEAR ARMS APPLIES.[1]

Statutory Definition of the Crime

Carrying a concealed weapon, as defined in § 941.23 of the Criminal Code of Wisconsin, is committed by any person who carries a concealed and dangerous weapon for an unlawful purpose.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant carried[2] a dangerous weapon.

   "Carried" means went armed with.

2. The defendant was aware of the presence of the weapon.[3]

3. The weapon was concealed.

4. The defendant went armed with the weapon for an unlawful purpose.

Meaning of "Went Armed"

The phrase "went armed" means that the weapon must have been either on the defendant's person or that the weapon must have been within the defendant's reach.[4]

Meaning of "Dangerous Weapon"

"Dangerous weapon" means[5]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.]

[any device or instrumentality which in the manner it is used or intended to be used is calculated or likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Meaning of "Concealed"

"Concealed" means hidden from ordinary observation. The weapon does not have to be completely hidden.[6]

Meaning of "Unlawful Purpose"

"Unlawful purpose" means intent to use the weapon in furtherance of the commission of (name intended crime).[7]

The crime of (name intended crime) is committed by one who

> [DEFINE THE CRIME, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE][8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1335A was originally published in 2004 and revised in 2006 and 2012. This revision was approved by the Committee in February 2016; it updated footnote 5 to reflect changes made by 2015 Wisconsin Act 109.

This instruction was drafted to address the "constitutional defense" recognized by the Wisconsin Supreme Court in State v. Hamdan, 2003 WI 113, 264 Wis.2d 433, 665 N.W.2d 785.

In a case decided the same day as Hamdan, the court held that § 941.23 is constitutional on its face despite the adoption of a state constitutional amendment guaranteeing "the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." Wis. Const. art. I, § 25. State v. Cole, 2003 WI 112, 264 Wis.2d 520, 665 N.W.2d 328. However, whether the statute is constitutional as applied must be determined on a case-by-case basis: ". . . only if the public benefit in this exercise of the police power is substantially outweighed by an individual's need to conceal a weapon in the exercise of the right to bear arms will an otherwise valid restriction on that right be unconstitutional as applied." State v. Hamdan, 2003 WI 113, ¶46.

Because the defense is based on the amendment to the state constitution, it applies only to offenses committed after the amendment's effective date, which was November 30, 1998. State v. Cole, supra, ¶9; State v. Gonzales, 2002 WI 59, 253 Wis.2d 134, 645 N.W.2d 264.

The Wisconsin Supreme Court applied Cole and Hamdan in State v. Fisher, 2006 WI 44, 290 Wis.2d 121, 714 N.W.2d 495. In Fisher, the trial court dismissed a charge of carrying a concealed weapon against a tavern owner who kept a loaded gun in the center console of his vehicle. Fisher was arrested at about 4 p.m. while running personal errands. The supreme court reversed, concluding "that § 941.23 is constitutional as applied to Fisher because his interest in exercising his right to keep and bear arms for purposes of security by carrying a concealed weapon in his vehicle does not substantially outweigh the state's interest in enforcing § 941.23." Fisher, ¶3.

Procedure for determining whether the defense is raised.

Hamdan held that a defendant seeking to raise a "constitutional defense" to a charge under § 941.23 must raise the issue by pretrial motion and show two things:

1) that under the circumstances, the defendant's interest in concealing the weapon to facilitate exercise of his or her right to keep and bear arms substantially outweighed the State's interest in enforcing the concealed weapons statute; and,

2) that the defendant concealed his or her weapon because concealment was the only reasonable means under the circumstances to exercise his or her right to bear arms.

Hamdan did not provide a complete delineation of the scope of these requirements, but did hold that:

. . . the right to keep and bear arms for purposes of security is at its apex when undertaken to secure one's home or privately owned business. Conversely, the State's interest in prohibiting concealed weapons is least compelling in these circumstances. . . .

If the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of his private residence or privately operated business, and to safely move and store weapons within these premises.
Hamdan, supra, ¶¶67 and 68.

If the trial court finds that the defendant has satisfied both requirements, the state must, still at the pretrial stage, assert and show probable cause to believe that the defendant had an unlawful purpose at the time he or she carried the concealed weapon. If supported by evidence at trial, the issue of unlawful purpose is to be submitted to the jury. Hamdan, ¶¶86-88.

Submitting the defense to the jury.

For cases involving the constitutional defense recognized by Hamdan, Wis JI-Criminal 1335A provides a separate instruction with an additional element: the state must disprove the constitutional defense by proving that the defendant went armed with a concealed weapon for an unlawful purpose. The Committee concluded that this was the most effective way to address the question, even though the Hamdan decision suggested a different procedure:

¶87. . . . Whether the defendant had an unlawful purpose, defined as an intent to use the weapon in furtherance of the commission of a crime, is a question of fact. The question should be submitted to the trier of fact along with separate, traditional instructions on the crime of carrying a concealed weapon.

¶88. If a jury answers that the defendant did not intend the unlawful purpose specifically alleged by the State, then it will not need to reach the questions posed in the jury instructions for a CCW offense as the defendant's conduct remains constitutionally protected. If any unlawful purpose is proven, then the defendant can be found guilty of carrying a concealed weapon upon proof beyond a reasonable doubt of the elements of carrying a concealed weapon. See Wis JI-Criminal 1335.

These paragraphs could be read to authorize submitting this issue as a separate verdict question. The Committee concluded that presenting the unlawful purpose issue first as a separate question could create a problem in that it would assume that the defendant "went armed" with a concealed weapon, facts that must be established as elements of the crime. The Committee concluded that it is preferable to have a separate

instruction for a case in which the defense is raised, which includes the absence of the defense as an additional element of the crime. This is consistent with the way other defenses are usually addressed.

1. This instruction is drafted for a case where there is no evidence of an exception to the applicability of § 941.23. The statute has always had an exception for peace officers. 2011 Wisconsin Act 35 created four additional exceptions – see § 941.23(2)(a)-(e):

- a peace officer – sub. (a)
- a qualified out-of-state law enforcement officer – sub. (b)
- a former officer – sub. (c)
- a licensee or out-of-state licensee – sub. (d)
- an individual who carries in his or her own dwelling or place of business or on land that he or she owns, leases, or legally occupies – sub. (e).

See Wis JI-Criminal 1335B for a model to use where there is evidence that an exception may apply.

2. 2011 Wisconsin Act 35 changed the definition of this offense from "goes armed with" a dangerous weapon to "carries" a dangerous weapon. Section 941.23(1)(ag) provides that "carry" has the meaning given in § 175.60(1)(ag). Section 175.60(1)(ag) defines "carry" as "to go armed with."

3. See note 3, Wis JI-Criminal 1335.

4. See note 4, Wis JI-Criminal 1335.

5. Choose the alternative supported by the evidence. They are based in the definition of "dangerous weapon" provided in § 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

2015 Wisconsin Act 109 [effective date: February 8, 2016] created § 941.23(1)(ap): "Notwithstanding s. 939.22(10), 'dangerous weapon' does not include a knife."

6. See note 6, Wis JI-Criminal 1335.

7. The definition of "unlawful purpose" used in the instruction is the one required by the Hamdan decision:

> . . . Whether the defendant had an unlawful purpose, defined as an intent to use the weapon in furtherance of the commission of a crime, is a question of fact. The question should be submitted to the trier of fact along with separate, traditional instructions on the crime of carrying a concealed weapon. State v. Hamdan, 2003 WI 113, ¶87.

8. The Committee concluded that the elements of the alleged intended crime should be included in the instruction, as they are for attempts. See Wis JI-Criminal 580. Also see, Wis JI-Criminal 1795, Bail Jumping, which has been modified to reflect the decision in State v. Henning, 2003 WI App 54, 261 Wis.2d 664, 660 N.W. 698, holding that where a bail jumping charge is based on committing a new crime, the jury must be instructed on the elements of that crime.

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1335B CARRYING A CONCEALED WEAPON: EVIDENCE OF EXCEPTION — § 941.23

USE THIS INSTRUCTION FOR CASES IN WHICH THERE IS EVIDENCE OF THE LICENSEE EXCEPTION TO THE APPLICABILITY OF SEC. 941.23. USE IT AS A MODEL IF THERE IS EVIDENCE OF ONE OF THE OTHER EXCEPTIONS.[1]

Statutory Definition of the Crime

Carrying a concealed weapon, as defined in § 941.23 of the Criminal Code of Wisconsin, is committed by a person who is not (a licensee) (an out-of-state licensee)[2] who carries a concealed and dangerous weapon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four[3] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant carried[4] a dangerous weapon.

   "Carried" means went armed with.

2. The defendant was aware of the presence of the weapon.[5]

3. The weapon was concealed.

4. The defendant was not (a licensee) (an out-of-state licensee).[6]

   ("Licensee" means an individual holding a valid license to carry a concealed weapon issued under section 175.60 of the Wisconsin Statutes.)[7]

("Out-of-state licensee" means an individual who is 21 years of age or over, who is not a Wisconsin resident, and who has been issued an out-of-state license to carry a concealed weapon.)[8]

Meaning of "Went Armed"

The phrase "went armed" means that the weapon must have been either on the defendant's person or that the weapon must have been within the defendant's reach.[9]

Meaning of "Dangerous Weapon"

"Dangerous weapon" means[10]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.]

[any device or instrumentality which in the manner it is used or intended to be used is calculated or likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Meaning of "Concealed"

"Concealed" means hidden from ordinary observation. The weapon does not have to be completely hidden.[11]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1335 in 1966 and revised in 1988, 1996, 2003, and 2006. In 2011, Wis JI-Criminal 1335 was revised to eliminate reference to exceptions to the applicability of § 941.23 and Wis JI-Criminal 1335B was created for use when evidence of an exception is in the case. It reflects changes made to § 941.23 by 2011 Wisconsin Act 35.

See the Comment to Wis JI-Criminal 1335 for discussion of case law upholding the constitutionality of § 941.23 after the adoption of a state constitutional amendment guaranteeing "the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." Wis. Const. art. I, § 25.

Also see the Comment to Wis JI-Criminal 1335 for a discussion of the relationship between carrying a concealed weapon in violation of § 941.23 and the rules relating to carrying cased guns in § 167.31(2).

1. This instruction can be used as a model for cases where one of the other exceptions to § 941.23 applies. The first paragraph of the instruction would be modified to replace "not a licensee" with an equivalent statement that the person is not covered by the exception raised in the case. And the fourth element would be changed to include the same statement.

This instruction is drafted for the case where there is evidence of the licensee exception to the applicability of § 941.23. The statute has always had an exception for peace officers. 2011 Wisconsin Act created four additional exceptions – see § 941.23(2)(a)-(e):

- a peace officer – sub. (a)
- a qualified out-of-state law enforcement officer, as defined in s. 941.23(1)(g) – sub. (b)
- a former officer, as defined in s. 941.23(1)(c) – sub. (c)
- a licensee, as defined in s. 175.60(1)(d) or out-of-state licensee, as defined in s. 175.60(1)(g) – sub. (d)
- an individual who carries in his or her own dwelling or place of business or on land that he or she owns, leases, or legally occupies – sub. (e).

In State v. Williamson, 58 Wis.2d 514, 206 N.W.2d 613 (1973), the Wisconsin Supreme Court confirmed that the question whether a defendant is a peace officer is one that must be raised by the defendant as an affirmative defense. The court noted that a long list of officials qualify as "peace officers," making it difficult for the state to establish that the defendant was not one of the identified individuals. The court recognized that an exception to the general rule imposing the burden on the state to disprove defenses exists where "evidence

of the exempting fact lies especially within the control of the defendant or peculiarly within his knowledge." 58 Wis.2d at 524.

Several years after Williamson was decided, Wisconsin law relating to defenses was clarified in Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979). Moes was concerned with the statutorily recognized defense of coercion – see § 939.46. The statute defines the defense but does not address the procedure for litigating a coercion claim. Moes concluded that the common law rule in Wisconsin for "affirmative defenses" is that a burden of production can be placed on defendant; if the burden of production is satisfied, the state has the burden to prove the defense does not apply [by the beyond a reasonable doubt standard]. While the United States Constitution allows imposing a burden of persuasion on the defendant for true affirmative defenses [those that do not negate an element of the crime], the common law rule applies as a matter of state law unless the legislature has specifically provided to the contrary. 91 Wis.2d 756, 768. As to the rule under federal due process analysis, see Patterson v. New York, 432 U.S. 197 (1977).

In the Committee's judgment, statutory exceptions are therefore best addressed as follows. The question whether an exception applies is not an issue in the case until there is some evidence of that fact. Once there is evidence sufficient to raise the issue, the burden is on the state to prove beyond a reasonable doubt that the exception does not apply. See the text of the instruction at note 6.

2. See footnote 1, supra.

3. The instruction treats the absence of the exception as an element that the state must prove. See note 1, supra. The absence of the exception becomes an element only when raised by the evidence. If there is no evidence of an exception, only three elements must be proved. Wis JI-Criminal 1335 is the instruction to use in that case.

4. 2011 Wisconsin Act 35 changed the definition of this offense from "goes armed with" a dangerous weapon to "carries" a dangerous weapon. Section 941.23(1)(ag) provides that "'carry' has the meaning given in s. 175.60(1)(ag)." Section 175.60(1)(ag) defines "carry" as "to go armed with."

5. The original version of Wis JI-Criminal 1335, published in 1966, included the "aware of the presence" requirement. An instruction including that statement was approved as a correct statement of the law in State v. Asfoor, where the court stated that "[c]oncealing or hiding a weapon precludes inadvertence." 75 Wis.2d 411, 415, 249 N.W.2d 529 (1976). The concept is similar to that involved for offenses requiring "possession." See Wis JI-Criminal 920. For cases identifying "aware of the presence" as an element of the crime, see State v. Fry and State v. Keith, note 9, below. The 1995 revision of the instruction added "aware of the presence" as a separate element.

6. This element must be changed if one of the other exceptions to the applicability of § 941.23 is raised in the case. The exceptions are listed in footnote 1, supra.

7. This is the definition of "licensee" provided in § 175.60(1)(d).

8. This is the definition of "out-of-state licensee" provided in § 175.60(1)(g), with the addition of the last phrase: "to carry a concealed weapon." "Out-of-state-license" is defined in § 175.60(1)(f).

9. In Mularkey v. State, 201 Wis. 429, 230 N.W. 76 (1930), the court affirmed the conviction of a driver who had a revolver within his reach on a shelf back of the seat of his automobile but did not have the weapon on his person.

The Mularkey "within his reach" test was reaffirmed by the Wisconsin Supreme Court in State v. Fry, 131 Wis.2d 153, 388 N.W.2d 565 (1986). In Fry, the court found sufficient evidence to support a conviction for carrying a concealed weapon where the gun was in the glove compartment of the vehicle the defendant was driving.

In State v. Walls, 190 Wis.2d 65, 526 N.W.2d 765 (Ct. App. 1994), the court affirmed a conviction for carrying a concealed weapon where a handgun was lying on the front seat of an automobile. The court held that:

> . . . the statute evinces a strong rationale to prevent the carrying of weapons in automobiles, as well as on a person. . . . A person is guilty of carrying a concealed weapon in an automobile where: (1) the weapon is located inside a vehicle and is within the defendant's reach; (2) the defendant is aware of the presence of the weapon; and (3) the weapon is concealed, or hidden from ordinary view B meaning it is indiscernible from ordinary observation of a person located outside and within the immediate vicinity of the vehicle.

190 Wis.2d 65, 71-72.

In State v. Keith, 175 Wis.2d 75, 498 N.W.2d 865 (Ct. App. 1993), the court affirmed a conviction where the defendant had a gun in her purse on the porch of her home. The court rejected Keith's argument that to "go armed, you have to go somewhere." The court held that "there is no separate element requiring that a person actually go somewhere." 175 Wis.2d 75, 79.

In State v. Hamdan, the court rejected the argument that Keith was wrongly decided, stating that "[we] continue to adhere to prior interpretations of the 'goes armed' language." 2003 WI 113, ¶24.

10. Choose the alternative supported by the evidence. They are based in the definition of "dangerous weapon" provided in § 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

11. The "hidden from ordinary observation" requirement is adapted from State v. Mularkey, 201 Wis. 429, 230 N.W.2d 76 (1930). Also see, State v. Asfoor, 75 Wis.2d 411, 433, 249 N.W.2d 529 (1976), which approved an instruction that included this requirement.

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1336 CARRYING A CONCEALED KNIFE — § 941.231

Statutory Definition of the Crime

Section 941.231 of the Criminal Code of Wisconsin is violated by a person who goes armed with a concealed knife that is a dangerous weapon if that person has been convicted of a felony.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant went armed with a concealed knife.

   "Went armed" means that the knife must have been either on the defendant's person or that the knife must have been within the defendant's reach.[2]

   "Concealed" means hidden from ordinary observation. The knife does not have to be completely hidden.[3]

2. The concealed knife was a dangerous weapon.

   A knife is a dangerous weapon if[4]

   [it is designed as a weapon and is capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.]

   [in the manner in which it is used or intended to be used, it is calculated or

likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.][5]

3. The defendant had been convicted of a felony before (date of offense).

[(Name of felony) is a felony in Wisconsin.][6]

[The parties have agreed that the defendant was convicted of a felony before (date of offense) and you must accept this as conclusively proved.][7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1336 was approved by the Committee in 2016. This revision was approved by the Committee in December 2021; it added to the comment.

Section 941.231, Carrying a Concealed Knife, was created by 2015 Wisconsin Act 149 [effective date: February 8, 2016]. Act 149 also repealed former § 941.24, Possession of a Switchblade Knife.

The statutory text of § 941.231 provides that "[a]ny person who is prohibited from possessing a firearm under s. 941.29 [Possession of a Firearm] who goes armed with a concealed knife that is a dangerous weapon is guilty of a Class A misdemeanor." If the instruction were to use this statutory text, both the Statutory Definition of the Crime and the list of Elements of the Crime would refer to § 941.29. Referring to § 941.29 would require defining why the defendant is prohibited from possessing a firearm under that statute. The Committee concluded that it would be simpler and more direct to omit the reference to the defendant being "prohibited from possessing a firearm under section 941.29 of the Wisconsin Statutes" and state the status element in terms of the reason why the defendant is prohibited from possessing a firearm

under § 941.29.

1. The instruction is drafted for cases involving going armed with a concealed knife that is a dangerous weapon by a person convicted of a felony, which is the most common basis for the prohibition on firearm possession under § 941.29. See § 941.29(1m)(a), (b), and (bm). However, the prohibition in § 941.231 applies to other categories of persons who are prohibited from possessing a firearm under § 941.29. See § 941.29(1m)(c) to (g). For cases involving subs. (1)(c) through (g), the instruction must be modified. For cases involving subs. (1m)(f) and (g), the modification may be based on Wis JI-Criminal 1344, Possession of a Firearm by a Person Subject to an Injunction.

2. The definition of "went armed" in the instruction is based on the one articulated in case law under the old carrying a concealed weapon statute. See State v. Mularkey, 201 Wis. 429, 432, 230 N.W. 76 (1930), and other cases cited in footnote 4, Wis JI-Criminal 1335.

3. The "hidden from ordinary observation" requirement is adapted from State v. Mularkey, 201 Wis. 429, 432, 230 NW 76 (1930). Also see, State v. Asfoor, 75 Wis.2d 411, 433, 249 N.W.2d 529 (1976), which approved an instruction that included this requirement.

4. Choose the alternative supported by the evidence. These are two of the four alternatives in the standard definition of "dangerous weapon." See § 939.22(10). Eliminated are those relating to firearms and electric weapons, which would not apply to a knife. See Wis JI-Criminal 910 for footnotes discussing each alternative.

5. This instruction uses the standard definition of "dangerous weapon" provided in § 939.22(10), in which a knife is applicable. However, 2015 Wisconsin Act 149 also created subsection 941.23(1)(ap) which provides that "Notwithstanding s. 939.22(10), 'dangerous weapon' does not include a knife." Because § 941.23(1)(ap) is prefaced by the phrase "in this section," the exclusion applies only to offenses provided in § 941.23.

6. The prohibition on firearm possession in § 941.29 applies to person convicted of a felony in Wisconsin and also to persons convicted of crimes in other jurisdictions that would be felonies in Wisconsin. In the Committee's judgment, the way the third element is phrased should be suitable for handling either alternative. See footnote 7, Wis JI-Criminal 1343, for additional considerations relating to out of state convictions.

The Committee also concluded that the statute need not be interpreted to require that the defendant "know he was convicted of a felony" or know that he was prohibited from carrying a concealed knife that is a dangerous weapon. A person may fairly be held to know the nature of a crime of which he was convicted and to know the disabilities that may attend that conviction.

7. Defendants may offer to stipulate to the fact of their felon status. The bracketed statement in the instruction includes the standard statement on the effect of a stipulation found in Wis JI-Criminal 162, Agreed Facts. The effect of a stipulation in a prosecution for violating § 941.29 has been described as follows:

> . . . where prior conviction of a felony is an element of the offense with which the defendant is charged and the defendant is willing to stipulate that he or she is a convicted felon, evidence of

> the nature of the felony is irrelevant if offered solely to establish the felony conviction element of the offense. The trial court therefore abused its discretion in allowing the prosecutor to inform the jury as to the nature of McAllister's crime.

State v. McAllister, 153 Wis.2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989). The Committee concluded the effect of a stipulation to felon status should be the same in a prosecution under § 941.231.

The fact of felon status may still be revealed; it is the nature of the felony that is not to be disclosed. State v. Nicholson, 160 Wis.2d 803, 804, 467 N.W.2d 139 (Ct. App. 1991).

Care must be taken where a stipulation goes to an element of a crime. A waiver should be obtained. See Wis JI-Criminal 162A Law Note: Stipulations. An example of a complete waiver inquiry is provided in footnote 8, Wis JI-Criminal 1343.

1337 CARRYING A FIREARM IN A PUBLIC BUILDING — § 941.235

Statutory Definition of the Crime

Section 941.235 of the Criminal Code of Wisconsin is violated by any person[1] who goes armed with a firearm in any building owned or leased by the state or any political subdivision of the state.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant went armed with a firearm.

   The phrase "went armed" means that a firearm must have been on the defendant's person or that a firearm must have been within the defendant's reach.[2] In addition, the defendant must have been aware of the presence of the firearm.[3]

   The term "firearm" means a weapon that acts by force of gunpowder.[4]

2. The defendant went armed with a firearm in a building owned or leased by (the state.) (a political subdivision of the state. _____ is a political subdivision of the state.)[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1337 was originally published in 1995 and revised in 2007 and 2011. The 2011 revision updated footnote 1 to refer to changes made by 2011 Wisconsin Act 35. This revision was approved by the Committee in April 2019; it added the material at footnote 3.

1. Subsection (2)(a) of § 941.235 provides that the statute does not apply:

> . . . to peace officers or armed forces or military personnel who go armed in the line of duty or to any person duly authorized by the chief of police of any city, village or town, the chief of the capitol police or the sheriff of any county to possess a firearm in any building under sub.(1).

2011 Wisconsin Act 35 amended § 941.235(2) by creating subsecs. (2)(c)-(e), which recognize three additional exceptions:

- a qualified out-of-state law enforcement officer, as defined in s. 941.23(1)(g) – sub. (2)(c)
- a former officer, as defined in s. 941.23(1)(c) – sub. (2)(d)
- a licensee, as defined in s. 175.60(1)(d), or an out-of-state licensee, as defined in s. 175.60(1)(g) – sub. (2)(e).

The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W.2d 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

2. This is the definition of "went armed" used in Wis JI-Criminal 1335, Carrying A Concealed Weapon. See note 2 of that instruction for cases discussing "went armed."

3. The "aware of the presence" requirement was approved as a correct statement of the law in State v. Asfoor, where the court stated that "[c]oncealing or hiding a weapon precludes inadvertence." 75 Wis.2d 411, 415, 249 N.W.2d 529 (1976). The concept is similar to that involved for offenses requiring "possession." See Wis JI Criminal 920. For cases identifying "aware of the presence" as an element of

the crime, see note 3 of Wis JI-Criminal 1335. The 1995 revision of that instruction added "aware of the presence" as a separate element.

4. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes airguns.

5. Whether a particular entity is a "political subdivision" of the state is a question of law that may be communicated to the jury. Over twenty Wisconsin statutes define the term, the most common being as follows: "'Political subdivision' means a county, city, town or village." See, for example, § 560.60(13). Subsection 102.475(8)(d) refers to "counties, municipalities and municipal corporations." Subsection 144.442(9m)(a) adds "public inland lake protection and rehabilitation districts." Subsection 166.08(2)d), dealing with emergency government, adds "special districts, authorities and other public corporations and entities whether organized and existing under charter or general law."

The title of § 941.235 uses the term "public building" but that term is not used in the text. That term may have a broader meaning in general usage, referring to buildings that are open to the public. See, for example, § 101.01(2)(g). The Wisconsin Supreme Court discussed the meaning of "public building" in City of Milwaukee v. K.F., 145 Wis.2d 24, 426 N.W.2d 329 (1988), where the majority concluded that the Milwaukee War Memorial was a public building even when rented by a group for private use. The majority relied in part on the definition in § 101.01(2)(g). A dissenting opinion argued that a public building could lose its public character when a private event is held there and cautioned against incorporating definitions from civil statutes into the criminal setting.

Section 941.235 avoids some potential difficulties by referring to buildings owned by a "political subdivision" but does not define that term as do most other statutes which use it.

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1338 CARRYING A HANDGUN ON PREMISES WHERE ALCOHOL BEVERAGES ARE CONSUMED — § 941.237

Statutory Definition of the Crime

Section 941.237 of the Criminal Code of Wisconsin is violated by one who intentionally goes armed with a handgun on any premises licensed for the sale and consumption of alcohol beverages.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant went armed with a handgun.

   The phrase "went armed" means that a firearm must have been on the defendant's person or that a firearm must have been within the defendant's reach.[2] In addition, the defendant must have been aware of the presence of the firearm.[3]

   ["Handgun" means any weapon designed or redesigned, or made or remade, and intended to be fired while held in one hand and to use the energy of an explosive to expel a projectile through a smooth or rifled bore.][4]

2. The defendant went armed with a handgun on a premises licensed for the sale and consumption of alcohol beverages.[5]

3. The defendant acted intentionally.

This requires that the defendant knew that (he) (she) was armed with a handgun and knew that the premises was licensed for the sale and consumption of alcohol beverages.[6]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1338 was originally published in 1996 and revised in 2007, 2011, and 2019. The 2019 revision amended the definition of "went armed" defined under element 1 and updated notes 2 and 3 in the Comment. This revision was approved by the Committee in October 2023. It addressed the repeal of subsection 941.237(4) and the introduction of Wis JI-Criminal 1338A, which concerns the exceptions set forth in § 941.237(3)(a) – (j).

This instruction is for a violation of § 941.237, created by 1993 Wisconsin Act 95, effective date: December 25, 1993. The offense is defined in sub. (2): "Whoever intentionally goes armed with a handgun on any premises for which a Class "B" or "Class B" license or permit has been issued under ch. 125 is guilty of a Class A misdemeanor." As to Class "B" and "Class B" licenses, see note 1 below.

Numerous exceptions are provided in § 941.237(3)(a) through (j). 2011 Wisconsin Act 35 amended

§ 941.237(3) by creating subds. (cr)-(cx), which recognize three additional exceptions:

- a qualified out-of-state law enforcement officer, as defined in s. 941.23(1)(g) – sub. (3)(cr)
- a former officer, as defined in s. 941.23(1)(c) – sub. (3)(ct)
- a licensee, as defined in s. 175.60(1)(d), or an out-of-state licensee, as defined in s. 175.60(1)(g) if the licensee is not consuming alcohol on the premises – sub. (3)(cx).

See Wis JI-Criminal 1338A for a corresponding instruction concerning the exceptions set forth in § 941.237(3)(a) – (j).

2011 Wisconsin Act 35 repealed subsection (4) of section 941.237. This subsection stated that "[T]he state does not have to negate any exception under sub. (3). Any party that claims that an exception under sub. (3) is applicable has the burden of proving the exception by a preponderance of the evidence."

Prior to the enactment of 2011 Wisconsin Act 35, it appears that the burden of disproving an exception under sub. (3) never shifted to the State, regardless of whether the defendant successfully demonstrated the exception by a preponderance of the evidence. However, the repeal of sub. (4) without any replacement language brought about two significant changes.

First, the removal of sub. (4) relieved the defendant from the burden of proving the exception by a preponderance of the evidence. The Committee believes it is now sufficient for the defendant to simply point to or produce "some evidence" in support of an exception under sub. (3) in order to fulfill their required burden.

Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). Though the burden of producing "some evidence" of a defense is commonly referred to as the defendant's burden, that is not literally correct. The source of the evidence may be facts presented by the prosecution; facts elicited from prosecution witnesses by defense cross-examination or evidence affirmatively presented by the defense. State v. Coleman, 206 Wis.2d 199, 214, 556 N.W.2d 701 (1996).

Secondly, in the event that the defendant meets the "some evidence" standard, the Committee believes that the burden shifts to the State to disprove the exception beyond a reasonable doubt. See Wis JI-Criminal 1338A.

1. This phrase is used in place of the following statutory language: ". . . premises for which a Class "B" or "Class B" license or permit has been issued under ch. 125." The Class "B" license is described in § 125.26(1); it "authorizes retail sales of fermented malt beverages to be consumed either on the premises where sold or off the premises." The Class "B" permit is described in § 125.27(1); it applies to country clubs and similar clubs not open to the general public and "authorizes retail sales of fermented malt beverages to be consumed on the premises where sold." The "Class B" license is described in § 125.51(3); it "authorizes the retail sale of intoxicating liquor for consumption on the premises where sold by the glass and not in the original package or container."

In addition to avoiding the inherent difficulty in communicating to a jury the difference between a "Class B" license and a Class "B" license, the phrase used in the instruction is believed to address the core conduct the statute was intended to address: carrying a handgun into a tavern. Though not used in subsection

(2), which defines the offense, "tavern" does appear in some of the exceptions listed in subsection (3). And it is defined as follows in subsection (1)(fm): "'Tavern' means an establishment, other than a private club or fraternal organization, in which alcohol beverages are sold for consumption on the premises."

2. This is the definition of "went armed" used in Wis JI-Criminal 1335, Carrying A Concealed Weapon. See note 2 of that instruction for cases discussing "went armed."

3. The "aware of the presence" requirement was approved as a correct statement of the law in State v. Asfoor, where the court stated that "[c]oncealing or hiding a weapon precludes inadvertence." 75 Wis.2d 411, 415, 249 N.W.2d 529 (1976). The concept is similar to that involved for offenses requiring "possession." See Wis JI-Criminal 920. For cases identifying "aware of the presence" as an element of the crime, see note 3 of Wis JI-Criminal 1335. The 1995 revision of that instruction added "aware of the presence" as a separate element.

4. This is the definition of "handgun" provided in § 175.35(1)(b). That definition is adopted by cross-reference in § 941.237(1)(d).

5. See note 1, supra.

6. The Committee concluded that in this statute, the significance of the use of the word "intentionally" is to require knowledge that one is armed and knowledge that the premises is a licensed one. See § 939.23(3).

1338A CARRYING A HANDGUN ON PREMISES WHERE ALCOHOL BEVERAGES ARE CONSUMED — EXCEPTIONS UNDER § 941.237(3)(a) – (j)[1]

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.[2]

Carrying a Handgun on Premises Where Alcohol Beverages are consumed Under Wis. Stat. § 941.237(2)

The defendant's possession of a handgun on a premises licensed for the sale and consumption of alcohol beverages is an issue in this case. The law allows an individual to intentionally go armed with a handgun on a premises licensed for the sale and consumption of alcohol beverages[3] if [CHOOSE ONE OF THE FOLLOWING][4]

[the individual is a peace officer.][5]

[the individual is a correctional officer while going armed in the line of duty.][6]

[the individual is a member of the U.S. armed forces or national guard while going armed in the line of duty.]

[the individual is a private security person meeting all of the following criteria:

1. The private security person is covered by a license or permit issued under s. 440.26.

2. The private security person is going armed in the line of duty.

3. The private security person is acting with the consent of the person specified in par. (d).][7]

[the individual is a qualified out-of-state law enforcement officer, as defined in s.

941.23(1)(g), to whom s. 941.23(2)(b)1. to 3. applies.][8]

[the individual is a former officer, as defined in s. 941.23(1)(c), to whom s. 941.23(2)(c)1. to 7. applies.][9]

[(1) the individual is a (licensee, as defined in s. 175.60(1)(d)[10]) (out-of-state licensee, as defined in s. 175.60(1)(g)[11]) and, (2) is not consuming alcohol on the premises.]

[the individual is the licensee, owner, or manager of the premises, or any employee or agent authorized to possess a handgun by the licensee, owner, or manager of the premises.]

[the individual is in possession of a handgun that is unloaded and encased in a vehicle in any parking lot area.]

[the individual is in possession or use of a handgun at a public or private gun or sportsmen's range or club.]

[the individual is in possession or use of a handgun on the premises if authorized for a specific event of limited duration by the owner or manager of the premises who is issued the Class "B" or "Class B" license or permit under ch. 125 for the premises.]

[the individual is in possession of any handgun that is used for decoration if the handgun is encased, inoperable or secured in a locked condition.]

[the individual is in possession of a handgun in any portion of a hotel other than the portion of the hotel that is a tavern.]

[the individual is in possession of a handgun in any portion of a combination tavern

and store devoted to other business if the store is owned or operated by a firearms dealer, the other business includes the sale of handguns and the handgun is possessed in a place other than a tavern.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the exception of (insert the applicable statutory exception) did not apply to the defendant.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of carrying a handgun on premises where alcohol beverages are consumed have been proved and that the exception of (insert the applicable statutory exception) did not apply to the defendant, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 1338A was approved by the Committee in October 2023.

This instruction is drafted for the exceptions set forth in § 941.237(3)(a) – (j).

2011 Wisconsin Act 35 [effective date: November 1, 2011] created a process to obtain a license to carry a concealed weapon. A person who is licensed or who is an out-of-state licensee is exempted from the crime that prohibits carrying a handgun where alcohol beverages are sold and consumed if the person is not consuming alcohol on the premises.

2011 Wisconsin Act 35 repealed subsection (4) of section 941.237. This subsection stated that "[T]he state does not have to negate any exception under sub. (3). Any party that claims that an exception under

sub. (3) is applicable has the burden of proving the exception by a preponderance of the evidence."

The Committee believes that prior to the enactment of 2011 Wisconsin Act 35, the burden of disproving an exception under sub. (3) never shifted to the state, regardless of whether the defendant successfully demonstrated the exception by a preponderance of the evidence. However, the repeal of sub. (4) without any replacement language resulted in two significant changes.

First, the removal of sub. (4) relieved the defendant from the burden of proving the exception by a preponderance of the evidence. The Committee believes it is now sufficient for the defendant to simply point to or produce "some evidence" in support of an exception under sub. (3) in order to fulfill their required burden.

Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). Though the burden of producing "some evidence" of a defense is commonly referred to as the defendant's burden, that is not literally correct. The source of the evidence may be facts presented by the prosecution; facts elicited from prosecution witnesses by defense cross-examination or evidence affirmatively presented by the defense. State v. Coleman, 206 Wis.2d 199, 214, 556 N.W.2d 701 (1996).

Secondly, in the event that the defendant meets the "some evidence" standard, the Committee believes that the burden shifts to the State to disprove the exception beyond a reasonable doubt.

1. Subsections 941.237(3)(a)–(j) set forth a list of statutory exceptions. The jury instructions typically treat these exceptions like an affirmative defense. That is, the state need not anticipate them in the charging document, and they are not issues in the case until supported by "some evidence." If so supported, the state must prove the inapplicability of the exception beyond a reasonable doubt. See, e.g., Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979). See also Wis JI-Criminal 700, Sec. II, 3.

§ 941.237(3) provides that subsection (2) does not apply to any of the following:

(a) A peace officer.
(b) A correctional officer while going armed in the line of duty.
(c) A member of the U.S. armed forces or national guard while going armed in the line of duty.
(cm) A private security person meeting all of the following criteria:
    1. The private security person is covered by a license or permit issued under s. 440.26.
    2. The private security person is going armed in the line of duty.
    3. The private security person is acting with the consent of the person specified in par. (d).
(cr) A qualified out-of-state law enforcement officer, as defined in s. 941.23(1)(g), to whom s. 941.23(2)(b)1. to 3. applies.
(ct) A former officer, as defined in s. 941.23(1)(c), to whom s. 941.23(2)(c)1. to 7. applies.
(cx) A licensee, as defined in s. 175.60(1)(d), or an out-of-state licensee, as defined in s. 175.60(1)(g), if the licensee or out-of-state licensee is not consuming alcohol on the premises.
(d) The licensee, owner, or manager of the premises, or any employee or agent authorized to possess a handgun by the licensee, owner, or manager of the premises.

(e) The possession of a handgun that is unloaded and encased in a vehicle in any parking lot area.
(f) The possession or use of a handgun at a public or private gun or sportsmen's range or club.
(g) The possession or use of a handgun on the premises if authorized for a specific event of limited duration by the owner or manager of the premises who is issued the Class "B" or "Class B" license or permit under ch. 125 for the premises.
(h) The possession of any handgun that is used for decoration if the handgun is encased, inoperable or secured in a locked condition.
(i) The possession of a handgun in any portion of a hotel other than the portion of the hotel that is a tavern.
(j) [in] The possession of a handgun in any portion of a combination tavern and store devoted to other business if the store is owned or operated by a firearms dealer, the other business includes the sale of handguns and the handgun is possessed in a place other than a tavern.

2. The Committee recommends that all instructions on defensive matters be combined with the instruction on the underlying offense. Combining the instructions will help the jury understand the issues and clarify the allocation of the burden of persuasion.

3. "Alcohol beverages" is defined as follows in §125.02(1)

"Alcohol beverages" means fermented malt beverages and intoxicating liquor.

4. The applicable statutory exception should be selected. The alternatives are those provided in sub. (3)(a) – (j) of § 941.237.

5. "Peace officer" is defined as follows in § 939.22(22):

"Peace officer" means any person vested by law with a duty to maintain public order, whether that duty extends to all crimes or is limited to specific crimes.

6. "Correctional officer" is defined as follows in § 941.237(1)(b):

"Correctional officer" means any person employed by the state or any political subdivision as a guard or officer whose principal duties are the supervision and discipline of inmates.

7. "Private security person" is defined as follows in §440.26 (1m):

"Private security person" means any private police, guard, or any person who stands watch for security purposes.

8. "Qualified out-of-state law enforcement officer" is defined as follows in § 941.23:

"Qualified out-of-state law enforcement officer" means a law enforcement officer to whom all of the following apply:

1. The person is employed by a state or local government agency in another state.

2. The agency has authorized the person to carry a firearm.
3. The person is not the subject of any disciplinary action by the agency that could result in the suspension or loss of the person's law enforcement authority.
4. The person meets all standards established by the agency to qualify the person on a regular basis to use a firearm.
5. The person is not prohibited under federal law from possessing a firearm.

"Law enforcement officer" is defined as a person who is employed by a law enforcement agency for the purpose of engaging in, or supervising others engaging in, the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law and who has statutory powers of arrest. See § 175.49(1)(g).

"Law enforcement agency" means an agency that consists of one or more persons employed by the federal government, including any agency described under 18 USC 926C (e) (2); a state, or a political subdivision of a state; the U.S. armed forces; or the national guard, that has as its purposes the prevention and detection of crime and the enforcement of laws or ordinances, and that is authorized to make arrests for crimes. See § 175.49(1)(f).

9. "Former law enforcement officer" is defined as follows in § 175.49(1)(d):

> "Former law enforcement officer" means a person who separated from service as a law enforcement officer at a state or local law enforcement agency in Wisconsin.

"Law enforcement officer" is defined as a person who is employed by a law enforcement agency for the purpose of engaging in, or supervising others engaging in, the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law and who has statutory powers of arrest. See § 175.49(1)(g).

"Law enforcement agency" means an agency that consists of one or more persons employed by the federal government, including any agency described under 18 USC 926C (e) (2); a state, or a political subdivision of a state; the U.S. armed forces; or the national guard, that has as its purposes the prevention and detection of crime and the enforcement of laws or ordinances, and that is authorized to make arrests for crimes. See § 175.49(1)(f).

10. "Licensee" is defined as follows in § 175.60(1)(d):

> "Licensee" means an individual holding a valid license to carry a concealed weapon issued under this section.

11. "Out-of-state licensee" is defined as follows in § 175.60(1)(g):

> "Out-of-state licensee" means an individual who is 21 years of age or over, who is not a Wisconsin resident, and who has been issued an out-of-state license.

1339 CARRYING A WEAPON BY LICENSEE WHERE PROHIBITED — § 175.60(16)

Statutory Definition of the Crime

Section 175.60(16) of the Wisconsin Statutes provides that it is unlawful for any (licensee) (out-of-state licensee) to knowingly carry (a concealed weapon) (a weapon that is not concealed) (a firearm that is not a weapon) in a place where carrying a weapon is prohibited.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was (a licensee) (an out-of-state licensee).

   ("Licensee" means an individual holding a valid license to carry a concealed weapon issued under section 175.60 of the Wisconsin Statutes.)[1]

   ("Out-of-state licensee" means an individual who is 21 years of age or over, who is not a Wisconsin resident, and who has been issued an out-of-state license to carry a concealed weapon.)[2]

2. The defendant knowingly carried (a concealed weapon) (a weapon that is not concealed) (a firearm that is not a weapon).

"Carried" means "went armed with."[3]

The phrase "went armed" means that the (weapon) (firearm) must have been either on the defendant's person or that the (weapon) (firearm) must have been within the defendant's reach.[4]

"Knowingly" requires that the defendant knew the (weapon) (firearm) was on (his) (her) person or within (his) (her) control.

["Concealed" means hidden from ordinary observation. The weapon does not have to be completely hidden.][5]

["Weapon" means (a handgun) (an electric weapon) (a knife other than a switchblade knife) (a billy club).][6]

FOR CASES INVOLVING "A FIREARM THAT IS NOT A WEAPON," ADD THE FOLLOWING.

["A firearm that is not a weapon" means a firearm other than a handgun.

"Firearm" means a device that acts by the force of gunpowder.][7]

3. The defendant carried the (concealed weapon) (weapon that was not concealed) (firearm that was not a weapon) in (specify a place listed in § 175.60(16)(a) 1. through 8.).[8]

Deciding About Knowledge

You cannot look into a person's mind to determine knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1339 was originally published as Wis JI-Criminal 5401 in 2012. It was renumbered and republished without substantive change in January 2024.

This instruction is for violations of § 175.60(16)(a), a statute created by 2011 Wisconsin Act 35. Effective date: November 1, 2011. The penalty is a fine of $500 or imprisonment for 30 days or both. See § 175.60(17)(b).

Note that this statute applies only to persons licensed to carry a concealed weapon by Wisconsin or by another state whose licensees are recognized in Wisconsin. Persons who are not licensees would be prosecuted under the regular criminal statutes, such as those prohibiting carrying a concealed weapon [§ 941.23] or carrying a firearm in a public building [§ 941.235].

Subsection (b) of § 175.60(16) provides that the "prohibitions under par. (a) do not apply to any of the following:

1. A weapon in a vehicle driven or parked in a parking facility located in a building that is used as, or any portion of which is used as, a location under par. (a).

2. A weapon in a courthouse or courtroom if a judge who is a licensee is carrying the weapon or if another licensee or out-of-state licensee, whom a judge has permitted in writing to carry a weapon, is carrying the weapon.

3. A weapon in a courthouse or courtroom if a district attorney, or an assistant district attorney, who is a licensee is carrying the weapon."

1. This is the definition of "licensee" provided in § 175.60(1)(d).

2. This is the definition of "out-of-state licensee" provided in § 175.60(1)(g), with the addition of the last phrase: "to carry a concealed weapon." "Out of state license" is defined in § 175.60(1)(f).

3. Section 175.60(1)(ag) defines "carry" as "to go armed with."

4. See footnote 4, Wis JI-Criminal 1335 for an explanation of the derivation of the definition of "went armed."

5. This is the definition of "concealed" used in Wis JI-Criminal 1335, Carrying A Concealed Weapon. It is to be included in the instruction only if the "concealed weapon" option is selected for the second element.

6. This is the definition of "weapon" provided in § 175.60(1)(j).

"Handgun" is defined as follows in § 175.60(1)(bm): ". . . any weapon designed or redesigned, or made or remade, and intended to be fired while held in one hand and to use the energy of any explosive to expel a projectile through a smooth or rifled bore. 'Handgun' does not include a machine gun, as defined in s. 941.27(1), a short-barreled rifle, as defined in s. 941.28(1)(b), or a short-barreled shotgun, as defined in s. 941.28(1)(c)."

"Electric weapon" is defined in § 941.295(1c)(a).

7. Section 175.60(16)(a) refers to three categories of weapons: a concealed weapon; a weapon that is not concealed; and, a firearm that is not a weapon. "Weapon" is defined in § 175.60(1)(j) as a handgun, electric weapon, a knife other than a switchblade, or a billy club. "Handgun" is defined in § 175.60(1)(bm) to exclude machine guns and short-barreled rifles or shotguns. [See footnote 6, which contains the complete definition.] The latter would still qualify as firearms, because they operate by force of gunpowder. Thus, in the Committee's judgment, the statutory reference to "a firearm that is not a weapon" would include machine guns and short-barreled rifles or shotguns.

The definition of firearm is the standard one used in the instructions [see Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892)], modified to refer to "device" in place of the usual reference to "weapon."

8. Section 175.60(16)(a) prohibits carrying a weapon or a firearm that is not a weapon in the following places.

1. Any portion of a building that is a police station, sheriff's office, state patrol station, or the office of division of criminal investigation special agent of the department.
2. Any portion of a building that is a prison, jail, house of correction, or secured correctional facility.
3. The facility established under s. 46.055. [The secure mental health facility for sexually violent persons.]
4. The facility established under s. 46.056. [The Wisconsin Resource Center.]
5. Any secured unit or secured portion of a mental health institute under s.51.05, including a facility designated as the Maximum Security Facility at Mendota Mental Health Institute.
6. Any portion of a building that is a county, state, or federal courthouse.
7. Any portion of a building that is a municipal courtroom if court is in session.
8. A place beyond a security checkpoint in an airport.

1340 POSSESSION OF A SWITCHBLADE KNIFE — § 941.24

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1240 was originally published in 1974 and revised in 1987, 1995, and 2007. Its withdrawal was approved by the Committee in February 2016.

This instruction was withdrawn because the statute prohibiting possession of a switchblade knife was repealed by 2015 Wisconsin Act 149. [Effective Date: February 8, 2016.] Act 149 also created § 941.231 Carrying a concealed knife, which applies only to those who are prohibited from possessing a firearm under § 941.29 – e.g., convicted felons. See Wis JI-Criminal 1336.

Shortly before the enactment of Act 149, the Wisconsin Court of Appeals found that § 941.24 violated the constitutional right to bear arms in self defense when applied to a person who possessed a switchblade in his home. State v. Herrmann, 2015 WI App 97, 366 Wis.2d 312, 873 N.W.2d 257.

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1340A POSSESSION OF A MACHINE GUN OR OTHER FULL AUTOMATIC FIREARM — § 941.26(1)(a)

This instruction was renumbered Wis JI-Criminal 1341A in 2007.

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1341 USING OLEORESIN OF CAPSICUM (PEPPER SPRAY) TO CAUSE BODILY HARM OR DISCOMFORT — § 941.26(4)(b)

This instruction was renumbered JI-Criminal 1341B in 2007.

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1341A POSSESSION OF A MACHINE GUN OR OTHER FULL AUTOMATIC FIREARM — § 941.26(1)(a)

Statutory Definition of the Crime

Section 941.26(1)(a) of the Criminal Code of Wisconsin is violated by a person who possesses a machine gun or other full automatic firearm.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a firearm.

   "Possessed" means that the defendant knowingly[2] had actual physical control of a firearm.[3]

Deciding About Knowledge[4]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge

2. The firearm was a [machine gun] [full automatic firearm].

   A [machine gun] [full automatic firearm] is any weapon that shoots automatically more than one shot, without manual reloading, by a single function

of the trigger.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1340A in 1996. It was renumbered Wis JI-Criminal 1341A in 2007. The 2007 revision involved the adoption of a new format and nonsubstantive changes to the text. The instruction was revised in 2009. The 2009 revision restored material in footnote 2 that was inadvertently dropped in 2007. This revision was approved by the Committee in August 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

This instruction is for a violation of § 941.26(1)(a). Possession of "any machine gun or other full automatic firearm" is prohibited. "Machine gun" is defined in § 941.27(1) in a way that includes any full automatic firearm. Thus, the instruction can be used with reference to either "machine gun" or "full automatic firearm," depending on the way the offense is charged. Both terms are defined in the same way.

Note that there are several exceptions set forth in subsection (3) of § 941.26 and in subsection (2) of § 941.27. For example, "possession of a machine gun not usable as a weapon and possessed as a curiosity, ornament or keepsake" is not prohibited. See, § 941.27(2). It is the Committee's judgment that statutory exceptions are best handled as follows. The question of whether an exception applies is not an issue in the case until there is some evidence of that fact. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the exception is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. Section 941.26(1)(a) provides that "no person may sell, possess, use or transport any machine gun or other full automatic firearm." The instruction is drafted for a case involving "possession" because that appeared to the Committee to be the most likely charge and because "possess" is the most inclusive term.

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

3. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical

control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

4. The Committee concluded that what is required for this offense is knowing possession of a firearm that is a machine gun or full automatic weapon, not knowledge that the firearm has characteristics that make it a machine gun or full automatic weapon. This is because § 941.26(1)(a) does not include any "intent words" that indicate knowledge of the nature of the weapon is required. See § 939.23(1). Note, however, that in interpreting federal statutes defining a similar offense, the United States Supreme Court concluded that knowledge of the nature of the weapon was required. In United States v. Staples, 511 U.S. 600 (1994), the court held that in a prosecution for violation 26 USC § 5861(d), the government "should have been required to prove beyond a reasonable doubt that [Staples] knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machine gun." The decision involved statutory construction; the court found that the language of the statute was not helpful because it is silent on "mens rea" and concluded:

> . . . absent a clear statement from Congress that mens rea is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with mens rea.

The Committee concluded that Staples is not binding on the construction of the Wisconsin statute since federal statutes do not incorporate a rule regarding "intent words" like the one provided in § 939.23(1). Though not always consistent on this issue, Wisconsin appellate courts typically find that the absence of an "intent word" in a statute in the criminal code indicates legislative intent that no knowledge element is required. See, for example, State v. Stanfield, 105 Wis.2d 553, 560, 314 N.W.2d 339 (1982), interpreting what is now § 951.02, cruelty to animals; State v. Stoehr, 134 Wis.2d 66, 396 N.W.2d 177 (1986), interpreting § 946.13, private interest in public contract; and, State v. Neumann, 179 Wis.2d 687, 708, 508 N.W.2d 54 (Ct. App. 1993), interpreting § 940.225(2)(a). However, a mental element has been read into criminal statutes outside the criminal code. See State v. Collova, 79 Wis.2d 473, 255 N.W.2d 581 (1977), adopting a mental element for operating after revocation, and State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973), adopting a knowledge element for controlled substance offenses.

The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 2, supra. The Committee concluded that sec. 941.26(1)(a) does not require proof that defendants know of the prohibition against possessing a machine gun. This conclusion is based on sec. 939.23(1)

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 939 to 951, such intent is indicated by the term 'intentionally,' the phrase 'with intent to,'

the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute.

5. This is based on the definition provided in § 941.27(1)(a). Subsections (b) and (c) of the same statute extend the definition to include the frame or receiver or other part designed for use in converting a weapon to an automatic one [sub. (b)] and to a combination of parts from which an automatic weapon could be assembled [sub. (c)]. The instruction obviously must be modified if one of those options is involved.

1341B USING OLEORESIN OF CAPSICUM (PEPPER SPRAY)[1] OR CS GEL TO CAUSE BODILY HARM OR DISCOMFORT — § 941.26(4)(b)

Statutory Definition of the Crime

Section 941.26(4)(b) of the Criminal Code of Wisconsin is violated by one[2] who intentionally uses a device or container of (oleoresin of capsicum)[3] (CS gel) to cause bodily harm or bodily discomfort to another person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant used a device or container of (oleoresin of capsicum) (CS gel)[4] to cause bodily harm or bodily discomfort to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing bodily harm or discomfort.[5]

   ["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.][6]

2. The defendant acted intentionally.

   This requires that the defendant acted with the mental purpose to cause bodily harm or bodily discomfort to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.[7]

It also requires that the defendant knew that the device or container contained (oleoresin of capsicum) (CS gel).[8]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1341 in 1994. It was revised and renumbered as Wis JI-Criminal 1341B in 2007 and revised again in 2014 to reflect changes made by 2013 Wisconsin Act 77. This revision was approved by the Committee in December 2019; it reflects changes made by 2019 Wisconsin Act 52.

This instruction is for one of several offenses contained in § 941.26(4) as amended by 1993 Wisconsin Act 91. Act 91 was enacted in December 1993 but with a delayed effective date of October 1, 1994. The criminal offenses involving "pepper spray" therefore apply only to conduct occurring on or after October 1, 1994.

The substance CS gel was added to the language of § 941.26 (4)(a) by 2019 Wisconsin Act 52 [effective date November 24, 2019].

See Wis JI-Criminal 1341C for violations of § 941.26(4)(d), using "pepper spray" to cause bodily harm or discomfort to a police officer.

See Wis JI-Criminal 1341D for violations of § 941.26(4)(L), possession of "pepper spray" by a convicted felon.

1993 Wisconsin Act 91 also required the Department of Justice to enact administrative rules relating to the sale and distribution of oleoresin of capsicum products. Those rules are found in Chapter Jus 14, Wisconsin Administrative Code. 2013 Wisconsin Act 77 [effective date: December 13, 2013] created § 941.26(4m) to read: "The department of justice may not promulgate or enforce any rule that regulates a device or container described under para. (a)."

1. The statute uses the term "oleoresin of capsicum" to refer to the substance commonly known as "pepper gas," "pepper spray," or "pepper mace." Not all material commonly referred to by these terms may meet the requirements of § 941.26(4)(a), which provides, in effect, that the offenses defined in sub. (4) apply to "a device or container that contains a combination of oleoresin of capsicum or CS gel and inert ingredients but does not contain any other gas or substance that will cause bodily discomfort." § 941.26(4)(a). Thus, the instruction uses the statutory term "oleoresin of capsicum" throughout.

2. Subsection (4)(c) of § 941.26 provides that the criminal offense defined in subsec. (4)(b) does "not apply to any of the following:"

1. "Any person acting in self-defense or defense of another, as allowed under s. 939.48."

2. "Any peace officer acting in his or her official capacity."

3. "Any armed forces or national guard personnel acting in the line of duty."

The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925).

Factual disputes about the applicability of an exception would likely be determined by pretrial motion. If a factual dispute is raised at trial, the Committee concluded that they are best handled in the same manner as most "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

3. See note 1, supra.

4. "'CS gel' means nonatomizing, gel-form chlorobenzalmalononitrile. § 941.26(1c)(a)."

5. The Committee concluded that the "substantial factor" definition of "cause" is sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

6. This is the definition of "bodily harm" provided in § 939.22(4).

7. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

8. The knowledge requirement is included because the statute uses the word "intentionally." Section 939.23(3) provides that this requires "purpose to do the thing or cause the result specified . . ." and "knowledge of those facts which are necessary to make his or her conduct criminal which are set forth after the word 'intentionally.'" The Committee concluded that the container or device being one that contains oleoresin of capsicum or CS gel is one of those facts. The Committee also concluded that is sufficient that the defendant know the substance by a common name, like "pepper spray," and not that the defendant know the exact chemical composition of the substance.

1341C USING OLEORESIN OF CAPSICUM (PEPPER SPRAY)[1] OR CS GEL TO CAUSE BODILY HARM TO A PEACE OFFICER — § 941.26(4)(d)

Statutory Definition of the Crime

Section 941.26(4)(d) of the Criminal Code of Wisconsin is violated by one who intentionally uses a device or container of (oleoresin of capsicum)[2] (CS gel) to cause bodily harm or bodily discomfort to a peace officer and knows, or has reason to know, that the person is a peace officer acting in an official capacity.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant used a device or container of (oleoresin of capsicum) (CS gel)[3] to cause bodily harm or bodily discomfort to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing bodily harm or discomfort.[4]

   ["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.][5]

2. The defendant acted intentionally.

This requires that the defendant acted with the mental purpose to cause bodily harm or bodily discomfort to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.[6]

It also requires that the defendant knew that the device or container contained (oleoresin of capsicum) (CS gel).[7]

3. (Name of victim) was a peace officer acting in an official capacity.

A (name type of officer) is a peace officer.[8]

(Name type of officer)[9] act in an official capacity when they perform duties that they are employed to perform. A (name type of officer) who performs acts for personal reasons that are not within the responsibilities of a (name type of officer) does not act in an official capacity.[10] [The responsibilities of a (name type of officer) include: _____.][11]

4. The defendant knew, or had reason to know, that (name of victim) was a peace officer acting in an official capacity.[12]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1341.1 in 1994. It was republished as Wis JI-Criminal 1341A in 1995. It was revised and renumbered as Wis JI-Criminal 1341C in 2007 and revised again in 2014 to reflect changes made by 2013 Wisconsin Act 77. This revision was approved by the Committee in December 2019; it reflects changes made by 2019 Wisconsin Act 52.

This instruction is for one of several offenses contained in § 941.26(4) as amended by 1993 Wisconsin Act 91. Act 91 was enacted in December 1993 but with a delayed effective date of October 1, 1994. The criminal offenses involving "pepper spray" therefore apply only to conduct occurring on or after October 1, 1994.

The substance CS gel was added to the language of § 941.26 (4)(a) by 2019 Wisconsin Act 52 [effective date November 24, 2019].

See Wis JI-Criminal 1341B for violations of § 941.26(4)(b), using "pepper spray" to cause bodily harm or discomfort to another person. See Wis JI-Criminal 1341D for violations of § 941.26(4)(L), possession of "pepper spray" by a convicted felon.

1993 Wisconsin Act 91 also required the Department of Justice to enact administrative rules relating to the sale and distribution of oleoresin of capsicum products. Those rules are found in Chapter Jus 14, Wisconsin Administrative Code. 2013 Wisconsin Act 77 [effective date: December 13, 2013] created § 941.26(4m) to read: "The department of justice may not promulgate or enforce any rule that regulates a device or container described under para. (a)."

1. The statute uses the term "oleoresin of capsicum" to refer to the substance commonly known as "pepper gas," "pepper spray," or "pepper mace." Not all material commonly referred to by these terms may meet the requirements of § 941.26(4)(a), which provides, in effect, that the offenses defined in sub. (4) apply to "a device or container that contains a combination of oleoresin of capsicum or CS gel and inert ingredients but does not contain any other gas or substance that will cause bodily discomfort." § 941.26(4)(a). Thus, the instruction uses the statutory term "oleoresin of capsicum" throughout.

2. See note 1, supra.

3. "'CS gel' means nonatomizing, gel-form chlorobenzalmalononitrile. § 941.26(1c)(a)."

4. The Committee concluded that the "substantial factor" definition of "cause" is sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

5. This is the definition of "bodily harm" provided in § 939.22(4).

6. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

7. The knowledge requirement is included because the statute uses the word "intentionally." Section 939.23(3) provides that this requires "purpose to do the thing or cause the result specified . . ." and "knowledge of those facts which are necessary to make his or her conduct criminal which are set forth after the word 'intentionally.'" The Committee concluded that the container or device being one that contains oleoresin of capsicum or CS gel is one of those facts. The Committee also concluded that is sufficient that the defendant know the substance by a common name, like "pepper spray," and not that the defendant know the exact chemical composition of the substance.

8. In the Committee's judgment, the jury may be told, for example, that a sheriff is a peace officer. It is still for the jury to be satisfied that, in the example, the victim was a sheriff.

9. Use the plural form in the blank, e.g., "sheriff," "police officers," etc.

10. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

11. The duties, powers, or responsibilities of some peace officers are set forth in the Wisconsin statutes. Where applicable, reference to such statutes may be helpful in attempting to define the responsibilities of such officers.

12. This is taken directly from § 941.26(4)(d), which refers to causing harm to "a person who the actor knows, or has reason to know, is a peace officer who is acting in an official capacity."

1341D POSSESSION OF OLEORESIN OF CAPSICUM (PEPPER SPRAY)[1] OR CS GEL BY A CONVICTED FELON — § 941.26(4)(L)

Statutory Definition of the Crime

Section 941.26(4)(L) of the Criminal Code of Wisconsin is violated by a person who possesses a device or container of (oleoresin of capsicum)[2] (CS gel)[3] and has been convicted of a felony.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a device or container.

   "Possess" means that the defendant knowingly[4] had actual physical control of a device or container.[5]

Deciding About Knowledge[6]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

2. The device or container contained (oleoresin of capsicum) (CS gel).[7]

3. The defendant had been convicted of a felony before (date of offense).[8]

(Name of felony) is a felony in Wisconsin.[9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1341B in 1995. It was revised and renumbered as Wis JI-Criminal 1341D in 2007. The instruction was revised in 2019. The 2019 revision reflected changes made by 2019 Wisconsin Act 52. This revision was approved by the Committee in August 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

This instruction is for an offense created by 1995 Wisconsin Act 25 [effective date: July 20, 1995]. Section 2 of 1995 Wisconsin Act 25 provides that it "first applies to the possession of a device or container on the effective date of this subsection, regardless of the date that the prior felony or crime, as described in section 941.26(4)(L) of the statutes, as created by this act, occurred." The statute does not apply if the person has received a pardon. § 941.26(4)(L).

The substance CS gel was added to the language of § 941.26 (4)(a) by 2019 Wisconsin Act 52 [effective date November 24, 2019].

Other offenses involving oleoresin of capsicum or CS gel are addressed in Wis JI-Criminal 1341B and 1341C.

1. The statute uses the term "oleoresin of capsicum" to refer to the substance commonly known as "pepper spray" or "pepper mace." It may help the understandability of the instruction if the common name is used, but the statutory term is used throughout this model. The full statutory description is "a device or container that contains a combination of oleoresin of capsicum or CS gel and inert ingredients but does not contain any other gas or substance that will cause bodily discomfort." § 941.26(4)(a).

2. See note 1, supra.

3. "'CS gel' means nonatomizing, gel-form chlorobenzalmalononitrile. § 941.26(1c)(a)."

4. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

5. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

6. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 4, supra. The Committee concluded that sec. 941.26(4)(L) does not require proof that defendants know of the prohibition against possessing the designated substances. This conclusion is based on sec. 939.23(1).

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 939 to 951, such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute.

7. Because the offense definition does not use the word "intentionally," the Committee concluded that knowledge that the device or container contained oleoresin of capsicum or CS gel is not required. Compare footnote 8 in Wis JI-Criminal 1341B.

8. The date of the offense should be inserted in this blank.

9. See note 7, Wis JI-Criminal 1343, which discusses the application of a similar statute to felony convictions from other states, stipulating to the fact of the felony conviction, and similar issues.

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1342 POSSESSION OF A SHORT-BARRELED SHOTGUN OR RIFLE[1] — § 941.28

Statutory Definition of the Crime

Section 941.28 of the Criminal Code of Wisconsin is violated by one who possesses a short-barreled (rifle) (shotgun).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a (rifle)[2] (shotgun).[3]

   "Possess" means that the defendant knowingly[4] had actual physical control[5] of a (rifle) (shotgun).

Deciding About Knowledge[6]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

2. The (rifle) (shotgun) was short-barreled.[7]

   ["Short-barreled rifle" means a rifle having one or more barrels having a length of less than 16 inches measured from closed breech or bolt face to muzzle or a rifle having an overall length of less than 26 inches.][8]

["Short-barreled shotgun" means a shotgun having one or more barrels having a length of less than 18 inches measured from closed breech or bolt face to muzzle or a shotgun having an overall length of less than 26 inches.][9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1342 was originally published in 1983 and revised in 1985, 1987, 1995, and 2007. The 2007 revision involved the adoption of a new format and nonsubstantive changes to the text. This revision was approved by the Committee in August 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

In State v. Johnson, 171 Wis.2d 175, 491 N.W.2d 110 (Ct. App. 1992), the court held that § 941.28 applies to a shotgun whose firing pin has been removed. The court noted its agreement with the trial court's conclusion that the statute does not require "that the shotgun be capable of being fired at the time it was possessed." 171 Wis.2d 175, 178.

1. This instruction is for a violation of § 941.28, created by Chapter 115, Laws of 1979 (effective date May 1, 1979). The statute prohibits not only "possession" but also "selling," "offering to sell," "transporting," "purchasing," or "going armed with" a short-barreled rifle or shotgun. The instruction is written in terms of "possession" because the Committee concluded that "possession" would be the most commonly charged type of offense. Further, "possession" is a broad enough term to cover most of the other prohibited activities; one must possess something in order to transport it, or to sell it, or to go armed with it.

2. "Rifle" is defined by § 941.28(1)(a):

> "Rifle" means a firearm designed or redesigned, made or remade, and intended to be fired from the shoulder or the hip and designed or redesigned and made or remade to use the energy of a propellant in a metallic cartridge to fire through a rifled barrel a single projectile for each pull of the trigger.

3. "Shotgun" is defined by § 941.28(1)(d):

> "Shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder or the hip and designed or redesigned and made or remade to use the energy of a propellant in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

4. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

5. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

6. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 4, supra. The Committee concluded that sec. 941.28 does not require proof that defendants know of the prohibition against possessing a short-barreled rifle or shotgun. This conclusion is based on sec. 939.23(1).

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 939 to 951, such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute.

7. The statutory definitions of "rifle" and "shotgun" require that it be "designed or redesigned, made or remade, and intended to be fired from the shoulder or hip. . . ." The weapon that is the subject of a charge covered by this instruction must have originally been "intended to be fired from the shoulder or hip" and later modified to be "short-barreled." The weapon so modified need not be "intended to be shot from the shoulder or hip."

The court of appeals reached a conclusion consistent with this analysis in State v. Johnson, supra at 182.

> . . . the pertinent intent is that of the fabricator and not that of the possessor. . . Thus, a weapon is within the scope of section 941.28(1)(d) if it was either "designed" or "redesigned" and either "made" or "remade" "to be fired from the shoulder or hip" and intended by the designer or redesigner and the maker or remaker to be so operated.

The Johnson court rejected the argument that "the statute's prohibition could be defeated by the possessor's

professed subjective intent to not fire the weapon from his or her shoulder or hip." 171 Wis.2d 175, 183.

Because the offense definition does not use the word "intentionally," the Committee concluded that knowledge that the rifle or shotgun was short-barreled is not required.

8. This is the definition provided in § 941.28(1)(b).

9. This is the definition provided in § 941.28(1)(c).

1343 POSSESSION OF A FIREARM [BY AN ADULT CONVICTED OF A FELONY][1] — § 941.29(1m)

Statutory Definition of the Crime

Section 941.29(1m) of the Criminal Code of Wisconsin is violated by a person who possesses a firearm if that person has been convicted of a felony.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a firearm.

"Firearm" means a weapon which acts by the force of gunpowder.[3]

[It is not necessary that the firearm was loaded or capable of being fired.][4]

"Possess" means that the defendant knowingly[5] had actual physical control of a firearm.[6]

Deciding About Knowledge[7]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his or her possession, even though another person may also have similar control.]

2. The defendant had been convicted of a felony before (date of offense).[8]

[(Name of felony) is a felony in Wisconsin.][9]

[The parties have agreed that the defendant was convicted of a felony before (date of offense) and you must accept this as conclusively proved.][10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1343 was originally published in 1983 and revised in 1984, 1986, 1987, 1993, 1996, 1999, 2007, 2011, 2016, and 2019. This revision was approved by the Committee in February 2021; it added to the Comment. This revision was approved by the Committee in August 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

Section 941.29 was revised by 2015 Wisconsin Act 109. The offense definition did not change but is now found in sub. (1m); the instruction was revised to reflect that change. In addition, Act 109 repealed former sub. (2) and created sub. (4m) to require a minimum sentence for cases involving persons with a

prior record relating to a "violent felony" or a "violent misdemeanor." Those terms are defined in new sub. (1g). [The effective date of Act 109 is November 13, 2015; but § 941.29(4m)(b) states: "This subsection does not apply to sentences imposed after July 1, 2020."]

See Wis JI-Criminal 1343A for material to add to this instruction in cases where the narrow defense of privilege recognized in State v. Coleman, 206 Wis.2d 199, 556 N.W.2d 701 (1996) is raised.

See Wis JI-Criminal 1343B for violations of § 941.29(4), furnishing a firearm to a felon.

See Wis JI-Criminal 1343D for violations of § 941.29(1m)(bm) through (em), possession of a firearm by a person who has been adjudicated delinquent for an act that would be a felony if committed by an adult in the state, found not guilty of a felony due to mental disease or defect, found not guilty or not responsible for a felony in another jurisdiction due to insanity or mental disease, defect, or illness, committed for treatment under s. 51.20 (13) (a) and ordered not to possess a firearm under s. 51.20 (13) (cv) 1., 2007 stats., or who has been ordered not to possess a firearm under s. 51.20 (13) (cv) 1., 51.45 (13) (i) 1., 54.10 (3) (f) 1., or 55.12 (10) (a).

See Wis JI-Criminal 1344 for violations of § 941.29(1m)(f) and (g), possession of a firearm by a person subject to an injunction.

The state has jurisdiction to enforce § 941.29 on tribal reservations. State v. Jacobs, 2007 WI App 155, 302 Wis.2d 675, 735 N.W.2d 535.

The right to bear arms amendment to the state constitution did not invalidate § 941.29. State v. Thomas, 2004 WI App 115, 274 Wis.2d 513, 683 N.W.2d 497. The statute is not unconstitutionally vague or overbroad and it does not deny the equal protection of the laws. Id.

Wisconsin's possession of a firearm by a felon law is not unconstitutional as applied to a defendant convicted of a non-violent felony. The Wisconsin Supreme Court has held that prohibiting all felons from possessing firearms under § 941.29, even those convicted of non-violent offenses is substantially related to the important governmental objectives of public safety and the prevention of gun violence. State v. Roundtree, 2021 WI 1, 395 Wis.2d 94, 952 N.W.2d 765. Accordingly, § 941.29 is constitutional as applied to all felons, regardless of the nature or age of the underlying felony conviction. Id.

Section 2 of Chapter 141, Laws of 1981, related to the applicability of the law and was not printed in the statutes. It provided: "This act applies to persons regardless of the date the crime specified under § 941.29(1) of the statutes, as created by this act, is committed." However, for the statute to apply, the possession of the firearm would have had to occur after the statute's effective date, which was March 31, 1982.

Section 973.033, effective March 31, 1990, requires that whenever a defendant is sentenced for a felony, "the court shall inform the defendant of the requirements and penalties under s. 941.29." This does not add a requirement to a charge under § 941.29 that the required advice was given. State v. Phillips, 172 Wis.2d 391, 493 N.W.2d 238 (Ct. App. 1992). Phillips confirmed that the offense has two elements: being a convicted felon and possessing a firearm. 172 Wis.2d 391, 354.

In State v. Thiel, 188 Wis.2d 695, 524 N.W.2d 641 (1994), the court upheld the application of § 941.29 to a person whose felony conviction occurred in 1970, eleven years before § 941.29 was enacted. The court

concluded that "the statute was not enacted with the intent to punish convicted felons and as such is not an ex post facto law as applied to [Thiel]." 188 Wis.2d 695, 697.

1. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. The title of § 941.29 addresses "Possession of a firearm." However, this instruction only applies to adults who are prohibited from possessing firearms because of a previous felony conviction. The bracketed language "by an adult felon" is optional and can be included to distinguish between individuals who are prohibited from possessing firearms under § 941.29(1m)(a) and (b) due to being an adult convicted of a felony, and other groups of people who are prohibited from possessing firearms, such as those who have been adjudicated delinquent, found not guilty of a felony by reason of mental illness or defect, or are subject to an injunction.

2. The instruction is drafted for cases involving possession of a firearm by a person convicted of a felony. However, the statute also applies to other categories of individuals. See § 941.29(1m)(a) through (g). This instruction is suitable for use in cases involving subs. (1m)(a) and (b). (See discussion in note 7.) For cases involving subs. (1m)(bm) through (em), see Wis JI-Criminal 1343D. For cases involving subs. (1m)(f) and (g), see Wis JI-Criminal 1344.

The statement of the elements in the instruction is a substantial shortening of the full statutory definition. Note that there are exceptions to the coverage of the statute in subsections (5) through (9) of § 941.29. The exception in subsection (5)(b) was added by 1985 Wisconsin Act 259. The cited provision, 18 U.S.C. § 925(c), allows the secretary of the treasury to grant relief from the disabilities relating to possession of firearms if the person's conviction did not involve a firearm offense and the secretary is satisfied "that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief will not be contrary to the public interest." However, § 925(c), and by extension (5)(b), no longer provide a functional mechanism for relief from the firearms disability imposed on felons in Wisconsin. This is because "since 1992, Congress has provided in each ATF appropriations bill that none of the appropriated funds are to be used to investigate or act upon applications for relief from federal firearms disabilities." Moran v. Wisconsin Department of Justice, 2019 WI App 206, ¶19, 388 Wis. 2d 193, 932 N.W.2d 430.

Subsection (5)(a) contains two prerequisites for lawful possession of a firearm by a felon: the individual must have received a pardon, and they must have been expressly authorized to possess a firearm under 18 U.S.C. app 1203. However, it is important to note that the latter requirement was repealed in 1986. Moran, 388 Wis. 2d 193, ¶17. Wisconsin law distinguishes between a pardon and a restoration of rights. A pardon alone will restore a felon's firearm rights. Id. ¶¶ 23-26. Where the removal of a felon's political disabilities imposed as a result of an out-of-state conviction restores the felon's right to possess a firearm in that state, a pardon is still required for the felon to possess firearms in Wisconsin. Moran v. Wisconsin Department of Justice, 2019 WI App 38, 388 Wis.2d 193, 932 N.W.2d 430.

3. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

4. Possession of a disassembled and inoperable firearm is a violation of § 941.29. The "term 'firearm' is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to disassembly." State v. Rardon, 185 Wis.2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994), citing Wis JI-Criminal 1343 with approval. Also see State v. Johnson, 171 Wis.2d 175, 491 N.W.2d 110 (Ct. App. 1992), reaching a similar conclusion with respect to the definition of "shotgun" under § 941.28.

5. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

6. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another:

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

In State v. Black, 2001 WI 31, 242 Wis.2d 126, 624 N.W.2d 363, the court suggested that "handling" a firearm was sufficient to satisfy the "possession" element. The court concluded that a criminal complaint alleging that the defendant handled a firearm provided a sufficient factual basis to support a guilty plea to violating § 941.29.

7. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 5, supra. The Committee concluded that subsections (1m)(a) through (g) do not require proof that defendants know their enumerated status or know of the prohibition against possessing a firearm. This conclusion is based on sec. 939.23(1).

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 939 to 951, such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute. In the context of Wis. Stat. § 941.29(1m), the absence of the intent word "knowingly" is particularly significant, indicating that proof of intent is not required. See also State v. Phillips, 172 Wis.2d 391, 451 N.W.2d 238 (Ct. App. 1989), which concluded that the statute requiring sentencing courts to inform defendants convicted of felonies about the prohibition on firearm possession did not create an extra element for the crime of illegal firearm possession by a felon.

8. The date of the offense should be inserted in this blank.

9. The statute applies to persons convicted of a felony in Wisconsin and also to persons convicted of crimes in other states that would be felonies in Wisconsin. In the Committee's judgment, the way the second element is phrased should be suitable for handling either alternative. Where the crime committed in another state has a name not used in Wisconsin, it may be helpful to add a sentence to the effect that the offense would have been a felony if committed in this state. The Committee concluded that the statutory elements of the crime of which the defendant was convicted in the other state should be compared with the statutory elements of the comparable Wisconsin offense. One must be able to say that those elements "would be a felony if committed in this state."

Compare § 941.29 with its federal counterpart, 18 USC 924(a)(2), which refers to one who "knowingly" violates the federal prohibition in 18 USC 922(g) on firearm possession. 18 USC 924(a)(2) was interpreted in Rehaif v. United States, 139 S.CT. 2191 [No. 17-9560, decided June 21, 2019] to require that the defendant knew he possessed a firearm and knew that he was an alien unlawfully in the country and thus prohibited from possessing a firearm under 18 USC 922(g). Because it is a decision interpreting a

federal statute and is not constitutionally based, Rehaif has no direct application to § 941.29.

Where the out-of-state conviction is under a statute that is broader than its Wisconsin counterpart, courts should evaluate whether the conduct that led to the conviction would be considered a felony if committed in Wisconsin. If it would, the out-of-state conviction can be the basis for the application of § 941.29. State v. Campbell, 2002 WI App 20, 250 Wis.2d 238, ¶¶7-6, 642 N.W.2d 230.

10. Defendants may offer to stipulate to the fact of their felon status. The bracketed statement in the instruction includes the standard statement on the effect of a stipulation found in Wis JI-Criminal 162, **AGREED FACTS**. The effect of a stipulation in a prosecution for violating § 941.29 has been described as follows:

> . . . where prior conviction of a felony is an element of the offense with which the defendant is charged and the defendant is willing to stipulate that he or she is a convicted felon, evidence of the nature of the felony is irrelevant if offered solely to establish the felony-conviction element of the offense. The trial court therefore abused its discretion in allowing the prosecutor to inform the jury as to the nature of McAllister's crime.

State v. McAllister, 153 Wis.2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989).

The fact of felon status may still be revealed; it is the nature of the felony that is not to be disclosed. State v. Nicholson, 160 Wis.2d 803, 804, 467 N.W.2d 139 (Ct. App. 1991).

Care must be taken where a stipulation goes to an element of a crime. A waiver should be obtained. See Wis JI-Criminal 162A Law Note: Stipulations.

An example of a complete waiver inquiry is as follows:

TO THE DEFENDANT:

1. Do you understand that one of the elements of the crime of felon in possession of a firearm is that you have been convicted of a felony before the date of this offense?

2. Do you understand that you have the right to have a jury, that is, twelve people, decide whether or not the state has proved beyond a reasonable doubt that you have been convicted of a felony before the date of this offense?

3. Do you understand that the State has to convince each member of the jury that you have been convicted of a felony before the date of this offense?

4. Do you understand that with this stipulation, you are agreeing that I tell the jury that you have been convicted of a felony before the date of this offense and that they are to accept this fact as conclusively proved?

5. Has your attorney explained the pros and cons, that is, the advantages and disadvantages of entering into this agreement?

6. Have you had enough time to talk all of this over with your attorney?

7. Has anyone pressured you or threatened you in any way, or made any promises to you, to get you to enter into this agreement?

8. Are you entering into this agreement of your own free will?

9. Have you had enough time to make your decision?

TO DEFENSE COUNSEL:

1. Are you satisfied that your client thoroughly understands (his) (her) right to enter into this agreement regarding (his) (her) prior conviction or to not enter into this agreement?

2. Are you satisfied that your client is entering into this agreement freely, voluntarily, intelligently, and knowingly?

FINDING: The court is also satisfied that the defendant is entering into this agreement freely, voluntarily, intelligently, and knowingly. The court, therefore, accepts the stipulation.

Also see State v. Aldazabal, 146 Wis.2d 267, 430 N.W.2d 614 (Ct. App. 1988), where the defendant, charged with violating § 941.29, stipulated that he had been convicted of a felony. The stipulation was not formally admitted into evidence, but the court of appeals held that the mentioning of the stipulation during the prosecutor's opening statement was sufficient to support the conviction.

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1343A POSSESSION OF A FIREARM BY A FELON: PRIVILEGE

[INSERT THE FOLLOWING INTO WIS JI-CRIMINAL 1343 AFTER THE ELEMENTS OF THE CRIME ARE DEFINED IN PLACE OF THE TWO CONCLUDING PARAGRAPHS.]

The law allows a person convicted of a felony to possess a firearm under certain circumstances.

The state must prove by evidence which satisfies you beyond a reasonable doubt that the circumstances permitting the defendant to possess a firearm did not exist in this case.

The law allows the defendant to possess a firearm if all the following circumstances are present:

(1) the defendant reasonably believed (he) (she) was under an unlawful threat of imminent death or great bodily harm;[1]

(2) the defendant reasonably believed (he) (she) had no alternative way to avoid the threatened harm other than by possessing a firearm;[2]

(3) the defendant did not recklessly or negligently place (himself) (herself) in a situation in which it was probable that (he) (she) would be forced to possess a firearm; and,

(4) the defendant possessed the firearm only for the time necessary to prevent the threatened harm.[3]

If you are satisfied beyond a reasonable doubt that the defendant knowingly possessed a firearm, that the defendant had previously been convicted of a felony and that the

circumstances permitting the defendant to possess a firearm did not exist, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1343A was approved by the Committee in May 1997 and republished without substantive change in 2008.

This instruction was drafted to implement the decision in State v. Coleman, 206 Wis.2d 198, 556 N.W.2d 701 (1996), where the Wisconsin Supreme Court held that "a narrow defense of privilege exists to a charge of felon in possession of a firearm." However, the court agreed with the state that the generally applicable defenses like coercion, self defense, defense of others, and defense of property should not apply. Rather, a special privilege, based on U.S. v. Gant, 691 F.2d 1159 (5th Cir. 1982), was adopted:

> In order to be entitled to the defense, the defendant must prove:
>
> (1) the defendant was under an unlawful, present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury, or the defendant reasonably believes he or she is under such a threat;
>
> (2) the defendant did not recklessly or negligently place himself or herself in a situation in which it was probable that he or she would be forced to possess a firearm;
>
> (3) the defendant had no reasonable, legal alternative to possessing a firearm, or reasonably believed that he or she had no such alternative; in other words, the defendant did not have a chance to refuse to possess the firearm and also to avoid the threatened harm, or reasonably believed he or she did not have such a chance;
>
> (4) a direct causal relationship may be reasonably anticipated between possessing the firearm and the avoidance of the threatened harm;
>
> (5) the defendant did not possess the firearm for any longer than reasonably necessary.

206 Wis.2d 198, 209-10.

The Committee concluded that the substance of this five-part test could be captured in the four factors that are used in the instruction. See notes 1-3, below. No change in meaning was intended.

The Coleman decision was ambiguous on the crucial issue of the allocation of the burden of persuasion. The quoted material above was introduced by the phrase: "the defendant must prove." Later however, the court refers to the defendant "bear[ing] the burden of producing sufficient evidence" and noted that "the source of such evidence may be facts produced by the defense or by the state." And, in two other instances, the court

noted that "Coleman presented sufficient evidence in support of the privilege" because the jury "could have determined that Coleman had satisfied the five-part test."

In the absence of more specific direction, the Committee concluded that this instruction should be drafted to reflect the typical Wisconsin approach to privileges: the defendant bears the burden of production which may be satisfied by producing or pointing to "some evidence" of the privilege; upon that showing, the burden switches to the state to prove beyond a reasonable doubt that the privilege does not apply. With a multi-part privilege like this one, that burden can be satisfied by proving that any part of the privilege is not present.

1. This is a paraphrase of the first factor in the test adopted in Coleman, which was stated as follows: ". . . the defendant was under an unlawful, present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury, or the defendant reasonably believes he or she is under such a threat. . . ." No change in meaning is intended.

2. The Committee believes this captures the substance of the third part of the test adopted in Coleman, which was stated as follows: "the defendant had no reasonable, legal alternative to possessing a firearm, or reasonably believed that he or she had no such alternative; in other words, the defendant did not have a chance to refuse to possess the firearm and also to avoid the threatened harm, or reasonably believed he or she did not have such a chance; . . ." No change in meaning is intended.

3. The Committee concluded that this captures the substance of the fourth and fifth parts of the test adopted in Coleman, which provided: "(4) a direct causal relationship may be reasonably anticipated between possessing the firearm and the avoidance of the threatened harm; and, (5) the defendant did not possess the firearm for any longer than reasonably necessary." No change in meaning is intended.

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1343B FURNISHING A FIREARM TO A FELON — § 941.29(4)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1343B was originally published in 2008 and revised in 2016. It was withdrawn in 2018 when § 941.29(4) was repealed by 2017 Wisconsin Act 145 [effective date: March 30, 2018]. Act 145 also created § 941.2905 which defines a similar offense – Straw Purchasing Of A Firearm. See Wis JI-Criminal 1343C.

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1343C STRAW PURCHASING OF A FIREARM — § 941.2905

Statutory Definition of the Crime

Section 941.2905 of the Criminal Code of Wisconsin is violated by a person who intentionally furnishes, purchases, or possesses a firearm for another person, knowing that the other person has been convicted of a felony.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally [furnished][2] [purchased] [possessed] a firearm for (name of felon).

   "Firearm" means a weapon which acts by the force of gunpowder.[3] [It is not necessary that the firearm was loaded or capable of being fired.][4]

   ["Possessed" means that the defendant knowingly had actual physical control of the firearm.][5]

2. (Name of felon) had been convicted of a felony before (date of offense).[6]

   [(Name of felony) is a felony in Wisconsin.][7]

3. The defendant knew that the object was a firearm and knew that (name of felon) had been convicted of a felony.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1343C was approved by the Committee in October 2018.

This instruction is for violations of § 941.2905 which provides: "Whoever intentionally furnishes, purchases or possesses a firearm for a person, knowing that the person is prohibited from possessing a firearm under s. 941.29(1m), is guilty of a Class G felony." Section 941.2905 was created by 2017 Wisconsin Act 145 [effective date: March 30, 2018].

The instruction is drafted for intentionally furnishing, purchasing, or possessing a firearm for a person convicted of a felony, the most common type of individual prohibited from possessing a firearm under s. 941.29(1m). The full list follows:

(a) The person has been convicted of a felony in this state.
(b) The person has been convicted of a crime elsewhere that would be a felony if committed in this state.
(bm) The person has been adjudicated delinquent for an act committed on or after April 21, 1994, that if committed by an adult in this state would be a felony.
(c) The person has been found not guilty of a felony in this state by reason of mental disease or defect.
(d) The person has been found not guilty of or not responsible for a crime elsewhere that would be a felony in this state by reason of insanity or mental disease, defect or illness.
(e) The person has been committed for treatment under s. 51.20 (13) (a) and is subject to an order not to possess a firearm under s. 51.20 (13) (cv) 1., 2007 stats.
(em) The person is subject to an order not to possess a firearm under s. 51.20 (13) (cv) 1., 51.45 (13) (i) 1., 54.10 (3) (f) 1., or 55.12 (10) (a).
(f) The person is subject to an injunction issued under s. 813.12 or 813.122 or under a tribal injunction, as defined in s. 813.12 (1)(e), issued by a court established by any federally recognized Wisconsin Indian tribe or band, except the Menominee Indian tribe of Wisconsin, that includes notice to the respondent that he or she is subject to the requirements and penalties under this section and that has been filed under s. 813.128 (3g).
(g) The person is subject to an order not to possess a firearm under s. 813.123 (5m) or 813.125 (4m).

Exceptions to the application of § 941.2905 are set forth in sub.(2)(a) through (f). In the Committee's judgment, evidence of exceptions is best addressed as follows. The question whether an

exception applies is not an issue in the case until there is some evidence of that fact. Once there is evidence sufficient to raise the issue, the burden is on the state to prove beyond a reasonable doubt that the exception does not apply. See Wis JI-Criminal 1335B for a more complete discussion of this issue; JI 1335B provides a model for integrating the absence of a statutory exception in the instruction for carrying a concealed weapon in violation of § 941.23.

1. The instruction is drafted for cases involving furnishing, purchasing, or possessing a firearm to a person convicted of a felony. However, the statute also applies to other categories of individuals. See §941.29(1m)(a) through (g). This instruction is suitable for use in cases involving subs. (1m)(a) and (b). (See discussion in note 7.) For cases involving subs. (1m)(c) through (g), the instruction must be modified.

2. "Furnish" does not have a statutory definition and therefore should be given its plain and ordinary meaning. A typical definition is: "To equip with what is needed; to supply, give." The American Heritage Dictionary of the English Language, Third Edition.

3. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

4. Volume V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 83 (February 1953).

Possession of a disassembled and inoperable firearm is a violation of § 941.29. The "term 'firearm' is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to disassembly." State v. Rardon, 185 Wis.2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994), citing Wis JI-Criminal 1343 with approval. Also see State v. Johnson, 171 Wis.2d 175, 491 N.W.2d 110 (Ct. App. 1992), reaching a similar conclusion with respect to the definition of "shotgun" under § 941.28.

5. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

6. The date of the offense should be inserted in this blank.

7. The statute applies to persons convicted of a felony in Wisconsin and also to persons convicted of crimes in other states that would be felonies in Wisconsin. In the Committee's judgment, the way the second element is phrased should be suitable for handling either alternative. Where the crime committed in another state has a name not used in Wisconsin, it may be helpful to add a sentence to the effect that the offense would have been a felony if committed in this state. The Committee concluded that the statutory elements of the crime of which the person was convicted in the other state should be compared with the statutory elements of the comparable Wisconsin offense. One must be able to say that those elements "would be a felony if committed in this state."

8. Subsection (1) of § 941.2905 defines this offense as applying to one who "intentionally furnishes . . . a firearm for a person, knowing that the person is prohibited from possessing a firearm under s. 941.29(1m)." As applied to this instruction, this requires that the defendant knew the person was a felon. Further, the Committee concluded that the defendant must know the item was a firearm, because the offense definition begins with the word "intentionally." See § 939.23(3).

1343D POSSESSION OF A FIREARM [OTHER CIRCUMSTANCES][1] — § 941.29(1m)(bm) – (em)

Statutory Definition of the Crime

Section 941.29(1m) of the Criminal Code of Wisconsin is violated by a person who possesses a firearm if that person [CHOOSE ONE OF THE FOLLOWING][2]

[has been adjudicated delinquent for an act that, if committed by an adult in Wisconsin, would be a felony.]

[has been found not guilty of a felony in Wisconsin by reason of mental disease or defect.]

[has been found (not guilty of) (not responsible for) a crime elsewhere that would be a felony in Wisconsin by reason of (insanity) (mental disease, defect, or illness).]

[has been committed for treatment under Wis. Stat. § 51.20 (13) (a) and is subject to an order not to possess a firearm under § 51.20 (13) (cv) 1.]

[is subject to an order not to possess a firearm under § (51.20 (13) (cv) 1.) (51.45(13) (i) 1.) (54.10 (3) (f) 1.) (55.12 (10) (a)).][3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a firearm.

"Firearm" means a weapon which acts by the force of gunpowder.[4]

[It is not necessary that the firearm was loaded or capable of being fired.][5]

"Possess" means that the defendant knowingly[6] had actual physical control of a firearm.[7]

Deciding About Knowledge[8]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in their possession, even though another person may also have similar control.]

2. The defendant, [CHOOSE ONE OF THE FOLLOWING].[9]

[before (date of offense), had been adjudicated delinquent for an act that would

be a felony in Wisconsin if committed by an adult.[10]

(Name of act), if committed by an adult in this state, would be a felony.)]

[before (date of offense), had been found not guilty of a felony in Wisconsin due to mental disease or defect.][11]

[before (date of offense), had been found (not guilty of) (not responsible for) a crime elsewhere, which would be a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness).[12]

(Name of felony) is a felony in Wisconsin.][13]

[had been committed for treatment under Wis. Stat. § 51.20 (13) (a) and was subject to an order not to possess a firearm under § 51.20 (13) (cv) 1. on (date of offense)][14]

[was subject to an order not to possess a firearm under § (51.20 (13) (cv) 1.) (51.45(13) (i) 1.) (54.10 (3) (f) 1.) (55.12 (10) (a)) on (date of offense)][15]

[The parties have agreed that [CHOOSE ONE OF THE FOLLOWING], and you must accept this as conclusively proved.][16]

[before (date of offense), the defendant was adjudicated delinquent for an act that would be a felony in Wisconsin if committed by an adult]

[before (date of offense), the defendant was found not guilty of a felony in Wisconsin due to mental disease or defect]

[before (date of offense), the defendant was found (not guilty of) (not

responsible for) a crime elsewhere, which would be a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)]

[on (date of offense), the defendant was committed for treatment under s. 51.20 (13) (a) and was subject to an order not to possess a firearm]

[on (date of offense), the defendant was subject to an order not to possess a firearm under § 51.20 (13) (cv) 1., 51.45(13) (i) 1., 54.10 (3) (f) 1., or 55.12 (10) (a).]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 1343D was approved by the Committee in August 2023.

Section 941.29 was revised by 2015 Wisconsin Act 109. The offense definition did not change but is now found in sub. (1m). In addition, Act 109 repealed former sub. (2) and created sub. (4m) to require a minimum sentence for cases involving persons with a prior record relating to a "violent felony" or a "violent misdemeanor." Those terms are defined in the new sub. (1g). [The effective date of Act 109 is November 13, 2015, but § 941.29(4m)(b) states: "This subsection does not apply to sentences imposed after July 1, 2020."]

See Wis JI-Criminal 1343 for violations § 941.29(1m) possession of a firearm by a person convicted of a felony.

See Wis JI-Criminal 1343A for material to add to this instruction in cases where the narrow defense of privilege recognized in State v. Coleman, 206 Wis.2d 198, 556 N.W.2d 701 (1996) is raised.

See Wis JI-Criminal 1343B for violations of § 941.29(4), furnishing a firearm to a felon.

See Wis JI-Criminal 1344 for violations of § 941.29(1m)(f) and (g), possession of a firearm by a person subject to an injunction.

The state has jurisdiction to enforce § 941.29 on tribal reservations. State v. Jacobs, 2007 WI App 155, 302 Wis.2d 675, 735 N.W.2d 535.

The right to bear arms amendment to the state constitution did not invalidate § 941.29. State v. Thomas, 2004 WI App 115, 274 Wis.2d 513, 683 N.W.2d 497. The statute is not unconstitutionally vague or overbroad, and it does not deny the equal protection of the laws. Id.

Wisconsin's possession of a firearm by a felon law is not unconstitutional as applied to a defendant convicted of a non-violent felony. The Wisconsin Supreme Court has held that prohibiting all felons from possessing firearms under § 941.29, even those convicted of non-violent offenses is substantially related to the important governmental objectives of public safety and the prevention of gun violence. State v. Roundtree, 2021 WI 1, 395 Wis.2d 94, 952 N.W.2d 765. Accordingly, § 941.29 is constitutional as applied to all felons, regardless of the nature or age of the underlying felony conviction. Id.

Section 2 of Chapter 141, Laws of 1981, is related to the applicability of the law. However, it was not printed in the statutes. It provided: "This act applies to persons regardless of the date the crime specified under § 941.29(1) of the statutes, as created by this act, is committed." However, for the statute to apply, the possession of the firearm would have had to occur after the statute's effective date, which was March 31, 1982.

Section 973.033, effective March 31, 1990, requires that whenever a defendant is sentenced for a felony, "the court shall inform the defendant of the requirements and penalties under s. 941.29." This does not add a requirement to a charge under § 941.29 that the required advice was given. State v. Phillips, 172 Wis.2d 391, 493 N.W.2d 238 (Ct. App. 1992). Phillips confirmed that the offense has two elements: being a convicted felon and possessing a firearm. 172 Wis.2d 391, 354.

In State v. Thiel, 188 Wis.2d 695, 524 N.W.2d 641 (1994), the court upheld the application of § 941.29 to a person whose felony conviction occurred in 1970, eleven years before § 941.29 was enacted. The court concluded that "the statute was not enacted with the intent to punish convicted felons and as such is not an ex post facto law as applied to [Thiel]." 188 Wis.2d 695, 697.

1. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. The title of § 941.29 addresses "Possession of a firearm." However, this instruction only applies to individuals who are prohibited from possessing firearms because they were adjudicated delinquent or found not guilty of a felony by reason of mental illness or defect. The bracketed language "other circumstances" is optional and can be included to distinguish between those individuals restricted from firearm possession under § 941.29(1m)(bm) - (em) and other types of individuals who are also banned from possessing firearms, such as adult felons or persons subject to an injunction at the time of the offense.

2. The applicable term should be selected. The alternatives are those provided in sub. (1m)(bm) – (em) of § 941.29.

3. This instruction is drafted to address cases concerning the possession of a firearm by an individual falling under one of the categories provided in subs. 941.29(1m)(bm) through (em). [Subsection (1m)(em)

was created by 2009 Wisconsin Act 258.] It is important to note that the statute extends to other categories of individuals as well. See § 941.29(1m)(a) through (g). For cases involving possession of a firearm by a person convicted of a felony, see Wis JI-Criminal 1343. That instruction is also suitable for use in cases involving subs. (1m)(a) and (b). For cases involving subs. (1m)(f) and (g), see Wis JI-Criminal 1344.

The statement of the elements in the instruction is a substantial shortening of the full statutory definition. Note that there are exceptions to the coverage of the statute in subsections (5) through (9) of § 941.29. The exception in subsection (5)(b) was added by 1985 Wisconsin Act 259. The cited provision, 18 U.S.C. § 925(c), allows the secretary of the treasury to grant relief from the disabilities relating to possession of firearms if the person's conviction did not involve a firearm offense and the secretary is satisfied "that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief will not be contrary to the public interest." However, § 925(c), and by extension (5)(b), no longer provide a functional mechanism for relief from the firearms disability imposed on felons in Wisconsin. This is because "since 1992, Congress has provided in each ATF appropriations bill that none of the appropriated funds are to be used to investigate or act upon applications for relief from federal firearms disabilities." Moran v. Wisconsin Department of Justice, 2019 WI App 206, ¶19, 388 Wis. 2d 193, 932 N.W.2d 430.

Subsection (5)(a) contains two prerequisites for lawful possession of a firearm by a felon: the individual must have received a pardon, and they must have been expressly authorized to possess a firearm under 18 U.S.C. app 1203. However, it is important to note that the latter requirement was repealed in 1986. Moran, 388 Wis. 2d 193, ¶17. Wisconsin law distinguishes between a pardon and a restoration of rights. A pardon alone will restore a felon's firearm rights. Id. ¶¶ 23-26. Where the removal of a felon's political disabilities imposed as a result of an out-of-state conviction restores the felon's right to possess a firearm in that state, a pardon is still required for the felon to possess firearms in Wisconsin. Moran v. Wisconsin Department of Justice, 2019 WI App 38, 388 Wis.2d 193, 932 N.W.2d 430.

An individual who has been adjudicated delinquent for a felony, as defined in Wis. Stat. § 941.29(1m)(bm), has the option to petition for the restoration of their firearm possession rights under Wis. Stat. § 941.29(8). That section provides the following:

> This section does not apply to any person specified in sub. (1m)(bm) if a court subsequently determines that the person is not likely to act in a manner dangerous to public safety. In any action or proceeding regarding this determination, the person has the burden of proving by a preponderance of the evidence that he or she is not likely to act in a manner dangerous to public safety.

To initiate this process, individuals can make use of a specific court form called the "Petition for Removal of Firearm Restriction" (JD-1771).

4. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

5. Possession of a disassembled and inoperable firearm is a violation of § 941.29. The "term 'firearm' is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to disassembly." State v. Rardon, 185 Wis.2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994), citing Wis JI-Criminal 1343 with approval. Also see State v. Johnson, 171 Wis.2d 175, 491 N.W.2d 110 (Ct. App. 1992), reaching a similar conclusion with respect to the definition of "shotgun" under § 941.28.

6. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

7. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

In State v. Black, 2001 WI 31, 242 Wis.2d 126, 624 N.W.2d 363, the court suggested that "handling" a firearm was sufficient to satisfy the "possession" element. The court concluded that a criminal complaint alleging that the defendant handled a firearm provided a sufficient factual basis to support a guilty plea to violating § 941.29.

8. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 6, supra. The Committee concluded that subsections (1m)(bm) through (em) do not require proof that defendants know their enumerated status or know of the prohibition against possessing a firearm. This conclusion is based on sec. 939.23(1).

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 939 to 951, such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute. In the context of Wis. Stat. § 941.29(1m), the absence of intent word "knowingly" is particularly significant, indicating that proof of intent is not required. See also, State v. Phillips, 172 Wis.2d 391, 451 N.W.2d 238 (Ct. App. 1989), which concluded that the statute requiring sentencing courts to inform defendants convicted of felonies about the prohibition on firearm possession did not create an extra element for the crime of illegal firearm possession by a felon.

9. The applicable term should be selected. The alternatives are those provided in sub. (1m)(bm) – (em) of § 941.29.

10. The language in brackets is an abbreviated version of the complete statutory definition. See § 941.29(1m)(bm) for the complete language.

11. See § 941.29(1m)(c)

12. The language in brackets is an abbreviated version of the complete statutory definition. See § 941.29(1m)(d) for the complete language.

13. The statute applies to persons found not guilty of a felony in Wisconsin by reason of mental disease or defect and also persons found not guilty of or not responsible for a crime by reason of insanity or mental disease, defect, or illness in another state that would be a felony in Wisconsin.

In the Committee's judgment, the way the second element is phrased should be suitable for handling

either alternative. Where the crime committed in another state has a name not used in Wisconsin, it may be helpful to add a sentence to the effect that the offense would have been a felony if committed in this state. The Committee concluded that the statutory elements of the crime of which the defendant was convicted in the other state should be compared with the statutory elements of the comparable Wisconsin offense. One must be able to say that those elements "would be a felony if committed in this state."

14. The language in brackets is an abbreviated version of the complete statutory definition. See § 941.29(1m)(e) for the complete language.

15. The language in brackets is an abbreviated version of the complete statutory definition. See § 941.29(1m)(em) for the complete language.

Compare § 941.29 with its federal counterpart, 18 USC 924(a)(2), which refers to one who "knowingly" violates the federal prohibition in 18 USC 922(g) on firearm possession. 18 USC 924(a)(2) was interpreted in Rehaif v. United States, 139 S.CT. 2191 [No. 17-9560, decided June 21, 2019] to require that the defendant knew he possessed a firearm and knew that he was an alien unlawfully in the country and thus prohibited from possessing a firearm under 18 USC 922(g). Because it is a decision interpreting a federal statute and is not constitutionally based, Rehaif has no direct application to § 941.29.

When an out-of-state criminal charge is based on a statute broader than its Wisconsin equivalent, courts should determine whether the underlying conduct resulting in the adjudication or finding of not guilty due to mental disease or defect would qualify as a felony under Wisconsin law. If it would, the out-of-state criminal conduct can be the basis for the application of § 941.29. State v. Campbell, 2002 WI App 20, 250 Wis.2d 238, ¶¶7-6, 642 N.W.2d 230.

16. Defendants may offer to stipulate to the fact of their adjudication status. The bracketed statement in the instruction includes the standard statement on the effect of a stipulation found in Wis JI-Criminal 162, **AGREED FACTS**.

There is authority recognizing that defendants may offer to stipulate to the fact of a prior felony conviction when the charge is possession of a firearm by a felon under § 941.29(1m)(a). The effect of a stipulation in a prosecution for violating § 941.29(1m)(a) has been described as follows:

> . . . where prior conviction of a felony is an element of the offense with which the defendant is charged and the defendant is willing to stipulate that he or she is a convicted felon, evidence of the nature of the felony is irrelevant if offered solely to establish the felony-conviction element of the offense. The trial court therefore abused its discretion in allowing the prosecutor to inform the jury as to the nature of McAllister's crime.

State v. McAllister, 153 Wis.2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989).

The fact of felon status may still be revealed; it is the nature of the felony that is not to be disclosed. State v. Nicholson, 160 Wis.2d 803, 804, 467 N.W.2d 139 (Ct. App. 1991).

The same concerns may lead to offers to stipulate to the fact of a prior adjudication addressed by this instruction. Care must be taken where a stipulation goes to an element of a crime. A waiver should be

obtained. See Wis JI-Criminal 162A Law Note: Stipulations.

An example of a complete waiver inquiry is as follows:

TO THE DEFENDANT:

1. Do you understand that one of the elements of the crime of possession of a firearm by a person (adjudicated delinquent) (found not guilty of a felony in Wisconsin by reason of mental disease or defect) (subject to an order not to possess a firearm) is that you (have been adjudicated delinquent for an act that would be considered a felony in Wisconsin if committed by an adult) (have been found not guilty of a felony charge in Wisconsin due to mental disease or defect) (have been found (not guilty of) (not responsible for) a crime elsewhere, which would be considered a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)) (have been committed for treatment and were subject to an order not to possess a firearm) (were subject to an order not to possess a firearm) before the date of this offense?

2. Do you understand that you have the right to have a jury, that is, twelve people, decide whether or not the State has proved beyond a reasonable doubt that you (have been adjudicated delinquent for an act that would be considered a felony in Wisconsin if committed by an adult) (have been found not guilty of a felony charge in Wisconsin due to mental disease or defect) (have been found (not guilty of) (not responsible for) a crime elsewhere, which would be considered a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)) (have been committed for treatment and were subject to an order not to possess a firearm) (were subject to an order not to possess a firearm) before the date of offense?

3. Do you understand that the State has to convince each member of the jury that you (have been adjudicated delinquent for an act that would be considered a felony in Wisconsin if committed by an adult) (have been found not guilty of a felony charge in Wisconsin due to mental disease or defect) (have been found (not guilty of) (not responsible for) a crime elsewhere, which would be considered a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)) (have been committed for treatment and were subject to an order not to possess a firearm) (were subject to an order not to possess a firearm) before the date of offense?

4. With this stipulation, you are agreeing that I tell the jury that you (have been adjudicated delinquent for an act that would be considered a felony in Wisconsin if committed by an adult) (have been found not guilty of a felony charge in Wisconsin due to mental disease or defect) (have been found (not guilty of) (not responsible for) a crime elsewhere, which would be considered a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)) (have been committed for treatment and were subject to an order not to possess a firearm) (were subject to an order not to possess a firearm) before the date of offense, and that they are to accept this fact as conclusively proved?

5. Has your attorney explained the pros and cons, that is, the advantages and disadvantages of entering into this agreement?

6. Have you had enough time to talk all of this over with your attorney?

7. Has anyone pressured you or threatened you in any way or made any promises to you to get you

to enter into this agreement?

8. Are you entering into this agreement of your own free will?

9. Have you had enough time to make your decision?

TO DEFENSE COUNSEL:

1. Are you satisfied that your client thoroughly understands their right to enter into this agreement regarding their (prior adjudication for an act considered a felony) (prior finding of not guilty of a felony charge due to mental disease or defect) (previously being subjected to an order that prohibits firearm possession) or to not enter into this agreement?

2. Are you satisfied that your client is entering into this agreement freely, voluntarily, intelligently, and knowingly?

FINDING: The court is also satisfied that the defendant is entering into this agreement freely, voluntarily, intelligently, and knowingly. The court, therefore, accepts the stipulation.

Also see State v. Aldazabal, 146 Wis.2d 267, 430 N.W.2d 614 (Ct. App. 1988), where the defendant, charged with violating § 941.29, stipulated that he had been convicted of a felony. The stipulation was not formally admitted into evidence, but the court of appeals held that the mentioning of the stipulation during the prosecutor's opening statement was sufficient to support the conviction.

1344 POSSESSION OF A FIREARM [BY A PERSON SUBJECT TO AN INJUNCTION][1] — § 941.29(1m)(f) or (g)

Statutory Definition of the Crime

Section 941.29 of the Criminal Code of Wisconsin is violated by a person who possesses a firearm if that person is subject to (an injunction issued under (§ 813.12) (§ 813.122)) (a tribal injunction) (an order not to possess a firearm issued under (§ 813.123(5m)) (§ 813.125(4m)).[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a firearm.

   A firearm is a weapon which acts by the force of gunpowder.[3]

   [It is not necessary that the firearm was loaded or capable of being fired.][4]

   "Possess" means that the defendant knowingly[5] had actual physical control of a firearm.

Deciding About Knowledge[6]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the

facts and circumstances in this case bearing upon knowledge.

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.[7]

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his or her possession, even though another person may also have similar control.]

2. The defendant was subject to (an injunction issued under (§ 813.12) (§ 813.122)) (a tribal injunction) (an order not to possess a firearm issued under (§ 813.123(5m)) (§ 813.125(4m)) before (date of offense).[8]

An injunction is a court order prohibiting specified conduct.[9]

[The parties have agreed that an injunction was issued to the defendant under subsection ((§ 813.12) (§ 813.122)) (a tribal injunction) (an order not to possess a firearm issued under (§ 813.123(5m)) (§ 813.125(4m)) before (date of offense) and you must accept this as conclusively proved.][10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1344 was originally published in 1996 and revised in 2008, 2015, and 2018. The 2018 revision made changes in the comment and non-substantive changes in the text. This revision was approved by the Committee in August 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

Section 941.29 was revised by 2015 Wisconsin Act 109. The offense definition did not change but is now found in sub. (1m); the instruction was revised in 2016 to reflect that change. In addition, Act 109 repealed former sub. (2) and created sub. (4m) to require a minimum sentence for cases involving persons with a prior record relating to a "violent felony" or a "violent misdemeanor." Those terms are defined in sub. (1g). [The effective date of Act 109 is November 13, 2015; but § 941.29(4m)(b) states: "This subsection does not apply to sentences imposed after July 1, 2020."]

This instruction is for a violation of § 941.29(1m)(f) or (g) – by a person subject to an injunction. It is modeled after Wis JI-Criminal 1343, Possession of a Firearm, defined by § 941.29(1m)(a).

See Wis JI-Criminal 1343D for violations of § 941.29(1m)(bm) through (em), possession of a firearm by a person who has been adjudicated delinquent for an act that would be a felony if committed by an adult in the state, found not guilty of a felony due to mental disease or defect, found not guilty or not responsible for a felony in another jurisdiction due to insanity or mental disease, defect, or illness, committed for treatment under s. 51.20 (13) (a) and ordered not to possess a firearm under s. 51.20 (13) (cv) 1., 2007 stats., or who has been ordered not to possess a firearm under s. 51.20 (13) (cv) 1., 51.45 (13) (i) 1., 54.10 (3) (f) 1., or 55.12 (10) (a).

Section 941.29(4)(f) applies to persons enjoined under § 813.12 (domestic abuse) and § 813.122 (child abuse) and to an injunction or order "issued by a tribal court under a tribal domestic abuse ordinance adopted in conformity with this section." § 813.12(1)(e). The tribal injunction must include notice that the respondent is subject to the requirements and penalties of § 941.29. Section 941.29(4)(g) applies to persons ordered not to possess a firearm under § 813.123(5m) (vulnerable adult injunctions) or § 813.125(4m) (harassment injunctions). Those statutes require specific findings to support the firearm prohibition.

Note that there are several exceptions set forth in subsections (5) through (10) of § 941.29. See note 1, Wis JI-Criminal 1343, Possession Of A Firearm.

1. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. The title of § 941.29 addresses "Possession of a firearm." However, this instruction only applies to individuals who are prohibited from possessing firearms because they were subject to an injunction on the date of the offense. The bracketed language "by a person subject to an injunction" is optional and can be included to distinguish between those individuals restricted from firearm possession under § 941.29(1m)(f) or (g) and other types of individuals who are also banned from possessing firearms, such as those who have been adjudicated delinquent, found not guilty of a felony by reason of mental illness or defect, or are adult felons.

2. Here, select the number of the statute under which the injunction or order was issued. All injunctions issued under §§ 813.12 and 812.122 include a prohibition against possession of a firearm. A tribal injunction that satisfies § 813.12(1(e) is covered if it "includes notice to the respondent that he or she is subject to the requirements and penalties under this section and that has been filed under s. 813.128(3g)." § 941.29(1m)(f). Injunctions under §§ 813.123 and § 813.125 may include an order prohibiting firearm possession if a specific finding is made by the court. See § 813.123(5m) and § 813.125(4m).

3. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes air guns. See note 3, Wis JI-Criminal 1305.

4. Volume V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 83 (February 1953).

Possession of a disassembled and inoperable firearm is a violation of § 941.29. The "term 'firearm' is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to disassembly." State v. Rardon, 185 Wis.2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994), citing Wis JI-Criminal 1343 with approval. Also see State v. Johnson, 171 Wis.2d 175, 491 N.W.2d 110 (Ct. App. 1992), reaching a similar conclusion with respect to the definition of "shotgun" under § 941.28.

5. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

6. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 5, supra. The Committee concluded that subsections (1m)(f) and (g) do not require proof that defendants know they were subject to an injunction or order or know of the prohibition against possessing a firearm. This conclusion is based on sec. 939.23(1)

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 939 to 951, such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute.

7. The definition of "possess" is the one provided in Wis JI-Criminal 920. See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

In State v. Black, 2001 WI 31, 242 Wis.2d 126, 624 N.W.2d 363, the court suggested that "handling" a firearm was sufficient to satisfy the "possession" element. The court concluded that a criminal complaint alleging that the defendant handled a firearm provided a sufficient factual basis to support a guilty plea to violating § 941.29.

8. Compare § 941.29 with its federal counterpart, 18 USC 924(a)(2), which refers to one who "knowingly" violates the federal prohibition in 18 USC 922(g) on firearm possession. 18 USC 924(a)(2) was interpreted in Rehaif v. United States, 139 S.CT. 2191 [No. 17-9560, decided June 21, 2019] to require that the defendant knew he possessed a firearm and knew that he was an alien unlawfully in the country and thus prohibited from possessing a firearm under 18 USC 922(g). Because it is a decision interpreting a federal statute and is not constitutionally based, Rehaif has no direct application to § 941.29.

Section 941.29(1m)(f) provides the following:

> The person is subject to an injunction issued under s. 813.12 or 813.122 or under a tribal injunction, as defined in s. 813.12 (1) (e), issued by a court established by any federally recognized Wisconsin Indian tribe or band, except the Menominee Indian tribe of Wisconsin, that includes notice to the respondent that he or she is subject to the requirements and penalties under this section and that has been filed under s. 813.128 (3g). [Emphasis added.]

Based on the language of this subsection, the Committee believes that the notice provision is exclusively applicable to tribal injunctions. Circuit court orders under sections 813.12 and 813.122 have explicit notice requirements concerning section 941.29. Conversely, tribal injunctions may not have the same requirement. Given that a tribal injunction must fulfill certain criteria, such as originating from a federally recognized Wisconsin tribe (excluding Menominee), containing notice regarding the requirements and penalties outlined in section 941.29, and being filed in the circuit court, it is logical to ensure that a respondent receives actual notice regarding the requirements and penalties specified in § 941.29(1m)(f) for a tribal injunction. This interpretation aligns with the original enactment of this provision in 1995 and subsequent amendments over the years. It has consistently been the case that the later provisions, including the notice requirement, have always been applicable to tribal injunctions.

9. This is the definition of "injunction" used in Wis JI-Criminal 2040.

10. Defendants may offer to stipulate to the fact of an injunction having been issued under § 813.12 or § 813.122 or under a tribal injunction, as defined in § 813.12 (1) (e). The bracketed statement in the instruction includes the standard statement on the effect of a stipulation found in Wis JI-Criminal 162, AGREED FACTS.

There is authority recognizing that defendants may offer to stipulate to the fact of a prior felony conviction when the charge is possession of a firearm by a felon under § 941.29(1m)(a). The effect of a stipulation in a prosecution for violating § 941.29(1m)(a) has been described as follows:

> . . . where prior conviction of a felony is an element of the offense with which the defendant is charged and the defendant is willing to stipulate that he or she is a convicted felon, evidence of the nature of the felony is irrelevant if offered solely to establish the felony-conviction element of the offense. The trial court therefore abused its discretion in allowing the prosecutor to inform the jury as to the nature of McAllister's crime.

State v. McAllister, 153 Wis.2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989).

The same concerns may lead to offers to stipulate to the fact of an injunction having been issued under the subsection addressed by this instruction. Care must be taken where a stipulation goes to an element of a crime. A waiver should be obtained. See Wis JI-Criminal 162A Law Note: Stipulations.

An example of a complete waiver inquiry is as follows:

TO THE DEFENDANT:

1. Do you understand that one of the elements of the crime of possession of a firearm by a person subject to an injunction is that an injunction was issued to you under subsection ((§ 813.12) (§ 813.122)) (a tribal injunction) (an order not to possess a firearm issued under (§ 813.123(5m)) (§ 813.125(4m)) before the date of this offense?

2. Do you understand that you have the right to have a jury, that is, twelve people, decide whether or not the state has proved beyond a reasonable doubt that an injunction issued to you before the date of this offense?

3. Do you understand that the State has to convince each member of the jury that an injunction was issued to you before the date of this offense?

4. Do you understand that with this stipulation, you are agreeing that I tell the jury that an injunction under ((§ 813.12) (§ 813.122)) (a tribal injunction) (an order not to possess a firearm issued under (§ 813.123(5m)) (§ 813.125(4m)) was issued to you before the date of this offense, and that they are to accept this fact as conclusively proved?

5. Has your attorney explained the pros and cons, that is, the advantages and disadvantages of entering into this agreement?

6. Have you had enough time to talk all of this over with your attorney?

7. Has anyone pressured you or threatened you in any way, or made any promises to you, to get you to enter into this agreement?

8. Are you entering into this agreement of your own free will?

9. Have you had enough time to make your decision?

TO DEFENSE COUNSEL:

1. Are you satisfied that your client thoroughly understands (his) (her) right to enter into this agreement regarding an injunction being issued to (him) (her) before the date of this offense or to not enter into this agreement?

2. Are you satisfied that your client is entering into this agreement freely, voluntarily, intelligently, and knowingly?

FINDING: The court is also satisfied that the defendant is entering into this agreement freely, voluntarily, intelligently, and knowingly. The court, therefore, accepts the stipulation.

Also see State v. Aldazabal, 146 Wis.2d 267, 430 N.W.2d 614 (Ct. App. 1988), where the defendant, charged with violating § 941.29, stipulated that he had been convicted of a felony. The stipulation was not

formally admitted into evidence, but the court of appeals held that the mentioning of the stipulation during the prosecutor's opening statement was sufficient to support the conviction.

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1344A POSSESSION OF AN ELECTRIC WEAPON — § 941.295

Statutory Definition of the Crime

Section 941.295 of the Criminal Code of Wisconsin is violated by a person who possesses an electric weapon.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a device.

"Possessed" means that the defendant knowingly[2] had actual physical control of a device.[3]

Deciding About Knowledge[4]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

2. The device was an electric weapon.

An electric weapon is any device that is designed, redesigned, used or intended to be used, offensively or defensively, to immobilize or incapacitate persons by the use of electric current.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 2010 and revised in 2011. The 2011 revision updated the Comment to reflect changes made by 2011 Wisconsin Act 35. This revision was approved by the Committee in August 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

Note that there are several exceptions set forth in subsection (2) of § 941.295. In the Committee's judgment, statutory exceptions are best handled as follows. The question of whether an exception applies is not an issue in the case until there is some evidence of that fact. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the exception is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

A second set of exceptions was created by 2011 Wisconsin Act 35:

> (2g) The prohibition in sub. (1m) on possessing or going armed with an electric weapon does not apply to any of the following:
>
> (a) A licensee or an out-of-state licensee.
> (b) An individual who goes armed with an electric weapon in his or her own dwelling or place of business or on land that he or she owns, leases, or legally occupies.

Section 941.295(1c)(b) provides that "'licensee' has the meaning given in s. 175.60(1)(d)," which is: ". . . an individual holding a valid license to carry a concealed weapon issued under this section." Section 941.295(1c)(c) provides that "out-of-state licensee" has the meaning given in s. 175.60(1)(g).

1. Section 941.295(1m) applies to "whoever sells, transports, manufactures, possesses, or goes armed with any electric weapon." The instruction is drafted for a case involving "possession" because that appeared to the Committee to be the most likely charge and because "possess" is the most inclusive term.

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). The Committee concluded that knowledge of the characteristics that make the weapon an electric weapon is not required. For an analogous situation, see Wis JI-Criminal 1341A, Possession Of

A Machine Gun, note 2.

3. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

4. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 2, supra. The Committee concluded that sec. 941.295 does not require proof that defendants know of the prohibition against possessing an electric weapon. This conclusion is based on sec. 939.23(1)

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 939 to 951, such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute.

5. This is the definition provided in § 941.295(1c)(a).

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1345 FIRST DEGREE RECKLESSLY ENDANGERING SAFETY — § 941.30(1)

Statutory Definition of the Crime

First degree recklessly endangering safety, as defined in § 941.30(1) of the Criminal Code of Wisconsin, is committed by one who recklessly endangers the safety of another human being under circumstances that show utter disregard for human life.

State's Burden of Proof

Before you may find the defendant guilty of first degree recklessly endangering safety, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant endangered the safety of another human being.

2. The defendant endangered the safety of another by criminally reckless conduct.

"Criminally reckless conduct" means:[1]

- the conduct created a risk of death or great bodily harm to another person; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[2]

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent

or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.[3]

3. The circumstances of the defendant's conduct showed utter disregard[4] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all other facts and circumstances relating to the conduct.[5]

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[6]

[Consider also the defendant's conduct after the act alleged to have endangered safety to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the act alleged to have endangered safety occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense were present, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1345 was originally published in 1962 and revised in 1989, 1993, 2002, 2003, 2009, 2012, and 2015. The 2012 revision added the material at footnote 6. The 2015 revision revised footnote 2 to reflect 2013 Wisconsin Act 307. The Comment was updated in April 2019. A "Reporter's Note" was removed in 2020.

This instruction is for a violation of § 941.30(1), as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The amended statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

First degree recklessly endangering safety replaces what was called "endangering safety by conduct regardless of life" under prior law.

The homicide revision also created § 941.30(2), Second Degree Recklessly Endangering Safety. See Wis JI-Criminal 1347.

In State v. Kloss, 2019 WI App 13, 386 Wis.2d 314, 925 N.W.2d 563, the court of appeals held that solicitation of first-degree recklessly endangering safety is a crime and that it is a lesser included offense of solicitation of first-degree reckless injury. Therefore convicting the defendant of both offenses was multiplicitous.

1. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

2. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

3. See § 939.22(14) and Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

4. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. However, if voluntary intoxication prevents the actor from being aware of the risk, such intoxication is not a defense. Section 939.24(3) provides:

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.
>
> Note to § 939.24(3), 1987 Senate Bill 191.

In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

5. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

> First-degree reckless homicide is analogous to the prior offense of 2nd-degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness,

> is required for liability. See s. 939.24, stats. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).
>
> Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to aggravated reckless homicide offense.

A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further clarified." Attempts to explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978); Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); and, Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15, 339 Wis.2d 170, 810 N.W.2d 226, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the

> victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

> Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). Under this revision, the analogs of those crimes, i.e., first-degree reckless and 2nd-degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01(3), stats., are inapplicable.
>
> Judicial Council Note to § 940.02, 1987 Senate Bill 191.

6. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

> ¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

> ¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis

JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The committee decided it was not necessary to include a reference to conduct before or during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.

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1347 SECOND DEGREE RECKLESSLY ENDANGERING SAFETY — § 941.30(2)[1]

Statutory Definition of the Crime

Second degree recklessly endangering safety, as defined in § 941.30(2) of the Criminal Code of Wisconsin, is committed by one who recklessly endangers the safety of another human being.

State's Burden of Proof

Before you may find the defendant guilty of second degree recklessly endangering safety, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant endangered the safety of another human being.

2. The defendant endangered the safety of another by criminally reckless conduct.

"Criminally reckless conduct" means:[2]

- the conduct created a risk of death or great bodily harm to another person; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[3]

"Great bodily harm" means serious bodily injury.[4] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or

which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense were present, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1347 was originally published in 1988 and revised in 1993 and 2003. This revision was approved by the Committee in March 2015; it revised footnote 3 to reflect 2013 Wisconsin Act 307.

This instruction is for a violation of § 941.30(2), created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The amended statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision generally, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

1. This offense was created by the 1989 homicide revision.

2. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

3. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

4. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

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1350 POSSESSION OF EXPLOSIVES FOR AN UNLAWFUL PURPOSE — § 941.31(1)

Statutory Definition of the Crime

Possession of explosives for unlawful purpose, as defined in § 941.31(1) of the Criminal Code of Wisconsin, is committed by one who possesses[1] any explosive compound with intent to use the explosive to commit a crime.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed any explosive compound.

   "Possessed" means that the defendant knowingly[3] had actual physical control[4] of the explosive compound.[5]

   ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.[6]

   [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

   [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

2. The defendant possessed an explosive compound with the intent[7] to use the explosive to commit a crime.[8]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1350 was originally published in 1966 and revised in 1980, 1987, 1988, 1995, and 1996. This revision was approved by the Committee in March 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for violations of subsection (1) of § 941.31, which are punishable as Class F felonies. The statute was amended by 1987 Wisconsin Act 234, effective date: April 21, 1988, by adding subsection (2) which makes it a Class H felony if a person "makes, buys, sells, transports, possesses, uses or transfers any improvised explosive device, or possesses materials or components with intent to assemble any improvised explosive device." Section 941.31(2)(b). Wis JI-Criminal 1351A and 1351B are drafted for violations of sub. (2).

1. The instruction is drafted for a violation of the statute involving "possession." The statute also applies to one who "makes, buys, transports, or transfers, or offers to do the same." If one of the other alternatives is involved, the instruction must be modified (though most necessarily will involve possession).

Section 939.22(40) defines "transfer" as follows: "Transfer means any transaction involving a change in possession of any property or a change of right, title, or interest to or in any property."

2. The statute provides an alternative to possession with intent to commit a crime: "knowing that another intends to use it to commit a crime." If this alternative is used, the instruction must be modified. See note 6 below.

3. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

4. The definition of "possession" is based on the one provided in Wis JI-Criminal 920. That instruction also includes optional explanations for cases when an object is arguably under the defendant's control but not in his or her physical possession:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

5. In State v. Brulport, 202 Wis.2d 506, 551W.2d 824 (Ct. App. 1996), the court approved the use of Wisconsin Administrative Code definitions of "explosive compound" and "explosion" in a case involving a violation of § 941.31(1):

> "Explosive compound" means any chemical compound, mixture or device, the primary of common purpose of which is to function by explosion. [§ ILHR 7.04(18)]
>
> "Explosion" means the substantially instantaneous release of both gas and heat. [§ ILHR 7.04(18)]

Brulport argued on appeal that a plastic soda bottle containing aluminum foil and drain cleaner did not qualify as an "explosive compound" under § 941.31. The evidence showed that the combination of the ingredients produces a hydrogen gas which gradually, heats, expands and ultimately explodes. The court of appeals noted that "explosive compound" and "explosion" were not defined in the statutes and adopted definitions from the Wis. Administrative Code, Chapter ILHR 7. Applying these definitions, the court found that the devices in question qualified as an "explosive compound." The fact that a detonating or ignition mechanism is not required to trigger the explosion of these devices is not relevant; the definitions are satisfied if a "chemical compound, mixture or device" is present.

6. The definition of "possess" is the one provided in Wis JI-Criminal 920. See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

7. See Wis JI-Criminal 923A for a discussion of various issues relating to definition of "with intent to." "Knowing that another intends to use it to commit a crime" is an alternative mental element for this offense. The following may be a helpful explanation:

> "With the knowledge that another intended to use the explosive to commit a crime" means that the defendant believed another intended to so use the explosives. With respect to the defendant's knowledge, you cannot look into a person's mind to determine knowledge or belief. Knowledge or belief must be found, if found at all, from acts, words, and statements, if any, and from all of the facts and circumstances in this case bearing upon knowledge or belief. To "know" that another intended to commit a crime requires merely that the defendant so believed.

8. A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime. Section 939.12.

1351A POSSESSION OF AN IMPROVISED EXPLOSIVE DEVICE — § 941.31(2)

Statutory Definition of the Crime

Possession of an improvised explosive device, as defined in § 941.31(2) of the Criminal Code of Wisconsin, is committed by one who possesses[1] any improvised explosive device.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a device.

   "Possessed" means that the defendant knowingly[2] had the device under (his) (her) actual physical control.

   ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.[3]

   [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

   [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

   [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

2. The device was an improvised explosive device.[4] This requires:

- that the device was explosive; that is, that it contained some type of explosive material[5] and a means of detonating that material; and
- that the device was destructive; that is, that it was capable of causing bodily harm or damage to property; and
- that the device was improvised; that is, that it was made by a person not engaged in the legitimate manufacture or use of explosives (or otherwise authorized by law to do so).[6]

["Improvised explosive device" does not include ammunition for any rifle, pistol, or shotgun.][7]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published Wis JI-Criminal 1351 in 1988. It was revised and renumbered 1351A in 1996. This revision was approved by the Committee in March 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for one type of violation of subsection (2) of § 943.31, which is a punishable as a Class H felony. The statute was created by 1987 Wisconsin Act 234 (effective date: April 21, 1988). Possession of an improvised explosive device, also prohibited by § 941.31(2), is addressed by Wis JI-Criminal 1351A. Possession of an explosive compound with intent to use it to commit a crime is prohibited by § 943.31(1). See Wis JI-Criminal 1350.

Subsection (2)(c) of § 941.31 provides exceptions to the coverage of the statute:

> This subsection does not apply to the transportation, possession, use or transfer of any improvised explosive device by any armed forces or national guard personnel or to any peace officer in the line of duty or as part of a duty-related function or exercise. The restriction on transportation in this subsection does not apply to common carriers.

1. The instruction is drafted for a violation of the statute involving "possession." The statute also applies to one who "makes, buys, transports, uses or transfers . . . or possesses materials or components with intent to assemble any improvised explosive device." If one of the other alternatives is involved, the instruction must be modified (though most necessarily will involve possession).

Section 939.22(40) defines "transfer" as follows: "Transfer means any transaction involving a change in possession of any property or a change of right, title, or interest to or in any property."

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

3. The definition of "possess" is the one provided in Wis JI-Criminal 920. See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

4. The explanation of "improvised explosive device" is from the definition provided in § 941.31(2)(a). The statutory definition appears to require that the device have the three attributes emphasized in the instruction: that it be explosive, destructive, and improvised. The full statutory definition reads as follows:

> "Improvised explosive device" means a destructive explosive device capable of causing bodily harm, great bodily harm, death or property damage; with some type of explosive material and a means of detonating the explosive material, directly, remotely, or with a timer either present or readily capable of being inserted or attached; which may include a pipe or similar casing, with the ends of the pipe or casing capped, plugged or crimped, and a fuse or similar object sticking out of the pipe or casing; and made by a person not engaged in the legitimate manufacture or legitimate use of explosives, or otherwise authorized by law to do so. "Improvised explosive device" does not include ammunition for any rifle, pistol or shotgun.

5. In State v. Brulport, 202 Wis.2d 506,551 N.W.2d 824 (Ct. App. 1996), the court approved the use of Wisconsin Administrative Code definitions of "explosive compound" and "explosion" in a case involving a violation of § 941.31(1):

> "Explosive compound" means any chemical compound, mixture or device, the primary of common purpose of which is to function by explosion. [§ ILHR 7.04(18)]
>
> "Explosion" means the substantially instantaneous release of both gas and heat. [§ ILHR 7.04(18)]

Brulport held that a plastic soda bottle containing aluminum foil and drain cleaner qualified as an "explosive compound" under § 941.31. See footnote 5, Wis JI-Criminal 1350.

6. The phrase in parentheses is based on the definition found in § 941.31(2)(a). See note 3, supra.

7. See s. 941.31(2)(a), note 4, supra.

1351B POSSESSION OF MATERIALS OR COMPONENTS WITH INTENT TO ASSEMBLE AN IMPROVISED EXPLOSIVE DEVICE — § 941.31(2)

Statutory Definition of the Crime

Section 941.31(2) of the Criminal Code of Wisconsin is violated by a person who possesses materials or components with intent to assemble an improvised explosive device.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed materials or components.

"Possessed" means that the defendant knowingly[1] had actual physical control of materials or components.

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.[2]

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

2. The defendant possessed materials or components with intent to assemble an improvised explosive device.[3]

An "improvised explosive device" requires:

- that the device was explosive; that is, that it contained some type of explosive material[4] and a means of detonating that material; and
- that the device was destructive; that is, that it was capable of causing bodily harm or damage to property; and
- that the device was improvised; that is, that it was made by a person not engaged in the legitimate manufacture or use of explosives (or otherwise authorized by law to do so).[5]

["Improvised explosive device" does not include ammunition for any rifle, pistol, or shotgun.][6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1351B was originally published in 1996. This revision was approved by the Committee in March 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for one type of violation of subsection (2) of § 943.31, which is punishable as Class H felonies. The statute was created by 1987 Wisconsin Act 234 (effective date: April 21, 1988). Possession of an improvised explosive device, also prohibited by § 941.31(2), is addressed by Wis JI-Criminal 1351A. Possession of an explosive compound with intent to use it to commit a crime is prohibited by § 943.31(1). See Wis JI-Criminal 1350.

Subsection (2)(c) of § 941.31 provides exceptions to the coverage of the statute:

> This subsection does not apply to the transportation, possession, use or transfer of any improvised explosive device by any armed forces or national guard personnel or to any peace officer in the line of duty or as part of a duty-related function or exercise. The restriction on transportation in this subsection does not apply to common carriers.

1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

2. The definition of "possess" is the one provided in Wis JI-Criminal 920. See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

3. The explanation of "improvised explosive device" is from the definition provided in § 941.31(2)(a). The statutory definition appears to require that the device have the three attributes emphasized in the instruction: that it be explosive, destructive, and improvised. The full statutory definition reads as follows:

> "Improvised explosive device" means a destructive explosive device capable of causing bodily harm, great bodily harm, death or property damage; with some type of explosive material and a means of detonating the explosive material, directly, remotely, or with a timer either present or readily capable of being inserted or attached; which may include a pipe or similar casing, with the ends of the pipe or casing capped, plugged or crimped, and a fuse or similar object sticking out of the pipe or casing; and made by a person not engaged in the legitimate manufacture or legitimate use of explosives, or otherwise authorized by law to do so. "Improvised explosive device" does not include ammunition for any rifle, pistol or shotgun.

4. In State v. Brulport, 202 Wis.2d 506,551 N.W.2d 824 (Ct. App. 1996), the court approved the use of Wisconsin Administrative Code definitions of "explosive compound" and "explosion" in a case involving a violation of § 941.31(1):

> "Explosive compound" means any chemical compound, mixture or device, the primary of common purpose of which is to function by explosion. [§ ILHR 7.04(18)]
>
> "Explosion" means the substantially instantaneous release of both gas and heat. [§ ILHR 7.04(18)]

Brulport held that a plastic soda bottle containing aluminum foil and drain cleaner qualified as an "explosive compound" under § 941.31. See footnote 5, Wis JI-Criminal 1350.

5. The phrase in parentheses is based on the definition found in § 941.31(2)(a). See note 3, supra.

6. See § 941.31(2)(a), note 3, supra.

1352 ADMINISTERING A DANGEROUS OR STUPEFYING DRUG — § 941.32

Statutory Definition of the Crime

Section 941.32 of the Criminal Code of Wisconsin, is violated by one who administers to another or causes another to take any poisonous, stupefying, overpowering, narcotic, or anesthetic substance with intent thereby to facilitate the commission of a crime.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [administered[1] a substance to (name of victim)] [caused (name of victim) to take a substance].
2. The substance was poisonous, stupefying, overpowering, narcotic, or anesthetic.
3. The defendant acted with the intent to[2] facilitate the commission of a crime.

"Facilitate" means to make easier or less difficult.[3]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1352 was originally published in 1974 and revised in 1977. This revision was approved by the Committee in March 2007 and involved adoption of a new format and nonsubstantive changes to the text.

1. If the definition of "administered" is an issue, consulting § 961.01(1r) may be helpful. It contains the definition for "administer" as used in the Uniform Controlled Substance Act. The committee concluded that with modification that definition can be used here. A suggested definition for "administered," based on § 961.01(1r) is:

> "Administered" as used here means the direct application of the substance, whether by injection, inhalation, ingestion or any other means to the body of the victim.

2. "With intent to" is defined in § 939.23(4) to require the mental purpose to cause the result specified or awareness that conduct is practically certain to cause that result. See Wis JI-Criminal 923B.

3. Webster's Third New International Dictionary 812 (unabridged ed. 1961).

1354 PLACING FOREIGN OBJECTS IN EDIBLES — § 941.325

Statutory Definition of the Crime

Placing foreign objects in edibles, as defined in § 941.325 of the Criminal Code of Wisconsin, is committed by one who places objects, drugs, or other substances in candy or other liquid or solid edibles with the intent to cause bodily harm to another person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant placed (an object) (a drug) (a substance) in (candy) (a liquid or solid edible).

   ("Edible" means something that can be eaten.)[1]

2. The defendant committed that act with intent to cause bodily harm to another person.

   "Bodily harm" means physical pain, injury, illness, or any impairment of physical condition.[2]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1354 was originally published in 1987 and revised in 1991. This revision was approved by the Committee in March 2007 and involved adoption of a new format and nonsubstantive changes to the text.

1. This definition is based on the dictionary definition of the term. See, for example, Webster's New Collegiate Dictionary.

The Wisconsin Court of Appeals has held that the statute also applies to "liquid food" or "liquid edibles." State v. Timm, 163 Wis.2d 894, 472 N.W.2d 593 (Ct. App. 1991). The court apparently approved a broader definition which equates "edible" with "food" as defined in Webster's Third International Dictionary 722 (1976): "material . . . taken or absorbed into the body . . . to sustain growth . . . and to furnish energy." 163 Wis.2d 894, 898.

In 1996, the statute was amended to add the following underlined language: ". . . or other liquid or solid edibles." 1995 Wisconsin Act 410.

2. Section 939.22(4).

1360 OBSTRUCTING EMERGENCY MEDICAL PERSONNEL — § 941.37(3)

Statutory Definition of the Crime

Obstructing emergency medical personnel, as defined by § 941.37(3) of the Criminal Code of Wisconsin, is committed by one who intentionally interferes with any emergency medical personnel in the performance of duties relating to an emergency or rescue and who has reasonable grounds to believe that the interference may endanger another's safety.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant interfered with (identify appropriate category for the victim) [1] in the performance of duties relating to an emergency or rescue.

   (Identify appropriate category for the victim) are emergency medical personnel.[2]

   "Interfere" means to delay, prevent, hinder, or impede.

2. The defendant intentionally interfered with (a) (an) (identify appropriate category for the victim) .

   "Intentionally" means that the defendant acted with the purpose to interfere with (a) (an) (identify appropriate category for the victim) .[3] It also requires that the

defendant knew that the person was (a) (an) (identify appropriate category for the victim) and knew that (he) (she) was performing duties relating to an emergency or rescue.[4]

3. The defendant had reasonable grounds to believe that the interference might endanger the safety of another person.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS E FELONY AND THERE IS EVIDENCE THAT THE PENALTY-INCREASING FACT IS PRESENT.[5]

If you find the defendant guilty, you must answer the following question:

Did the defendant's violation contribute to the death of another person?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1360 was originally published in 1985 and revised in 1995 and 2008. This revision was approved by the Committee in December 2017; it reflects changes in terminology made by 2017 Wisconsin Act 12.

This instruction is for a violation of sub. (3) of § 941.37, which is punishable as a Class I felony. The penalty increases to a Class E felony if the violation "contributes to the death of another." § 941.37(4). The instruction provides a special question to be added if the Class E felony is charged.

Subsection (2) of § 941.37 defines a misdemeanor offense which differs from the felony offense under sub. (3) in two ways: it requires "knowingly obstructs" rather than "intentionally interferes"; and it does not require that the actor have "reasonable grounds to believe that the interference may endanger another's safety." There is not a uniform instruction for violations of sub. (2).

2017 Wisconsin Act 12 [effective date: June 23, 2017] changed the terminology used in the statute from "emergency medical technician" to "emergency medical services practitioner" and from "first responder" to "emergency medical responder."

1. Sub. (1)(c) of § 941.37 defines "emergency medical personnel" as follows:

> ". . . an emergency medical services practitioner licensed under § 256.15, emergency medical responder certified under s. 256.15(8), peace officer or fire fighter, or other person operating or staffing an ambulance or an authorized emergency vehicle."

Section 256.15 is an extensive statute addressing several matters. Licensing of emergency medical technicians is addressed in sub. (5). Sub. (1)(a) of § 941.37 provides that "'ambulance' has the meaning specified in s. 256.01(1t)." Sub. (1)(b) of § 941.37 provides that "'authorized emergency vehicle' has the meaning specified in s. 340.01(3)."

2. Because § 941.37 specifically so provides, the Committee has concluded that the jury may be informed that, for example, "fire fighters are emergency medical personnel." It is for the jury to determine whether the individuals allegedly interfered with in the case were, in fact, fire fighters.

3. If appropriate, add or substitute: "or was aware his conduct was practically certain to cause that result." See § 939.23(3) and Wis JI-Criminal 923A.

4. See § 939.23(3).

5. Subsection (4) of § 941.37 provides that the penalty for violations of § 941.37(3) increases to a Class E felony if a person "violates sub. (3) and thereby contributes to the death of another . . ." If the offense is charged as a Class E felony, the special question should be added to assure a jury finding on the penalty-increasing fact. If the offense is charged as a Class I felony, the instruction should be given without the special question.

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1365 THROWING OR EXPELLING A BODILY SUBSTANCE AT A PUBLIC SAFETY WORKER OR PROSECUTOR — § 941.375

Statutory Definition of the Crime

Section 941.375 of the Criminal Code of Wisconsin, is violated by one who throws or expels a bodily substance[1] at or toward a (public safety worker) (prosecutor) under the following circumstances:

- the person intends that the bodily substance come into contact with the (public safety worker) (prosecutor); and,
- the (public safety worker) (prosecutor) does not consent to the substance being thrown or expelled at or toward (him) (her).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a (public safety worker)[2] (prosecutor).[3]

["Public safety worker" means (an emergency medical services practitioner licensed under § 256.15) (an emergency medical responder certified under § 256.15(8)) (a peace officer) (a fire fighter) (a person operating or staffing an ambulance).[4]]

[A (e.g. district attorney) is a prosecutor.[5]]

2. The defendant threw or expelled a bodily substance at or toward (name of victim) with intent that the bodily substance come into contact with (name of victim).[6]

   (Identify substance) is a bodily substance.[7]

3. (Name of victim) did not consent to the substance being thrown or expelled at or toward (him) (her).[8]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1365 was originally published in 2007 and revised in 2012 and 2017. This revision was approved by the Committee in June 2018; it reflects changes made by 2015 Wisconsin Act 340 and 2017 Wisconsin Act 12.

Section 941.375 was created by 2003 Wisconsin Act 190 [effective date: April 22, 2004]. 2011 Wisconsin Act 72 [effective date: December 2, 2011] amended § 941.375 by repealing former subsection (2)(b). That subsection required that the defendant throw the substance with the intent to cause bodily harm to the public safety worker. The change is reflected in the instruction by striking what was the third element, reducing the number of elements from four to three.

2015 Wisconsin Act 340 amended § 941.375 to include "prosecutor." [Effective date: April 1, 2016.]

2017 Wisconsin Act 12 [effective date: June 23, 2017] changed the terminology used in § 941.375 from "emergency medical technician" to "emergency medical services practitioner" and from "first responder" to "emergency medical responder."

1. "Bodily substance" is used in place of the following phrase in the statute: ". . . blood, semen, vomit, saliva, urine, feces or other bodily substance . . ." The instruction recommends naming the substance in element 2. See footnote 7.

2. These elements do not require that the public safety worker was acting in an official capacity or that the defendant knew that the victim was a public safety worker. However reasonable these elements might seem, the statute does not specify them and the Committee considered that the legislature did specify these elements in § 941.20(1m)(b), which criminalizes pointing a firearm at a very similar group of public workers: "Whoever intentionally points a firearm at or towards a law enforcement officer. . ." The inference that the legislature did not intend to include these elements in § 941.375(2) is particularly strong because both of these crimes were enacted in 2003 Wisconsin Act 190. The Committee recognizes that under the recommended elements, the law could be applied to circumstances in which a covered safety worker was not on duty and in which the defendant had no reason to be aware of the employment status of the victim. This could include an "emergency medical technician" or a "first responder" who was licensed but not then employed in that capacity.

3. See note 2, supra. The Committee reached the same conclusions with regard to the victim's status as a prosecutor. Prosecutors were added to the statute by 2015 Wisconsin Act 340.

4. The alternatives in brackets are those provided in § 941.375(1)(b). Section 941.375(1)(a) provides: "'Ambulance' has the meaning specified in s. 256.01(1t)."

"Emergency medical services practitioner" is defined in § 256.01(5). "Emergency medical responder" is defined in § 256.01(4p). Section 939.22(22) provides a definition of "peace officer."

5. In the Committee's judgment, the jury may be told, for example, that a district attorney is a prosecutor. It is still for the jury to be satisfied that, in the example, the victim was a district attorney. Section 941.375(1)(am) provides:

> "Prosecutor" means any of the following:
>
> 1. A district attorney, a deputy district attorney, an assistant district attorney, or a special prosecutor appointed under s. 978.045 or 978.05(8)(b).
> 2. The attorney general, a deputy attorney general, or an assistant attorney general.

The applicable term should be inserted in the blank.

6. Section 941.375(2)(a).

7. Section 941.375 applies to the following: "blood, semen, vomit, saliva, urine, feces or other bodily substance." Because the statute specifies certain substances as "bodily substances," the Committee concluded that the jury may be told, for example, that "blood is a bodily substance."

8. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

1375 VIOLATING A NO CONTACT ORDER — § 941.39

Statutory Definition of the Crime

Violating a no contact order, as defined in § 941.39 of the Wisconsin Statutes, is committed by one who intentionally violates a court order issued under § 973.049(2) of the Wisconsin Statutes.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. A no contact order was issued under § 973.049(2) of the Wisconsin Statutes as a result of a conviction for a (felony) (misdemeanor).

   (A felony is a crime punishable by imprisonment in the Wisconsin state prisons.[1] _____ is a felony.)[2]

   (A misdemeanor is a crime punishable by imprisonment in the county jail.[3] _____ is a misdemeanor.)[4]

2. The defendant committed an act that violated the no contact order.

3. The defendant intentionally violated the no contact order.

   This requires that the defendant knew that the no contact order had been issued and knew that (his) (her) acts violated the order.[5]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1375 was originally published in 2007. This revision was approved by the Committee in July 2012; it reflects changes made by 2011 Wisconsin Act 267.

This instruction is for violations of § 941.39 Victim or co-actor contact, created by 2005 Wisconsin Act 32. Effective date: August 30, 2005.

2011 Wisconsin Act 267 amended § 941.39 to change the penalty [effective date: April 24, 2012]. The penalty is a Class A misdemeanor if the order resulted from a conviction for a misdemeanor; the penalty is a Class H felony if the order resulted from a conviction for a felony. The Committee concluded that because the nature of the conviction on which the order is based determines the penalty range, it is a fact that must be submitted to the jury. The penalty structure is like that for bail jumping under § 946.49; see Wis JI-Criminal 1975.

The offense is defined as violating a no contact order issued under § 973.049(2), which provides that a sentencing court "may" prohibit an individual who is being sentenced or placed on probation "from contacting victims of, or co-actors in, a crime considered at sentencing during any part of the individual's sentence or period of probation if the court determines that the prohibition would be in the interest of public protection."

Subsection (3) of § 973.049, as amended by 2011 Wisconsin Act 267, provides: "If a court issues an order under sub. (2), the court shall inform the individual of the prohibition and include the prohibition in the judgment of conviction for the crime." The Committee concluded that whether or not this requirement was met is not relevant in a prosecution for violating § 941.39.

1. See § 939.60.

2. In the Committee's judgment, the jury may be told that a certain crime is in fact a felony or a misdemeanor. The jury must find that the defendant was actually convicted of that crime.

3. See §§ 939.60 and 939.12. "County jail" includes the Milwaukee County House of Correction.

4. See note 2, supra.

5. The basis for the knowledge requirement in the third element is the provision in § 939.23(3) which states that when the word "intentionally" is used in a criminal statute, it requires "knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'."

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1380 DEFAMATION — § 942.01

Statutory Definition of the Crime

Defamation, as defined in § 942.01 of the Criminal Code of Wisconsin, is committed by one who, with intent to defame, communicates any defamatory matter to a third person without the consent of the person defamed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following (five) (six)[1] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant communicated some information or matter about (name of defamed person) .

   "Communicate" means to make something known, such as stating something, writing something, or even drawing a picture of something.[2]

2. This communication about (name of defamed person) was made to a third person.

   The crime of defamation is not committed if the matter or information is communicated only to the person allegedly defamed.[3]

3. The information or matter communicated about (name of defamed person) was defamatory matter.

"Defamatory matter" is anything which exposes a person to hatred, contempt, ridicule, degradation or disgrace in society, or injury in business or occupation.[4] With respect to the crime of defamation, it is not necessary that the reputation of the person defamed be actually harmed. It is necessary only that the matter or information communicated tends to have a defamatory effect.[5]

4. The defendant communicated this information or matter with the intent to defame (name of defamed person) .

The phrase "with the intent to" means that the defendant had the purpose to defame (name of defamed person) or was aware that this conduct was practically certain to cause that result.[6]

5. (Name of defamed person) did not consent to the communication.

ADD THE FOLLOWING IF AN ORAL COMMUNICATION IS INVOLVED.

[6. Two other persons heard and understood the oral statement as defamatory.][7]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

ADD THE FOLLOWING IF THERE IS EVIDENCE OF THE EXCEPTION[S] RECOGNIZED IN § 942.01(3):[8]

[You must also consider whether the defamatory matter was true and was communicated with good motives and for justifiable ends. The burden is on the State to satisfy you beyond

a reasonable doubt that the defamatory matter was not true or was not communicated with good motives and for justifiable ends.[9]]

[You must also consider whether the communication was privileged. A communication is privileged when (describe the privilege) . The burden is on the State to satisfy you beyond a reasonable doubt that the communication was not privileged.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all (five) (six)[10] elements of this offense have been proved [and that the defamatory matter was not true or was not communicated with good motives and for justifiable ends][11] [and that the communication was not privileged],[12] you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1380 was originally published in 1974 and revised in 1977 and 1994. This revision was approved by the Committee in June 2007 and involved adoption of a new format and nonsubstantive changes to the text.

Defamation, as defined in § 942.01, must be interpreted in light of Article 1, Section 3 of the Wisconsin Constitution, which provides:

> **Free speech; libel.** Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libel, the truth may be given in evidence, and if it shall appear to the jury that the matter charged as libel be true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Subsection (3) of § 942.01 recognizes an exception regarding a communication made "with good motives and for justifiable ends." See the instruction at footnote 8.

Subsection (4) of § 942.01 provides that "No person shall be convicted on the basis of an oral communication of defamatory matter except upon the testimony of 2 other persons that they heard and

understood the oral statement as defamatory or upon a plea of guilty or no contest." See bracketed element 6 of the instruction.

1. Choose the appropriate number. Six elements are to be used if an oral communication is involved.

2. Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 91 (Wis. Legislative Council, February 1953).

3. Section 942.01(1); 1953 Judiciary Committee Report, supra note 4, p. 91.

4. Section 942.01(2).

5. 1953 Judiciary Committee Report, supra note 4, p. 91.

6. Section 939.23(4).

7. Include this element only if the defamatory matter was communicated through an oral statement. See § 942.01(4).

8. Subsection (3) of § 942.01 provides: "This section does not apply if the defamatory matter was true and was communicated with good motives and for justifiable ends or if the communication was otherwise privileged." [Note that the references to "true . . . with good motives and for justifiable ends" are based on Article I, Section 3 of the Wisconsin Constitution.] Thus, the subsection contains exceptions to the statute and reference to privileges. The Committee's recommended approach is to treat these matters as follows. The matters referred to are not issues in the case until there is some evidence of those facts. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the exception or the privilege does not apply. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981). In these cases, the appropriate bracketed material should be included in the instruction. The same material should also be added to the "Jury's Decision" paragraph. See notes 11 and 12, below.

Privileges available to a defendant under common law are in general the same as the privileges relating to civil defamation. 1953 Judiciary Committee Report on the Criminal Code, p. 91 (Wis. Legislative Council, 1953). The 1953 Report referred to sections of the Restatement of Torts, found at §§ 582-612 of Restatement of Torts 2d (1977 ed.). A helpful summary of civil defamation law, including privileges, is provided at Wis JI-Civil 2500 Defamation: Law Note For Trial Judges.

In State v. Gilles, 173 Wis.2d 101, 496 N.W.2d 133 (Ct. App. 1992), the court confirmed that conditional privileges recognized in civil defamation cases also apply to the criminal charge. On the facts of that case, the court found that it was proper for the trial judge to refuse to submit the privilege issue to the jury because the evidence supporting it was insufficient as a matter of law.

In State v. Cardenas-Hernandez, 214 Wis.2d 71, 571 N.W.2d 406 (Ct. App. 1997), convictions for criminal defamation were reversed. The statements on which the charges were based were made during a John Doe proceeding. The court held that an absolute privilege applies to statements made in judicial proceedings.

9. The Committee concluded that the state may meet its burden of disproving the exception by proving either that the defamatory material was not true OR that it was not communicated with good motives and for justifiable ends.

10. Choose the appropriate number. Six elements are to be used if an oral communication is involved.

11. Add the bracketed material if the jury was instructed on the exception recognized in sec. 942.01(3).

12. Add the bracketed material if the jury was instructed on a privilege recognized in sec. 942.01(3).

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1390 DENIAL OF RIGHTS: IN GENERAL — § 942.04(1)(a)
1391 DENIAL OF RIGHTS: WRITTEN COMMUNICATION — § 942.04(1)(b)
1392 DENIAL OF RIGHTS: AUTOMOBILE INSURANCE — § 942.04(1)(c)

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1390, 1391, and 1392 were originally published in 1974. They were withdrawn in 1992.

Wis JI-Criminal 1390-1392 were withdrawn because the offenses with which they dealt are no longer punished as crimes. The three instructions dealt with three types of violations under former 942.04, Denial of Rights. The offenses were punished as Class A misdemeanors.

Section 942.04 was renumbered and amended by 1989 Wisconsin Act 47, effective date: September 12, 1989. The substantive provisions addressed by the instructions are now found in § 101.22(9)(a)1., 3., and 4. Violations are punished as forfeitures. See § 101.22(6).

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1392 INVASION OF PRIVACY: USE OF A SURVEILLANCE DEVICE — § 942.08(2)(a)

Statutory Definition of the Crime

Invasion of privacy, as defined in § 942.08(2)(a) of the Criminal Code of Wisconsin, is committed by one who knowingly installs a surveillance device in any private place, or uses a surveillance device to observe in a private place, with the intent to observe any nude or partially nude person without the consent of that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements are present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly (installed a surveillance device in a private place) (used a surveillance device to observe in a private place).[1]
2. The defendant intended to use the surveillance device to observe any nude or partially nude person.
3. The defendant intended to observe a nude or partially nude person without the consent of that person.

Meaning of "Surveillance Device"

"Surveillance device" means any device that can be used to observe activities of another person. [It includes a peephole.][2]

Meaning of "Private Place"

"Private place" means a place where a person may reasonably expect to be safe from being observed without his or her knowledge and consent.[3]

Meaning of "Nude or Partially Nude Person"

"Nude or partially nude person" means [any human being who has less than fully and opaquely covered genitals, pubic area or buttocks] [any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple] [any male human being with covered genitals in a discernibly turgid state].[4]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.[5]

If you find the defendant guilty, you must answer the following question:

Was (name of victim) under the age of 18 years at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1392 was originally published in 2007 and revised in October 2016 to reflect changes made to § 942.08 by 2015 Wisconsin Acts 292 and 320. This revision was approved by the Committee in February 2020; it added to the comment.

This instruction is for a violation of sub. (2)(a) of §942.08. Three additional offenses are defined in subs. (2)(b), (c), and (d). See Wis JI-Criminal 1395 for violations of sub. (2)(d); uniform instructions have not been drafted for the other two offenses.

1. 2019 Wisconsin Act 72 [effective date: January 23, 2020] created a narrow exception in regard to the installation of a surveillance device by an owner of real estate in connection with the sale of the real estate. See § 995.60(2). This exception does not apply to surveillance devices installed in bathrooms or washrooms. § 995.60(3).

2. This is a simplification of the definition provided in s. 942.08(1)(c). The Committee concluded that referring to "device" covered the other terms used in the statutory definition: "instrument, apparatus, implement, mechanism or contrivance." While referring to a device that "can be used" is arguably broader than the statute's "used, designed to be used to observe, or capable of observing," any potential problem is cured by the second element of the offense, which requires that the defendant intended to use the device to observe a nude or partially nude person.

3. This is the definition provided in s. 942.08(1)(b).

4. This is the definition provided in s. 942.08(1)(a), without change, except for bracketing separable parts of the definition. The applicable bracketed definition should be selected.

5. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of sec. 942.08: the offense is a Class I felony if the victim had not attained the age of 18 years at the time of the offense. See § 942.08(4). The instruction reflects this change by providing a special question to be used where the Class I felony is charged. If the Class I felony is not charged, the instruction should be used without the special question.

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1395 INVASION OF PRIVACY: LOOKING INTO A DWELLING UNIT — § 942.08(2)(d)

Statutory Definition of the Crime

Invasion of privacy, as defined in §942.08(2)(d) of the Criminal Code of Wisconsin, is committed by one who enters [another person's private property without that person's consent] [a common area of a multiunit dwelling or condominium][1] and looks into any individual's dwelling unit and all the following apply:

- (he)(she) looks into the dwelling unit for the purpose of sexual arousal or gratification and with the intent to intrude upon or interfere with an individual's privacy; and,
- (he)(she) looks into a part of the dwelling unit in which an individual is present; and,
- the individual has a reasonable expectation of privacy in that part of the dwelling unit; and,
- the individual does not consent to (him)(her) looking into that part of the dwelling unit.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements are present.

Elements of the Crime That the State Must Prove

1. The defendant entered [another person's private property without that person's consent] [a common area of a multiunit dwelling or condominium].[2]
2. The defendant looked into (name of individual) 's dwelling unit.

3. The defendant looked into the dwelling unit for the purpose of sexual arousal or gratification and with the intent to intrude upon or interfere with (name of individual) 's privacy.

4. The defendant looked into a part of the dwelling unit in which (name of individual) was present.

5. (Name of individual) had a reasonable expectation of privacy in that part of the dwelling unit.

6. (Name of individual) did not consent to the defendant looking into that part of the dwelling unit.

Meaning of "Reasonable Expectation of Privacy"[3]

"Reasonable expectation of privacy" requires

- that (name of individual) had an actual expectation of privacy in the part of the dwelling unit in question; and,
- that expectation of privacy was reasonable.

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.[4]

If you find the defendant guilty, you must answer the following question:

Was (name of victim) under the age of 18 years at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1395 was originally published in 2007 and revised in 2009. This revision was approved by the Committee in October 2016; it reflects changes made by 2015 Wisconsin Act 320.

This instruction is for a violation of sub. (2)(d) of § 942.08. Three additional offenses are defined in subs. (2)(b), (c), and (d). See Wis JI-Criminal 1392 for violations of sub. (2)(a); uniform instructions have not been drafted for the other two offenses.

1. The second bracketed phrase was added by 2007 Wisconsin Act 198 – effective date April 11, 2008. The statute refers to "an enclosed or unenclosed common area." The Committee concluded that it was not necessary to include that reference in the instruction.

2. See footnote 1, supra.

3. The definition of "reasonable expectation of privacy" is based on one originally used in Wis JI-Criminal 1396, Representations Depicting Nudity – § 942.09. The note in that instruction stated that the definition was based on the one used for 4th Amendment purposes.

In State v. Nelson, 2006 WI App 124, 294 Wis.2d 578, 718 N.W.2d 168, the court of appeals acknowledged Wis JI-Criminal 1396 and the footnote referring to the 4th Amendment meaning of the term:

> The comment does not purport to be an analysis of whether "reasonable expectation of privacy" was intended by the legislature to import all Fourth Amendment case law applying this term, as Nelson argues. Moreover, there is no need to resort to Fourth Amendment case law, as opposed to the language of the statute, to arrive at the definition the comment refers to: the common and ordinary meaning of "a person who has a reasonable expectation of privacy" is that the person actually has an expectation of privacy and the expectation is a reasonable one.
> 2006 WI App 124, footnote 7.

The Committee believes the definition in the instruction is consistent with the Nelson decision.

4. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of sec. 942.08: the offense is a Class I felony if the victim had not attained the age of 18 years at the time of the offense. See § 942.08(4). The instruction reflects this change by providing a special question to be used where the Class I felony is charged. If the Class I felony is not charged, the instruction should be used without the special question.

1395A INVASION OF PRIVACY: USE OF A DEVICE TO VIEW UNDER THE OUTER CLOTHING OF AN INDIVIDUAL — § 942.08(3)

Statutory Definition of the Crime

Invasion of privacy, as defined in § 942.08(3) of the Criminal Code of Wisconsin, is committed by one who knowingly installs or uses any device[1] to intentionally view, broadcast, or record under the outer clothing of an individual that individual's genitals, pubic area, breast, or buttocks, including genitals, pubic area, breasts, or buttocks that are covered by undergarments, or to intentionally view, broadcast, or record a body part of an individual that is not otherwise visible, without that individual's consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements are present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly (installed) (used) a device.
2. The defendant (installed) (used) the device to intentionally [(view) (broadcast) (record) under the outer clothing of an individual that individual's genitals, pubic area, breast, or buttocks, whether or not covered by undergarments] [(view) (broadcast) (record) a body part of an individual that is not otherwise visible].
3. (Name of victim) did not consent[2] to the (installation) (use) of the device.

4. The defendant knew (name of victim) did not consent to the (installation) (use) of the device.[3]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find out intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1395A was approved by the Committee in February 2016.

This instruction is for a violation of sub. (3) of § 942.08, which was created by 2015 Wisconsin Act 80 [effective date: November 13, 2015]. The offense is a Class I felony. Additional violation of § 942.08 are defined in subs. (2)(a) through (d). See Wis JI-Criminal 1392 for violations of sub. (2)(a) and Wis JI-Criminal 1395 for violations of sub. (2)(d); uniform instructions have not been drafted for the offenses defined in subs. (2)(b) or (2)(c).

1. The offense definition refers to "device, instrument, mechanism, or contrivance." The instruction refers only to "device," the Committee having concluded that the term is broad enough to include the other items referred to.

2. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

3. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally."

1396 REPRESENTATIONS DEPICTING NUDITY — § 942.09(2)(am)1.

Statutory Definition of the Crime

Section 942.09(2)(am)1. of the Criminal Code of Wisconsin is violated by a person who captures an intimate representation without the consent of the person depicted under circumstances in which he or she has a reasonable expectation of privacy, if the person knows or has reason to know that the person who is depicted does not consent to the capture of the intimate representation.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant captured an intimate representation.

Meaning of "Captures a Representation"

"Captures a representation" means takes a photograph, makes a motion picture, videotape, recording, or other visual or audio representation, or records or stores in any medium data that represents a visual image.[1]

Meaning Of "Intimate Representation"

"Intimate representation" means (a representation of a nude or partially nude person) (a representation of clothed, covered, or partially clothed or covered

genitalia or buttock that is not otherwise visible to the public) (a representation of a person urinating, defecating, or using a feminine hygiene product) (a representation of a person engaged in sexual intercourse or sexual contact).[2]

[**Meaning of "Nude or Partially Nude Person"]**[3]

["Nude or partially nude person" means (any human being who has less than fully and opaquely covered genitals, pubic area or buttocks) (any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple) (any male human being with covered genitals in a discernibly turgid state).]

2. The defendant captured the intimate representation without the consent of the person who is depicted.

Meaning Of "Without Consent"

"Without consent" means that (name) did not freely agree to the defendant capturing the intimate representation.[4]

3. The person was depicted under circumstances in which (he) (she) had a reasonable expectation of privacy.

Meaning of "Reasonable Expectation of Privacy"[5]

"Reasonable expectation of privacy" requires:

- that the person who was depicted nude had an actual expectation of privacy at the time in question; and

- that the expectation of privacy was reasonable.

4. The defendant knew or had reason to know that the person who is depicted did not consent to the capture of the intimate representation.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS H FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.[6]

If you find the defendant guilty, you must answer the following question:

Was (name of victim) under the age of 18 years at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1396 was originally published in 2002 and revised in 2007, 2009, and twice in 2016. This revision was approved by the Committee in December 2016; it reflects changes made to § 942.09 by 2015 Wisconsin Acts 292, 320, and 370.

This instruction is for a violation of sub. (2)(am)1. of § 942.09. Section 942.09 was formerly § 944.025, the original version of which was found to be unconstitutional in State v. Stevenson, 2000 WI 71, 236 Wis.2d 86, 613 N.W.2d 90. Section 944.025 was amended by 2001 Wisconsin Act 16, but those changes were superseded by 2001 Wisconsin Act 33, which renumbered the statute § 942.09 [effective date: December 18, 2001].

Two other offenses are defined in § 942.09(2)(am): making a reproduction of a representation captured in violation of sub. (2)(a) [see sub. (2)(am)2.]; and, possessing, distributing, or exhibiting a representation captured in violation of sub. (2)(a) [see sub. (2)(am)3.]. Uniform instructions have not been drafted for those offenses.

For violations of §§ 942.09(3m)(a)1. and 2., see Wis JI-Criminal 1398A and 1398B.

Subsection (2)(bm) of § 942.09 creates an exception for representations of nude children, captured or possessed by parents, that do not constitute violations of § 948.05, Sexual Exploitation of a Child, or § 948.12, Possession of Child Pornography. Subsection (2)(cm) extends the exception to those who receive a representation covered by sub. (2)(am) in a non-commercial context. Both provisions were amended by 2015 Wisconsin Act 370 [effective date: April 21, 2016]. Act 370 also created an exception to providers of an interactive computer service or an information service or telecommunications service if the representation is provided by a third party or the representation is provided to a person who posts or publishes a private representation that is newsworthy or of public importance. See § 942.09(2)(dm).

In State v. Adams, 2015 WI App 34, 361 Wis.2d 766, 863 N.W.2d 640, the defendant appealed his conviction for violating § 942.09(2)(am)1. He videotaped his sexual activity with a prostitute and argued that he had a legitimate reason for doing so – "to memorialize their illicit encounter in case she overdosed on drugs or later accused him of beating her up." ¶1. The court rejected the argument: "The victim did not relinquish her reasonable expectation of privacy by engaging in commercial sexual activity. Recording a nude person for legitimate reasons is not an element the state has to disprove and Adams's reasons are no defense to the crime." ¶1.

In State v. Schmucker, [No. 2014AP2165-CR] [Not published], the court of appeals affirmed a conviction for an attempt to violate § 942.09(2)(am)1., capturing a representation of nudity, based on taking a picture up a woman's skirt without consent. [Cited for informational purposes; see § 809.23(3)(b).] 2015 Wisconsin Act 80 [Eff. Date: Nov. 13, 2015] created § 942.08(3) to prohibit using a device to view under the outer clothing of an individual. Wis JI-Criminal 1395A has been approved as an instruction for this offense.

1. This is the definition provided in § 942.09(1)(a), without change. The references to "recording" and "audio" representations were added by 2015 Wisconsin Act 292 [effective date: April 1, 2016].

2. This is the definition provided in § 942.09(1)(ag), as created by 2015 Wisconsin Act 292 [effective date: April 1, 2016]. That definition provides a cross-reference to §§ 940.225(5)(b) and (c) for definitions of "sexual contact" and "sexual intercourse." See Wis JI-Criminal 1200A [sexual contact] and 1200B [sexual intercourse].

3. Add this definition when the basis for the representation being an "intimate representation" is that it involved a nude or partially nude person. The definition is the one provided in § 942.08(1)(a), which applies to this offense because of a cross-reference in § 942.09(1)(am).

4. § 942.09(1)(ae) defines "consent":

> ... words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to the act. A person who has not attained the age of 18 is incapable of consent. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11 (2):

1. A person suffering from a mental illness or defect that impairs capacity to appraise personal conduct.

2. A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The statutory definition is modeled on the one provided in § 940.225(4) for sexual assault. The instruction defines "without consent" in essentially the same manner as the instructions for sexual assault under § 940.225. A complete explanation of that definition is provided in, for example, footnote 2, Wis JI-Criminal 1201. Also see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for the victim's not being competent to give informed consent, suffering from a mental illness or defect, or being unconscious.

5. The definition of "reasonable expectation of privacy" is based on one used in the 2002 version of this instruction. The note in that instruction stated that the definition was based on the one used for 4th Amendment purposes.

In State v Nelson, 2006 WI App 124, 294 Wis.2d 578, 718 N.W.2d 168, the court of appeals acknowledged Wis JI-Criminal 1396 and the footnote referring to the 4th Amendment meaning of the term:

> The comment does not purport to be an analysis of whether "reasonable expectation of privacy" was intended by the legislature to import all Fourth Amendment case law applying this term, as Nelson argues. Moreover, there is no need to resort to Fourth Amendment case law, as opposed to the language of the statute, to arrive at the definition the comment refers to: the common and ordinary meaning of "a person who has a reasonable expectation of privacy" is that the person actually has an expectation of privacy and the expectation is a reasonable one.
> 2006 WI App 124, footnote 7.

The Committee believes the definition in the instruction is consistent with the Nelson decision.

In State v. Jahnke, 2009 WI App 4, 316 Wis.2d 324, 762 N.W.2d 696, the defendant argued that because his girlfriend knowingly exposed her nude body to him while he was secretly videotaping her, she had no "reasonable expectation of privacy." The court of appeals rejected the argument, concluding that "the phrase 'reasonable expectation of privacy' in Wis. Stat. § 942.09(2)(am)1. means a reasonable expectation under the circumstances that one will not be recorded in the nude." 2009 WI App 4, ¶14.

In State v. Adams, 2015 WI App 34, 361 Wis.2d 766, 863 N.W.2d 640, the court of appeals rejected the defendant's argument that a prostitute did not have a reasonable expectation of privacy when engaged in sexual activity with him: "Permission to be viewed in the nude does not mean permission to be recorded in the nude . . . That Adams and the woman were engaged in the crime of prostitution does not mean that the woman relinquished her reasonable expectation of privacy under § 942.09(2)(am)1." ¶5.

6. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of sec. 942.09: the offense is a Class H felony if the victim had not attained the age of 18 years at the time of the offense. See § 942.09(2)(dr). The instruction reflects this change by providing a special question to be used where the Class H felony is charged. If the Class H felony is not charged, the instruction should be used without the special question.

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1398A PUBLISHING A PRIVATE REPRESENTATION DEPICTING NUDITY WITHOUT CONSENT — § 942.09(3m)(a)1.

Statutory Definition of the Crime

Section 942.09(3m)(a)1. of the Criminal Code of Wisconsin is violated by a person who posts, publishes, or causes to be posted or published, a private representation if the actor knows that the person depicted does not consent to the posting or publication of the private representation.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [(posted) (published)][1] [(caused to be (posted) (published)] a private representation.
2. The defendant knew that the person who is depicted did not consent to the (posting) (publication) of the private representation.

Meaning of "Representation"

"Representation" means a photograph, exposed film, motion picture, videotape, recording, other visual or audio representation, or data that represents a visual image or audio recording.[2]

Meaning of "Did Not Consent"

"Did not consent" means that (name) did not freely agree to the (posting) (publishing) of the private representation.[3]

Meaning of "Private Representation"

"Private representation" means a representation depicting a nude or partially nude person or depicting a person engaging in sexually explicit conduct that is intended by the person depicted in the representation to be captured, viewed, or possessed only by the person who, with the consent of the person depicted, captured the representation or to whom the person depicted directly and intentionally gave possession of the representation.[4]

Meaning of "Nude or Partially Nude Person"

"Nude or partially nude person" means [any human being who has less than fully and opaquely covered genitals, pubic area or buttocks] [any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple] [any male human being with covered genitals in a discernibly turgid state].[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.[6]

If you find the defendant guilty, you must answer the following question:

Was (name of victim) under the age of 18 years at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1398A was originally published in 2015 and revised in 2017 and 2018. The 2017 revision reflected changes made to § 942.09 by 2015 Wisconsin Acts 292, 320, and 370. The 2018 revision made an editorial correction in the definition of "representation." This revision was approved by the Committee in 2019; it added to the Comment to reflect changes made by 2019 Wisconsin Act 16.

This instruction is for a violation of sub. (3m)(a)1. of § 942.09 as created by 2013 Wisconsin Act 243 [effective date: April 10, 2014].

A second, very similar offense is defined in § 942.09(3m)(a)2. that applies to one who: "posts, publishes, or causes to be posted or published, a depiction of a person that he or she knows is a private representation, without the consent of the person depicted." See Wis JI-Criminal 1398B.

Exceptions to the applicability of sub. (3m) are set forth in sub. (3m)(b)1. through 4. Subdivision 1 was amended by 2015 Wisconsin Act 370 [effective date: April 21, 2016] The instruction does not address the exceptions.

1. Section 942.09(1)(bg) states: "'Post or publish' includes posting or publishing on a Web site on the Internet, if the Web site may be viewed by the general public."

2. This is the definition provided in § 942.09(1)(c).

3. § 942.09(1)(ae) defines "consent":

> . . . words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to the act. A person who has not attained the age of 18 is incapable of consent. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11(2):
>
> 1. A person suffering from a mental illness or defect that impairs capacity to appraise personal conduct.
> 2. A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The statutory definition is modeled on the one provided in § 940.225(4) for sexual assault. The instruction defines "did not consent" in essentially the same manner as the instructions for sexual assault under § 940.225 define "without consent." A complete explanation of that definition is provided in, for example, footnote 2, Wis JI-Criminal 1201. Also see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for the victim's not being competent to give informed consent, suffering from a mental illness or defect, or being unconscious.

4. This is the definition provided in § 942.09(1)(bn).

If a definition of "sexually explicit conduct" is believed to be necessary, § 942.09(1)(d) provides that the definition of the term in § 948.01(7) applies:

"Sexually explicit conduct" means actual or simulated:

(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts. See Wis. Stat. 948.01(1t) for definition of this term.

5. This is the definition provided in § 942.08(1)(a), which applies to this offense because of a cross-reference in § 942.09(1)(am).

6. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of sec. 942.09: the offense is a Class I felony if the victim had not attained the age of 18 years at the time of the offense. See § 942.09(3m)(am). The instruction reflects this change by providing a special question to be used where the Class I felony is charged. If the Class I felony is not charged, the instruction should be used without the special question.

1398B PUBLISHING A DEPICTION THAT IS KNOWN TO BE A PRIVATE REPRESENTATION OF NUDITY WITHOUT CONSENT— § 942.09(3m)(a)2.

Statutory Definition of the Crime

Section 942.09(3m)(a)2. of the Criminal Code of Wisconsin is violated by a person who posts, publishes, or causes to be posted or published, a depiction of a person that he or she knows is a private representation without the consent the person depicted.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [(posted) (published)][1] [(caused to be (posted) (published)] a depiction of a person.
2. The defendant knew that the depiction was a private representation.
3. The person who is depicted did not consent to the (posting) (publication) of the private representation.

Meaning of "Representation"

"Representation" means a photograph, exposed film, motion picture, videotape, recording, other visual or audio representation, or data that represents a visual image or audio recording.[2]

Meaning of "Did Not Consent"

"Did not consent" means that (name) did not freely agree to the (posting) (publishing) of the private representation.[3]

Meaning of "Private Representation"

"Private representation" means a representation depicting a nude or partially nude person or depicting a person engaging in sexually explicit conduct that is intended by the person depicted in the representation to be captured, viewed, or possessed only by the person who, with the consent of the person depicted, captured the representation or to whom the person depicted directly and intentionally gave possession of the representation.[4]

Meaning of "Nude or Partially Nude Person"

"Nude or partially nude person" means [any human being who has less than fully and opaquely covered genitals, pubic area or buttocks] [any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple] [any male human being with covered genitals in a discernibly turgid state].[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD

NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.[6]

If you find the defendant guilty, you must answer the following question:

Was (name of victim) under the age of 18 years at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1398B was originally published in 2015 and revised in 2017, 2018, and 2019. The 2017 revision reflected changes made to § 942.09 by 2015 Wisconsin Acts 292, 320, and 370. The 2018 revision made an editorial correction in the definition of "representation." This revision was approved by the Committee in 2019; it added to the Comment to reflect changes made by 2019 Wisconsin Act 16.

This instruction is for a violation of sub. (3m)(a)2. of § 942.09 as created by 2013 Wisconsin Act 243 [effective date: April 10, 2014].

A second, very similar offense is defined in § 942.09(3m)(a)1. that applies to one who: "posts, publishes, or causes to be posted or published, a private representation if the actor knows that the person depicted did not consent to the posting or publication . . ." See Wis JI-Criminal 1398A.

In State v. Culver, 2018 WI App 55, 384 Wis.2d 222, 918 N.W.2d 103, the Wisconsin Court of Appeals held that § 942.09(3m)(a)2. was not overbroad in violation of the First Amendment and was unconstitutionally vague.

Exceptions to the applicability of sub. (3m) are set forth in sub. (3m)(b)1. through 4. Subdivision 1 was amended by 2015 Wisconsin Act 370 [effective date: April 21, 2016] The instruction does not address the exceptions.

1. Section 942.09(1)(bg) states: "'Post or publish' includes posting or publishing on a Web site on the Internet, if the Web site may be viewed by the general public."

2. This is the definition provided in § 942.09(1)(c).

3. § 942.09(1)(ae) defines "consent":

> . . . words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to the act. A person who has not attained the age of 18 is incapable of

consent. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11(2):

1. A person suffering from a mental illness or defect that impairs capacity to appraise personal conduct.
2. A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The statutory definition is modeled on the one provided in § 940.225(4) for sexual assault. The instruction defines "did not consent" in essentially the same manner as the instructions for sexual assault under § 940.225 define "without consent." A complete explanation of that definition is provided in, for example, footnote 2, Wis JI-Criminal 1201. Also see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for the victim's not being competent to give informed consent, suffering from a mental illness or defect, or being unconscious.

4. This is the definition provided in § 942.09(1)(bn).

If a definition of "sexually explicit conduct" is believed to be necessary, § 942.09(1)(d) provides that the definition of the term in § 948.01(7) applies:

"Sexually explicit conduct" means actual or simulated:

(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts. See Wis. Stat. 948.01(1t) for definition of this term.

5. This is the definition provided in § 942.08(1)(a), which applies to this offense because of a cross-reference in § 942.09(1)(am).

6. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of sec. 942.09: the offense is a Class I felony if the victim had not attained the age of 18 years at the time of the offense. See § 942.09(3m)(am). The instruction reflects this change by providing a special question to be used where the Class I felony is charged. If the Class I felony is not charged, the instruction should be used without the special question.

1399 SOLICITING AN INTIMATE OR PRIVATE REPRESENTATION — § 942.09(4)

Statutory Definition of the Crime

Section 942.09(4) of the Criminal Code of Wisconsin is violated by a person who solicits an intimate or private representation from a person who the actor believes or has reason to believe has not attained the age of 18 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant solicited an intimate or private representation from a person.
2. The defendant believed or had reason to believe that the person had not attained the age of 18 years at the time of the alleged offense.

Meaning of "Representation"

"Representation" means a photograph, exposed film, motion picture, videotape, recording, other visual or audio representation, or data that represents a visual image or audio recording.[1]

[Meaning Of "Intimate Representation"]

["Intimate representation" means (a representation of a nude or partially nude person) (a representation of clothed, covered, or partially clothed or

covered genitalia or buttock that is not otherwise visible to the public) (a representation of a person urinating, defecating, or using a feminine hygiene product) (a representation of a person engaged in sexual intercourse or sexual contact).][2]

[Meaning of "Private Representation"]

["Private representation" means a representation depicting a nude or partially nude person or depicting a person engaging in sexually explicit conduct that is intended by the person depicted in the representation to be captured, viewed, or possessed only by the person who, with the consent of the person depicted, captured the representation or to whom the person depicted directly and intentionally gave possession of the representation.][3]

[**Meaning of "Nude or Partially Nude Person"**][4]

["Nude or partially nude person" means (any human being who has less than fully and opaquely covered genitals, pubic area or buttocks) (any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple) (any male human being with covered genitals in a discernibly turgid state).]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1399 was approved by the Committee in February 2018.

This instruction is for a violation of sub. (4) of § 942.09, which was created by 2017 Wisconsin Act 129 [effective date: December 10, 2017]. The offense does not apply if the person soliciting the representation has not attained the age of 18 years. See sub. (4)(c). The offense is a Class I felony, unless the defendant is under age 21 and not more than three years older than the victim – then it is a Class A misdemeanor. See sub. (4)(b).

1. This is the definition provided in § 942.09(1)(c).

2. This is the definition provided in § 942.09(1)(ag), as created by 2015 Wisconsin Act 292 [effective date: April 1, 2016]. That definition provides a cross reference to §§ 940.225(5)(b) and (c) for definitions of "sexual contact" and "sexual intercourse." See Wis JI-Criminal 1200A [sexual contact] and 1200B [sexual intercourse].

3. This is the definition provided in § 942.09(1)(bn).

If a definition of "sexually explicit conduct" is believed to be necessary, § 942.09(1)(d) provides that the definition of the term in § 948.01(7) applies:

"Sexually explicit conduct" means actual or simulated:

(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts.

4. Add this definition when the basis for the representation being an "intimate representation" or "private representation" is that it involved a nude or partially nude person. The definition is the one provided in § 942.08(1)(a), which applies to this offense because of a cross-reference in § 942.09(1)(am).

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1400 CRIMINAL DAMAGE TO PROPERTY — § 943.01

Statutory Definition of the Crime

Criminal damage to property, as defined in § 943.01 of the Criminal Code of Wisconsin, is committed by one who intentionally causes damage to the physical property of another person without the consent of that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused damage to physical property.

   The word "damage" includes anything from mere defacement to total destruction.[1]

2. The defendant intentionally caused the damage.

   The term "intentionally" means that the defendant must have had the mental purpose to damage the property or was aware that the conduct was practically certain to cause that result.[2]

3. The property belonged to (name of owner, agent, etc.).[3]

4. The defendant caused the damage without the consent[4] of (name of owner, agent, etc.).

5. The defendant knew the property belonged to another and knew that the property owner did not consent to the damage.[5]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE FELONY OFFENSE IS CHARGED, AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE PROPERTY WAS REDUCED IN VALUE BY MORE THAN $2,500.[6]

[Finding the Reduction in the Value of the Property]

[If you find the defendant guilty, answer the following question:

"Was the property reduced in value by more than $2,500?"

Answer: "yes" or "no."

"Reduced in value" means what it would cost to repair or replace the property, whichever is less.[7] Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the property was reduced in value by more than $2,500.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING DAMAGE TO MORE THAN ONE ITEM OF PROPERTY "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 943.01(3).[8]

[In determining the amount by which the value of the property was reduced, you may consider all damage that you are satisfied beyond a reasonable doubt was caused by acts of the defendant pursuant to a single intent and design.]

COMMENT

Wis JI-Criminal 1400 was originally published in 1976 and revised in 1977, 1987, 1995, 1999, and 2002. This revision was approved by the Committee in February 2020; it added to the comment.

This instruction is for violations of § 943.01. The basic offense is a Class A misdemeanor. The penalty increases to a Class H felony under circumstances specified in sub. (2k). The penalty increases to a Class I felony in six situations specified in sub. (2), one of which is addressed by this instruction: where the amount of property damage exceeds $2,500. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001.

The offense is a Class I felony if the property damaged is a coin or card operated machine damaged in the course of a theft. See Wis JI-Criminal 1400A.

The offense is a Class H felony if the property damaged is owned, leased, or operated by an energy provider [sub. (2k)]. See Wis JI-Criminal 1400B.

"Energy" provider means any of the following:

1. A public utility under s. 196.01 (5) (a) that is engaged in any of the following: (a) The production, transmission, delivery, or furnishing of heat, power, light, or water. (b)The transmission or delivery of natural gas.
2. A transmission company under s. 196.485 (1) (ge).
3. A cooperative association organized under ch. 185 for the purpose of producing or furnishing heat, light, power or water for its members.
4. A wholesale merchant plant under s. 196.491 (1) (w), except that "wholesale merchant plant" includes an electric generating facility or an improvement to an electric generating facility that is subject to a leased generation contract, as defined in s.196.52 (9) (a) 3.
5. A decommissioned nuclear power plant.
6. A company that operates a gas, oil, petroleum, refined petroleum product, renewable fuel, water, or chemical generation, storage transportation, or delivery system that is not a service station, garage, or other place where gasoline or diesel fuel is sold at retailer offered for sale at retail.

The court should inquire whether the parties agree that the entity whose property is at issue is a qualified energy provider. If there is no agreement, the court should require the state designate under which subsection they are proceeding.

The offense is also a Class I felony where the property damaged:

- is a vehicle or highway and the damage is of a kind which is likely to cause injury to a person or further property damage [sub. (2)(a)2.]

- belongs to a public utility or common carrier and the damage is of a kind which is likely to impair the services of the public utility or common carrier [sub. (2)(c)]

- belongs to a person who is or was a grand or petit juror and the damage was caused by reason of any verdict or indictment assented to by the owner [sub. (2)(c)]

- is on state-owned land and is listed on the registry under sub. (5) [sub. (2)(e)]

- is a rock art site listed on the national register of historic places in Wisconsin [sub. (2)(f)2.]

- plant material used in research [sub. (2d), as created by 2001 Wisconsin Act 16; effective date: September 1, 2001]

If one of the above is alleged, the Committee recommends handling it with a special question, in the same manner that the value question is handled in this instruction.

"Common carrier" is defined in § 194.01. Also see Brockway v. Travelers Ins. Co., 107 Wis.2d 636, 638, 321 N.W.2d 332 (Ct. App. 1982): "Two elements characterize a carrier as a common carrier: (1) The service is for hire, and (2) the carrier holds itself out to the public."

There are other statutes which provide special criminal damage to property provisions for certain situations:

- § 943.01(2k) Criminal damage to property: energy provider property. See Wis JI-Criminal 1400B.

- § 943.011 Criminal damage or threat to property of witness. See Wis JI-Criminal 1400C.

- § 943.012 Criminal damage to religious and other property. See Wis JI-Criminal 1401.

- § 943.013 Criminal damage; threat; property of judge. See Wis JI-Criminal 1402A.

- § 943.015 Criminal damage; threat; property of department of revenue employee. See Wis JI-Criminal 1402B.

1. See Vol. V 1953 Judiciary Report on the Criminal Code, Wisconsin Legislative Council, page 97 (February 1953).

2. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923.1.

3. Section 939.22(28) provides the following definition of "property of another": "'Property of another' means property in which a person other than the defendant has a legal or equitable interest which the defendant has no right to defeat or impair, even though the defendant may also have a legal or equitable interest in the property."

In State v. Sevelin, 204 Wis.2d 127, 131, 554 N.W.2d 521 (Ct. App. 1996), the court held that § 939.22(48) "unambiguously means that a person can be convicted of criminal damage to property even though he or she has an ownership interest if someone else also has an ownership interest." Thus, the defendant's conviction was affirmed where the charge was based on his damaging his own marital home, because his wife also had an ownership interest in the home.

4. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

5. See § 939.23(3).

6. A misdemeanor charge requires no finding as to reduction in value. This instruction and the verdict question need be given only if a felony is charged and the evidence would support a finding of damage exceeding $2,500. The value level was increased to $2,500 by 2001 Wisconsin Act 2001, effective date: September 1, 2001.

7. § 943.01(2)(d).

8. This material deals with the issue addressed by § 943.01(3) which provides:

> Where more than one item of property is damaged under a single intent and design, the damage to all the property may be prosecuted as a single forfeiture offense or crime.

The Committee's research on the issue of whether this need be submitted to the jury can be summarized as follows: (1) there is no case law dealing with subsec. (3) of the criminal damage to property statute; (2) § 943.01(3) was modeled after the provision applicable to theft cases, now found at § 971.36; (3) an instructive case, State v. Spraggin, dealt with a similar situation in the context of receiving stolen property; and (4) while there may be equally effective ways of dealing with the issue, the Committee concluded that the question of whether all property was damaged pursuant to a single intent and design must be submitted to the jury.

No reported appellate opinion could be found that dealt with the multiple items of property issue. Subsection (3) of § 943.01 was not part of the criminal damage to property statute included in the 1953 draft of the Criminal Code. It was added during the 1954-55 review by the advisory committee and was modeled after the statute then in effect and applicable to theft cases. That statute (formerly § 355.31) now appears, virtually without change, as § 971.36. No cases were found that discuss § 971.36 or its predecessor.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 943.01(3) or § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (71 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal. App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis. 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury should include damage to "all property which you find, beyond a reasonable doubt, to have been damaged pursuant to a single intent or design."

1400A CRIMINAL DAMAGE TO PROPERTY: VENDING AND OTHER MACHINES — § 943.01(2g)

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER WIS JI-CRIMINAL 1400, CRIMINAL DAMAGE TO PROPERTY.[1]

Determining Damage to Coin- or Card- Operated Machines

If you find the defendant guilty, you must answer the following question:

"Did the defendant commit the crime of criminal damage to property under all of the following circumstances:

1) the property damaged was a machine operated by the insertion of coins, currency, debit cards or credit cards; and,

2) the defendant acted with the intent to commit a theft from the machine; and,

3) the property was reduced in value by more than $500 but not more than $2,500."

"Intent to commit theft" requires that the defendant acted with the purpose to take and carry away property of another without consent and with the intent to deprive the owner permanently of possession of that property.[2]

Property is "reduced in value" by the amount that it would cost to repair or replace it, whichever is less, plus other monetary losses associated with the damage.[3]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of criminal damage to property under all these circumstances, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1400A was originally published in 1997 and revised in 2002. This revision was approved by the Committee in April 2016; it updated the Comment.

The instruction was revised in 2001 to reflect the change in the value level that determines the penalty: it was increased to $2,500 by 2001 Wisconsin Act 16, effective September 1, 2001.

This instruction addresses subsection (2g) of § 943.01, created by 1995 Wisconsin Act 133. [Effective date: January 6, 1996]. Committing criminal damage to property under the circumstances specified in subsection (2g) increases the penalty to a Class I felony. As with similar provisions, the Committee recommends submitting this issue as a special question, to be considered by the jury if it reaches a guilty verdict on the criminal damage to property charge. The instruction assumes a case involving conduct which falls into the special niche created by § 943.01(2g): damage to a vending or other machine amounting to more than $500 but less than $2,500. See note 1, below.

The following form is suggested for the guilty verdict:

> We, the jury, find the defendant guilty of criminal damage to property, under Wis. Stat. § 943.01, at the time and place charged in the information.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> "Did the defendant commit the crime of criminal damage to property under all of the following circumstances:
>
> 1) the property damaged was a machine operated by the insertion of coins, currency, debit cards or credit cards; and,
>
> 2) the defendant acted with the intent to commit a theft from the machine; and,
>
> 3) the property was reduced in value by more than $500 but not more than $2,500."

1. This instruction should be given after the basic instruction on criminal damage to property, Wis JI-Criminal 1400, in place of the value question that is provided at the end of that instruction. This assumes that the case is charged as one falling into the special niche created by § 943.01(2g): damage to a vending or other machine amounting to more than $500 but less than $2.500. Damage to a vending machine that exceeded $2,500 could, of course, be charged under the regular penalty provisions and would also be a Class I felony. In that case, the value question at the end of Wis JI-Criminal 1400 should be used.

2. The statute uses the term "intent to commit theft." The definition provided here is what has been used to define "intent to steal." See, for example, Wis JI-Criminal 1421, Burglary With Intent To Steal. For a complete definition of the crime of theft as defined in § 943.20(1)(a), see Wis JI-Criminal 1441.

3. This is the definition of "reduced in value" provided in § 943.01(2g)(c). Note that it differs from the standard for determining value provided in § 943.01(2)(d) in that it allows consideration of "other monetary

losses associated with the damage."

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1400B CRIMINAL DAMAGE TO PROPERTY: ENERGY PROVIDER PROPERTY — § 943.01(2k)

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER WIS JI-CRIMINAL 1400, CRIMINAL DAMAGE TO PROPERTY. [1]

Determining Damage to Energy Provider Property

If you find the defendant guilty, you must answer the following question:

"Did the defendant commit the crime of criminal damage to property under all of the following circumstances:

1) the property damaged was owned, leased, or operated by an energy provider; and,

2) the defendant intended to or did cause substantial interruption or impairment of any service or good provided by the energy provider."

[A decommissioned nuclear power plant is an energy provider.][2]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of criminal damage to property under all these circumstances, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1400B was approved by the Committee in February 2019.

This instruction addresses subsection (2k) of § 943.01, created by 2015 Wisconsin Act 158. [Effective date: March 2, 2016]. Committing criminal damage to property under the circumstances specified in subsection (2k) increases the penalty to a Class H felony. As with similar provisions, the Committee recommends submitting this issue as a special question, to be considered by the jury if it reaches a guilty verdict on the criminal damage to property charge. The instruction assumes a case

involving conduct which falls into the special niche created by § 943.01(2k): damage to energy provider property. See note 1, below.

The following form is suggested for the guilty verdict:

We, the jury, find the defendant guilty of criminal damage to property, under Wis. Stat. § 943.01, at the time and place charged in the information.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant commit the crime of criminal damage to property under all of the following circumstances:

1) the property damaged was owned, leased, or operated by an energy provider; and,

2) the defendant intended to or did cause substantial interruption or impairment of any service or good provided by the energy provider.

1. This instruction should be given after the basic instruction on criminal damage to property, Wis JI-Criminal 1400, in place of the value question that is provided at the end of that instruction. This assumes that the case is charged as one falling into the special niche created by § 943.01(2k): damage to energy provider property. Damage to energy provider property that exceeded $2,500 could, of course, be charged under the regular penalty provisions and would be a Class D felony. In that case, the value question at the end of Wis JI-Criminal 1400 should be used.

2. "Specify the applicable category of energy provider." Section 943.143(1)(a) provides:

"Energy provider" means any of the following:

1. A public utility under s. 196.01 (5) (a) that is engaged in any of the following: (a) The production, transmission, delivery, or furnishing of heat, power, light, or water. (b) The transmission or delivery of natural gas.
2. A transmission company under s. 196.485 (1) (ge).
3. A cooperative association organized under ch. 185 for the purpose of producing or furnishing heat, light, power or water for its members.
4. A wholesale merchant plant under s. 196.491 (1) (w), except that "wholesale merchant plant" includes an electric generating facility or an improvement to an electric generating facility that is subject to a leased generation contract, as defined in s.196.52 (9) (a) 3.
5. A decommissioned nuclear power plant.
6. A company that operates a gas, oil, petroleum, refined petroleum product, renewable fuel, water, or chemical generation, storage transportation, or delivery system that is not a service station, garage, or other place where gasoline or diesel fuel is sold at retail or offered for sale at retail.

The court should inquire whether the parties agree that the entity whose property is at issue is a qualified energy provider. If there is no agreement, the court should require that the state designate under which subsection they are proceeding.

1400C DAMAGE OR THREAT TO PROPERTY OF A WITNESS — § 943.011

Statutory Definition of the Crime

Section 943.011 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) damage to any physical property owned by a person who is or was a witness by reason of the owner having attended or testified as a witness and without the owner's consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) damage to physical property that belonged to (name of victim).

   The word "damage" includes anything from mere defacement to total destruction.[1]

   IF THE CASE INVOLVES CAUSING DAMAGE, ADD THE FOLLOWING:

   ["Cause" means that the defendant's conduct was a substantial factor in producing damage.][2]

   IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][3]

2. (Name of victim) was a witness.

["Witness" means any person who has attended a proceeding to testify or who has testified.][4]

[A [insert proper term from the definition in § 940.41(3)] is a witness.]

3. The defendant (caused) (threatened to cause) damage to physical property owned by (name of victim) because[5] the person attended or testified as a witness.

4. The defendant (caused) (threatened to cause) damage to the property without the consent[6] of (name of victim).

5. The defendant acted intentionally.[7] This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) damage to property owned by (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent.[8]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1400C was originally published in 1998 and revised in 2004 and 2020. The 2004 revision involved adoption of a new format, adding a definition of "true threat," and nonsubstantive changes in the text. The instruction was previously designated as Wis JI-Criminal 1400B and was renumbered JI 1400C in 2020. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

This instruction is for violations of § 943.011(2)(a), which was created by 1997 Wisconsin Act 143, effective date: May 5, 1998. Causing criminal damage to the property of a witness was formerly addressed by increasing the penalty for violations of § 943.01, Criminal Damage To Property. Act 143 deleted reference to witnesses from § 943.01 and expanded the scope of the statute by including threats to damage property and, in sub. (2)(b), threats to cause and causing of damage to property owned by family members of a witness. If damage to the property of a family member of a witness is involved, the instruction must be modified.

1. The definition of "damage" is the one provided in Wis JI-Criminal 1400, Criminal Damage To Property. See Vol. V 1953 Judiciary Report on the Criminal Code, Wisconsin Legislative Council, page 97 (February 1953).

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of damage. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also, see Wis JI-Criminal 901, Cause.

3. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

4. The definition of "witness" in the first set of brackets is a simplified version of the definition provided in § 940.41(3), which applies to violations of § 943.011. If that statement does not fit the status of the victim, the definition in the second set of brackets should be used, selecting the proper alternative from the full definition, which reads as follows:

> (3) "Witness" means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under § 885.01 or under the authority of any court of this state or of the United States.

5. The instruction uses "because" in place of the statutory language "by reason of . . ." The Committee intended no substantive change and believed the instruction will be easier for a jury to understand if "because" is used.

6. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

7. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.207, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

8. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

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1401A CRIMINAL DAMAGE TO RELIGIOUS OR CEMETERY PROPERTY — § 943.012(1) & (2)

Statutory Definition of the Crime

Criminal damage to property, as defined in [§ 943.012(1)] [§ 943.012(2)] of the Criminal Code of Wisconsin, is committed by one who intentionally causes damage[1] to [religious] [cemetery] property[2] of another person without the person's consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused damage to property of another.[3]

   The word "damage" includes anything from mere defacement to total destruction.[4]

2. The defendant intentionally caused the damage.

   The term "intentionally" requires that the defendant had the mental purpose to damage the property or was aware that the conduct was practically certain to cause that result.[5]

3. The defendant caused the damage without the consent[6] of <u>(name of owner, agent, etc.)</u> .

4. The property was [religious] [cemetery] property.

["Religious property" means any church, synagogue, or other building, structure, or place primarily used for religious worship or another religious purpose.][7]

["Cemetery property" means any cemetery, mortuary, other facility used for burial or memorializing the dead.][8]

5. The defendant knew the property was [religious] [cemetery] property, knew the property belonged to another person, and knew that the other person did not consent to the damage.[9]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1402 in 1989. It was renumbered Wis JI-Criminal 1402 in 1995. This revision renumbered the instruction as Wis JI-Criminal 1401A, was approved by the Committee in December 2002 and involved adoption of a new format.

This instruction is for violations of subs. (1) and (2) § 943.012, a statute created by 1987 Wisconsin Act 348. That Act also created § 939.645, which provides an increased penalty for crimes committed against certain persons or property. See Wis JI-Criminal 996 and 996.1.

Subsection (1) of § 943.012 prohibits damage to "religious property;" subsection (2) prohibits damage to "any cemetery, mortuary or other facility used for burial or memorializing the dead." The latter is referred to as "cemetery property" in the instruction. For violations of subsec. (3) – damage to schools and other facilities associated with religious and other groups – see Wis JI-Criminal 1401B. For violations of sub. (4) – damage to personal property contained in property covered by subs. (1) through (3) – see Wis JI-Criminal 1401C.

1. The instruction refers only to "damage," but the statute also applies to one who "intentionally marks, draws or writes with ink or another substance on or intentionally etches into" any physical property. If a case involves conduct prohibited by the statute that is not covered by the general term "damage," the instruction must be modified.

2. This instruction is for violations of subs. (1) and (2) of § 943.012, which prohibit damage to "any church, synagogue or other building, structure or place primarily used for religious worship or another religious purpose" and to "any cemetery, mortuary or other facility used for burial or memorializing the dead." The instruction refers to the former as "religious property" and to the latter as "cemetery property." Definitions are provided in element 4.

3. Section 939.22(38) provides the following definition of "property of another": "'Property of another' means property in which a person other than the defendant has a legal or equitable interest which the defendant has no right to defeat or impair, even though the defendant may also have a legal or equitable interest in the property." Also see, State v. Sevelin, 204 Wis.2d 127, 131, 554 N.W.2d 521 (Ct. App. 1996), regarding damage to marital property, discussed in note 3, Wis JI-Criminal 1400.

4. The definition of "damage" is based on the one used in Wis JI-Criminal 1400, Criminal Damage To Property. See Vol. V 1953 Judiciary Report on the Criminal Code, Wisconsin Legislative Council, page 97 (February 1953).

5. See § 939.23(3) and Wis JI-Criminal 923B.

6. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

7. "Religious property" is a shorthand reference to the category of property covered by sub. (1) of § 943.012. See note 2, supra. The definition of the term is based on the full description of that category of property.

8. "Cemetery property" is a shorthand reference to the category of property covered by sub. (2) of § 943.012. See note 2, supra. The definition of the term is based on the full description of that category of property.

9. The three aspects of the knowledge requirement come from applying § 939.23(3): "intentionally" requires knowledge of all facts necessary to make the conduct criminal and appearing after the "intentionally" in the statute. Further, § 943.012 specifically requires "knowledge of the character of the property."

1401B CRIMINAL DAMAGE TO FACILITIES ASSOCIATED WITH DESIGNATED GROUPS — § 943.012(3)

Statutory Definition of the Crime

Criminal damage to property, as defined in § 943.012(3) of the Criminal Code of Wisconsin, is committed by one who intentionally causes damage[1] to property of another person without the person's consent, where the property is a school, educational facility, or community center publicly identified as associated with a group of persons of a particular race, religion, color, disability, sexual orientation, national origin, or ancestry, or by an institution of any such group.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused damage to property of another.[2]

   The word "damage" includes anything from mere defacement to total destruction.[3]

2. The defendant intentionally caused the damage.

   The term "intentionally" requires that the defendant had the mental purpose to damage the property or was aware that the conduct was practically certain to cause that result.[4]

3. The defendant caused the damage without the consent[5] of (name of owner, agent, etc.) .

4. The property was a (school) (educational facility) (community center) publicly identified as associated with a group of persons of a particular (race) (religion) (color) (disability) (sexual orientation) (national origin or ancestry) (or by an institution of any such group).

5. The defendant knew the property belonged to another person, knew that the other person did not consent to the damage, and knew that the property was a (school) (educational facility) (community center) publicly identified as associated with a group of persons of a particular (race) (religion) (color) (disability) (sexual orientation) (national origin or ancestry) (or by an institution of any such group).[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1401B was approved by the Committee in December 2002.

This instruction is for violations of sub. (3) of § 943.012, a statute created by 1987 Wisconsin Act 348. That Act also created § 939.645, which provides an increased penalty for crimes committed against certain persons or property. See Wis JI-Criminal 996 and 996.1.

For violations of subsecs. (1) and (2), damage to religious and cemetery property, see Wis JI-Criminal 1401A. For violations of sub. (4) – damage to personal property contained in property covered by subs. (1) through (3) – see Wis JI-Criminal 1401C.

1. The instruction refers only to "damage," but the statute also applies to one who "intentionally marks, draws or writes with ink or another substance on or intentionally etches into" any physical property. If a case involves conduct prohibited by the statute that is not covered by the general term "damage," the instruction must be modified.

2. Section 939.22(38) provides the following definition of "property of another": "'Property of another' means property in which a person other than the defendant has a legal or equitable interest which the defendant has no right to defeat or impair, even though the defendant may also have a legal or equitable interest in the property." Also see, State v. Sevelin, 204 Wis.2d 127, 131, 554 N.W.2d 521 (Ct. App. 1996), regarding damage to marital property, discussed in note 3, Wis JI-Criminal 1400.

3. The definition of "damage" is based on the one used in Wis JI-Criminal 1400, Criminal Damage To Property. See Vol. V 1953 Judiciary Report on the Criminal Code, Wisconsin Legislative Council, page 97 (February 1953).

4. See § 939.23(3) and Wis JI-Criminal 923B.

5. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

6. The three aspects of the knowledge requirement come from applying § 939.23(3): "intentionally" requires knowledge of all facts necessary to make the conduct criminal and appearing after the "intentionally" in the statute. Further, § 943.012 specifically requires "knowledge of the character of the property."

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1401C CRIMINAL DAMAGE TO PERSONAL PROPERTY CONTAINED IN RELIGIOUS, CEMETERY OR OTHER PROPERTY — § 943.012(4)

Statutory Definition of the Crime

Criminal damage to property, as defined in § 943.012(4) of the Criminal Code of Wisconsin, is committed by one who intentionally causes damage[1] to personal property contained in[2] [religious property] [cemetery property] [(describe) [3]] of another person without the person's consent, where the personal property has particular significance or value to a particular group and the defendant knows that the property has that significance or value.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused damage to personal property of another.[4]

   The word "damage" includes anything from mere defacement to total destruction.[5]

2. The defendant intentionally caused the damage.

   The term "intentionally" requires that the defendant had the mental purpose to damage the property or was aware that the conduct was practically certain to cause that result.[6]

3. The defendant caused the damage without the consent[7] of (name of owner, agent, etc.) .

4. The personal property was contained in

[religious property. "Religious property" means any church, synagogue, or other building, structure, or place primarily used for religious worship or another religious purpose.][8]

[cemetery property. "Cemetery property" means any cemetery, mortuary, or other facility used for burial or memorializing the dead.][9]

[a (school) (educational facility) (community center) publicly identified as associated with a group of persons of a particular (race) (religion) (color) (disability) (sexual orientation) (national origin or ancestry) (or by an institution of any such group).][10]

5. The personal property had particular significance or value to (describe group) .[11]

6. The defendant knew the property was [religious property] [cemetery property] [(describe)],[12] knew the property belonged to another person, knew that the other person did not consent to the damage, and knew that the property had particular significance or value to (describe group) .[13]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was approved by the Committee in December 2002.

This instruction is for violations of sub. (4) of § 943.012, a statute created by 1987 Wisconsin Act 348. That Act also created § 939.645, which provides an increased penalty for crimes committed against certain persons or property. See Wis JI-Criminal 996 and 996.1.

For violations of subsecs. (1) and (2), damage to religious and cemetery property, see Wis JI-Criminal 1401A. For violations of sub. (3), damage to facilities belonging to certain groups, see Wis JI-Criminal 1401B.

1. The instruction refers only to "damage," but the statute also applies to one who "intentionally marks, draws or writes with ink or another substance on or intentionally etches into" any physical property. If a case involves conduct prohibited by the statute that is not covered by the general term "damage," the instruction must be modified.

2. This instruction is for violations of sub. (4) of § 943.012, which prohibits damage to "any personal property contained in any property under subs. (1) to (3)." The instruction refers to the "religious property" and "cemetery property" which are shorthand terms for the property specified in subs. (1) and (2). The instruction provides a blank in which to describe the type of property specified in sub. (3). See note 3, below. Definitions are provided in element 4.

3. Here describe the applicable type of property from those designated in sub. (3) of § 943.012, which refers to "any school, educational facility or community center publicly identified as associated with a group of persons of a particular race, religion, color, disability, sexual orientation, national origin or ancestry or by an institution of any such group."

4. Section 939.22(38) provides the following definition of "property of another": "'Property of another' means property in which a person other than the defendant has a legal or equitable interest which the defendant has no right to defeat or impair, even though the defendant may also have a legal or equitable interest in the property." Also see, State v. Sevelin, 204 Wis.2d 127, 131, 554 N.W.2d 521 (Ct. App. 1996), regarding damage to marital property, discussed in note 3, Wis JI-Criminal 1400.

5. The definition of "damage" is based on the one used in Wis JI-Criminal 1400, Criminal Damage To Property. See Vol. V 1953 Judiciary Report on the Criminal Code, Wisconsin Legislative Council, page 97 (February 1953).

6. See § 939.23(3) and Wis JI-Criminal 923B.

7. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

8. "Religious property" is a shorthand reference to the category of property covered by sub. (1) of § 943.012. See note 2, supra. The definition of the term is based on the full description of that category of property.

9. "Cemetery property" is a shorthand reference to the category of property covered by sub. (2) of § 943.012. See note 2, supra. The definition of the term is based on the full description of that category of property.

10. This is the property described in sub. (3) of § 943.012.

11. Subsection (4) refers to "group of persons of a particular race, religion, color, disability, sexual orientation, national origin or ancestry." The applicable term should be used in the "describe group" blank.

12. See note 3, supra.

13. The three aspects of the knowledge requirement come from applying § 939.23(3): "intentionally" requires knowledge of all facts necessary to make the conduct criminal and appearing after the "intentionally" in the statute. Further, § 943.012 specifically requires "knowledge of the character of the property."

1402A CRIMINAL DAMAGE OR THREAT TO PROPERTY OF A JUDGE — § 943.013

Statutory Definition of the Crime

Section 943.013 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) damage to any physical property that belongs to a (judge) (family member of a judge) where at the time of the (act) (threat), the person knows[1] that the person whose property is (damaged) (threatened) is a (judge) (family member of a judge), [the judge is acting in an official capacity] [the (act) (threat) is in response to an action taken in the judge's official capacity],[2] and there is no consent by the person whose property is (damaged) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) damage to physical property that belonged to (name of victim).

   The word "damage" includes anything from mere defacement to total destruction.[3]

   IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

   [A "threat" is an expression of intention to do harm and may be communicated

orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][4]

2. (Name of victim) was a (judge) (family member of a judge).

   [For the purpose of this offense, a (e.g., circuit court judge) is a judge.][5]

   [For the purpose of this offense, a (e.g., child) is a family member.][6]

3. At the time of the (act) (threat), the defendant knew[7] that (name of victim) was a (judge) (family member of a judge).

4. [The judge was acting in an official capacity at the time of the (act) (threat).] [The (act) (threat) was in response to an action taken in the judge's official capacity.][8]

   Judges act in an official capacity if they perform duties that they are employed[9] to perform. A judge who performs acts that are not within the responsibilities of a judge does not act in an official capacity.[10] (The duties of a judge include: _____.)[11]

5. The defendant (caused) (threatened to cause) damage to the property without the consent[12] of (name of victim).

6. The defendant acted intentionally.[13] This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) damage to property owned by

(name of victim), or was aware that his or her conduct was practically certain to cause that result and knew that (name of victim) did not consent.[14]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1403.1 in 1994. It was renumbered Wis JI-Criminal 1402A and revised in 1995, 2003, and 2004. The 2004 revision amended the definition of "true threat." This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 943.013 was created by 1993 Wisconsin Act 50 (effective date: November 25, 1993).

1. Neither the summary of the offense here nor the third element contains the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the judge's official capacity. That is, the threat or act must be committed either when the judge is acting in an official capacity or in response to an action taken in the judge's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the

instruction.

2. One of the alternatives in brackets should be selected.

3. See Vol. V 1953 Judiciary Report on the Criminal Code, Wisconsin Legislative Council, page 97 (February 1953).

4. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

5. Section 943.013(1)(b), as amended by 2001 Wisconsin Act 61, provides:

> "Judge" means a supreme court justice, court of appeals judge, circuit court judge, municipal judge, temporary or permanent reserve judge or circuit, supplemental, or municipal court commissioner.

The applicable term should be inserted in the blank.

6. Section 943.013(1)(a) provides:

> "Family member" means a parent, spouse, sibling, child, stepchild, foster child or treatment foster child.

The applicable term should be inserted in the blank.

7. See note 1, supra.

8. One of the alternatives in brackets should be selected.

9. "Employed" is used here in the general sense of being engaged in the performance of a duty.

10. The definition of "official capacity' is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

11. It may be helpful to set forth the applicable duty or responsibility here, which may be specifically set forth in statutes or case law.

12. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

13. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 943.013, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

14. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

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1402B CRIMINAL DAMAGE OR THREAT TO PROPERTY OF A DEPARTMENT OF REVENUE EMPLOYEE — § 943.015

Statutory Definition of the Crime

Section 943.015 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) damage to any physical property that belongs to a (Department of Revenue employee) (family member of a Department of Revenue employee) where at the time of the (act) (threat), the person knows[1] that the person whose property is (damaged) (threatened) is a (Department of Revenue employee) (family member of a Department of Revenue employee), [the Department of Revenue employee is acting in an official capacity], [the (act) (threat) is in response to an action taken in the Department of Revenue employee's official capacity],[2] and there is no consent by the person whose property is (damaged) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) damage to physical property that belonged to (name of victim).

   The word "damage" includes anything from mere defacement to

total destruction.[3]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][4]

2. (Name of victim) was a (Department of Revenue employee) (family member of a Department of Revenue employee).

[For the purpose of this offense, a (e.g., child) is a family member.][5]

3. At the time of the (act) (threat), the defendant knew[6] that (name of victim) was a (Department of Revenue employee) (family member of a Department of Revenue employee).

4. [The Department of Revenue employee was acting in an official capacity at the time of the (act) (threat).] [The (act) (threat) was in response to an action taken in the Department of Revenue employee's official capacity.][7]

Department of Revenue employees act in an official capacity if they perform duties that they are employed[8] to perform. A Department of Revenue employee

who performs acts that are not within the responsibilities of a judge does not act in an official capacity.[9] (The duties of a Department of Revenue employee include:_____.)[10]

5. The defendant (caused) (threatened to cause) damage to the property without the consent[11] of (name of victim).

6. The defendant acted intentionally.[12] This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) damage to property owned by (name of victim), or was aware that his or her conduct was practically certain to cause that result and knew that (name of victim) did not consent.[13]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1403.2 in 1994. It was renumbered Wis JI-Criminal 1402B and revised in 1995, 2003, and 2004. The 2004 revised the definition of "true threat." This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 943.015 was created by 1985 Wisconsin Act 29.

1. Neither the summary of the offense here nor the third element contains the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the Department of Revenue employee's official capacity. That is, the threat or act must be committed either when the Department of Revenue employee is acting in an official capacity or in response to an action taken in the Department of Revenue employee's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. One of the alternatives in brackets should be selected.

3. See Vol. V 1953 Judiciary Report on the Criminal Code, Wisconsin Legislative Council, page 97 (February 1953).

4. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

5. Section 943.015(1) provides:

"In this section, family member" means a parent, spouse, sibling, child, stepchild, foster child or treatment foster child.

The applicable term should be inserted in the blank.

6. See note 1, supra.

7. One of the alternatives in brackets should be selected.

8. "Employed" is used here in the general sense of being engaged in the performance of a duty.

9. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

10. It may be helpful to set forth the applicable duty or responsibility here, which may be specifically set forth in statutes or case law.

11. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

12. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 943.015, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2)

proper and the other facts that follow.

13. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

1403 GRAFFITI — § 943.017(1)

Statutory Definition of the Crime

Section 943.017(1) of the Criminal Code of Wisconsin is violated by one who intentionally marks, draws or writes with paint, ink or another substance on or intentionally etches into the physical property of another without the other person's consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (marked) (drew) (wrote) with paint, ink or another substance on physical property.[1]
2. The physical property belonged to another person.[2] [_____ is a person for purposes of this element.][3]
3. The defendant (marked) (drew) (wrote) on the property without the consent of (name of owner, agent, etc.) .
4. The defendant acted intentionally. The term "intentionally" means that the defendant must have had the mental purpose to (mark) (draw) (write) on the property.[4]
5. The defendant knew the property belonged to another person and knew that the other person did not consent to (marking) (drawing) (writing) on the property.[5]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE FELONY OFFENSE IS CHARGED, AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE PROPERTY WAS REDUCED IN VALUE BY MORE THAN $2,500.[6]

[Finding the Reduction in the Value of the Property]

[If you find the defendant guilty, answer the following question "yes" or "no":

"Was the property reduced in value by more than $2,500?"

"Reduced in value" means what it would cost to repair or replace the property, or to remove the (marking) (drawing) (writing), whichever is less.[7] Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the property was reduced in value by more than $2,500.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING DAMAGE TO MORE THAN ONE ITEM OF PROPERTY "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 943.017(3).[8]

[In determining the amount by which the value of the property was reduced, you may consider all damage that you are satisfied beyond a reasonable doubt was caused by acts of the defendant pursuant to a single intent and design.]

COMMENT

Wis JI-Criminal 1403 was originally published in 1995 and revised in 1998 and 2001. This revision was approved by the Committee in October 2009 and involved updating to reflect the renumbering of the statute's subsections.

This instruction is for violations of § 943.017(1), Graffiti, created by 1995 Wisconsin Act 24 [effective date: July 20, 1995]. The basic offense is a Class A misdemeanor. The penalty increases to a Class I felony in five situations specified in sub. (2), one of which is addressed by this instruction: where the value of the property is reduced by more than $2,500. See sub. (2)(d). This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001.

The offense is also a Class I felony where the property damaged:

- is a vehicle or highway and the damage is of a kind which is likely to cause injury to a person or further property damage [sub. (2)(a)]

- belongs to a public utility or common carrier and the damage is of a kind which is likely to impair the services of the public utility or common carrier [sub. (2)(b)]

- belongs to a person who is or was a witness or a grand or petit juror and the damage was caused by reason of the owner's having attended or testified as a witness or by reason of any verdict or indictment assented to by the owner [sub. (2)(c)]

- is on state-owned land and is listed on the registry under § 943.01 [sub. (2)(e)].

If one of the above is alleged, the Committee recommends handling it with a special question, in the same manner that the value question is handled in this instruction.

1995 Wisconsin Act 24 also amended § 943.012, Criminal damage to religious and other property, to include damage caused by "graffiti." See Wis JI-Criminal 1402.

Subsection (2m) of § 947.017 defines offenses against property of witnesses and family members of witnesses. There is no uniform instruction for those offenses.

1. The statute applies to one who "intentionally marks, draws or writes with paint, ink or another substance on or intentionally etches into the physical property of another." The instruction uses the alternative terms, "marks," "draws," or "writes." In a case that involves "etching into," the phrase "etched into physical property" should be substituted throughout the instruction.

2. Section 939.22(28) provides the following definition of "property of another": "'Property of another' means property in which a person other than the defendant has a legal or equitable interest which the defendant has no right to defeat or impair, even though the defendant may also have a legal or equitable interest in the property."

3. In many cases, the property is likely to belong to a government unit, a business or similar entity. In those cases, it would be helpful to the jury to state that, for example, "The City of Milwaukee is a person for purposes of this element." See § 990.01(26): "Person" includes all partnership, associations and bodies politic or corporate."

4. The Committee concluded that the "mental purpose" definition of "intentionally" is most likely to apply to this offense. "Intentionally" also includes being "practically certain that his or her conduct will cause that result." See § 939.23(3) and Wis JI-Criminal 923A.

5. See Wis. Stat. § 939.23(3).

6. A misdemeanor charge requires no finding as to reduction in value. This instruction and the verdict question need be given only if a felony is charged and the evidence would support a finding of damage exceeding $2,500. The value level was increased to $2,500 by 2001 Wisconsin Act 2001, effective date: September 1, 2001.

7. § 943.017(2)(d).

8. See § 947.013(4). This states the same rule as that applicable to criminal damage to property under § 943.01. See note 8, Wis JI-Criminal 1400.

1404 ARSON OF A BUILDING OF ANOTHER — § 943.02(1)(a)

Statutory Definition of the Crime

Arson, as defined in § 943.02(1)(a) of the Criminal Code of Wisconsin, is committed by one who, by means of fire, intentionally damages any building of another without consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally damaged a building[1] by means of fire.

   "Damaged" means injured, charred, defaced, and includes smoke damage.[2]

   "Intentionally" means that the defendant must have had the mental purpose to damage the building of another by means of fire or was aware that (his) (her) conduct was practically certain to cause damage to the building of another.[3]

2. The building belonged to another person.[4]

3. The defendant damaged the building without the owner's[5] consent.

   "Without consent" means that there was no consent in fact.[6]

4. The defendant knew that the building belonged to another person and knew that the other person did not consent to the damage of the building.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1404 was originally published in 1969 and revised in 1977, 1991, and 1992. This revision was approved by the Committee in December 2007 and involved adoption of a new format and nonsubstantive changes to the text.

1. This instruction has never included a definition of "building." In State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991), the court held it was error for the trial court to state that "a mobile home is a building." The court said this created a "mandatory conclusive presumption . . . regarding an element of the arson offense." However, the court further held that the error was harmless because it played no role in the jury's verdict:

> We conclude that no rational juror could plausibly find that the structure in question was a mobile home without also finding that the structure was a building. . . . If the jury found this structure to be a mobile home, as that term is commonly understood, this finding would be the 'functional equivalent' of finding that the structure was a building.

160 Wis.2d 722, 740.

Kuntz was decided as the 1992 revision of Wis JI-Criminal 1404 was being prepared for publication. The Committee will be pursuing the issues raised by the decision in the hope of developing a rationale for addressing them. At the present time, a trial court obviously must avoid a statement like the one reviewed in Kuntz. If a definition of "building" is necessary, resort to a standard dictionary may be helpful. For example, Webster's Ninth New Collegiate Dictionary provides that a "building" refers to "a usually roofed and walled structure built for permanent use (as for a dwelling)."

Wisconsin appellate courts have addressed the meaning of "building" on two occasions that are not directly on point but may be of some usefulness. In Clark v. State, 69 Wis. 203, 33 N.W. 436 (1887), the issue

was whether an unfinished house from which tools were taken was covered by § 4409 R.S. which made it a burglary to break "and enter in the night-time any office, shop, or any other building not adjoining or occupied with any dwelling house, or any ship, steamboat, vessel, railroad freight car or passenger car, with intent to commit the crime of larceny or other felony." The court held that the unfinished house was a "building" for purposes of burglary and defined the term as follows:

> . . . an edifice or structure erected upon land, and so far completed that it may be used temporarily or permanently for the occupation or shelter of man or beast, or for the storage of tools or other personal property for safe-keeping. . . . "The well-understood meaning of the word is a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property."

69 Wis. 203, 206-07

A more recent case discusses "building" in connection with zoning rules prohibiting "mobile homes" but allowing "modular homes" and other buildings. The person's home had been mobile once, but at the site was affixed to a foundation and attached to utilities with steel undercarriage and trailer hitch removed. The court of appeals used the county's own definition of "building" and found that the home in question qualified:

> . . . the county relies on the terms "building" and "mobile home" to classify structures. A building is "any structure used, designed or intended to be used for the protection, shelter or enclosure of persons, animals or property." It is clear that Hansman's structure is intended for the protection, shelter and enclosure of persons.

Hansman v. Oneida Co., 123 Wis.2d 511, 513, 366 N.W.2d 901 (Ct. App. 1985).

2. "The word 'damage' includes, in addition to what is thought of as damage in the narrow sense, anything from mere defacement and mutilation to total destruction." 1953 Judiciary Committee Report on the Criminal Code, p. 97 (Wis. Legislative Council, 1953). The quoted material referred to "damage" as used in the criminal damage to property statute; the meaning of "damage" was considered to be the same for arson, which was called "Criminal Damage By Fire or Explosives" in the original 1953 draft of the Criminal Code. Ibid, p. 99. The name of the offense was changed to "arson" before the draft was enacted. The recodification of the arson statutes was not intended to change the substantive law, although "by means of fire, intentionally damages," was substituted for "sets fire to or burns or causes to be burned" under the pre-1956 law. Bill Platz commented on this change in his law review article on the Criminal Code revision.

> This change is not intended to produce any different result, although conceivably the new language could be construed to include smoke damage without actual charring. However, such cases should be prosecuted under Code § 943.01 [criminal damage to property], or as attempted arson under Code § 939.32 depending on the facts.

Platz, "The Criminal Code: Thumbnail History of the Code" 1956 Wis. Law Rev. 350, 374

The Committee concluded that any damage, including smoke damage, is sufficient under the arson statutes as long as the damage is caused "by means of fire."

3. This is the definition of "intentionally" provided in § 939.23(3). See also Wis JI-Criminal 923A and 923B for further discussion of "intentionally."

The footnote to the 1980 version of this instruction provided as follows: "The defendant may set fire to furniture with mental purpose to damage only the furniture; he may be found guilty of arson of the building though indifferent to that result." This statement was cited and applied in State v. Thompson, 146 Wis.2d 554, 431 N.W.2d 716 (Ct. App. 1988). The court found that the defendant's actions of placing crumpled newspapers against a wall under drapes and igniting them "manifest an intent to damage the building." 146 Wis.2d 554, 563. Also see State v. Dunn, 121 Wis.2d 389, 359 N.W.2d 151 (1984), discussing the sufficiency of the evidence at a preliminary examination to show intent to damage the building.

4. If it is necessary to define "building of another," the Committee suggests the following: "A building in which a person other than the defendant has a legal or equitable interest which the defendant has no right to defeat or impair, even though the defendant may also have a legal or equitable interest in the building." This is based on the definition provided in § 943.02(2). "Another" under this definition includes a mortgagee. State v. Phillips, 99 Wis.2d 46, 289 N.W.2d 239 (1980). (The state had to rely on the mortgagee in the Phillips case because the owner of the building would not complain.)

5. The instruction refers to damage caused without consent of the "owner," but the statute does apply to damage caused without consent of any other person who has a right in the building superior to that of the defendant. In a case involving someone other than the owner, this part of the instruction would have to be modified.

6. If further definition of "without consent" is necessary, see § 939.22(48)(a)-(c) and Wis JI-Criminal 948.

In State v. Shoffner, 31 Wis.2d 412, 143 N.W.2d 354 (1958), the defendant contended that proof was lacking on the "without consent" element because the state produced the testimony of the owner but not that of his wife, who owned the property jointly with her husband. The court rejected the claim, finding that it was sufficient to show that one co-owner did not consent, since "the only reasonable inference which can be drawn from the undisputed facts in this case is that Shoffner acted without the consent of any owner." 31 Wis.2d 412, 430.

1405 ARSON OF A BUILDING WITH INTENT TO DEFRAUD AN INSURER — § 943.02(1)(b)

Statutory Definition of the Crime

Arson, as defined in § 943.02(1)(b) of the Criminal Code of Wisconsin, is committed by one who, by means of fire, intentionally damages any building with intent to defraud an insurer of that building.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally damaged a building[1] by means of fire.

   "Damaged" means injured, charred, defaced, and includes smoke damage.[2]

   "Intentionally" means that the defendant must have had the mental purpose to damage the building by means of fire or was aware that (his) (her) conduct was practically certain to cause damage to the building.[3]

2. The defendant damaged the building with intent to defraud an insurer of that building.

   The intent to defraud is the mental purpose to deceive an insurer of the building, and thereby induce an insurer to make payment under a fire insurance

policy.[4] This intent must have been formed at some time before the fire started and must have continued to exist at the time the fire started.[5]

ADD THE FOLLOWING PARAGRAPH WHEN THE VALIDITY OR EXISTENCE OF AN INSURANCE POLICY IS QUESTIONED:

[Whether in fact there was insurance coverage on the building is immaterial. It is sufficient that the defendant believed there was such coverage on the building.][6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1405 was originally published in 1969 and revised in 1977, 1983, and 1992. This revision was approved by the Committee in December 2007 and involved adoption of a new format and nonsubstantive changes to the text.

1. This instruction has never included a definition of "building." For an extensive discussion of the issue, see Wis JI-Criminal 1404, footnote 1.

2. "The word 'damage' includes, in addition to what is thought of as damage in the narrow sense, anything from mere defacement and mutilation to total destruction." 1953 Judiciary Committee Report on the Criminal Code, p. 97 (Wis. Legislative Council, 1953). The quoted material referred to "damage" as used in the criminal damage to property statute; the meaning of "damage" was considered to be the same for arson, which was called "Criminal Damage By Fire or Explosives" in the original 1953 draft of

the Criminal Code. Ibid, p. 99. The name of the offense was changed to "arson" before the draft was enacted. The recodification of the arson statutes was not intended to change the substantive law, although "by means of fire, intentionally damages," was substituted for "sets fire to or burns or causes to be burned" under the pre-1956 law. Bill Platz commented on this change in his law review article on the Criminal Code revision.

> This change is not intended to produce any different result, although conceivably the new language could be construed to include smoke damage without actual charring. However, such cases should be prosecuted under Code § 943.01 [criminal damage to property], or as attempted arson under Code § 939.32 depending on the facts.

Platz, "The Criminal Code: Thumbnail History of the Code" 1956 Wis. Law Rev. 350, 374

The Committee concluded that any damage, including smoke damage, is sufficient under the arson statutes as long as the damage is caused "by means of fire."

3. This is the definition of "intentionally" provided in § 939.23(3). See also Wis JI-Criminal 923A and 923B for further discussion of "intentionally."

The footnote to the 1980 version of this instruction provided as follows: "The defendant may set fire to furniture with mental purpose to damage only the furniture; he may be found guilty of arson of the building though indifferent to that result." This statement was cited and applied in State v. Thompson, 146 Wis.2d 554, 431 N.W.2d 716 (Ct. App. 1988). The court found that the defendant's actions of placing crumpled newspapers against a wall under drapes and igniting them "manifest an intent to damage the building." 146 Wis.2d 554, 563. Also see State v. Dunn, 121 Wis.2d 389, 359 N.W.2d 151 (1984), discussing the sufficiency of the evidence at a preliminary examination to show intent to damage the building.

4. Vol. V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, p. 101.

Section 943.02(2) provides that recovery or attempt to recover on an insurance policy is not an essential element of the crime but is relevant on the issue of intent to defraud.

5. If the fire was not directly set by the defendant, it should be made clear that the intent to defraud an insurer must have existed when the accomplice was hired to set it. In such a case, this instruction would need to be modified, and the jury would also have to be instructed on the appropriate basis of party-to-crime liability under § 939.05.

6. Parb v. State, 143 Wis. 561, 128 N.W. 65 (1910); Smith v. State, 149 Wis. 63, 134 N.W. 1123 (1912).

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1408 ARSON OF PROPERTY OTHER THAN A BUILDING — § 943.03

Statutory Definition of the Crime

Arson, as defined in § 943.03 of the Criminal Code of Wisconsin, is committed by one who, by means of fire, intentionally damages any property of another without the person's consent if the property is not a building and has a value of $100 or more.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally damaged (describe property) [1] by means of fire.

   "Damaged" means injured, charred, defaced, and includes smoke damage.[2]

   "Intentionally" means that the defendant must have had the mental purpose to damage the property of another by means of fire or was aware that (his) (her) conduct was practically certain to cause damage to the property.[3]

2. The (describe property) was the property of another.

   ["Property of another" means property in which a person other than the defendant has a legal interest which the defendant has no right to defeat or impair, even though the defendant may also have a legal interest in the property.[4] A _____ is a legal interest in property.][5]

3. The defendant damaged the property by fire without the owner's consent[6] (or the consent of the owner's authorized agent).

4. The value of the (describe property) was $100 or more.

5. The defendant knew that:

· that the (describe property) belonged to another person; and

· that the other person did not consent to the damage of the property; and

· that the value of the property was $100 or more.[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1408 was originally published in 1969 and revised in 1977, 1983, 1992, and 2002. This revision was approved by the Committee in February 2011 and involved correcting an inadvertent error in element 5 and nonsubstantive changes in footnotes.

Section 943.03 was amended by 1999 Wisconsin Act 85 [effective date: May 6, 2000] to read as follows:

943.03 Arson of property other than building. Whoever, by means of fire, intentionally damages any property of another without the person's consent, if the property is not a building and has a value of $100 or more, is guilty of a Class E felony.

1. The property, which must be property "other than a building" for this offense, should be identified in this blank by referring, for example, to "the boat" or "the automobile," etc.

2. "The word 'damage' includes, in addition to what is thought of as damage in the narrow sense, anything from mere defacement and mutilation to total destruction." 1953 Judiciary Committee Report on the Criminal Code, p. 97 (Wis. Legislative Council, 1953). The quoted material referred to "damage" as used in the criminal damage to property statute; the meaning of "damage" was considered to be the same for arson, which was called "Criminal Damage By Fire or Explosives" in the original 1953 draft of the Criminal Code. Ibid, p. 99. The name of the offense was changed to "arson" before the draft was enacted. The recodification of the arson statutes was not intended to change the substantive law, although "by means of fire, intentionally damages," was substituted for "sets fire to or burns or causes to be burned" under the pre-1956 law. Bill Platz commented on this change in his law review article on the Criminal Code revision.

> This change is not intended to produce any different result, although conceivably the new language could be construed to include smoke damage without actual charring. However, such cases should be prosecuted under Code § 943.01 [criminal damage to property], or as attempted arson under Code § 939.32 depending on the facts.

Platz, "The Criminal Code: Thumbnail History of the Code" 1956 Wis. Law Rev. 350, 374

The Committee concluded that any damage, including smoke damage, is sufficient under the arson statutes as long as the damage is caused "by means of fire."

3. This is the definition of "intentionally" provided in § 939.23(3). See also Wis JI-Criminal 923A and 923B for further discussion of "intentionally."

4. This paragraph should be included only if the defendant had an interest in the property. The definition of "property of another" is based on the one provided in § 939.22(28). Also see State v. Sevelin, 204 Wis.2d 127, 554 N.W.2d 521 (Ct. App. 1996), affirming a conviction for criminal damage to property where the charge was based on the defendant damaging his own marital home – the defendant's wife also had an ownership interest in the home, qualifying it as "property of another."

5. The Committee concluded that a trial judge may inform the jury that a particular interest is a legal interest in property as long as there is legal authority to support that statement. For example, § 401.201(37) defines and provides examples of "security interest."

6. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

In State v. Shoffner, 31 Wis.2d 412, 143 N.W.2d 354 (1958), the defendant contended that proof was lacking on the "without consent" element because the state produced the testimony of the owner but not that of his wife, who owned the property jointly with her husband. The court rejected the claim, finding that it was sufficient to show that one co-owner did not consent, since "the only reasonable inference which can be drawn from the undisputed facts in this case is that Shoffner acted without the consent of any owner." 31 Wis.2d 412, 430.

7. When "intentionally" is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3).

1410 ARSON (OF PROPERTY OTHER THAN A BUILDING) WITH INTENT TO DEFRAUD — § 943.04

Statutory Definition of the Crime

Arson, as defined in § 943.04 of the Criminal Code of Wisconsin, is committed by one who, by means of fire, damages any property other than a building with intent to defraud an insurer of that property.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant damaged (describe property)[2] by means of fire.

   "Damaged" means injured, charred, defaced, and includes smoke damage.[3]

2. The defendant damaged (describe property), by means of fire, with intent to defraud an insurer of the (describe property).

   The intent to defraud is the mental purpose to deceive an insurer of the property, and thereby induce an insurer to make payment under a fire insurance policy.[4] This intent must have been formed at any time before the fire started and must have continued to exist at the time the fire started.[5]

   GIVE THE FOLLOWING PARAGRAPH WHEN THE VALIDITY OR EXISTENCE OF AN INSURANCE POLICY IS QUESTIONED:

[Whether in fact there was insurance coverage on the property is immaterial. It is sufficient that the defendant believed there was insurance coverage on the property.][6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1410 was originally published in 1966 and revised in 1992. This revision was approved by the Committee in and involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment.

1. Note that, unlike the other arson statutes, § 943.04 does not use the word "intentionally." Thus, the instruction also does not include it.

2. The property, which must be property "other than a building" for this offense, should be identified in this blank by referring, for example, to "the boat" or "the automobile," etc.

3. See note 3, Wis JI-Criminal 1404.

4. Volume V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 101 (February 1953).

5. If the fire was not directly set by the defendant, it should be made clear that the intent to defraud an insurer must have existed when the accomplice was hired to set it. The instruction would need to be modified, and the jury would also have to be instructed on the appropriate basis of party-to-crime liability under § 939.05.

6. Parb v. State, 143 Wis. 561, 128 N.W. 65 (1910); Smith v. State, 149 Wis. 63, 134 N.W. 1123 (1912).

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1417 MOLOTOV COCKTAILS[1] (FIREBOMBS): POSSESSION[2] — § 943.06

Statutory Definition of the Crime

Section 943.06 of the Criminal Code of Wisconsin is violated by one who possesses a firebomb.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed an object.

   "Possessed" means that the defendant knowingly[4] had the object under (his) (her) actual physical control.[5]

2. The object was a firebomb.

   "Firebomb" means a breakable container containing a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less, having a wick or similar device capable of being ignited. The term "firebomb" does not mean a device commercially manufactured primarily for the purpose of illumination.[6]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1417 was originally published in 1974 and revised in 1987 and 1995. This revision was approved by the Committee in December 2007.

1. The statutory title for this offense uses the term "molotov cocktail," though that term is not used elsewhere in the statute. The American Heritage Dictionary provides the following definition:

> Molotov cocktail: A makeshift bomb made of a breakable container filled with flammable liquid and provided with a usually rag wick that is lighted just before being hurled.

It is named after Vyacheslav Mikhailovich Molotov (1890 - 1986), a Soviet politician who was head of the Council of People's commissars (1930-41) and foreign minister (1939-49 and 1953-56).

2. Section 943.06(2) applies to whoever "possesses, manufactures, sells, offers for sale, gives or transfers a firebomb." This instruction is drafted for a case involving "possession." Wis JI-Criminal 1418 is drafted for cases involving the other alternatives.

3. Subsection (3) of § 943.06 provides an exception for authorized possession of a firebomb by a member of the armed services, a fireman, or a law enforcement officer.

4. Generally, § 943.06 appears to be a "strict liability" statute, and the presence or absence of criminal intent or knowledge on the part of the defendant is immaterial. See Wis JI-Criminal 1418, note 2. Inherent in the legal definition of "possession," however, is the element of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Knowing or conscious possession is accordingly included as an element that must be alleged and proved by the state, notwithstanding the "strict liability" interpretation given § 943.06 in Wis JI-Criminal 1418.

5. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

6. This is the definition provided in § 943.06(1).

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1418 MOLOTOV COCKTAILS[1] (FIREBOMBS): MANUFACTURE, SALE, OFFER TO SELL, GIFT OR TRANSFER — § 943.06

Statutory Definition of the Crime

Section 943.06 of the Criminal Code of Wisconsin is violated by one who manufactures, sells, offers for sale, gives, or transfers a firebomb.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant (manufactured) (sold) (offered for sale) (gave) (transferred) a firebomb.[2]

"Firebomb" means a breakable container containing a flammable liquid with a flash point of 150 degrees Fahrenheit or less, having a wick or similar device capable of being ignited. The term "firebomb" does not mean a device commercially manufactured primarily for the purpose of illumination.[3]

["Transfer" means any transaction involving a change in possession of a firebomb or a change of right, title, or interest to or in a firebomb.][4]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant (manufactured) (sold) (offered for sale) (gave) (transferred) a firebomb, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1418 was originally published in 1974 and revised in 1995. This revision was approved by the Committee in December 2007 and involved adoption of a new format and nonsubstantive changes to the text.

1. The statutory title for this offense uses the term "molotov cocktail," though that term is not used elsewhere in the statute. The American Heritage Dictionary provides the following definition:

> Molotov cocktail: A makeshift bomb made of a breakable container filled with flammable liquid and provided with a usually rag wick that is lighted just before being hurled.

It is named after Vyacheslav Mikhailovich Molotov (1890 - 1986), a Soviet politician who was head of the Council of People's commissars (1930-41) and foreign minister (1939-49 and 1953-56).

2. Section 943.06(2) does not contain any of the words or phrases outlined in § 939.23 which indicate that knowledge or criminal intent is an element of a crime. Accordingly, although it remains an arguable issue inasmuch as the Wisconsin Supreme Court has not construed or interpreted § 943.06, it appears that § 943.06 is a "strict liability" statute and that knowledge or criminal intent does not have to be alleged or proved by the state in order to obtain a conviction under it. This appears to be the case, at least regarding a person who manufactures, sells, offers for sale, gives, or transfers a firebomb. With respect to a person who is charged with possession of a firebomb, see Wis JI-Criminal 1417.

3. This is the definition provided in § 943.06(1).

4. This is the definition provided in § 939.22(40). Insert this sentence when transfer of a firebomb is charged.

1421 BURGLARY WITH INTENT TO STEAL[1] — § 943.10(1)

Statutory Definition of the Crime

Burglary, as defined in § 943.10 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building[2] without the consent of the person in lawful possession and with intent to steal.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally entered a building.[3]
2. The defendant entered the building without the consent[4] of the person in lawful possession.[5]
3. The defendant knew that the entry was without consent.[6]
4. The defendant entered the building with intent to steal.[7]

"Intent to steal" requires that the defendant had the mental purpose to take and carry away[8] movable property of another without consent and that the defendant intended to deprive the owner permanently of possession of the property.[9] [It requires that the defendant knew the property belonged to another and knew the person did not consent to the taking of the property.][10]

When Must Intent Exist?

The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is no more or less than the mental purpose to steal formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[11]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF ONE OF THE AGGRAVATING FACTORS SET FORTH IN § 943.10(2) IS CHARGED AND SUPPORTED BY THE EVIDENCE, ADD WIS JI-CRIMINAL 1425A, 1425B, OR 1425C.[12]

COMMENT

Wis JI-Criminal 1421 was originally published in 1966 and revised in 1984, 1991, 1993, 1996, 2001, and 2020. The 2020 revision added to footnote 2 of the comment. This revision was approved by the Committee in December 2023; it updated footnote 10 to correct the referenced section in the statutory citation.

Criminal trespass to dwelling under § 943.14 is not a lesser included offense of burglary with intent to steal. Raymond v. State, 55 Wis.2d 482, 198 N.W.2d 351 (1972).

1. This instruction is drafted for burglary with the "intent to steal." If "intent to commit a felony" is charged, see Wis JI-Criminal 1424. For burglary offenses committed "while armed" or under other aggravating circumstances as prohibited by § 943.10(2), see Wis JI-Criminal 1425A, 1425B, and 1425C.

2. The model instruction is drafted for a case involving entry into a "building." It must be modified if entry involved any of the other places listed in § 943.10(1)(a) through (f): any building or dwelling; an enclosed railroad car; an enclosed portion of any ship or vessel; a locked enclosed cargo portion of a truck or trailer; a motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or a room in any of the above.

The instruction has never included a definition of "building." The meaning of the term has been considered to be the same for burglary and arson cases. In an arson case, State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991), the Wisconsin Supreme Court held it was error for the trial court to state that "a mobile home is a building." The court said this created a "mandatory conclusive presumption . . . regarding an element of the arson offense." However, the court further held that the error was harmless because it played no role in the jury's verdict:

> We conclude that no rational juror could plausibly find that the structure in question was a mobile home without also finding that the structure was a building. . . . If the jury found this structure to be a mobile home, as that term is commonly understood, this finding would be the 'functional equivalent' of finding that the structure was a building.

160 Wis.2d 722, 740.

In United States of America v. Franklin, 2019 WI 64, 387 Wis.2d 259, 272, 928 N.W.2d 545, the Wisconsin Supreme Court concluded that the locational alternatives provided in Wis. Stat. § 943.01(1m)(a)-(f) are alternative factual means of committing one element of burglary. Providing context to this holding, the court referenced an example previously incorporated in State v. Pinder, 2018 WI 106, ¶60, 384 Wis. 2d 416, 919 N.W.2d 568. Although the issue in Pinder concerned the validity of a search warrant issued for the placement and use of a GPS tracking device on a motor vehicle, the court did make a ruling in which it denied an ineffective assistance of counsel claim for failure to object to the burglary jury instruction Wis. JI-Criminal 1421. Addressing this claim, the court emphasized the latitude afforded in the crafting of a burglary jury instruction so as to comport with the evidence of the case, noting that:

> "[w]hile the circuit court could have used the phrase 'a room within a building' instead of the words 'office' or 'building,' the facts adduced would not confuse the jury as to what it was called upon to decide regardless of which of these words might be used." Id. at 456.

The court in Franklin cited the analysis of the statutory text, the legislative history and context of the statute, along with the nature of the conduct, and the appropriateness of multiple punishments in its conclusion that Wis. Stat. § 943.01 "identifies alternative means of committing one element of the crime of burglary under § 943.01 (1m)(a)-(f)." Franklin at 273. Furthermore, the court found that the crime of burglary does not include a separate locational element and jury unanimity on finding guilt beyond a

reasonable doubt as to locational alternatives provided in § 943.01(1m)(a)-(f) is not necessary to convict. Id. 273.

If a definition of "building" is necessary, resort to a standard dictionary may be helpful. For example, Webster's Ninth New Collegiate Dictionary provides that a "building" refers to "a usually roofed and walled structure built for permanent use (as for a dwelling)."

In Clark v. State, 69 Wis. 203, 33 N.W. 436 (1887), the issue was whether an unfinished house from which tools were taken was covered by § 4409 R.S. which made it a burglary to break "and enter in the night-time any office, shop, or any other building not adjoining or occupied with any dwelling house, or any ship, steamboat, vessel, railroad freight car or passenger car, with intent to commit the crime of larceny or other felony." The court held that the unfinished house was a "building" for purposes of burglary and defined the term as follows:

> . . . an edifice or structure erected upon land, and so far completed that it may be used temporarily or permanently for the occupation or shelter of man or beast, or for the storage of tools or other personal property for safe-keeping. . . . "The well-understood meaning of the word is a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property."

69 Wis. 203, 206-07

A more recent case discusses "building" in connection with zoning rules prohibiting "mobile homes" but allowing "modular homes" and other buildings. The person's home had been mobile once, but at the site was affixed to a foundation and attached to utilities with steel undercarriage and trailer hitch removed. The court of appeals used the county's own definition of "building" and found that the home in question qualified:

> . . . the county relies on the terms "building" and "mobile home" to classify structures. A building is "any structure used, designed or intended to be used for the protection, shelter or enclosure of persons, animals or property." It is clear that Hansman's structure is intended for the protection, shelter and enclosure of persons.

Hansman v. Oneida Co., 123 Wis.2d 511, 513, 366 N.W.2d 901 (Ct. App. 1985).

3. The offense of burglary is complete upon the slightest entry by the defendant into any one of the places described in § 943.10(1)(a)-(f) without the consent of the person in lawful possession, when such entry is made with the required intent. The least entry with any part of the body is sufficient. State v. Barclay, 54 Wis.2d 651, 655n.10, 196 N.W.2d 745 (1972).

The crime of burglary is completed once "the defendant jimmied the lock and pushed against the door, pushing it inward, [and making] entry onto the premises. . . . Whether he stepped in or, as he testified, later reached in to close the door, would not matter. It is not how or why the door was closed that matters. It is the fact that it was opened by a person with intent to steal that furnishes both entry and intent, the prerequisite for the crime of burglary." Morones v. State, 61 Wis.2d 544, 548-49, 213 N.W.2d 31 (1973).

4. The defendant's entry into the place involved was without consent if the person in lawful

possession did not consent in fact or if consent was given under the circumstances provided by Wis. Criminal Code § 939.22(48)(a)-(c). "Consent to enter which is obtained by the use or threat of force or by pretense of legal authority is in legal effect entry 'without consent.' The same ordinarily is true of consent obtained because the person giving the consent is mistaken as to the nature of the thing to which he consents. . . ." 1953 Legislative Council Committee Report on the Criminal Code, page 102.

Entry into a place when it is open to the public is not "without consent," see § 943.10(3). Thus, entry into a hotel lobby open to the public, although done with the intent to steal, is not burglary. Champlin v. State, 84 Wis.2d 621, 267 N.W.2d 295 (1978).

However, one who enters with consent may remain "at a time or place beyond his authority. 'Entry' in § 943.10(1)(a), Stats., must be construed to mean not only the simple act of passing through the outer wall of a structure but also the result of such action, namely, presence within the structure." Levesque v. State, 63 Wis.2d 412, 217 N.W.2d 317 (1974). Thus, an otherwise lawful entry became unlawful when Levesque hid himself in the false ceiling of the men's room and remained there until after the restaurant was closed.

State v. Schantek, 120 Wis.2d 79, 353 N.W.2d 832 (Ct. App. 1984), involved an entry of a gas station by an employee after regular business hours. The station closed at 9:00 p.m., and Schantek entered at around 11:30 p.m., using his own key. He took money from a cash box. The court upheld the conviction for burglary, stating that the extent of consent under these circumstances must be determined on the facts of each case:

> The task in most cases will be to determine the limits of such consent and the defendant's knowledge or lack of it.
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> . . . . We do conclude, however, that the arrangement between Schantek and his employer clearly rendered certain presence inappropriate and thus beyond the limits of the employer's consent and Schantek's knowledge. A fair reading of the evidence does not allow for the strained conclusion that Benco gave Schantek all-encompassing consent to enter the premises at all times for all purposes – including criminal adventure. Nor does the evidence remotely allow for Schantek's claim of knowledge of such all-encompassing consent. We therefore conclude under the facts of this case that the employer did not give Schantek consent to enter the premises, and Schantek had knowledge of such nonconsent.

120 Wis.2d 79, 85.

The Schantek approach was applied in State v. Karow, 154 Wis.2d 375, 453 N.W.2d 181 (Ct. App. 1990). In Karow, the defendant claimed the entry was with consent because the victim allowed him to come into the house and use the telephone. After entering, Karow and accomplices killed the victim. The court of appeals affirmed the burglary conviction, finding that the entry was "without consent" because of an "implied limitation on the scope of the invitation to enter":

> We hold that an implied limitation on the scope of the consent to enter may be recognized, and we recognize it here. The record supports an inference, not patently incredible, that the consent Brown granted to Karow, a stranger, was limited to a specific area and a single purpose. That consent can in no way be reasonably construed to extend beyond the purpose for which it was granted.

154 Wis.2d 375, 384.

5. Under § 943.10, the question is one of lawful possession and not legal title. Ordinarily, the question of who is in lawful possession, while presenting a mixed question of law and fact, can be decided by the court as a matter of law on admitted or undisputed facts.

6. Knowledge that the entry is without consent is an element of the offense of burglary because of the standard interpretation of criminal statutes required by § 939.23(3): Where the word "intentionally" is used, "the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" The decision in Hanson v. State, 52 Wis.2d 396, 190 N.W.2d 129 (1971), is sometimes cited for the contrary position. However, Hanson involved a defendant's postconviction challenge to the validity of his guilty plea and simply held that there was an adequate factual basis for a finding that there was no consent in fact to the defendant's entry. Under such circumstances, said the court, there was no additional burden on the state to show that the defendant did not "purport to be acting under legal authority," one of the alternatives to "no consent in fact" provided in the statutory definition of without consent, § 939.22(48). Recent decisions have reaffirmed that knowledge that entry is without consent is an essential element of burglary. See State v. Schantek, supra, note 4, and State v. Wilson, 160 Wis.2d 774, 467 N.W.2d 130 (Ct. App. 1991).

7. The problem of circumstantially proving intent to steal has received considerable attention from the Wisconsin Supreme Court. The present rule provides that while "intent to steal will not be inferred from the fact of entry alone," "'additional circumstances such as time, nature of the place entered, method of entry, identity of the accused and other circumstances, without proof of actual larceny, can be sufficient to permit a reasonable person to conclude the defendant entered with an intent to steal.'" State v. Barclay, 54 Wis.2d 651, 654, 196 N.W.2d 745 (1972), citing Strait v. State, 41 Wis.2d 552, 562, 164 N.W.2d 505 (1969). Also see State v. Holmstrom, 43 Wis.2d 465, 168 N.W.2d 574 (1969), and Bethards v. State, 45 Wis.2d 606, 173 N.W.2d 634 (1970), overruling State v. Kennedy, 15 Wis.2d 600, 113 N.W.2d 372 (1962). For a complete review of prior cases, see State v. Bowden, 93 Wis.2d 574, 288 N.W.2d 139 (1980).

8. The instruction uses "take and carry away" since it is the most common type of theft and the one that would most often be involved in a burglary case. In a proper case, the other alternatives in the theft statute ("use, transfer, conceal, or retain possession of . . .") should be substituted.

9. "Intent to deprive the owner permanently of possession" is used as the most common type of "intent to steal." It is possible that a burglary offense could involve mental states for other types of stealing. See, for example, theft under § 943.20(1)(b), which involves "intent to convert to his own use" and theft under § 943.10(1)(c), which requires intent to deprive a pledgee or other person having a superior right of possession.

10. The bracketed material should be added if there is evidence that, for example, the defendant believed he was reclaiming his own property. Referred to as "right to recapture," "claim of right," or "self-help," this defensive matter tends to negate either the "property of another" or the "knew it was property of another" elements. The rule applies to burglary, see State v. Pettit, 171 Wis.2d 627, 492 N.W.2d 633 (Ct. App. 1992), and is discussed at Wis JI-Criminal 710, Law Note: Right to Recapture.

11. Evidence of the defendant's possession of recently stolen property may often be offered to support a finding of intent to steal. If an instruction on the effect of such evidence is requested, see Wis

JI-Criminal 170, Circumstantial Evidence, and 173, Possession of Recently Stolen Property.

12. Burglary, as defined in § 943.10(1m), is punished as a Class F felony. The penalty increases to a Class E felony if a burglary is committed under any of the circumstances defined in subsec. (2). The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Instructions are provided for three of the four factors identified in subsec. (2): while armed (see Wis JI-Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (see Wis JI-Criminal 1425B); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); and, while in the enclosure, the person commits a battery upon a person lawfully therein (see Wis JI-Criminal 1425C).

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1422 BURGLARY WITH INTENT TO STEAL; WHILE ARMED WITH A DANGEROUS WEAPON[1] — § 943.10(1), (2)(a)

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 1422 was originally published in 1984 and revised in 1991 and 1993. It was withdrawn in 1996.

This instruction was withdrawn and replaced by Wis JI-Criminal 1425A. Instead of creating separate instructions for "armed burglary," the Committee concluded that it was more efficient to provide "special question" instructions to address the penalty-enhancing provisions found in subsec. (2) of § 943.10. These are provided in Wis JI-Criminal 1425A, 1425B and 1425C and can be added to either of the general burglary instructions: Wis JI-Criminal 1421, Burglary With Intent To Steal; or, Wis JI-Criminal 1424, Burglary With Intent To Commit A Felony.

1. This instruction is drafted for burglary with the "intent to steal," committed while armed with a dangerous weapon. If "intent to commit a felony" is charged, combine the explanation of "while armed . . ." in this instruction with Wis JI-Criminal 1424. This instruction may also be useful as a model for other aggravated offenses defined in subsec. (2) of § 943.10.

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1424 BURGLARY WITH INTENT TO COMMIT A FELONY[1] – § 943.10(1)

Statutory Definition of the Crime

Burglary, as defined in § 943.10 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building[2] without the consent of the person in lawful possession and with intent to commit a felony therein.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally entered a building.[3]
2. The defendant entered the building without the consent[4] of the person in lawful possession.[5]
3. The defendant knew that the entry was without consent.[6]
4. The defendant entered the building with intent to commit (state felony)[7], [that is, that the defendant intended to commit (state felony) at the time the defendant entered the building].[8]

   [IF THE JURY IS ALSO INSTRUCTED ON THE INTENDED FELONY, IT IS SUFFICIENT TO REFER TO THAT INSTRUCTION AND NOT REPEAT IT HERE.]

[IF THE INTENDED FELONY IS NOT CHARGED, DEFINE THE CRIME, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE.]

When Must Intent Exist?

The intent to commit a felony must be formed before entry is made. The intent to commit (state felony) which is an essential element of burglary is no more or less than the mental purpose[9] to commit (state felony) formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF ONE OF THE AGGRAVATING FACTORS SET FORTH IN § 943.10(2) IS CHARGED AND SUPPORTED BY THE EVIDENCE, ADD WIS JI-CRIMINAL 1425A, 1425B, OR 1425C.[10]

COMMENT

Wis JI-Criminal 1421 was originally published in 1966 and revised in 1985, 1991, 1994, 1995, 1998, 2001, 2020, and 2021. The 2020 revision added to footnote 2 of the comment. The 2021 revision added footnote 7 to the comment. This revision was approved by the Committee in December 2023; it updated footnote 10 to correct the referenced section in the statutory citation. It also added to the comment.

1. This instruction is drafted for burglary with the "intent to commit a felony." If "intent to steal" is charged, see Wis JI-Criminal 1421. For burglary offenses committed "while armed" or under aggravating circumstances as prohibited by § 943.10(2), see Wis JI-Criminal 1425A, 1425B, and 1425C.

In State v. O'Neill, 121 Wis.2d 300, 359 N.W.2d 906 (1984), the Wisconsin Supreme Court held that ". . . the legislature intended to include only offenses against persons and property within the felonies which could form the basis of a burglary charge" under subsec. 943.10(1)(a). O'Neill involved a burglary charge against a campus police supervisor who allegedly conducted an illegal entry and search of an apartment. The theory of prosecution was that the illegal entry and search constituted misconduct in public office which could serve as the underlying felony for the burglary charge. The supreme court reversed the burglary conviction, holding that "misconduct in public office is not the type of felony contemplated by sec. 943.10(1)."

The text of the instruction has not been changed to accommodate the O'Neill decision because the Committee concluded that the question of whether a particular felony could form the basis for a burglary charge would be one of law for the trial court rather than one of fact for the jury.

In State v. Semrau, 2000 WI APP 54, 233 Wis.2d 508, 608 N.W.2d 376, the court applied O'Neill and concluded that bail jumping could be the intended felony upon which a burglary charge can be based.

"Felon in possession of a firearm" in violation of § 941.29 is a crime against persons or property and can be the basis for the intent to commit a felony element of burglary. State v. Steele, 2001 WI APP 34, ¶ 21, 241 Wis.2d 269, 625 N.W.2d 595.

2. The model instruction is drafted for a case involving entry into a "building." It must be modified if entry involved any of the other places listed in § 943.10(1)(a) through (f): any building or dwelling; an enclosed railroad car; an enclosed portion of any ship or vessel; a locked enclosed cargo portion of a truck or trailer; a motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or a room in any of the above.

The instruction has never included a definition of "building." The meaning of the term has been considered to be the same for burglary and arson cases. In an arson case, State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991), the Wisconsin Supreme Court held it was error for the trial court to state that "a mobile home is a building." The court said this created a "mandatory conclusive presumption . . . regarding an element of the arson offense." However, the court further held that the error was harmless because it played no role in the jury's verdict:

> We conclude that no rational juror could plausibly find that the structure in question was a mobile home without also finding that the structure was a building. . . . If the jury found this structure

> to be a mobile home, as that term is commonly understood, this finding would be the 'functional equivalent' of finding that the structure was a building.

160 Wis.2d 722, 740.

In United States of America v. Franklin, 2019 WI 64, 387 Wis.2d 259, 272, 928 N.W.2d 545, the Wisconsin Supreme Court concluded that the locational alternatives provided in Wis. Stat. § 943.01(1m)(a)-(f) are alternative factual means of committing one element of burglary. Providing context to this holding, the court referenced an example previously incorporated in State v. Pinder, 2018 WI 106, ¶60, 384 Wis. 2d 416, 919 N.W.2d 568. Although the issue in Pinder concerned the validity of a search warrant issued for the placement and use of a GPS tracking device on a motor vehicle, the court did make a ruling in which it denied an ineffective assistance of counsel claim for failure to object to the burglary jury instruction Wis. JI-Criminal 1421. Addressing this claim, the court emphasized the latitude afforded in the crafting of a burglary jury instruction so as to comport with the evidence of the case, noting that:

> "[w]hile the circuit court could have used the phrase 'a room within a building' instead of the words 'office' or 'building,' the facts adduced would not confuse the jury as to what it was called upon to decide regardless of which of these words might be used." Id. at 456.

The court in Franklin cited the analysis of the statutory text, the legislative history and context of the statute, along with the nature of the conduct, and the appropriateness of multiple punishments in its conclusion that Wis. Stat. § 943.01 "identifies alternative means of committing one element of the crime of burglary under § 943.01 (1m)(a)-(f)." Franklin at 273. Furthermore, the court found that the crime of burglary does not include a separate locational element, and jury unanimity on finding guilt beyond a reasonable doubt as to locational alternatives provided in § 943.01(1m)(a)-(f) is not necessary to convict. Id. 273.

If a definition of "building" is necessary, resort to a standard dictionary may be helpful. For example, Webster's Ninth New Collegiate Dictionary provides that a "building" refers to "a usually roofed and walled structure built for permanent use (as for a dwelling)."

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> . . . an edifice or structure erected upon land, and so far completed that it may be used temporarily or permanently for the occupation or shelter of man or beast, or for the storage of tools or other personal property for safe-keeping. . . . "The well-understood meaning of the word is a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property."

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4. The defendant's entry into the place involved was without consent if the person in lawful possession did not consent in fact or if consent was given under the circumstances provided by Wis. Criminal Code § 939.22(48)(a)-(c). "Consent to enter which is obtained by the use or threat of force or by pretense of legal authority is in legal effect entry 'without consent.' The same ordinarily is true of consent obtained because the person giving the consent is mistaken as to the nature of the thing to which he consents. . . ." 1953 Legislative Council Committee Report on the Criminal Code, page 102.

Entry into a place when it is open to the public is not "without consent," see § 943.10(3). Thus, entry into a hotel lobby open to the public, although done with the intent to steal, is not burglary. Champlin v. State, 84 Wis.2d 621, 267 N.W.2d 295 (1978).

However, one who enters with consent may remain "at a time or place beyond his authority. 'Entry' in § 943.10(1)(a), Stats., must be construed to mean not only the simple act of passing through the outer wall of a structure but also the result of such action, namely, presence within the structure." Levesque v. State, 63 Wis.2d 412, 217 N.W.2d 317 (1974). Thus, an otherwise lawful entry became unlawful when Levesque hid himself in the false ceiling of the men's room and remained there until after the restaurant was closed.

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> The task in most cases will be to determine the limits of such consent and the defendant's knowledge or lack of it.
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5. Under § 943.10, the question is one of lawful possession and not legal title. Ordinarily, the question of who is in lawful possession, while presenting a mixed question of law and fact, can be decided by the court as a matter of law on admitted or undisputed facts.

6. Knowledge that the entry is without consent is an element of the offense of burglary because of the standard interpretation of criminal statutes required by § 939.23(3): Where the word "intentionally" is used, "the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" The decision in Hanson v. State, 52 Wis.2d 396, 190 N.W.2d 129 (1971), is sometimes cited for the contrary position. However, Hanson involved a defendant's postconviction challenge to the validity of his guilty plea and simply held that there was an adequate factual basis for a finding that there was no consent in fact to the defendant's entry. Under such circumstances, said the court, there was no additional burden on the state to show that the defendant did not "purport to be acting under legal authority," one of the alternatives to "no consent in fact" provided in the statutory definition of without consent, § 939.22(48). Recent decisions have reaffirmed that knowledge that entry is without consent is an essential element of burglary. See State v. Schantek, supra, note 4, and State v. Wilson, 160 Wis.2d 774, 467 N.W.2d 130 (Ct. App. 1991).

7. If multiple felonies are alleged, identify and define each felony. A defendant is not entitled to a unanimity instruction regarding the felonies that form the basis of their intent to enter a dwelling. In State

v. Hammer, 216 Wis. 2d 214, 576 N.W.2d 285 (Ct. App. 1997) the court of appeals considered whether, in order to support a conviction for burglary, the jury had to be unanimous as to the predicate felony that the defendant intended to commit when entering a dwelling. The circuit court had instructed the jury that three different acts (first-degree sexual assault, armed robbery, and battery causing substantial bodily harm) were felonies but declined to instruct the jury that the verdict had to be unanimous as to the predicate felony that the defendant intended to commit. Id. at 217-18. Affirming Hammer's conviction, the court concluded that the language of Wis. Stat. § 943.10(1) "indicates that the crime is one single offense with multiple modes of commission." Id. at 220. Although there are different ways to satisfy the intent element of the crime of burglary, "the different ways do not create separate and distinct offenses." Id. at 220. Furthermore, the statute focuses on the intent to commit a felony, not any particular felony. Therefore, all the felonies are conceptually similar for the purposes of unanimity. Id. at 222.

8. The intent to commit the felony must exist at the time the defendant entered the place. It is not sufficient that the defendant formed an intent to commit the felony after entry. Such intent, however, is usually proved circumstantially by what defendant did after he entered the place.

Care must be taken to assure that the crime intended was a felony. In State v. Gilbertson, 69 Wis.2d 587, 230 N.W.2d 874 (1975), a burglary conviction was reversed because there was insufficient proof of intent to commit a felony. The underlying crime was alleged to be criminal damage to property which becomes a felony only if there is intent to reduce the property's value by the requisite felony level. The insufficiency of the evidence on this point required reversal.

A defendant's intention to endanger the safety of others through criminally reckless conduct is enough to satisfy element four's requirement that a defendant enter a building with the intent to commit a felony. See State v. Mays, 2022 WI App 24, 402 Wis.2d 162, 975 N.W.2d 649. In Mays, the Wisconsin Court of Appeals held the defendant's conviction for the crime of felony murder, with the underlying crime of armed burglary, predicated on his intent to commit second-degree recklessly endangering safety, was valid under Wisconsin law.

9. Under the Criminal Code, the phrase "with intent to" means that the defendant either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result. Subsection 939.23(4) and Wis JI-Criminal 923A and 923B.

10. Burglary, as defined in § 943.10(1m), is punished as Class F felony. The penalty increases to a Class E felony if a burglary is committed under any of the circumstances defined in subsec. (2). The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Instructions are provided for three of the four factors identified in subsec. (2): while armed (see Wis JI-Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (see Wis JI-Criminal 1425B); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); and, while in the enclosure, the person commits a battery upon a person lawfully therein (see Wis JI-Criminal 1425C).

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1425A BURGLARY WHILE ARMED — § 943.10(1), (2)(a)

[THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER WIS JI-CRIMINAL 1421 or 1424.]

The information alleges not only that the defendant committed the crime of burglary but also that the defendant committed that crime while armed with a dangerous weapon.[1]

If you find the defendant guilty, you must answer the following question "yes" or "no":

"Did the defendant commit the crime of burglary while armed with a dangerous weapon?"

"Dangerous weapon" means _____.[2]

"Armed" means that at the time of the entry, the weapon must have been either on the defendant's person or within the defendant's reach. In addition, the defendant must have been aware of the presence of the weapon.[3]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of burglary while armed with a dangerous weapon, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1425A was originally published in 1996 and revised in 2001. This revision was approved by the Committee in June 2004 and involved nonsubstantive editorial corrections.

Burglary, as defined in § 943.10(1), is punished as a Class C felony. The penalty increases to a Class B felony if a burglary is committed under any of the circumstances defined in subsec. (2): while armed (covered by this instruction); while unarmed, but the person arms himself or herself while in the enclosure (see Wis JI-Criminal 1425B); while in the enclosure, the person uses explosives to open a depository

(there is no instruction for this alternative); and while in the enclosure, the person commits a battery upon a person lawfully therein (see Wis JI-Criminal 1425C).

The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Thus, this instruction, or Wis JI-Criminal 1425B or Wis JI-Criminal 1425C, would be added to Wis JI-Criminal 1421, Burglary With Intent To Steal, or to Wis JI-Criminal 1424, Burglary With Intent To Commit A Felony.

The following form is suggested for the guilty verdict:

> We, the jury, find the defendant guilty of burglary, as defined in § 943.10, Wis. Stats., at the time and place charged in the information.

If you find the defendant guilty, answer the following question "yes" or "no":

> Did the defendant commit the crime of burglary while armed with a dangerous weapon?

Proof of a "nexus" between the weapon and the underlying burglary is not required. State v. Gardner, 230 Wis.2d 32, 601 N.W.2d 670 (Ct. App. 1999).

1. Subsection 943.10(2)(a) was amended by 1995 Wisconsin Act 288 (effective date: May 10, 1996) to refer not only to dangerous weapons but also to "a device or container described under s. 941.26(4)(a)." The reference is to containers of oleoresin of capsicum, commonly referred to as "pepper spray." If that option is presented, the instruction must be modified. The Committee suggests simply substituting "container of oleoresin of capsicum" for "dangerous weapon" and not defining the term further. This is the approach used in the instructions for violations of § 941.26(4); see Wis JI-Criminal 1341, 1341A, and 1341B.

2. The Committee suggests using the part of the statutory definition that applies to the facts of the case. "Dangerous weapon" is defined as follows in § 939.22(10):

> (10) "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon, as defined in § 941.295(4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

For example, if the evidence shows a firearm was used, the sentence at note 1 would read: "'Dangerous weapon' means any firearm, whether loaded or unloaded." Similar statements should be used for the other alternatives provided by the statutory definition. See Wis JI-Criminal 910 for suggested instructions for the other alternatives and a discussion of some of the substantive issues relating to "dangerous weapons."

3. The definition of "armed" is adapted from that used in other uniform instructions for offenses having "armed" as an element. See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon. The Committee concluded that for purposes of the enhancement of penalty for committing the crime "while armed," the defendant must have been armed at the time of entry. For cases where the defendant arms himself or herself after entry, see Wis JI-Criminal 1425B.

1425B BURGLARY: ARMING ONESELF WITH A DANGEROUS WEAPON WHILE IN THE ENCLOSURE — § 943.10(1), (2)(b)

[THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER WIS JI-CRIMINAL 1421 or 1424.]

The information alleges not only that the defendant committed the crime of burglary but also that the defendant armed (himself) (herself) with a dangerous weapon[1] while in the enclosure.

If you find the defendant guilty, you must answer the following question "yes" or "no":

"Did the defendant arm (himself) (herself) with a dangerous weapon while in the enclosure?"

"Dangerous weapon" means _____.[2]

"Armed" means that the defendant knowingly took physical control of a dangerous weapon.[3]

"Enclosure" means the building or room where the burglary was committed.[4]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of burglary and that the defendant armed (himself) (herself) with a dangerous weapon while in the enclosure, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1425B was originally published in 1996 and revised in 2001. This revision was approved by the Committee in June 2004 and involved nonsubstantive editorial corrections.

Burglary, as defined in § 943.10(1), is punished as a Class C felony. The penalty increases to a Class B felony if a burglary is committed under any of the circumstances defined in subsec. (2): while armed (see Wis JI-Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (covered by this instruction); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); and, while in the enclosure, the person commits a battery upon a person lawfully therein (see Wis JI-Criminal 1425C).

The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Thus, this instruction, or Wis JI-Criminal 1425A or Wis JI-Criminal 1425C, would be added to Wis JI-Criminal 1421, Burglary With Intent To Steal, or to Wis JI-Criminal 1424, Burglary With Intent To Commit A Felony.

The following form is suggested for the guilty verdict:

> We, the jury, find the defendant guilty of burglary, as defined in § 943.10, Wis. Stats., at the time and place charged in the information.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> > Did the defendant arm (himself) (herself) with a dangerous weapon while in the enclosure?

This charge requires proof that the defendant armed himself while in the enclosure but does not require any further proof of a "nexus" between the weapon and the burglary offense. State v. Norris, 214 Wis.2d 25, 571 N.W.2d 857 (Ct. App. 1997).

1. Subsection 943.10(2)(a) was amended by 1995 Wisconsin Act 288 (effective date: May 10, 1996) to refer not only to dangerous weapons but also to "a device or container described under s. 941.26(4)(a)." The reference is to containers of oleoresin of capsicum, commonly referred to as "pepper spray." If that option is presented, the instruction must be modified. The Committee suggests simply substituting "container of oleoresin of capsicum" for "dangerous weapon" and not defining the term further. This is the approach used in the instructions for violations of § 941.26(4); see Wis JI-Criminal 1341, 1341A, and 1341B.

2. The Committee suggests using the part of the statutory definition that applies to the facts of the case. "Dangerous weapon" is defined as follows in § 939.22(10):

> (10) "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon, as defined in § 941.295(4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

For example, if the evidence shows a firearm was used, the sentence at note 1 would read: "'Dangerous weapon' means any firearm, whether loaded or unloaded." Similar statements should be used for the other alternatives provided by the statutory definition. See Wis JI-Criminal 910 for suggested instructions for the other alternatives and a discussion of some of the substantive issues relating to "dangerous weapons."

3. The definition of "armed" is adapted from that used in other uniform instructions for offenses having "armed" as an element. See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon.

It differs from those other definitions in that it requires that the defendant actually take physical control of a weapon. The Committee concluded that such a requirement was necessary in the context of this offense – simply being aware of the presence of the weapon is not sufficient.

4. The definition assumes the burglary took place in a building or dwelling. Other alternatives are possible, such as enclosed railroad cars, enclosed portions of a ship or vessel, etc. See § 943.10(1)(b) - (e) and note 2, Wis JI-Criminal 1421. If other than a building is involved, this definition should be eliminated or modified.

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1425C BURGLARY: COMMITTING A BATTERY WHILE IN THE ENCLOSURE — § 943.10(1), (2)(d)

[THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER WIS JI-CRIMINAL 1421 or 1424.]

The information alleges not only that the defendant committed the crime of burglary but also that the defendant committed a battery upon a person who was lawfully present in the enclosure.

If you find the defendant guilty, you must answer the following question "yes" or "no":

"Did the defendant commit a battery upon a person who was lawfully present in the enclosure?"

"Battery" is committed by one who causes bodily harm to another person, with intent to cause bodily harm and without the consent of the other person, and who knows that the person does not consent to the bodily harm.[1]

"Enclosure" means the building or room where the burglary was committed.[2]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of burglary and that the defendant committed a battery upon a person who was lawfully present in the enclosure, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1425C was originally published in 1996 and revised in 2001. This revision was approved by the Committee in June 2004 and involved nonsubstantive editorial corrections.

Burglary, as defined in § 943.10(1), is punished as a Class C felony. The penalty increases to a Class B felony if a burglary is committed under any of the circumstances defined in subsec. (2): while armed (see Wis JI-Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (see Wis JI-Criminal 1425B); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); and, while in the enclosure, the person commits a battery upon a person lawfully therein (covered by this instruction).

The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Thus, this instruction, or Wis JI-Criminal 1425A or Wis JI-Criminal 1425B, would be added to Wis JI-Criminal 1421, Burglary With Intent To Steal, or to Wis JI-Criminal 1424, Burglary With Intent To Commit A Felony.

The following form is suggested for the guilty verdict:

> We, the jury, find the defendant guilty of burglary, as defined in § 943.10, Wis. Stats., at the time and place charged in the information.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> > Did the defendant commit a battery upon a person who was lawfully present in the enclosure?

1. The definition of "battery" is based on the one provided in § 940.19(1). If additional instruction on the elements of simple battery is believed to be necessary, see Wis JI-Criminal 1220.

2. The definition assumes the burglary took place in a building or dwelling. Other alternatives are possible, such as enclosed railroad cars, enclosed portions of a ship or vessel, etc. See § 943.10(1)(b) - (e) and note 2, Wis JI-Criminal 1421. If other than a building is involved, this definition should be eliminated or modified.

1425E BURGLARY: PERSON LAWFULLY PRESENT IN THE ENCLOSURE — § 943.10(1), (2)(e)

[THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER WIS JI-CRIMINAL 1421 or 1424.]

The information alleges not only that the defendant committed the crime of burglary, but also that the enclosure was a (dwelling) (boat) (motor home) and another person was lawfully present in the enclosure.

If you find the defendant guilty, you must answer the following question "yes" or "no":

"Was the enclosure a (dwelling) (boat)[1] (motor home)[2] and was another person lawfully present in the enclosure?"

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of burglary and that the enclosure was a (dwelling) (boat) (motor home) and another person was lawfully present in the enclosure you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1425E was approved by the Committee in June 2004.

Burglary, as defined in § 943.10(1), is punished as a Class C felony. The penalty increases to a Class B felony if a burglary is committed under any of the circumstances defined in subsec. (2): while armed (see Wis JI-Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (see Wis JI-Criminal 1425B); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); while in the enclosure, the person commits a battery upon a person lawfully therein see Wis JI-Criminal 1425C); and, where the enclosure is a

dwelling, boat, or motor home and another person was lawfully present in the enclosure (covered by this instruction).

The penalty-increasing fact addressed by this instruction is set forth in § 943.10(2)(e), created by 2003 Wisconsin Act 189. Effective date: April 22, 2004.

The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Thus, this instruction, or Wis JI-Criminal 1425A, Wis JI-Criminal 1425B, or Wis JI-Criminal 1425C would be added to Wis JI-Criminal 1421, Burglary With Intent To Steal, or to Wis JI-Criminal 1424, Burglary With Intent To Commit A Felony.

The following form is suggested for the guilty verdict:

> We, the jury, find the defendant guilty of burglary, as defined in § 943.10, Wis. Stats., at the time and place charged in the information.
>
> If you find the defendant guilty, you must answer the following question "yes" or "no":
>
> "Was the enclosure a (dwelling) (boat) (motor home) and was another person lawfully present in the enclosure?"

1. "Boat" is defined in § 943.10(lg) (a) as "any ship or vessel that has sleeping quarters."

2. Subsection 943.10(1g)(b) provides that "'motor home' has the meaning given in s. 340.01(33m)." That definition provides:

> "Motor home" means a motor vehicle designed to be operated upon a highway for use as a temporary or recreational dwelling and having the same internal characteristics and equipment as a mobile home."

1426 ENTRY INTO A LOCKED VEHICLE — § 943.11

Statutory Definition of the Crime

Entry into a locked vehicle, as defined in § 943.11 of the Criminal Code of Wisconsin, is committed by one who intentionally enters the locked and enclosed portion or compartment of the vehicle of another without consent and with intent to steal.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally entered[1] the locked and enclosed portion or compartment of the vehicle of another.

   ["Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether the device is operated on land, rails, water, or in the air.][2]

2. The defendant intentionally entered without the consent of a person authorized to give consent.[3]

3. The defendant knew that the vehicle belonged to another person and knew that the entry was without consent.[4]

4. The defendant entered the (vehicle) (compartment) with intent to steal.

This requires that the defendant had the mental purpose to take and carry away movable property of another without consent and that the defendant intended to deprive the owner permanently of possession of the property. This intent to steal must be formed before entry into the vehicle is made. The intent to steal, which is an essential element of this offense, is no more or less than a mental purpose to steal, formed at any time before the entry, which continued to exist at the time of entry.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1426 was originally published in 1969 and revised in 1984 and 1995. This revision was approved by the Committee in December 2007 and involved adoption of a new format and nonsubstantive changes to the text.

1. As with burglary, the slightest entry should be sufficient. See note 3, Wis JI-Criminal 1421.

2. This is the definition provided in § 939.22(44). A trailer, for example, is not "a vehicle" within this definition. However, entry of a house trailer or the cargo portion of a nonself-propelled vehicle is a burglary under § 943.10(1)(d).

3. "Without consent" is defined in § 939.22(48). Also wee Wis JI-Criminal 948. Unlike the statutes defining related offenses, § 943.11 does not specify that the entry be "without consent of the owner" (e.g., § 943.15) or "without consent of the person in lawful possession" (e.g., § 943.10). The instruction uses "without consent of a person authorized to give consent" as a helpful elaboration consistent with the common sense meaning of "without consent."

4. Knowledge that the vehicle belonged to another and that the entry was without consent is an element because of the standard interpretation of criminal statutes required by § 939.23(3): Where the word "intentionally" is used, "the actor must have knowledge of those facts which are necessary to make the conduct criminal, and which are set forth after the word 'intentionally.'"

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1431 POSSESSION OF BURGLARIOUS TOOLS — § 943.12

Statutory Definition of the Crime

Possession of burglarious tools, as defined in § 943.12 of the Criminal Code of Wisconsin, is committed by one who has in personal possession any device or instrumentality intended, designed, or adapted for use in breaking into any depository designed for the safekeeping of any valuables or into any building or room with intent to use such device or instrumentality to break into a depository, building, or room and to steal therefrom.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had possession[1] of a tool or device.

   "Possession" means that the defendant knowingly[2] had actual physical control[3] of the tool or device.

2. The tool or device was suitable for use[4] in breaking into a building.[5] This may include common and special tools and devices.

3. The defendant intended to use the tool or device to break into a building with intent to steal.

This means that the defendant must have possessed the tool or device for the purpose of using it to break into a building with the intent to take and carry away movable property of another without consent and with intent to deprive the owner permanently of possession of such property.[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1431 was originally published in 1966 and revised in 1979, 1984, 1987, and 1995. This revision was approved by the Committee in December 2007 and involved adoption of a new format and nonsubstantive changes to the text.

In Dumas v. State, 90 Wis.2d 518, 280 N.W.2d 310 (Ct. App. 1979), the court affirmed convictions for both burglary and possession of burglarious tools where the defendant was apprehended inside the burglarized building, while the burglary was in progress, with a tire iron and a crowbar in his possession.

1. A change made in § 943.12 by Chapter 173, Laws of 1977, was to "in personal possession" from "in his possession." The Committee has concluded that this change was intended only to eliminate the use of the masculine pronoun in the statute and not to change the substance of the offense.

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

3. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

4. The Committee concluded that "suitable for use" was an appropriate substitute for the statutory language "intended, designed, or adapted." Chapter 173, Laws of 1977, introduced the latter language for the previously existing "designed and adapted." This substantially broadened the coverage of the statute (and was accompanied by a substantial reduction in the maximum penalty – from 10 to 2 years). The broader concept seems to be equivalent to "suitable for use," a construction that should be easier for the jury to understand (and which had been used in the 1953 draft of the proposed Criminal Code revision).

"The clear legislative intent [of § 943.12] was to make criminal the possession of any device designed for the criminal purpose of an illegal entry when that possession was coupled with the intent to use a device for the prohibited purpose." Perkins v. State, 61 Wis.2d 341, 350-51, 212 N.W.2d 141 (1973) (affirming a conviction based on the possession of a homemade key used to open parking meters). Also see Hansen v. State, 64 Wis.2d 541, 219 N.W.2d 246 (1974), finding the evidence sufficient to support a conviction based on the possession of a crowbar, gloves, and socks.

5. The instruction is drafted in terms of "breaking into a building," but the statute also covers a "room" and "any depository designed for the safekeeping of any valuables." If a "room" or "depository" is involved, that term should be substituted for "building" throughout the instruction.

6. Evidence of prior burglary convictions was held to be admissible as relevant to the intent issue in State v. Vanlue, 96 Wis.2d 81, 291 N.W.2d 467 (1980).

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1433 ENTRY INTO LOCKED COIN BOX — § 943.125

Statutory Definition of the Crime

Entry into a locked coin box, as defined in § 943.125 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a locked coin box of another without consent and with intent to steal.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally entered a locked coin box of another.

   "Coin box" means any device or receptacle designed to receive money or any other thing of value. [A (name item specified in § 943.125(3)) is a coin box.][1]

2. The defendant intentionally entered a locked coin box without the consent[2] of the owner.

3. The defendant knew that the coin box belonged to another and knew that the entry was without the consent of the owner.[3]

4. The defendant entered the coin box with intent to steal.

   "Intent to steal" requires that the defendant had the mental purpose to take and carry away movable property of another without consent and that the

defendant intended to deprive the owner permanently of possession of the property.[4]

When Must Intent Exist?

The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of this offense, is no more or less than the mental purpose to steal formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1433 was originally published in 1984 and revised in 1995. This revision was approved by the Committee in February 2004 and involved adoption of a new format and non-substantive changes in the text.

This instruction is for a violation of § 943.125(1). Subsection (2) of the statute makes it a crime to possess "any device or instrumentality" for use in breaking into a coin box. There is no standard instruction for violations of sub. (2).

1. The Committee has concluded that the jury may be advised that a particular device is listed in the statutory definition of "coin box" in § 943.125(3). It is for the jury to determine whether the device in the case is, in fact, one of the listed devices or receptacles. If the device in the case is not listed in the statute, the statement in brackets should not be used.

The definition in § 943.125(3) provides:

> (3) In this section, "coin box" means any device or receptacle designed to receive money or any other thing of value. The term includes a depository box, parking meter, vending machine, pay telephone, money changing machine, coin-operated phonograph and amusement machine if they are designed to receive money or other thing of value.

2. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

3. Knowledge that the coin box belonged to another and that the entry was without consent is required because the definition of this offense begins with the word "intentionally." Section 939.23(3) provides that the word "intentionally" requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally'" in the statute.

4. This is intended to be a summary of the necessary components of "intent to steal." See Wis JI-Criminal 1441, Theft.

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1437 CRIMINAL TRESPASS TO DWELLINGS — § 943.14

Statutory Definition of the Crime

Criminal trespass to a dwelling, as defined in § 943.14 of the Criminal Code of Wisconsin, is committed by one who intentionally (enters) (remains in)[1] the dwelling of another without the consent of some person lawfully upon the premises,[2] under circumstances tending to create or provoke a breach of the peace.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (entered) (remained in) the dwelling of another.

   "Dwelling" means a structure that is used or intended to be used as a home or residence by one or more persons to the exclusion of all others [whether or not currently occupied by a resident].[3]

2. The defendant (entered) (remained in) the dwelling without the consent[4] of someone lawfully upon the premises.

3. The defendant (entered) (remained in) the dwelling under circumstances tending to create or provoke a breach of the peace.

   It is not necessary that an actual breach of the peace occurred as a result of defendant's conduct.

The term "breach of the peace" includes all violations of peace and order.[5]

[It may consist of an act of violence or an act likely to produce violence. It may consist of profane and abusive language by one toward another.]

[It may consist of acts that put (name of victim) in fear of bodily harm or otherwise disturb or disrupt the peace and sanctity of the home.][6]

4. The defendant knew that (the entry into) (remaining in) the dwelling was without consent and under circumstances tending to create or provoke a breach of the peace and knew that it was the dwelling of another.[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1437 was originally published in 1974 and revised in 1985, 1993, 2002, and 2016. This revision was approved by the Committee in July 2016; it reflects the amendment of § 943.14 by 2015 Wisconsin Act 176.

". . . [W]here a person enters a dwelling which is another person's residence, that person violates § 943.14 if acting without consent, other statutory authority or court order and regardless of any ownership rights in the property." State v. Carls, 186 Wis.2d 533, 534, 521 N.W.2d 181 (Ct. App. 1994). In Carls, the defendant and his wife were in the process of divorce. The wife had obtained an injunction prohibiting the defendant from entering the house that was their joint marital property. The defendant's entry without consent was held to violate § 943.14: although he "jointly owned the home, he no longer lived there. . . Therefore, according to the plain meaning of the statute, the home was not [the defendant's] dwelling but the dwelling of another. . ." 186 Wis.2d 533, 536.

1. The "remains in" alternative was added to the statute by 2015 Wisconsin Act 176 [effective date: March 2, 2016].

2. 2015 Wisconsin Act 176 also added the following to the offense definition: ". . . or, if no person is lawfully upon the premises, without the consent of the owner of the property that includes the dwelling." If a case involves this option, the Committee suggests substituting the following: "without the consent of the owner of the dwelling." A similar change will be required in element 2. See footnote 4.

3. The definition of "dwelling" is the one provided in s. 943.14(1), as created by 2015 Wisconsin Act 176 [effective date: March 2, 2016]. The definition also provides: "For the purposes of this section, a dwelling meets the definition regardless of whether the dwelling is currently occupied by a resident." If the facts of the case so require, the statement in brackets should be added.

4. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

2015 Wisconsin Act 176 also added the following to the offense definition: ". . . or, if no person is lawfully upon the premises, without the consent of the owner of the property that includes the dwelling." If a case involves this option, the Committee suggests substituting the following: "without the consent of the owner of the dwelling."

5. This description of "tending to create or provoke a breach of the peace" was adopted in 1994 as a substantial shortening of that provided in the earlier version of the instruction. For more detail, see Wis JI-Criminal 1900, Disorderly Conduct, and the Comment to that instruction.

Also see State v. Givens, 28 Wis.2d 109, 135 N.W.2d 780 (1965), upholding the constitutionality of Wisconsin's disorderly conduct statute and discussing the type of conduct required to constitute conduct engaged in under circumstances "tending to provoke or cause a disturbance."

6. State v. Van Loh, 157 Wis.2d 91, 99, 458 N.W.2d 556 (Ct. App. 1990).

7. The knowledge element is based on the rule of construction provided in § 939.23(3): "'Intentionally' means that . . . the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" Because "dwelling of another," "without consent," and "under circumstances tending . . ." all follow the word "intentionally" in § 943.14, the instruction requires knowledge of those facts.

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1438 ENTRY INTO A LOCKED DWELLING — § 943.15

Statutory Definition of the Crime

Entry into a locked dwelling, as defined in § 943.15 of the Criminal Code of Wisconsin, is committed by one who enters the locked and enclosed dwelling of another without the consent of the owner or person in lawful possession of the premises.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant entered the dwelling of another.

   The term "dwelling" means the (apartment) (room) (building) or other structure in which a person makes a home.[1]

2. The defendant entered the dwelling when it was locked and enclosed.

3. The defendant entered the dwelling of another without the consent[2] of the owner or person in lawful possession of the premises.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1438 was originally published in 1984 and revised in 1995. This revision was approved by the Committee in December 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 943.15 which prohibits entry without consent into a "locked and enclosed building, dwelling or room of another." The model instruction is drafted for charges involving entry into a dwelling. The statute also prohibits entry into a locked or posted construction site.

1. The definition of "dwelling" is based on the one used in Wis JI-Criminal 1437 Criminal Trespass to Dwellings. Regarding what constitutes "entry" for the purposes of burglary, see note 3, Wis JI-Criminal 1421.

2. Entry is "without consent" if there was no consent in fact or if the consent was given under the circumstances identified in § 939.22(48)(a)-(c). Also see, Wis JI-Criminal 948.

1439 CRIMINAL TRESPASS TO A MEDICAL FACILITY — § 943.145

Statutory Definition of the Crime

Criminal trespass to a medical facility, as defined in § 943.145 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a medical facility without the consent of some person lawfully upon the premises, under circumstances tending to create or provoke a breach of the peace.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally entered a medical facility.

   "Medical facility" means a hospital or a clinic or office that is used by a licensed physician.[1]

   "Intentionally" requires that the defendant had the purpose of entering a medical facility.[2]

2. The defendant entered a medical facility without the consent of someone lawfully upon the premises.

   The phrase "without consent" means that there was no consent in fact.[3]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE

[The general consent given to the public to enter a business premise is not for all things and all purposes but is conditioned by the purpose of doing business in the area set aside for that purpose.][4]

3. The defendant entered a medical facility under circumstances tending to create or provoke a breach of the peace.

It is not necessary that an actual breach of the peace occurred as a result of defendant's conduct. The term "breach of the peace" includes all violations of peace and order. It may consist of an act of violence or an act likely to produce violence. It may consist of profane and abusive language by one toward another. To constitute criminal trespass to a medical facility, the entry must be done under circumstances tending to create or provoke a breach of the peace.[5]

4. The defendant knew that the entry into a medical facility was made without consent and under circumstances likely to provoke a breach of the peace.[6]

Deciding About Purpose and Knowledge

You cannot look into a person's mind to find purpose and knowledge. Purpose and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1439 was originally published in 1988 and revised in 1995. This revision was approved by the Committee in December 2007 and involved adoption of a new format and nonsubstantive changes to the text.

Section 943.145 was created by 1985 Wisconsin Act 56, the "Abortion Prevention and Family Responsibility Act of 1985." The constitutionality of § 943.145 was upheld in State v. Migliorino, 150 Wis.2d 513, 525-35, 442 N.W.2d 36 (1989).

State v. Horn, 139 Wis.2d 473, 407 N.W.2d 854 (1987), involved a protest at a facility providing abortions and other medical services that took place before the enactment of § 943.145. Horn and others were charged with criminal trespass to land under § 943.13 for their conduct protesting the performance of abortions at the Fox Valley Reproductive Health Care Center. The supreme court held that the trial court correctly refused to instruct the jury on or allow evidence in support of a "free speech" defense. Neither the First Amendment nor the Wisconsin Constitution protects free speech on private property (see Jacobs v. Major, 139 Wis.2d 492, 407 N.W.2d 832 (1987)), so there was no legal basis for the defense.

1. The suggested definition is based on the one provided in § 943.145(1), see below, which includes cross-references to the definition of "hospital" under § 50.33(2), also below. The § 943.145(1) definition also includes cross-references to the licensing requirements for physicians found in Chapter 448 and the rules of the medical examining board which apply to clinics and offices.

Regarding the cross-reference to "rules of the medical examining board," see State v. Migliorino, 150 Wis.2d 513, 522-24, 442 N.W.2d 36 (1989).

2. Section 939.23(3).

3. Section 939.22(48). Also see Wis JI-Criminal 948.

4. In State v. Migliorino, 170 Wis.2d 576, 592, 489 N.W.2d 678 (Ct. App. 1992), the court approved an addition to the definition of "without consent" like the one provided in brackets. The court held that the rule reflected in the instruction, based on the rule applicable in burglary cases, also applies to § 943.145. 150 Wis.2d 513, 535-37 (citing Levesque v. State, 63 Wis.2d 412, 217 N.W.2d 317 (1974), a case involving "entry without consent" under the burglary statute). See the discussion in note 4, Wis JI-Criminal 1421.

5. This description of "tending to create or provoke a breach of the peace" is based on the one used in Wis JI-Criminal 1437, Criminal Trespass to Dwellings. For more detail, see Wis JI-Criminal 1900, Disorderly Conduct, and the Comment to that instruction.

The focus of this element is on the circumstances at the time of the entry and requires a case-by-case analysis. State v. Migliorino, 170 Wis.2d 576, 592, 489 N.W.2d 678 (Ct. App. 1992) (citing with approval the elements set forth in this instruction and also concluding that the standards applicable to disorderly conduct offenses apply to this offense as well).

Also see State v. Givens, 28 Wis.2d 109, 135 N.W.2d 780 (1965), upholding the constitutionality of Wisconsin's disorderly conduct statute and discussing the type of conduct required to constitute conduct engaged in under circumstances which "tends to provoke or cause a disturbance."

6. When "intentionally" is used in a criminal statute, it requires a purpose to achieve the result specified and knowledge of all facts necessary to make the conduct criminal and which follow the word "intentionally" in the statute. Section 939.23(3).

1440 CRIMINAL TRESPASS TO AN ENERGY PROVIDER PROPERTY — § 943.143

Statutory Definition of the Crime

Criminal trespass to an energy provider property, as defined in § 943.143 of the Criminal Code of Wisconsin, is committed by one who intentionally enters an energy provider property without the consent of the energy provider that owns, leases, or operates the property.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally entered an energy provider property.

("Energy provider property" means property that is part of an electric, natural gas, oil, petroleum, refined petroleum product, renewable fuel, water, or chemical generation, transmission, or distribution system and that is owned, leased, or operated by an energy provider.)[2]

(A decommissioned nuclear power plant is an energy provider.)[3]

"Intentionally" requires that the defendant had the purpose of entering an energy provider property.[4]

2. The defendant entered an energy provider property without the lawful authority and consent of the energy provider.

The phrase "without consent" means that there was no consent in fact.[5]

Deciding About Purpose and Knowledge

You cannot look into a person's mind to find purpose and knowledge. Purpose and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1440 was approved by the Committee in February 2020.

Section 943.143 was created by 2015 Wisconsin Act 158. The statute was modified by 2019 Wisconsin Act 33 to expand the scope of the enhanced penalty for intentionally causing damage and trespassing to include property owned, leased, or operated by public water utilities, cooperative associations producing or furnishing water, and companies that operate gas, oil, petroleum, refined petroleum product, renewable fuel, water, or chemical generation storage transportation or delivery system.

1. Section 943.143(3) does not apply to any of the following:

(a) Any person who is:

1. Monitoring compliance with public or worker safety laws, wage and hour requirements, or other statutory requirements.
2. Engaging in picketing occurring at the workplace that is otherwise lawful and arises out of a bona fide labor dispute including any controversy concerning any of the following:

wages or salaries; hours; working conditions; benefits, including welfare, sick leave, insurance, pension or retirement provisions; or the managing or maintenance of collective bargaining agreements and the terms to be included in those agreements.

3. Engaging in union organizing or recruitment activities that are otherwise lawful including attempting to reach workers verbally, in writing, and in the investigation of non-union working conditions.

(b) An exercise of a person's right of free speech or assembly that is otherwise lawful.

2. Select qualifying business activity.

3. "Specify the applicable category of energy provider." Section 943.143(1)(a) provides:

"Energy provider" means any of the following:

1. A public utility under s. 196.01 (5) (a) that is engaged in any of the following: (a) The production, transmission, delivery, or furnishing of heat, power, light, or water. (b) The transmission or delivery of natural gas.
2. A transmission company under s. 196.485 (1) (ge).
3. A cooperative association organized under ch. 185 for the purpose of producing or furnishing heat, light, power or water for its members.
4. A wholesale merchant plant under s. 196.491 (1) (w), except that "wholesale merchant plant" includes an electric generating facility or an improvement to an electric generating facility that is subject to a leased generation contract, as defined in s.196.52 (9) (a) 3.
5. A decommissioned nuclear power plant.
6. A company that operates a gas, oil, petroleum, refined petroleum product, renewable fuel, water, or chemical generation, storage transportation, or delivery system that is not a service station, garage, or other place where gasoline or diesel fuel is sold at retailer offered for sale at retail.

The court should inquire whether the parties agree that the entity whose property is at issue is a qualified energy provider. If there is no agreement, the court should require that the state designate under which subsection they are proceeding.

4. Section 939.23(3).

5. Section 939.22(48). Also see Wis JI-Criminal 948.

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1441 THEFT — § 943.20(1)(a)

Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(a) of the Criminal Code of Wisconsin, is committed by one who intentionally (takes and carries away) (uses) (transfers) (conceals) (retains possession of)[1] movable property of another without consent and with intent to deprive the owner permanently of possession of the property.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally took and carried away movable property of another.[2]

   The term "intentionally" means that the defendant must have had the mental purpose to take and carry away property.[3]

   "Movable property" means property whose physical location can be changed.[4]

2. The owner of the property did not consent[5] to taking and carrying away the property.

3. The defendant knew that the owner did not consent.[6]

4. The defendant intended to deprive the owner permanently of the possession of the property.

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of theft have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.[8]

[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of property stolen more than $100,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $10,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $5,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $2,500?"

Answer: "yes" or "no.")

"Value" means the market value of the property at the time of the theft or the replacement cost, whichever is less.[9]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[10]

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.].

COMMENT

Wis JI-Criminal 1441 was originally published in 1966 and revised in 1977, 1987, 1991, 1999, 2000, 2002, 2003, 2006, 2009, and 2018. This revision was approved by the Committee in February 2022; it updated footnote 10 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(a). The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. See footnote 8, below. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. The penalty increases to a Class D felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

For a general discussion of past and current Wisconsin theft statutes, see Melli & Remington, "Theft

A Comparative Analysis," 1954 Wis. L. Rev. 253; Baldwin, "Criminal Misappropriations in Wisconsin—Part I," 44 Marq. L. Rev. 253 (1960 61).

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes "ownership" and "possession" in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

Charging ten counts of theft and five counts of concealing stolen property for taking ten firearms during a burglary and concealing five of them does not violate rules prohibiting multiple charges. State v. Trawitzki, 2001 WI 77, 244 Wis.2d 523, 628 N.W.2d 801. "[T]he theft and concealment of each firearm increases the danger posed to society. Accordingly, it is appropriate to punish the taking and the concealing of each firearm separately." 2001 WI 77 ¶36.

1. One of the five alternatives in parentheses should be selected. The rest of the instruction is drafted for a case where the act is alleged to be "takes and carries away," which, in the Committee's judgment, is the most commonly charged alternative.

In State v. Genova, 77 Wis.2d 141, 252 N.W.2d 380 (1977), the Wisconsin Supreme Court approved the construction of the theft statute adopted in this instruction. A theft charge had been dismissed on the basis that the complaint charged only that the defendant had transferred property and not that he had taken the property and transferred it. The supreme court held that the complaint had been sufficient in charging only "transfer." The statute should be read as though the following "or"" appeared in it: takes and carries away, or uses, or transfers, or conceals, or retains. A violation of the statute need not include a taking from the owner.

2. Define "property of another" if necessary. The term is defined as follows in §§ 939.22(28) and 943.20(2)(c):

> 939.22(28) "Property of another" means property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property.
>
> 943.20(2)(c) "Property of another" includes property in which the actor is a co owner and property of a partnership of which the actor is a member, unless the actor and the victim are husband and wife.

3. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

4. This is based on the definition of "movable property" in § 943.20(2)(a) which provides:

(a) "Movable property" is property whose physical location can be changed, without limitation including electricity and gas, documents which represent or embody intangible rights, and things growing on, affixed to or found in land.

Section 943.20(2) defines "property" as follows:

(b) "Property" means all forms of tangible property, whether real or personal, without limitation including electricity, gas and documents which represent or embody a chose in action or other intangible rights.

5. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

6. Knowledge that the taking was without consent is required because the definition of this offense begins with the word "intentionally." Section 939.23(3) provides that the word "intentionally" requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally'" in the statute.

7. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

8. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000 2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18, 2018]. The penalties provided in subs. (3)(a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000 but not $100,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

2007 Wisconsin Act 64 [effective date: March 26, 2008] added the following to § 943.20(2)(d): "If the property stolen is scrap metal, as defined in s. 134.405(1)(f), 'value' also includes any costs that would be incurred in repairing or replacing any property damaged in the theft or removal of the scrap metal."

The questions in the instruction omit the upper limits of the penalty categories; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

9. This is the most often used part of the definition of "value" provided in § 943.20(2)(d). The full definition as amended by 2007 Wisconsin Act 64 and 2011 Wisconsin Act 194, reads as follows:

> Except as otherwise provided in this paragraph, "value" means the market value at the time of the theft or the cost to the victim of replacing the property within a reasonable time after the theft, whichever is less. If the property stolen is a document evidencing a chose in action or other intangible right, "value" means either the market value of the chose in action or other right or the intrinsic value of the document, whichever is greater. If the property stolen is scrap metal, as defined in s. 134.405(1)(f), or "plastic bulk merchandise container" as defined in s. 134.405(1)(em), "value" also includes any costs that would be incurred in repairing or replacing any property damaged in the theft or removal of the scrap metal or plastic bulk merchandise container. If the thief gave consideration for, or had a legal interest in, the stolen property, the amount of such consideration or value of such interest shall be deducted from the total value of the property.

The Wisconsin Supreme Court in Sartin v. State, 44 Wis.2d 138, 170 N.W.2d 727 (1969), a theft case, refused to adopt either a retail or wholesale value definition of the term "value." It is felt that in the theft statute, "[t]he statutory scheme clearly contemplates a determination of the cost of replacement to the victim." Sartin at 149.

10. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme.
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it. or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles

(valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

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1441A DETERMINING VALUE IN THEFT CASES

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 1441A was originally published in 1987 and revised in 1989 and 1992. It was withdrawn in 2001 when the questions relating to determining value were added to the instructions for the theft offenses.

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1441B THEFT: PENALTY FACTORS — § 943.20(3)(d) and (3)(e)

ADD ONE OF THE FOLLOWING QUESTIONS IF FELONY THEFT IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN SUB. (3)(d) OR (3)(e) IS ESTABLISHED.

If you find the defendant guilty, you must answer the following question:

FOR CHARGES UNDER SUB. (3)(d)1.

["Was the property taken a domestic animal?"][1]

FOR CHARGES UNDER SUB. (3)(d)3.

["Was the property taken from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing or the proximity of battle?"][2]

FOR CHARGES UNDER SUB. (3)(d)4.

["Was the property taken after physical disaster, riot, bombing or the proximity of battle has necessitated its removal from a building?"][3]

FOR CHARGES UNDER SUB. (3)(d)5.

["Was the property taken a firearm?"[4]

"Firearm" means a weapon that acts by the force of gunpowder.]

FOR CHARGES UNDER SUB. (3)(d)6.

["Was the property taken from (an individual at risk) (a patient or resident of a (name type of facility under s. 940.295(2)))?"][5]

FOR CHARGES UNDER SUB. (3)(e).

["Was the property taken from (the person of another) (a corpse)?"][6]

[This requires that the property was taken from the body of the person in possession of the property, or that the person had immediate control over the property.][7]

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer to the question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1441B was originally published in 1999 and revised in 2002, 2003, 2008, and 2018. The 2018 revision made an editorial correction and added to footnote 6. This revision was approved by the Committee in December 2019; it added language to the bracketed requirement for charges under sub. (3)(e), and added footnote 7.

This instruction addresses the six penalty-increasing factors set forth in § 943.20(3)(d) and (e). Theft from person – set forth in subdiv. (3)(e) – was formerly covered by a separate instruction, Wis JI-Criminal 1442, but that instruction has been withdrawn in favor of including all the factors together in this instruction. Each of the factors in sub. (3)(d) increases the penalty to a Class H felony; theft from person under sub. (3)(e) is a Class G felony. Section 943.20(3)(d), as amended by 2001 Wisconsin Act 109.

As with the value question in theft cases, see Wis JI-Criminal 1441, the Committee recommends that these factors be presented to the jury in the form of a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of theft under Wis. Stat. § 943.20, at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> "Was the property taken (repeat the essential facts in the question)?"

1. This is the factor in subdiv. 1. of § 943.20(3)(d). "Domestic animal" is defined as follows for the purposes of Chapter 174: "'Domestic animal' includes livestock, dogs, and cats." § 174.001(2g).

2. This is the factor set forth in subdiv. 3. of § 943.20(3)(d).

3. This is the factor set forth in subdiv. 4. of § 943.20(3)(d).

4. This is the factor in subdiv. 5. of § 943.20(3)(d). The definition of "firearm" in the next sentence is the standard one used in the uniform instructions. It is based on Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

5. These are the factors set forth in subdiv. 6. of § 943.20(3)(d). The facilities "under s. 940.295(2)" include a variety of facilities, most of which involve providing health care or related services. See note 1, Wis JI-Criminal 1271. 2005 Wisconsin Act 388 changed the reference to "individual at risk" from "vulnerable adult." "Individual at risk" is defined as follows in § 940.20(2)(ae): "'Individual at risk' means an elder adult at risk or an adult at risk." Section 943.20(2)(a) provides that "'Adult at risk' has the meaning given in s. 55.01(1e)." Section 943.20(2)(ad) provides that "'Elder adult at risk' has the meaning provided in s. 46.90(1)(br)." Definitions based on those cross references, which also apply to violations of § 940.285, are provided in Wis JI-Criminal 1268.

6. These are the factors in § 943.20(3)(e). The explication of "from the person" in the next sentence is what was formerly provided in Wis JI-Criminal 1442, Theft From Person. In State v. Hughes, 218 Wis.2d 538, 548, 582 N.W.2d 49 (Ct. App. 1998), the court concluded that "theft 'from the person' encompasses the taking of property from the wheelchair of one sitting in the wheelchair at the time of the taking." Hughes did not state a generally applicable definition of "from the person" and expressly provided that the court "refrain[ed] from embracing either a narrow or broad standard that would necessarily apply to other factual situations." 218 Wis.2d 538, 548, note 10. Also see, State v. Graham, 2000 WI App 138, 237 Wis.2d 620, 614 N.W.2d 504, finding the evidence sufficient to prove "theft from person"; and State v. Tidwell, 2009 WI App 153, 321 Wis.2d 596, 774 N.W.2d 650, finding the evidence sufficient to prove "attempted theft from person."

"'Corpse' means the dead body of a human being." American Heritage Dictionary of the English Language, 3rd Edition, 1992.

7. In State v. Tidwell, 321 Wis.2d 596, 774 N.W.2d 650, 2009 WI App 153, the defendant argued that the evidence was insufficient to find him guilty on the charge of attempted theft from a person as the property he attempted to steal, a cash register on a counter, was not connected in any way to the victim's person. After reviewing the legislative history of § 943.20(3) the court of appeals disagreed and concluded that the intent of the "from the person" penalty enhancer was to "cove[r] circumstances which made stealing particularly dangerous and undesirable." It was the victim's constructive possession of the property which made the attempted theft particularly dangerous and undesirable. Id. at ¶¶8-12.

The Committee concluded that acts of theft in which the victim has immediate control over the property in question fall into the category of particularly dangerous and undesirable circumstances, and therefore constitutes theft from a person.

See JI 920 Possession.

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1442 THEFT FROM PERSON — § 943.20(1)(a) and (3)(d)2.

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1442 was originally published in 1981 and revised in 1991. It was withdrawn in 1999 when theft from person was included in Wis JI-Criminal 1441B, an instruction that adds a special question for use when any of the penalty-increasing factors in § 943.20(3)(d) are involved.

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1443 THEFT BY CONTRACTOR — §§ 779.02(5) and 943.20(1)(b)

Statutory Definition of the Crime

Theft by contractor, as defined in § 779.02(5) of the Wisconsin Construction Lien Law and in § 943.20(1)(b) of the Criminal Code of Wisconsin, is committed by one who, under an agreement for the improvement of land, receives money from the owner, and who, without consent of the owner, contrary to his or her authority, intentionally uses any of the money for any purpose other than the payment of claims due or to become due from the defendant for labor or materials used in the improvements before all claims[1] are paid[2] [in full] [or] [proportionally in cases of deficiency].[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant entered into an oral or written agreement for the improvement of land.

   (Building) (Repairing) (Altering) (_____) a (house) (garage) (_____) is an improvement of land.[4]

2. The defendant received money from the owner under the agreement for the improvement of land.[5]

["Owner" means the owner of any interest in land who, personally or through an agent, enters into a contract for the improvement of the land.]

3. The defendant intentionally used any of the money for a purpose other than the payment of claims due or to become due from the defendant for labor or materials used in the improvements before all claims were paid [in full][6] [proportionally in cases of deficiency].[7]

4. The use of the money was without the consent of the owner of the land and contrary to the defendant's authority.

5. The defendant knew that the use of the money was without the consent of the owner of the land and contrary to the defendant's authority.[8]

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of theft by contractor have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD

SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[10]

[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of the money used more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $2,500?"

Answer: "yes" or "no.")

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[11]

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

COMMENT

Wis JI-Criminal 1443 was originally published in 1976 and revised in 1985, 1991, 1994, 2002, 2003, 2006, 2007, 2014, and 2019. The 2014 revision added references to proportional payment in cases of deficiency to the text at footnotes 3 and 7. The 2019 revision updated the text and footnote 10 to reflect a new penalty category. This revision was approved by the Committee in February 2022; it updated footnote 11 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of §§ 779.02(5) and 943.20(1)(b). The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the money used exceeds specified levels. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 10, below.

Section 779.02(5) provides that any use by a contractor of money paid for improvements except to pay the claims of those who furnished labor and materials is theft and is "punishable under sec. 943.20." Longstanding Wisconsin case law has interpreted this offense and the reference to sec. 943.20 as not simply a reference to the penalty provision but rather to the definition of theft by trustee under sec. 943.20(1)(b), thereby incorporating the elements of that offense. Pauly v. Keebler, 175 Wis. 428, 185 N.W.2d 554 (1921); State v. Halverson, 32 Wis.2d 503, 145 N.W.2d 749 (1966).

The history and development of this offense were traced in footnote 9 to the 1976 version of JI-1443. It explained the early cases as follows:

> 9. This instruction on the nature of theft by a contractor demonstrates that it is a sophisticated cousin of ordinary embezzlement. The relationship between a misappropriation by a contractor and ordinary embezzlement was first made clear in Pauly v. Keebler (1921), 175 Wis. 428, 185 N.W. 554. At that time the misappropriation by a contractor was called "embezzlement" (Wis. Stat. § 3315(3) (1921)), which corresponded to the terminology used in the criminal code at the time. Wis. Stat. § 4418 (1921).
>
> In Pauly, supra, the court indicated that the elements which are essential to an ordinary embezzlement conviction may be implied into this statute, outside the criminal code, making misappropriations by contractors illegal. 175 Wis. at 436. In that particular case, the court implied the element of wrongful intent into the contractors statute because such intent was part of the ordinary embezzlement provisions of the criminal code. Since that case, nothing has happened which indicates that the court or the legislature intended any result other than the inclusion of all essential elements of the criminal embezzlement offense in the offense of theft by a contractor. In fact, the available evidence tends to reaffirm the view expressed in Pauly. In 1955, the legislature passed a complete revision of the criminal code to be effective July 1, 1956. Chapter 696, Laws of Wisconsin (Vol. II, 1955). In section 943.20 of the code revision act, the old embezzlement statute was revised by removing the word "embezzlement" and replacing it with the word "theft," and by merging it with other misappropriation laws to make one multiparagraph section on criminal misappropriation. Section I (943.20(1)(b)), Chapter 696, Laws of Wisconsin (Vol. II, 1955). In an effort to keep the close relationship between the old embezzlement law and the embezzlement by contractors provision constant, the legislature also amended section 289.02(4) to change the word "embezzlement" to "theft" in the contractors statute. Section 55 (289.02(4), Chapter 696, Laws of Wisconsin (Vol. II, 1955). Furthermore, in State v. Halverson, (1966) 32 Wis.2d 503, 154 N.W.2d 739, the court stated that the statutes

> governing what used to be known as embezzlement in the criminal code and a statute nearly identical to the theft by contractors one involved here (Wis. Stat. § 235.701 (1965)) were to be read together. In the Halverson case, the court also indicated that the trustee referred to in the criminal code provision on misappropriation would include a contractor who held funds advanced to him pursuant to the trust created by the statute in his hands. Wis. Stat. §§ 289.02(5) or 706.11(3).

More recent cases indicate that "criminal intent," rather than "intent to defraud" is sufficient to constitute the crime, and Wis JI-Criminal 1443 now reflects this conclusion. See discussion at note 6, below.

1. Section 779.02 applies only to claims that are "not the subject of a bona fide dispute." If there is evidence of a bona fide dispute about the claims, the phrase "not the subject of a bona fide dispute" should be added immediately after the word "claims." Also see note 6, below.

2. The statement of the definition of the offense is a slightly simplified version of the full statutory text. No change in meaning is intended.

In cases involving mortgages, "proceeds of any mortgage" may be used in place of "money" and "mortgagee" used in place of or in addition to "owner." The changes would be necessary throughout the instruction.

3. Use the first phrase in brackets when there is no issue relating to proportional payment in a case involving a deficiency. Use the second phrase in brackets when there is an issue relating to proportional payment; see note 7, below. Use both phrases, connected with "or," when there is conflicting evidence about whether the case involves a deficiency.

4. If a more formal definition of "improvement" is needed, see sec. 779.01(2)(a) which provides as follows:

> (a) "Improve" or "improvement" includes any building, structure, erection, fixture, demolition, alteration, excavation, filling, grading, tiling, planting, clearing or landscaping which is built, erected, made or done on or to land for its permanent benefit. This enumeration is intended as an extension rather than a limitation of the normal meaning and scope of "improve" and "improvement."

5. This definition is adapted from the one found in sec. 779.01(2)(c).

6. The third element was affirmed as a correct statement of the law in State v. Sobkowiak, 173 Wis.2d 327, 336-39, 496 N.W.2d 620 (Ct. App. 1992): "The intent establishing the violation is the intent to use moneys subject to a trust for purposes inconsistent with the trust." No further intent – to defraud or to permanently deprive – is required. See note 8, below, which Sobkowiak cited with apparent approval.

If there is evidence in the case that the unpaid claims, or portions of the unpaid claims, were the subject of a bona fide dispute, add the following as a second paragraph of the definition of the third element:

The third element also requires that the claims for labor or materials were not the subject of a bona fide dispute. The state must prove either that there was no bona fide dispute about the claim or, that aside

from any bona fide dispute, the defendant failed to pay claims that were not disputed. A "bona fide dispute" means a dispute based on a reasonable belief about the basis for or the amount of a claim.

7. Use this bracketed material when the case involves a deficiency in the amount available to pay the lienholders. In this situation, § 779.02(5) requires that the trust fund money be paid proportionally. See, State v. Keyes, 2008 WI 54, 309 Wis.2d 516, 750 N.W.2d 30, at ¶24-34.

8. In State v. Hess, 99 Wis.2d 22, 298 N.W.2d 111 (Ct. App. 1980), the court held that theft by contractor requires only "criminal intent" and not "intent to defraud." Hess seems to indicate the "criminal intent" boils down to knowledge that the defendant is in the position of trustee and that he or she intentionally uses the money for some other purpose than paying the suppliers. Wis JI-Criminal 1443 is drafted on the premise that using the funds for any purpose other than paying off the lien claimants is theft by contractor. This position is consistent with Hess, and with other recent cases: State v. Blaisdell, 85 Wis.2d 172, 270 N.W.2d 69 (1978); State v. Wolter, 85 Wis.2d 353, 270 N.W.2d 230 (Ct. App. 1978).

The 1976 version of Wis JI-Criminal 1443 included a sixth element which emphasized that the defendant must act with intent to convert the funds to his own personal use. This element has been eliminated as possibly confusing in light of the Hess, Blaisdell, and Wolter decisions discussed above. The matter is not as clear as one would like, since Hess and Wolter both cite the 1976 version of Wis JI-Criminal 1443 with approval while reaching conclusions that are arguably inconsistent with the instruction's emphasis on "personal use." The Committee takes the position that using the trust fund money for any purpose other than paying off the lienholders is "personal use" and thus the sixth element in the 1976 instruction was redundant.

This note was cited with apparent approval in State v. Sobkowiak, note 6, supra.

In Tri-Tech Corp. v. Americomp Services, 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822 – a civil case – the court referred to the "six elements" of theft by contractor without referring to this instruction or to State v. Sobkowiak, (see note 6, supra). The Committee concluded that this reference did not require a change in the conclusion that the offense can be defined with five elements as described above.

9. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal-923A.

10. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). [In the context of this offense, the "property" is the money used for purposes other than paying the claims due.] While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

11. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

1443A THEFT BY CONTRACTOR: DEFENDANT IS A CORPORATE OFFICER — §§ 779.02(5) and 943.20(1)(b)

Statutory Definition of the Crime

Theft by contractor, as defined in § 779.02(5) of the Wisconsin Construction Lien Law and in § 943.20(1)(b) of the Criminal Code of Wisconsin, is committed by one who is (an officer) (a director) (an agent) of a corporation which, under an agreement for the improvement of land, receives money from the owner, and which, without consent of the owner, contrary to its authority, intentionally uses any of the money for any purpose other than the payment of claims due or to become due from the corporation for labor or materials used in the improvements before all claims[1] are paid[2] [in full] [or] [proportionately in cases of deficiency].[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following seven elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was (an officer) (a director) (an agent) of (name) corporation.
2. The (name) corporation entered into an oral or written agreement for the improvement of land.

   (Building) (Repairing) (Altering) (_____) a (house) (garage) (_____) is an

improvement of land.

3. The (name) corporation received money from the owner under the agreement for the improvement of land.

["Owner" means the owner of any interest in land who, personally or through an agent, enters into a contract for the improvement of the land.][5]

4. The (name) corporation misappropriated money received from the owner.

"Misappropriate" means intentionally use any of the money for a purpose other than the payment of claims due or to become due from the corporation for labor or materials used in the improvements before all claims were paid[6] [in full] [or] [proportionately in cases of deficiency].[7]

5. The defendant was responsible for the misappropriation.

6. The misappropriation was without the consent of the owner of the land and contrary to the corporation's authority.

7. The defendant knew that the use of the money was without the consent of the owner of the land and contrary to the corporation's authority.[8]

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all seven elements of theft by contractor have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[10]

[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of the money used more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $2,500?"

Answer: "yes" or "no.")

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[11]

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

COMMENT

Wis JI-Criminal 1443A was originally published in 2008 and revised in 2019. This revision was approved by the Committee in February 2022; it updated footnote 11 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is drafted for violations of §§ 779.02(5) and 943.20(1)(b) that involve the third sentence of § 779.02(5) which provides for liability of corporate officers, etc., if the prime contractor is a corporation:

> If the prime contractor or subcontractor is a corporation, limited liability company, or other legal entity other than a sole proprietorship, such misappropriation also shall be deemed theft by any officers, directors, members, partners, or agents responsible for the misappropriation.

The instruction is drafted for violations involving an officer, director, or agent of a corporation. The statute also applies to "members" and "partners" of a "limited liability company, or other legal entity other than a sole proprietorship." If other alternatives are involved, the instruction must be modified accordingly.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the money used exceeds specified levels. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 10, below.

Section 779.02(5) provides that any use by a contractor of money paid for improvements except to pay the claims of those who furnished labor and materials is theft and is "punishable under sec. 943.20." Longstanding Wisconsin case law has interpreted this offense and the reference to sec. 943.20 as not simply a reference to the penalty provision but rather to the definition of theft by trustee under sec. 943.20(1)(b), thereby incorporating the elements of that offense. Pauly v. Keebler, 175 Wis. 428, 185 N.W.2d 554 (1921); State v. Halverson, 32 Wis.2d 503, 145 N.W.2d 749 (1966).

The history and development of this offense are discussed in the Comment, Wis JI-Criminal 1443.

1. Section 779.02 applies only to claims that are "not the subject of a bona fide dispute." If there is

evidence of a bona fide dispute about the claims, the phrase "not the subject of a bona fide dispute" should be added immediately after the word "claims." Also see note 6, below.

2. The statement of the definition of the offense is a slightly simplified version of the full statutory text. No change in meaning is intended.

In cases involving mortgages, "proceeds of any mortgage" may be used in place of "money" and "mortgagee" used in place of or in addition to "owner." The changes would be necessary throughout the instruction.

3. Use the first phrase in brackets when there is no issue relating to proportional payment in a case involving a deficiency. Use the second phrase in brackets when there is an issue relating to proportional payment; see note 7, below. Use both phrases, connected with "or," when there is conflicting evidence about whether the case involves a deficiency.

4. If a more formal definition of "improvement" is needed, see sec. 779.01(2)(a) which provides as follows:

> (a) "Improve" or "improvement" includes any building, structure, erection, fixture, demolition, alteration, excavation, filling, grading, tiling, planting, clearing or landscaping which is built, erected, made or done on or to land for its permanent benefit. This enumeration is intended as an extension rather than a limitation of the normal meaning and scope of "improve" and "improvement."

5. This definition is adapted from the one found in sec. 779.01(2)(c).

6. This element was affirmed as a correct statement of the law in State v. Sobkowiak, 173 Wis.2d 327, 336-39, 496 N.W.2d 620 (Ct. App. 1992): "The intent establishing the violation is the intent to use moneys subject to a trust for purposes inconsistent with the trust." No further intent – to defraud or to permanently deprive – is required. See note 8, below, which Sobkowiak cited with apparent approval.

If there is evidence in the case that the unpaid claims, or portions of the unpaid claims, were the subject of a bona fide dispute, add the following as a second paragraph of the definition of the third element:

> The third element also requires that the claims for labor or materials were not the subject of a bona fide dispute. The state must prove either that there was no bona fide dispute about the claim or, that aside from any bona fide dispute, the defendant failed to pay claims that were not disputed. A "bona fide dispute" means a dispute based on a reasonable belief about the basis for or the amount of a claim.

7. Use this bracketed material when the case involves a deficiency in the amount available to pay the lienholders. In this situation, § 779.02(5) requires that the trust fund money be paid proportionally. See, State v. Keyes, 2008 WI 54, 309 Wis.2d 516, 750 N.W.2d 30, at ¶24-34.

8. In State v. Hess, 99 Wis.2d 22, 298 N.W.2d 111 (Ct. App. 1980), the court held that theft by contractor requires only "criminal intent" and not "intent to defraud." Hess seems to indicate the "criminal intent" boils down to knowledge that the defendant is in the position of trustee and that he or she intentionally uses the money for some other purpose than paying the suppliers. Wis JI-Criminal 1443 is

drafted on the premise that using the funds for any purpose other than paying off the lien claimants is theft by contractor. This position is consistent with Hess, and with other recent cases: State v. Blaisdell, 85 Wis.2d 172, 270 N.W.2d 69 (1978); State v. Wolter, 85 Wis.2d 353, 270 N.W.2d 230 (Ct. App. 1978).

The 1976 version of Wis JI-Criminal 1443 included a sixth element which emphasized that the defendant must act with intent to convert the funds to his own personal use. This element has been eliminated as possibly confusing in light of the Hess, Blaisdell, and Wolter decisions discussed above. The matter is not as clear as one would like, since Hess and Wolter both cite the 1976 version of Wis JI-Criminal 1443 with approval while reaching conclusions that are arguably inconsistent with the instruction's emphasis on "personal use." The Committee takes the position that using the trust fund money for any purpose other than paying off the lienholders is "personal use" and thus the sixth element in the 1976 instruction was redundant.

This note was cited with apparent approval in State v. Sobkowiak, note 6, supra.

In Tri-Tech Corp. v. Americomp Services, 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822 – a civil case – the court referred to the "six elements" of theft by contractor without referring to this instruction or to State v. Sobkowiak, (see note 6, supra). The Committee concluded that this reference did not require a change in the conclusion that the offense can be defined with five elements as described above.

9. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

10. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957).

[In the context of this offense, the "property" is the money used for purposes other than paying the claims due.] While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18, 2018]. The penalties provided in subs. (3)(a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class

G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

11. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single

or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

1444 THEFT BY EMPLOYEE, TRUSTEE, OR BAILEE (EMBEZZLEMENT) — § 943.20(1)(b)

Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(b) of the Criminal Code of Wisconsin, is committed by one who,[1] by virtue of his or her employment, has possession of money belonging to another and intentionally uses[2] the money without the owner's consent, contrary to his or her authority, and with intent to convert it to [his or her own use] [the use of another].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had possession of money belonging to another because of (his) (her) employment.[3]
2. The defendant intentionally used the money without the owner's consent and contrary to the defendant's authority.

   The term "intentionally" means that the defendant must have had the mental purpose to use the money without the owner's consent[4] and contrary to the defendant's authority.[5]
3. The defendant knew that the use of the money was without the owner's consent

and contrary to the defendant's authority.[6]

4. The defendant intended to convert the money to [(his) (her) own use] [the use of any other person].[7]

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[9]

[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of the money used more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $2,500?"

Answer: "yes" or "no.")

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[10]

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

COMMENT

Wis JI-Criminal 1444 was originally published in 1966 and revised in 1991, 1994, 2002, 2003, 2006, and 2019. This revision was approved by the Committee in February 2022; it updated the text and footnote 10 to reflect a new sub category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(b). For theft by contractor offenses involving the combination of § 943.20(1)(b) with § 779.02(5), see Wis JI-Criminal 1443.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the money used exceeds specified amounts. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 9, below.

The four elements used in this instruction have been cited as a correct breakdown of this offense. See, State v. Halverson, 32 Wis.2d 503, 509, 145 N.W.2d 739 (1966); State v. Blaisdell, 85 Wis.2d 172, 176, 270 N.W.2d 69 (1978).

The essential distinction between a violation of section 943.20(1)(a) and section 943.20(1)(b) of the Criminal Code is that, under subsection (1)(a), the intention to return the property is a defense; whereas, under subsection (1)(b), an intention to return the property is not a defense since an intent to deprive the owner permanently is not essential to constitute the offense. Baldwin, "Criminal Misappropriations in Wisconsin – Part I," 44 Marq. L. Rev. 253, 275 (1960-1961). A distinction between theft under subsection (1)(b) and subsection (1)(d) is that, under the former section, the defendant has obtained only possession of the property; whereas, under the latter section, the defendant has obtained title to the property by false pretenses. See State v. Burke, 189 Wis. 641, 207 N.W. 406 (1926).

1. The summary of this offense in the first paragraph, and the elements of the instruction, represent a considerable simplification of a rather complex statutory definition. "By virtue of his employment" could be replaced by any of the following: "by virtue of his office"; "by virtue of his business"; "as a trustee"; or "as a bailee." "Having possession" is a choice over "having possession or custody." "Money" is one of several options, the others being "negotiable security," "instrument," "paper," or "other negotiable writing of another." If the theft of something other than money is involved, it may be necessary to define "value." See § 943.20(2)(d). "Uses" was selected rather than "transfers," "conceals," or "retains possession of." But see note 4, below. Finally, the statute also provides an alternative to "convert to his own use": "to the use of any other person except the owner." Rather than carry all these alternatives in parentheses throughout the instruction, the Committee concluded it was more efficient to select the simpler statement that ought to be general enough to cover the most common cases.

2. If the charge does not specify one of the alternatives in the statute – "use, transfer, conceal or retain possession of" – the jury instruction should either elect one of the alternatives or advise the jury they must unanimously agree if more than one alternative is submitted. In State v. Seymour, 183 Wis.2d 683, 515 N.W.2d 874 (1994), the Wisconsin Supreme Court held that it was error to instruct the jury in the disjunctive – "used, transferred, concealed or retained possession of . . ." – without requiring the jury to agree unanimously on which alternative applied. Rather, the statute "uses words which were intended to describe independent offenses rather than simply delineating methods by which the same offense may be committed." 183 Wis.2d 683, 685. This affirmed the court of appeals, which had reached the same conclusion. See 177 Wis.2d 305, 502 N.W.2d 591 (Ct. App. 1993). [See Wis JI-Criminal 517 for a suggested instruction requiring jury agreement.].

3. The Committee concluded that the general phrase, "because of (his) (her) employment," will be preferable in most cases to using one of the more specific statutory terms – "office," "business," "trustee," or "bailee." See note 1, supra.

However, in a case involving a bailment, it may be necessary for the court to give the jury additional instruction in the light of the particular facts of the case. The situations here are so varied that the Committee has not attempted to set forth a standard definition, and the necessity and form for an instruction in that respect must be determined on a case-by-case basis. See Burns v. State, 145 Wis. 373, 380, 128 N.W. 987 (1911). Whether the relationship of bailee or trustee or the like is created does, however, sometimes present a question of fact. No particular ceremony is necessary for the creation of such a relationship under the Criminal Code. In Burns v. State, supra, the supreme court said, in part, at page 380:

> It seems to be thought that a bailment was not established by the evidence because some sort of contract inter partes was essential thereto. No particular ceremony or actual meeting of minds is necessary to the creation of a bailment. If one, without the trespass which characterizes ordinary larceny, comes into possession of any personalty of another and is in duty bound to exercise some degree of care to preserve and restore the thing to such other or to some person for that other, or otherwise account for the property as that of such other, according to circumstances, – he is a bailee. It is the element of lawful possession, however created, and duty to account for the thing as the property of another, that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense or not.

What constitutes a "bailment" was discussed in State v. Kuhn, 178 Wis.2d 428, 504 N.W.2d 405 (Ct. App. 1993). Kuhn affirmed the conviction of the owner of an auction gallery who took in goods consignment, sold them, and then failed to pay the person who consigned the goods to her. Her business was failing, and she apparently used the full sale proceeds to pay off debts. The court held that this consignment arrangement did constitute a "bailment" for purpose of § 943.20(1)(b), rejecting the defendant's argument that the formal definition of "bailment" in the Uniform Commercial Code should apply.

4. The defendant accused of this offense has by definition been given consent to hold or use the property for some purpose. It is the use beyond the scope of this consent that is the essence of this crime. Consent to the use of property may be expressed or implied and may result from words or from conduct involving a course of dealings between the parties. See Boyd v. State, 217 Wis. 149, 258 N.W. 330 (1935).

Liabilities growing out of a debtor-creditor relationship cannot be made the basis of the charge of theft. See Hanser v. State, 217 Wis. 587, 592, 259 N.W. 418 (1935). Also see Peters v. State, 42 Wis.2d 541, 167 N.W.2d 250 (1969), where the evidence was found to be sufficient to establish that a loan did not exist.

5. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

In State v. Bryzek, 2016 WI App 48, 370 Wis.2d 237, 882 N.W.2d 483, the trial court added to the standard instruction to include a definition of "power of attorney" in connection with the "contrary to the defendant's authority" element. The court of appeals reversed the conviction because the statute upon which the definition was based was not enacted until after the date of the offense.

6. The word "intentionally," as defined by § 939.23(3), requires "knowledge of those facts necessary to make the conduct criminal" and which appear after the word "intentionally" in the statute.

7. Under section 943.20(1)(b), an intent to pay back the money or restore the property at a later time is not a defense even though such intent existed contemporaneously with the act of conversion. Boyd v. State, supra; McGeever v. State, 239 Wis. 87, 93-94, 300 N.W. 486 (1941).

The evidence was found sufficient to establish "intent to convert to one's own use" in State v. Doss, 2008 WI 93, ¶¶57-64, 312 Wis.2d 570, 754 N.W.2d 150. Also see State v. Kuhn, 178 Wis.2d 426, 505 N.W.2d 405 (Ct. App. 1993).

The jury is under no obligation to accept direct evidence of intent furnished by the defendant, and it may infer intent from such of the defendant's acts as objectively evidence his state of mind. State v. Kuenzli, 208 Wis. 340, 346, 242 N.W. 147 (1932). In Boyd v. State, supra, the supreme court said ". . . acts intentionally committed under circumstances such as to constitute a crime are not justified by the claim of innocent intent." Boyd, 217 Wis. at 163.

Section 943.20(1)(b) includes a provision establishing refusal to deliver the property upon demand as "prima facie evidence" of intent to convert to his own use. The last sentence of that subsection provides:

> A refusal to deliver any money or a negotiable security, instrument, paper or other negotiable writing, which is in his possession or custody by virtue of his office, business or employment, or as trustee or bailee, upon demand of the person entitled to receive it, or as required by law, is prima facie evidence of an intent to convert to his own use within the meaning of this paragraph.

Wis JI-Criminal 225 provides a recommended model for implementing "prima facie evidence" provisions.

The definition of "conversion" is discussed in the context of a civil case in Kozak v. United States Fidelity & Guaranty Co., 120 Wis.2d 462, 355 N.W.2d 362 (Ct. App. 1984).

8. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

9. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

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A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
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example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

10. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

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> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
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> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

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> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser

> included charges, see: Devroy v. State (1942), 239 Wis. 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

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The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

1450 THEFT BY ONE HAVING AN UNDISPUTED INTEREST IN PROPERTY FROM ONE HAVING SUPERIOR RIGHT OF POSSESSION — § 943.20(1)(c)

Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(c) of the Criminal Code of Wisconsin, is committed by one who, having a legal interest in movable property, intentionally and without consent, takes the property out of the possession of a person having a superior right of possession[1] with intent thereby to deprive that person permanently of possession of the property.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally took movable property out of the possession of (name person who had possession).

   The term "intentionally" means that the defendant must have had the mental purpose to take movable property.[2]

   "Movable property" means property whose physical location can be changed.[3]

2. (Name person who had possession) had a right of possession of the property superior to that of the defendant.

3. (Name person who had possession) did not consent[4] to the defendant taking the

property.

4. The defendant knew that (name person who had possession) had a right of possession superior to defendant's and knew that (name person who had possession) did not consent to taking the property.[5]

5. The defendant took the property with intent thereby to deprive (name person who had possession) permanently of the possession of the property.

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.[7]

[Finding Value]

[If you find the defendant guilty, answer the following question:

("Was the value of property stolen more than $100,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $10,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $5,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $2,500?"

Answer: "yes" or "no.")

"Value" means the market value of the property at the time of the theft or the replacement cost, whichever is less.[8]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[9]

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

COMMENT

Wis JI-Criminal 1450 was originally published in 1966 and revised in 1992, 2002, 2006, and 2019. This revision was approved by the Committee in February 2022; it updated the text and footnote 9 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(c). The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 7, below. The penalty increases to a Class D felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes "ownership" and "possession" in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

1. The instruction does not include the statutory alternative of "pledgee," assuming that the broader statement is sufficient in most cases. If a pledge situation is involved, the term should be defined for the jury. No standard definition is offered because the facts of each case will need to be included.

2. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

3. This is based on the definition of "movable property" in § 943.20(2)(a) which provides:

> (a) "Movable property" is property whose physical location can be changed, without limitation including electricity and gas, documents which represent or embody intangible rights, and things growing on, affixed to or found in land.

Section 943.20(2) defines "property" as follows:

> (b) "Property" means all forms of tangible property, whether real or personal, without limitation including electricity, gas and documents which represent or embody a chose in action or other intangible rights.

4. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

5. Knowledge that the other person had a superior right of possession and that the taking was without consent is required because the definition of this offense begins with the word "intentionally." Section 939.23(3) provides that the word "intentionally" requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally'" in the statute.

6. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

7. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

8. This is the most often used part of the definition of "value" provided in § 943.20(2)(d). The full definition follows:

"Value" means that market value at the time of the theft or the cost to the victim of replacing the property within a reasonable time after the theft, whichever is less, but if the property stolen is a document evidencing a chose in action or other intangible right, value means either the market value of the chose in action or other right or the intrinsic value of the document, whichever is greater. If the thief gave consideration for, or had a legal interest in, the stolen property, the amount of such consideration or value of such interest shall be deducted from the total value of the property.

The Wisconsin Supreme Court in Sartin v. State, 44 Wis.2d 138, 170 N.W.2d 727 (1969), a theft case, refused to adopt either a retail or wholesale value definition of the term "value." It is felt that in the theft statute, "[t]he statutory scheme clearly contemplates a determination of the cost of replacement to the victim." Sartin at 149.

9. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis. 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

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1453 THEFT BY FRAUD — § 943.20(1)(d)

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 1453 was originally published in 1967 and revised in 1977, 1983, 1988, 1991, and 2003.

In 2003, the instruction was divided into two versions: Wis JI-Criminal 1453A and 1453B. Wis JI-Criminal 1453 should have been withdrawn at that time but was mistakenly republished. It is now withdrawn.

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1453A THEFT BY FRAUD: REPRESENTATIONS MADE TO THE OWNER, DIRECTLY OR BY A THIRD PERSON — § 943.20(1)(d)

Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(d) of the Criminal Code of Wisconsin, is committed by one who obtains title to property of another person by intentionally deceiving that person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following seven elements were present.

Elements of the Crime That the State Must Prove

1. (Name) was the owner of property.

2. The defendant made a false representation to the owner.

   This requires that the false representation be one of past or existing fact. It does not include expressions of opinions or representations of law.[1]

   ADD THE FOLLOWING IF THE ALLEGED REPRESENTATION WAS MADE TO A THIRD PERSON.[2]

   [It is not required that the defendant directly communicated with the owner. The defendant is responsible for a statement made to a third person if the defendant intended or had reason to expect that the statement would be repeated to, or its

substance communicated to, the owner and that it would influence the owner's conduct in the transaction.]

IF THERE WAS A PROMISE IN ADDITION TO THE REPRESENTATION OF PAST OR EXISTING FACT, ADD THE FOLLOWING PARAGRAPH USING "ALSO INCLUDES." IF THE ONLY REPRESENTATION WAS A PROMISE, STRIKE THE PREVIOUS TWO SENTENCES AND GIVE THE FOLLOWING PARAGRAPH INSTEAD, USING "IN THIS CASE MEANS."

[A false representation (also includes) (in this case means) a promise made with intent not to perform it, if the promise is a part of a false and fraudulent scheme.][3]

3. The defendant knew the representation was false.

4. The defendant made the representation with intent to deceive and to defraud the owner.

This requires that the defendant made the representations with the purpose to deceive and defraud the owner or that the defendant was practically certain that (his) (her) representations would deceive and defraud the owner.

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE:

[It is not required that the defendant knew the identity of the owner.][4]

5. The defendant obtained title[5] to the property of the owner by the false representation.

IF MONEY WAS OBTAINED, USE THE FOLLOWING:

[Money is property. Title to money is obtained by gaining possession.]

IF PROPERTY OTHER THAN MONEY WAS OBTAINED, USE THE FOLLOWING:

[Title to property may be obtained by [execution and delivery of a (deed) (bill of sale) (conditional sales contract) (land contract) (assignment) (other instrument transferring ownership)] [sale and delivery of the property] [gift] [gaining possession of property through a lease.][6]

6. The owner was deceived by the representation.

"Deceived" means "misled."

7. The owner was defrauded by the representation.

This requires that the owner did in fact part with title to property in reliance (at least in part) on the false representation.[7]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all seven elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE OR OTHER FACT MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE PROPERTY WAS MORE THAN THE AMOUNT STATED IN THE

QUESTION. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.[9]

[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of the property obtained more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $2,500?"

Answer: "yes" or "no.")

"Value" means the market value of the property at the time of the theft or the replacement cost, whichever is less.[10]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[11]

[In determining the value of the property obtained, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

COMMENT

This instruction is based on Wis JI-Criminal 1453, which was originally published in 1967 and revised in 1977, 1983, 1988, 1991, 2003, 2006, and 2019. This revision was approved by the Committee in February 2022; it updated footnote 11 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(d) that involve representations made to the owner of the property. If representations were made to an agent of the owner, see Wis JI-Criminal 1453B. Representations communicated via a third person do not necessarily involve an agency relationship. See State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, discussed in footnote 2, below.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 9, below. The penalty increases to a Class H felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes "ownership" and "possession" in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

Multiple counts of theft by fraud were found to be appropriate when each required proof of a fact the other did not. State v. Swinson, 2003 WI App 45, 261 Wis.2d 633, 660 N.W.2d 12.

It is lawful to charge theft by fraud in violation of § 943.20(1)(d) where a more specific statute may apply – in this case, § 98.15(1), which makes it a misdemeanor to manipulate the quality of milk samples. State v. Ploeckelman, 2007 WI App 31, 199 Wis.2d 251, 729 N.W.2d 784.

1. It is generally held that the representation must be one of fact (Corscott v. State, 178 Wis. 661, 671, 190 N.W. 465 (1922)) and that a representation of law or an opinion does not fall within the statute. 32 Am. Jur. False Pretenses §§ 15 and 17 (1939). The difficulty, however, is in drawing the distinction between representation of "facts" and representations of "opinions" or "law." Declarations of value, it has been held, can be fraud (United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932)) and whether a statement is one of fact or of law may be a close question. See Melli and Remington, "Theft - A Comparative Analysis," 1954 Wis. L. Rev. 253, 263-65; Baldwin, "Criminal Misappropriations in Wisconsin - Part I," 44 Marq. L. Rev. 253, 282-87 (1960-61).

Conduct can constitute a "representation" under the theft by fraud statute. State v. Ploeckelman 2007 WI App 31, 199 Wis.2d 251, 729 N.W.2d 784.

"[P]roviding fictitious business names and stolen personal identifying information to a phone company as a way of avoiding payment falls within the meaning of 'false representation.'" State v. Steffes, 2013 WI 33, ¶4, 347 Wis.2d 683, 832 N.W.2d 101.

2. This material is intended to reflect the decision in State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, which held that the theft by fraud statute applies in a case where the defendant did not

communicate directly with the victim of his fraudulent scheme. Communication was achieved via a third person, whom, the court concluded, was not the agent of the defendant or the victim. The court relied on the Restatement (Second) of Torts which recognizes "civil liability for misrepresentation where it is foreseeable and intended that a fraudulent misrepresentation will be repeated to third parties and acted upon by them." 2002 WI App 304, ¶ 31. Though the decision addressed plea withdrawal, it appears to be clear authority for the proposition that the same rule is sufficient for criminal liability.

3. Section 943.20(1)(d) changed old case law to the effect that a false promise was not sufficient to satisfy the statute. See, e.g., State ex rel. Labuwi v. Hathaway, 168 Wis. 518, 170 N.W. 654 (1919). The false promise must be part of a "false and fraudulent scheme." This means that the defendant must have made the promise without any intention of carrying the promise out and for the purpose of causing the victim to part with his property. The mere failure to carry out the promise alone is, necessarily, not sufficient to support a conviction. See Melli and Remington, "Theft – A Comparative Analysis," 1954 Wis. L. Rev. 253, 271; Platz, "The Criminal Code," 1956 Wis. L. Rev. 350, 374-75; Baldwin, "Criminal Misappropriations in Wisconsin – Part I," 44 Marq. L. Rev. 253, 283-84 (1960-61). One example that the drafters of the Criminal Code had in mind was that of unscrupulous building contractors who accepted a down payment on a house they did not intend to build. See 1953 Report on the Criminal Code, p. 112. The contractor's failure to act (failure to build the house) may be considered in trying to decide whether the contractor intended not to perform the promise (to build the house) at the time the promise was made. It would be appropriate to add a reference to "failure to act" to "Deciding About Intent" paragraph of the instruction.

4. The Committee concluded that the defendant need not know the identity of the person who was ultimately defrauded, as where, for example, the fraudulent representations are not made directly to the ultimate victim. See, for example, State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, discussed in footnote 2, supra.

5. It is the opinion of the Committee that it is unnecessary that the defendant obtain full legal title to support a conviction under this section, although the section does specifically refer to obtaining "title." Obtaining property under a conditional sales contract, for example, would support a conviction under this section. See Whitmore v. State, 238 Wis. 79, 298 N.W. 194 (1941); Baldwin, "Criminal Misappropriations in Wisconsin - Part I," 44 Marq. L. Rev. 253, 280-81 (1960-61). Also see note 6, below.

"Property" is defined in § 943.20(2)(b). In State v. Steffes, 2013 WI 33, ¶¶8 and 26, 347 Wis.2d 683, 832 N.W.2d 101, the court answered "yes" to the following question: "[W]hether the applied electricity that AT&T uses to power its network is included in the definition of 'property' under § 943.20(2)(b)."

"Property of another" is defined by §§ 939.22(28) and 943.20(2)(d).

The proper construction of "obtains title" was discussed by the Wisconsin Court of Appeals in State v. O'Neil, 141 Wis.2d 535, 416 N.W.2d 77 (Ct. App. 1987). The O'Neil decision held that the defendant need not personally receive title to the property to satisfy the statute's requirement that title be "obtained." The court noted that the version of Wis JI-Criminal 1453 then in effect was inconsistent with this holding since it defined the fourth element as requiring that "there must have been a transfer of title from the owner to the defendant." The 1988 revision of the instruction deletes that phrase.

In the O'Neil case, the defendant was the interim director of a corporation that did business with Eau Claire County. Based on records altered by the defendant, the county was overbilled. The funds so obtained

were deposited in the corporation's account. The court of appeals held that O'Neil "obtained" the money even though she did not directly receive it herself:

> If a person induces another to part with money by fraudulent misrepresentations, then title to that property has been obtained within the meaning of the statute. The crime is complete when the title has been obtained. 141 Wis.2d 535, 536-37.

For a case like O'Neil, a definition of "obtains" would apparently be acceptable if it provided: "'Obtains' means to induce another to part with title to property." In the Committee's judgment, depending on the facts of the case, that definition might not go far enough. The common meaning of "obtains" appears to have two aspects: relinquishing of title by the owner and receipt by someone else. It is the receipt aspect that O'Neil leaves open. It was not a problem in O'Neil because of the defendant's close connection with the actual recipient of the money (director of the corporation). It could be argued that a complete definition ought to include an expression of the required relationship between the defendant and the actual recipient.

6. In State v. Meado, 163 Wis.2d 789, 472 N.W.2d 567 (Ct. App. 1991), the court concluded that "the phrase 'obtains title to property,' as used in § 943.20(1)(d), Stats., is intended to include cases where a person induces another to part with property under a lease agreement by fraudulent representation." 163 Wis.2d 789, 799. Meado had obtained a van from a dealer under a lease agreement. He gave the dealer a check as the down payment and the check bounced. The check was written on an account that was closed before the check was written; Meado had also given a false home address to the dealer. The court said that Meado had gained the benefit of the van through false representation, thereby violating "the leading idea" of the statute which is "to prohibit the deprivation of the owner's property by fraudulent, non-violent means." 163 Wis.2d 789, 798.

7. Section 943.20(1)(d) requires that the defendant obtain title to the property by deceiving the victim and that the victim be defrauded by the false representation. See Frank v. State ex rel. Meiers, 244 Wis. 658, 660, 12 N.W.2d 923 (1944); Palotta v. State, 184 Wis. 290, 199 N.W. 72 (1924). The victim is not under a duty to investigate the truth of the representations, and any negligence by the victim in not discovering the fraud is not a defense. See State v. Lambert, 73 Wis.2d 590, 243 N.W.2d 524 (1976); State v. Lunz, 86 Wis.2d 695, 273 N.W.2d 767 (1979); and Palotta v. State, supra.

What now appears at elements 6 and 7 was revised in 1983 as suggested by State v. Kennedy, 105 Wis.2d 625, 314 N.W.2d 884 (Ct. App. 1981). Kennedy also held that an ultimate financial loss by the victim is not required: ". . . the victim's final accounting is irrelevant." 105 Wis.2d at 640.

8. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A. If the case involves a promise made with intent not to perform it, it is appropriate to add reference to "failure to act" to this paragraph. See footnote 3, supra.

9. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

10. Section 943.20(2)(d).

11. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles

(valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis. 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.
>
> 71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

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1453B THEFT BY FRAUD: REPRESENTATIONS MADE TO AN AGENT — § 943.20(1)(d)

Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(d) of the Criminal Code of Wisconsin, is committed by one who obtains title to property of another person by intentionally deceiving an agent of that person with a false representation which is known to be false, made with intent to defraud, and which does defraud the owner of the property.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following eight elements were present.

Elements of the Crime That the State Must Prove

1. (Name) was the owner of property.

2. (Name) was the agent of the owner.

   An agent is a person authorized to act on the owner's behalf.[1]

3. The defendant made a false representation to the agent.

   This requires that the false representation be one of past or existing fact. It does not include expressions of opinions or representations of law.[2]

   IF THERE WAS A PROMISE IN ADDITION TO THE REPRESENTATION OF PAST OR EXISTING FACT, ADD THE FOLLOWING PARAGRAPH USING "ALSO INCLUDES." IF THE ONLY REPRESENTATION WAS A PROMISE, STRIKE THE

PREVIOUS TWO SENTENCES AND GIVE THE FOLLOWING PARAGRAPH INSTEAD, USING "IN THIS CASE MEANS."

[A false representation (also includes) (in this case means) a promise made with intent not to perform it, if the promise is a part of a false and fraudulent scheme.][3]

4. The defendant knew the representation was false.

5. The defendant made the representation with intent to deceive the agent and to defraud the owner.

This requires that the defendant made the representation with the purpose to deceive the agent and defraud the owner or that the defendant was practically certain that (his) (her) representation would deceive the agent and defraud the owner.

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE:

[It is not required that the defendant knew the identity of the owner.][4]

6. The defendant obtained title[5] to the property of the owner by making the false representation to the agent.

IF MONEY WAS OBTAINED, USE THE FOLLOWING:

[Money is property. Title to money is obtained by gaining possession.]

IF PROPERTY OTHER THAN MONEY WAS OBTAINED, USE THE FOLLOWING:

[Title to property may be obtained by [execution and delivery of a (deed) (bill of sale) (conditional sales contract) (land contract) (assignment) (other instrument

transferring ownership)] [sale and delivery of the property] [gift] [gaining possession of property through a lease.][6]

7. The agent was deceived by the representation.

"Deceived" means "misled."

8. The owner was defrauded by the representation.

This requires that the owner of property did in fact part with title to property in reliance (at least in part) on the false representation.[7]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all eight elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE OR OTHER FACT MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE PROPERTY WAS MORE THAN THE AMOUNT STATED IN THE QUESTION. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.[9]

[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of the property obtained more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $2,500?"

Answer: "yes" or "no.")

"Value" means the market value of the property at the time of the theft or the replacement cost, whichever is less.[10] Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[11]

[In determining the value of the property obtained, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

COMMENT

This instruction is based on Wis JI-Criminal 1453, which was originally published in 1967 and revised in 1977, 1983, 1988, 1991, 2003, 2006, 2019. This revision was approved by the Committee in February 2022; it updated footnote 11 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(d) that involve representations made to the agent of the owner of the property. If representations were made directly to the owner, see Wis JI-Criminal 1453A. Representations communicated via a third person do not necessarily involve an agency relationship. See State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, discussed in footnote 2, Wis JI-Criminal 1453A.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 9, below. The penalty increases to a Class H felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes "ownership" and "possession" in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

Multiple counts of theft by fraud were found to be appropriate when each required proof of a fact the other did not. State v. Swinson, 2003 WI App 45, 261 Wis.2d 633, 660 N.W.2d 12.

1. A fraudulent representation may be communicated via a third person without that third person being an agent of the defendant or the owner. See, for example, State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, discussed in footnote 2, Wis JI-Criminal 1453A.

2. A false representation to an agent of the owner is within the statute. The Committee is of the opinion that if the representation is made in writing, addressed to a corporation or a partnership, etc., it is made directly to the owner, but if addressed to an officer or employee, it is made to an agent of the owner.

3. See § 943.20(1)(d). The statute changes old case law to the effect that a false promise was not sufficient to satisfy the statute. See, e.g., State ex rel. Labuwi v. Hathaway, 168 Wis. 518, 170 N.W. 654 (1919). The false promise must be part of a "false and fraudulent scheme." § 943.20(1)(d). This means that the defendant must have made the promise without any intention of carrying the promise out and for the purpose of causing the victim to part with his property. The mere failure to carry out the promise alone is, necessarily, not sufficient to support a conviction. See Melli and Remington, "Theft – A Comparative Analysis," 1954 Wis. L. Rev. 253, 271; Platz, "The Criminal Code," 1956 Wis. L. Rev. 350, 374-75; Baldwin, "Criminal Misappropriations in Wisconsin – Part I," 44 Marq. L. Rev. 253, 283-84 (1960-61).

4. The Committee concluded that the defendant need not know the identity of the person who was ultimately defrauded, as where, for example, the fraudulent representations are not made directly to the ultimate victim. See, for example, State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, discussed in footnote 2, Wis JI-Criminal 1453A.

5. It is the opinion of the Committee that it is unnecessary that the defendant obtain full legal title to support a conviction under this section, although the section does specifically refer to obtaining "title." Obtaining property under a conditional sales contract, for example, would support a conviction under this section. See Whitmore v. State, 238 Wis. 79, 298 N.W. 194 (1941); Baldwin, "Criminal Misappropriations in Wisconsin - Part I," 44 Marq. L. Rev. 253, 280-81 (1960-61). Also see note 6, below.

"Property of another" is defined by §§ 939.22(28) and 943.20(2)(d).

The proper construction of "obtains title" was discussed by the Wisconsin Court of Appeals in State v. O'Neil, 141 Wis.2d 535, 416 N.W.2d 77 (Ct. App. 1987). The O'Neil decision held that the defendant need not personally receive title to the property to satisfy the statute's requirement that title be "obtained." The court noted that the version of Wis JI-Criminal 1453 then in effect was inconsistent with this holding since it defined the fourth element as requiring that "there must have been a transfer of title from the owner to the defendant." The 1988 revision of the instruction deletes that phrase.

In the O'Neil case, the defendant was the interim director of a corporation that did business with Eau Claire County. Based on records altered by the defendant, the county was overbilled. The funds so obtained were deposited in the corporation's account. The court of appeals held that O'Neil "obtained" the money even though she did not directly receive it herself:

> If a person induces another to part with money by fraudulent misrepresentations, then title to that property has been obtained within the meaning of the statute. The crime is complete when the title has been obtained. 141 Wis.2d 535, 536-37.

For a case like O'Neil, a definition of "obtains" would apparently be acceptable if it provided: "'Obtains' means to induce another to part with title to property." In the Committee's judgment, depending on the facts of the case, such a definition might not go far enough. The common meaning of "obtains" seems to have two aspects: relinquishing of title by the owner and receipt by someone else. It is the receipt aspect that O'Neil leaves open. It was not a problem in O'Neil because of the defendant's close connection with the actual recipient of the money (director of the corporation). It could be argued that a complete definition ought to include an expression of the required relationship between the defendant and the actual recipient.

6. In State v. Meado, 163 Wis.2d 789, 472 N.W.2d 567 (Ct. App. 1991), the court concluded that "the phrase 'obtains title to property,' as used in § 943.20(1)(d), Stats., is intended to include cases where a person induces another to part with property under a lease agreement by fraudulent representation." 163 Wis.2d 789, 799. Meado had obtained a van from a dealer under a lease agreement. He gave the dealer a check as the down payment and the check bounced. The check was written on an account that was closed before the check was written; Meado had also given a false home address to the dealer. The court said that Meado had gained the benefit of the van through false representation, thereby violating "the leading idea" of the statute which is "to prohibit the deprivation of the owner's property by fraudulent, non-violent means." 163 Wis.2d 789, 798.

7. Section 943.20(1)(d) requires that the defendant obtain title to the property by deceiving the victim and that the victim be defrauded by the false representation. See Frank v. State ex rel. Meiers, 244 Wis. 658, 660, 12 N.W.2d 923 (1944); Palotta v. State, 184 Wis. 290, 199 N.W. 72 (1924). The victim is not under a duty to investigate the truth of the representations, and any negligence by the victim in not discovering the fraud is not a defense. See State v. Lambert, 73 Wis.2d 590, 243 N.W.2d 524 (1976); State v. Lunz, 86 Wis.2d 695, 273 N.W.2d 767 (1979); and Palotta v. State, supra.

What now appears at elements 6 and 7 was revised in 1983 as suggested by State v. Kennedy, 105 Wis.2d 625, 314 N.W.2d 884 (Ct. App. 1981). Kennedy also held that an ultimate financial loss by the victim is not required: ". . . the victim's final accounting is irrelevant." 105 Wis.2d at 640.

8. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A. If the case involves a promise made with intent not to perform it, it is appropriate to add reference to "failure to act" to this paragraph. See footnote 3, supra.

9. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

10. Section 943.20(2)(d).

11. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;

(b) The property belonged to the same owner and was stolen by a person in possession of it; or

(c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.

(d) If The property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

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1453C THEFT BY FRAUD: FAILURE TO DISCLOSE AS A REPRESENTATION – § 943.20(1)(d)

Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(d) of the Criminal Code of Wisconsin, is committed by one who obtains title to property of another person by intentionally deceiving that person by failing to disclose a fact that (he) (she) had a duty to disclose, done with intent to defraud, and which does defraud that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained title[1] to the property of (name of victim).

   IF MONEY WAS OBTAINED, USE THE FOLLOWING:

   [Money is property. Title to money is obtained by gaining possession.]

   IF PROPERTY OTHER THAN MONEY WAS OBTAINED, USE THE FOLLOWING:

   [Title to property may be obtained by [execution and delivery of a (deed) (bill of sale) (conditional sales contract) (land contract) (assignment) (other instrument transferring ownership)] [sale and delivery of the property] [gift] [gaining possession of property through a lease.][2]

2. The defendant obtained title to the property of (name of victim) by failing to disclose a fact to (name of victim).

3. The defendant had a duty to disclose that fact.

A duty to disclose a fact exists under the following circumstances:[3]

• the fact is material to the transaction; and,

• the defendant knew that (name of victim) was about to enter into the transaction under a mistake as to the fact; and,

• the fact was peculiarly and exclusively within the knowledge of the defendant, and (name of victim) could not reasonably be expected to discover it; and,

• (name of victim) reasonably expected disclosure of the fact.

4. The defendant failed to disclose the fact with intent to deceive and to defraud (name of victim).

This requires that the defendant failed to disclose the fact with the purpose to deceive and defraud (name of victim) or that the defendant was practically certain that (his) (her) failure to disclose the fact would deceive and defraud (name of victim).

5. (Name of victim) was deceived by the failure to disclose the fact.

"Deceived" means "misled."

6. (Name of victim) was defrauded by the failure to disclose the fact.

This requires that (name of victim) did part with title to property in reliance (at least in part) on the failure to disclose.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE OR OTHER FACT MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE PROPERTY WAS MORE THAN THE AMOUNT STATED IN THE QUESTION. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.[6]

[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of the money used more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $2,500?"

Answer: "yes" or "no.")

"Value" means the market value of the property at the time of the theft or the replacement cost, whichever is less.[7] Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[8]

[In determining the value of the property obtained, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

COMMENT

Wis JI-Criminal 1453C was originally published in 2008 and revised in 2019. This revision was approved by the Committee in February 2022; it updated footnote 8 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(d) that involve failure to disclose facts to the owner of the property. See State v. Ploeckelman, 2007 WI App 31, 299 Wis.2d 251, 729 N.W.2d 784, discussed in footnote 3. For cases involving an agent of the owner, see Wis JI-Criminal 1453B for possible changes in the instruction. Representations communicated via a third person do not necessarily involve an agency relationship.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 7,

below. The penalty increases to a Class H felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes "ownership" and "possession" in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

Multiple counts of theft by fraud were found to be appropriate when each required proof of a fact the other did not. State v. Swinson, 2003 WI App 45, 261 Wis.2d 633, 660 N.W.2d 12.

1. It is the opinion of the Committee that it is unnecessary that the defendant obtain full legal title to support a conviction under this section, although the section does specifically refer to obtaining "title." Obtaining property under a conditional sales contract, for example, would support a conviction under this section. See Whitmore v. State, 238 Wis. 79, 298 N.W. 194 (1941); Baldwin, "Criminal Misappropriations in Wisconsin - Part I," 44 Marq. L. Rev. 253, 280-81 (1960-61).

"Property of another" is defined by §§ 939.22(28) and 943.20(2)(d).

The proper construction of "obtains title" was discussed by the Wisconsin Court of Appeals in State v. O'Neil, 141 Wis.2d 535, 416 N.W.2d 77 (Ct. App. 1987). The O'Neil decision held that the defendant need not personally receive title to the property to satisfy the statute's requirement that title be "obtained." The court noted that the version of Wis JI-Criminal 1453 then in effect was inconsistent with this holding since it defined the fourth element as requiring that "there must have been a transfer of title from the owner to the defendant." The 1988 revision of Wis JI-Criminal 1453 deleted that phrase.

In the O'Neil case, the defendant was the interim director of a corporation that did business with Eau Claire County. Based on records altered by the defendant, the county was overbilled. The funds so obtained were deposited in the corporation's account. The court of appeals held that O'Neil "obtained" the money even though she did not directly receive it herself:

> If a person induces another to part with money by fraudulent misrepresentations, then title to that property has been obtained within the meaning of the statute. The crime is complete when the title has been obtained. 141 Wis.2d 535, 536-37.

For a case like O'Neil, a definition of "obtains" would apparently be acceptable if it provided: "'Obtains' means to induce another to part with title to property." In the Committee's judgment, depending on the facts of the case, that a definition might not go far enough. The common meaning of "obtains" appears to have two aspects: relinquishing of title by the owner and receipt by someone else. It is the receipt aspect that O'Neil leaves open. It was not a problem in O'Neil because of the defendant's close connection with the actual recipient of the money (director of the corporation). It could be argued that a complete definition ought to include an expression of the required relationship between the defendant and the actual recipient.

2. In State v. Meado, 163 Wis.2d 789, 472 N.W.2d 567 (Ct. App. 1991), the court concluded that "the phrase 'obtains title to property,' as used in § 943.20(1)(d), Stats., is intended to include cases where a person induces another to part with property under a lease agreement by fraudulent representation." 163 Wis.2d 789, 799. Meado had obtained a van from a dealer under a lease agreement. He gave the dealer a check as the down payment and the check bounced. The check was written on an account that was closed

before the check was written; Meado had also given a false home address to the dealer. The court said that Meado had gained the benefit of the van through false representation, thereby violating "the leading idea" of the statute which is "to prohibit the deprivation of the owner's property by fraudulent, non-violent means." 163 Wis.2d 789, 798.

3. This definition is based on the standard adopted in State v. Ploeckelman, 2007 WI App 31, 299 Wis.2d 251, 729 N.W.2d 784:

> ¶18. A representation can be acts or conduct. In Kaloti Enters., Inc. v. Kellogg Sales Co., 2005 WI 111, our supreme court laid out the circumstances where a failure to disclose can constitute a representation. The court concluded:
>
> A party to a business transaction has a duty to disclose a fact where: (1) the fact is material to the transaction; (2) the party with knowledge of that fact knows that the other party is about to enter into the transaction under a mistake as to the fact; (3) the fact is peculiarly and exclusively within the knowledge of one party, and the mistaken party could not reasonably be expected to discover it; and (4) on account of the objective circumstances, the mistaken party would reasonably expect disclosure of the fact.

If a duty to disclose exists, the failure to disclose is a representation.

4. Section 943.20(1)(d) requires that the defendant obtain title to the property by deceiving the victim and that the victim be defrauded by the false representation. See note 7, Wis JI-Criminal 1453A.

5. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

6. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957).

[In the context of this offense, the "property" is the money used for purposes other than paying the claims due.] While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18, 2018]. The penalties provided in subs. (3)(a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,

- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

7. Section 943.20(2)(d). The "value of the property" is the value of the property the defendant received due to the failure to disclose. Note the final sentence of sec. 943.20(2)(d): "If the thief gave consideration for, or had a legal interest in, the stolen property, the amount of such consideration or value of such interest shall be deducted from the total value of the property."

8. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State

v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

1455 THEFT BY FAILURE TO RETURN LEASED OR RENTED PROPERTY — § 943.20(1)(e)

Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(e) of the Criminal Code of Wisconsin, is committed by one who intentionally fails to return any personal property which is in his or her possession or under his or her control by virtue of a written lease or written rental agreement within 10 days after the lease or rental agreement has expired.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had personal property in (his) (her) possession or under (his) (her) control by virtue of a written lease or written rental agreement.
2. The defendant failed to return the property within 10 days after the lease or rental agreement expired.[1]
3. The defendant intentionally failed to return the property.

   The term "intentionally" means that the defendant must have the mental purpose not to return the property within 10 days after the lease or rental agreement expired.

4. The defendant knew that the property belonged to another person and knew that the written lease or rental agreement had expired.

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.[3]

[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of property stolen more than $100,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $10,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $5,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $2,500?"

Answer: "yes" or "no.")

"Value" means the market value of the property at the time of the theft or the replacement cost, whichever is less.[4]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[5]

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

COMMENT

Wis JI-Criminal 1455 was originally published in 1976 and revised in 1992, 2002, 2003, 2006 and 2019. This revision was approved by the Committee in February 2022; it updated footnote 5 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(e). The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 3, below. The penalty increases to a Class D felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes "ownership" and "possession" in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

In State v. Roth, 115 Wis.2d 163, 339 N.W.2d 807 (Ct. App. 1983), the court held that § 943.20(1)(e) does not allow unconstitutional imprisonment for debt. The court also held that "intent to defraud" is not an element of the crime.

The essence of this offense is an omission – the failure to return the property. Criminal liability for an omission generally requires the ability to perform the required acts. See State v. Williquette, 129 Wis.2d 239, 251, 385 N.W.2d 145 (1986), citing LaFave and Scott, Criminal Law, sec. 28 at 182. See Wis JI-Criminal 905 Liability For Failure To Act – Criminal Omissions.

1. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

2. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

3. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

4. This is the most often used part of the definition of "value" provided in § 943.20(2)(d). The full definition follows:

> "Value" means that market value at the time of the theft or the cost to the victim of replacing the property within a reasonable time after the theft, whichever is less, but if the property stolen is a document evidencing a chose in action or other intangible right, value means either the market value of the chose in action or other right or the intrinsic value of the document, whichever is greater. If the thief gave consideration for, or had a legal interest in, the stolen property, the amount of such consideration or value of such interest shall be deducted from the total value of the property.

The Wisconsin Supreme Court in Sartin v. State, 44 Wis.2d 138, 170 N.W.2d 727 (1969), a theft case, refused to adopt either a retail or wholesale value definition of the term "value." It is felt that in the theft statute, "[t]he statutory scheme clearly contemplates a determination of the cost of replacement to the victim." Sartin at 149.

5. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme.
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it.
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. However, the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction,

apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

1457 MAIL THEFT — § 943.204

Statutory Definition of the Crime

Section 943.204 of the Criminal Code of Wisconsin is violated by one who intentionally takes or receives the mail[1] of another from a residence or other building or the curtilage of a residence or other building without the other's consent and with intent to deprive the other permanently of possession of such mail.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements are present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (took) (received) mail intended for (name of victim(s)) from a (residence) (building) (curtilage of a residence) (curtilage of a building).[2]

   The term "intentionally" means that the defendant must have had the mental purpose to take possession of the mail.[3]

2. (Name of victim(s)) did not consent[4] to the (taking) (receiving) of the mail.

3. The defendant knew that (name of victim(s)) did not consent.[5]

4. The defendant intended to deprive (name of victim(s)) permanently of the possession of the mail.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY MAIL THEFT IS CHARGED, A JURY DETERMINATION OF THE AMOUNT OF MAIL MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE AMOUNT OF MAIL WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[6]

[Determining Amount of Mail Taken]

[If you find the defendant guilty, you must answer the following questions:

("Was the amount of mail taken or received from one or more individuals in a course of conduct at least 30 pieces?"

Answer: "yes" or "no".)

(Was the amount of mail taken or received from one or more individuals in a course of conduct at least 10 pieces?

Answer: "yes" or "no".)

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that

the amount of mail taken or received was at least the amount stated in the question.

If you are not so satisfied, you must answer the question "no."]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM ONE OR MORE OWNERS "DURING A COURSE OF CONDUCT," AS PROVIDED IN § 971.36(3)(d).[7]

In determining the amount of mail taken or received, you may consider all thefts that you are satisfied beyond a reasonable doubt were from one or more owners and committed by the defendant during a course of conduct[8].

IF FELONY MAIL THEFT IS CHARGED, A JURY DETERMINATION OF THE VICTIM STATUS MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VICTIM WAS AN ADULT AT RISK OR AN ELDER ADULT AT RISK.[9]

[Determining Victim Status]

[If you find the defendant guilty, you must answer the following question:

("Was the mail taken or received addressed to an (adult at risk) (elder adult at risk?))[10]

Answer: "yes" or "no".)

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the mail taken or received was addressed to an (adult at risk) (elder adult at risk).

If you are not so satisfied, you must answer the question "no."]

COMMENT

Wis JI-Criminal 1457 was approved by the Committee in August 2022.

This instruction is for violations of § 943.204, created by 2019 Wisconsin Act 144 [effective date: March 5, 2020]. Act 144 also created new provisions relating to charging violations as a single crime if the property was mail and it was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a) [new § 971.36(3)(d)].

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the number of pieces of mail taken or received from one or more individuals in a course of conduct exceeds a specific amount. See footnote 5, below. The penalty also increases to a felony if the mail taken or received was addressed to an adult at risk or and elder adult at risk. See footnote 8, below.

1. Mail is defined as follows in § 943.204(d):

> "Mail" means a letter, flat, postcard, package, bag, or other sealed article that is delivered by the U.S. postal service, a common carrier, or a delivery service and is not yet received by the addressee or that has been left to be collected for delivery by the U.S. postal service, a common carrier, or a delivery service.

2. Wis. Stat. § 943.204 does not define "curtilage." Additionally, nothing in the legislative history indicates the intended scope of the term, and Wisconsin law does not sufficiently address this topic. Therefore, the Committee concluded that further definition in the instruction could not be provided with substantial assurance of accuracy.

However, if theft from the curtilage of a residence or a building is alleged, the term may need to be defined for the jury. If requested, the definition of "curtilage" included in similar "theft of mail" statutes from other jurisdictions may provide guidance as to the term's meaning. For example, in T.C.A. § 39-14-129 "mail theft," the Tennessee legislature defines "curtilage" as follows:

> "Curtilage" means the area surrounding a dwelling that is necessary, convenient and habitually used for family purposes and for those activities associated with the sanctity of a person's home.

Additionally, trial courts may gain some guidance by reviewing Wisconsin case law decisions that consider what constitutes "curtilage" for Fourth Amendment purposes. The Committee notes, however, that any factors that bear upon this consideration may not be ideally suited for defining the term in the context of criminal liability.

In State v. Dumstrey, 2016 WI 3, ¶32, 366 Wis.2d 64, 873 N.W.2d 502, the Wisconsin Supreme Court reviewed the term "curtilage" as applied for Fourth Amendment purposes. The court noted the four factors set forth by the United States Supreme Court in United States v. Dunn, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987) that it previously adopted as relevant to analyzing whether an area constitutes curtilage of a home.

(1) "the proximity of the area claimed to be curtilage to the home";
(2) "whether the area is included within an enclosure surrounding the home";
(3) "the nature of the uses to which the area is put [;] and"

(4) "the steps taken by the resident to protect the area from observation by people passing by."

However, the court noted that it does not "mechanically" apply these factors as part of a "finely tuned formula." Dumstrey, supra, at ¶32. Instead, these factors "'are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." Id.

3. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

4. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

5. Knowledge that the taking was without consent is required because the definition of this offense begins with the word "intentionally." Section 939.23(3) provides that the word "intentionally" requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally'" in the statute.

6. The penalties provided in subs. (3)(a) through (c) are as follows:

- If fewer than 10 pieces of mail are taken or received from one or more individuals in a course of conduct, a Class A misdemeanor.
- If at least 10 but fewer than 30 pieces of mail are taken or received from one or more individuals in a course of conduct, a Class I felony.
- If 30 or more pieces of mail are taken or received from one or more individuals in a course of conduct, a Class H felony.

While the number of pieces of mail taken or received may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to pieces of mail taken or received.

7. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime if one of the following applies:

(a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme.

(b) The property belonged to the same owner and was stolen by a person in possession of it.

(c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.

(d) If the property is mail, as defined in s. 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in 947.013(1)(a).

The legislature in § 971.36(3)(a) has explicitly provided prosecutors with discretion to charge multiple thefts as a single crime when "the property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme." See State v. Jacobsen, 2014 WI App 13, 352 Wis. 2d 409, ¶20, 842 N.W.2d 365, 13-0830.

The material in the instruction addresses the situation defined in subsec. (3)(d): property was stolen from one or more owners during a course of conduct. There is no Wisconsin case law interpreting this aspect of § 971.36.

Reading § 943.20(1)(a), the statute concerning theft of movable property, in conjunction with § 971.36(3)(a) and (4), the court of appeals in State v. Elverman, 2015 WI App 91, 367 Wis. 2d 126, ¶30, 876 N.W.2d 511 saw no other reasonable interpretation but that multiple acts of theft occurring over a period of time may, in certain circumstances, constitute one continuous offense that is not complete until the last act is completed.

The Committee's research on the issue of whether this need be submitted to the jury can be summarized as follows: (1) there is no case law dealing with § 943.204; (2) an instructive case, State v. Spraggin, dealt with a similar situation in the context of receiving stolen property; and (3) while there may be equally effective ways of dealing with the issue, the Committee concluded that the question of whether all mail was stolen from one or more owners during a course of conduct must be submitted to the jury.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25 inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (71 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal. App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis. 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or

joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616 17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple pieces of mail decision question alone. The instruction can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any item of mail," the jury should find the defendant guilty. Then, in determining the number of pieces of mail taken or received, the jury should include "all thefts which you find, beyond a reasonable doubt, were from one or more owners and committed by the defendant during a course of conduct."

8. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. See § 947.013(1)(a).

9. The special question addresses the penalty-increasing facts in § 943.204(3)(d). A violation of § 943.204(3)(d) is a Class H felony.

10. § 943.204(3)(d) provides a penalty enhancement if the mail that is taken or received is addressed to an adult at risk or an elder adult at risk. The definitions of "adult at risk" and "elder adult at risk" provided in other statutes. The cross-referenced definitions are as follow:

- "Adult at risk" means any adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation. See § 55.01(1e).

- "Elder adult at risk" means any person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation. See § 46.90(1)(br).

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1458 UNAUTHORIZED USE OF AN INDIVIDUAL'S PERSONAL IDENTIFYING INFORMATION OR DOCUMENTS — § 943.201(2)

Statutory Definition of the Crime

Section 943.201(2) of the Criminal Code of Wisconsin is violated by one who intentionally uses, attempts to use, or possesses with intent to use any personal identifying information or personal identification document of an individual, including a deceased individual, [to obtain credit, money, goods, services, employment or anything else of value or benefit] [to avoid civil or criminal process or penalty] [to harm the reputation, property, person, or estate of the individual] without the authorization or consent of the individual and by representing that [he or she is the individual] [he or she is acting with the authorization or consent of the individual] [that the information or document belongs to him or her].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements are present.

Elements of the Crime That The State Must Prove

1. The defendant intentionally [(used) (attempted to use) (possessed with intent to use)][1] [(personal identifying information) (a personal identification document)][2] of (name of individual).[3]

CHOOSE ONE OF THE FOLLOWING.

[(Insert term from § 943.201(1)(b) 1. through 15.) is "personal identifying information."][4]

["Personal identification document" means:

(a document containing personal identifying information.)

(an individual's card or plate that can be used to obtain money, goods, services, or any other thing of value or benefit or to initiate a transfer of funds.)

(any device that is unique to, assigned to, or belongs to an individual and is intended to be used to access services, funds, or benefits of any kind to which the individual is entitled.)][5]

2. The defendant intentionally [(used) (attempted to use) (possessed with intent to use)] [(personal identifying information) (a personal identification document)] of (name of individual) [to obtain credit, money, goods, services, employment or anything else of value or benefit] [to avoid civil or criminal process or penalty] [to harm the reputation, property, person, or estate of the individual].[6]

3. The defendant acted without the authorization or consent of (name of individual) and knew that (name of individual) did not give authorization or consent.[7]

4. The defendant intentionally represented[8] that [(he) (she) was (name of individual)] [(he) (she) was acting with the authorization or consent of (name of individual))] [the information or document belonged to him or her].[9]

"Intentionally" requires that the defendant had the mental purpose[10] to obtain credit, money, goods, services, employment or anything else of value or benefit by using (personal identifying information) (a personal identification document) of (name of individual) without (name of individual)'s consent or authorization.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1458 was originally published in 1999 and revised in 2000 and 2004. This revision was approved by the Committee in October 2018; it added to the Comment and footnotes.

This instruction is for violations of § 943.201(2), created by 1997 Wisconsin Act 101 (effective date: April 27, 1998). Significant changes were made by 2003 Wisconsin Act 36 (effective date: August 8, 2003). Among the changes made by Act 36 are the following:

- changed the title to refer to "unauthorized use" rather than "misappropriation" and to "an individual's" personal identifying information;
- added to the list of material and information that is covered;
- added "possesses with intent to use" as a prohibited act;
- extended coverage to information of a deceased person;
- added two prohibited purposes – to avoid civil or criminal process or penalty and to harm the reputation, property, person or estate of an individual; and,
- added an affirmative defense that the defendant was authorized by law to engage in the conduct. [See sub. (3) of § 943.201.]

In addition to amending § 940.201, Act 36 created two new criminal statutes:

- § 943.203 Unauthorized use of an entity's identifying information or documents;
- § 946.79 False statements to financial institutions.

See Wis JI-Criminal 1459 for violations of § 943.203.

There is no uniform instruction for violations of § 946.79.

Act 36 also created new provisions relating to jurisdiction [new § 939.03(1)(e)], venue [new § 971.19(11)], and charging violations as a single crime if committed pursuant to a single intent and design [new § 971.366].

Section 943.203(2)(a), the companion statute addressing identity theft from an entity, was interpreted in State v. Stewart, 2018 WI App 41, 383 Wis.2d 546, 916 N.W.2d 188, in the context of finding that there was a factual basis for a guilty plea. The charges were based on Stewart's presenting forged documents to the writer of a presentence report in a previous criminal proceeding – purported diplomas and a letter from the VA. First, the court found that the facts showed that Stewart represented that the use of the documents was authorized. "The statute does not require an express or verbal representation from the offeror that the document is authorized." ¶22. "...[B]y the act of presenting the documents to show the PSI writer his personal history and character, Stewart was implicitly saying they were real and he had consent to use them." ¶23. Second, he acted with the purpose to receive something of value or benefit – a more favorable sentencing result. The statute is not limited to things of commercial or financial value. ¶26.

Section 940.201(3) provides:

It is an affirmative defense to a prosecution under this section that the defendant was authorized by law to engage in the conduct that is the subject of the prosecution. A defendant who raises this affirmative defense has the burden of proving the defense by a preponderance of the evidence.

In State v. Ramirez, 2001 WI App 158, ¶17, 246 Wis.2d 802, 633 N.W.2d 656, the court of appeals held that § 943.201 defines a "continuing offense" in the sense that the statute is violated when something of value is obtained even if the personal information was put to an unauthorized use at an earlier date.

1. Choose one of the alternatives: "used," "attempted to use," or "possessed with intent to use."

2. Choose one of the alternatives: "personal identifying information" or "personal identification document."

3. An "individual" includes a deceased individual. See sub. (2) of § 943.201 as amended by 2003 Wisconsin Act 36.

4. The Committee recommends inserting the appropriate term. For example: "An individual's social security number is 'personal identifying information.'" The full list of possible terms is found in § 943.201(2)(b), which was extended to a list of 15 items by 2003 Wisconsin Act 36.

5. This list is based on § 943.201(1)(a)1.-3., as amended by 2003 Wisconsin Act 36.

6. 2003 Wisconsin Act 36 added "employment" as one of the items that could be obtained and added "or benefit" to the phrase "anything else of value."

Interpreting § 943.201 before the revisions of Act 36, the Wisconsin Supreme Court held: "A defendant who misappropriates another's identity and uses it during an arrest and in bail proceedings to obtain lower bail has stolen that identity to obtain credit or money, or both, within the meaning of the identify theft statute." State v. Peters, 2003 WI 88, ¶2, 263 Wis.2d 475, 665 N.W.2d 171.

Use of another's social security number to get a job allowed the defendant to obtain compensation and other economic benefits that resulted from employment and amounted to obtaining something of value under § 943.201. State v. Ramirez, 2001 WI App 158, ¶7, 246 Wis.2d 802, 633 N.W.2d 656. Obtaining employment is specifically covered by the statute as amended by 2003 Wisconsin Act 36.

In interpreting § 943.203, the companion statute addressing identity theft from an entity, the court of appeals held: "Anything of value or benefit" is not limited to things of commercial or financial value. State v. Stewart, 2018 WI App 41, ¶26, 383 Wis 2d 546, 916 N.W.2d 188 [Citing State v. Peters, supra. [Stewart is discussed above in the Comment preceding footnote 1.].

7. Section 939.23(3) provides that when the word "intentionally" is used in a criminal statute, it requires "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, . . . the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" Based on the latter requirement, the instruction includes the requirement that the defendant must know the victim did not consent to or authorize the use of the information or document.

8. State v. Mason, 2018 WI App 57, ¶26, 384 Wis.2d 111, 918 N.W.2d 78, concluded that using a stolen debit/credit card is sufficient to satisfy the "representing" requirement.

In interpreting § 943.203, the companion statute addressing identity theft from an entity, the court of appeals held: "The statute does not require an express or verbal representation from the offeror that the document is authorized. Rather, it requires that the user 'represent' that the user is 'acting with the authorization or consent of the entity.' See Wis. Stat. 943.203(2)." State v. Stewart, 2018 WI App 41, ¶22, 383 Wis 2d 546, 916 N.W.2d 188 [Stewart is discussed above in the Comment preceding footnote 1.].

9. Choose one of the alternatives: "(he) (she) was (name of victim)," "(he) (she) was acting with the authorization or consent of (name of victim)," or, "that the information or documents to (him) (her)." The latter was added to the statute by 2003 Wisconsin Act 36.

10. The Committee concluded that the "mental purpose" alternative for intent is most likely to apply to this offense. For further discussion of the full definition of "intentionally," see Wis JI-Criminal 923A and 923B.

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1459 UNAUTHORIZED USE OF AN ENTITY'S IDENTIFYING INFORMATION OR DOCUMENTS — § 943.203(2)

Statutory Definition of the Crime

Section 943.203(2) of the Criminal Code of Wisconsin is violated by one who intentionally uses, attempts to use, or possesses with intent to use any identifying information or identification document of an entity [to obtain credit, money, goods, services, or anything else of value or benefit] [to harm the reputation or property of the entity] without the authorization or consent of the entity and by representing that [he or she is the entity] [he or she is acting with the authorization or consent of the entity].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements are present.

Elements of the Crime That The State Must Prove

1. The defendant intentionally [(used) (attempted to use) (possessed with intent to use)][1] [(identifying information) (an identification document)][2] of an entity. (A corporation) (A partnership) (An association) (A body politic) is an entity.[3]

   CHOOSE ONE OF THE FOLLOWING.

   [(Insert term from § 943.203(1)(c) 1. through 8.) is "identifying information."][4]

   ["Identification document" means:

(a document containing identifying information.)

(an entity's card or plate that can be used to obtain money, goods, services, or any other thing of value or benefit[5] or to initiate a transfer of funds.)

(any device that is unique to, assigned to, or belongs to an entity and is intended to be used to access services, funds, or benefits of any kind to which the entity is entitled.)][6]

2. The defendant intentionally [(used) (attempted to use) (possessed with intent to use)] [(identifying information) (an identification document)] of the entity [to obtain credit, money, goods, services, or anything else of value or benefit] [to harm the reputation or property of the entity].
3. The defendant acted without the authorization or consent of the entity and knew that the entity did not give authorization or consent.[7]
4. The defendant intentionally represented[8] that [(he) (she) was the entity] [(he) (she) was acting with the authorization or consent of the entity)].[9]

"Intentionally" requires that the defendant had the mental purpose[10] to obtain credit, money, goods, services, or anything else of value or benefit by using (identifying information) (an identification document) of the entity without the entity's consent or authorization.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1459 was originally published in 2006. This revision was approved by the Committee in October 2018; it added to the Comment and footnotes.

This instruction is for violations of § 943.203(2), created by 2003 Wisconsin Act 36 (effective date: August 8, 2003).

Wis JI-Criminal 1458 provides a model for the related offense of "identity theft" from an individual, defined in § 943.201.

Act 36 also created § 946.79 False statements to financial institutions. There is no uniform instruction for this offense.

Act 36 also created new provisions relating to jurisdiction [new § 939.03(1)(e)], venue [new § 971.19(11)], and charging violations as a single crime if committed pursuant to a single intent and design [new § 971.366].

Section 943.203(2)(a) was interpreted in State v. Stewart, 2018 WI App 41, 383 Wis 2d 546, 916 N.W.2d 188, in the context of finding that there was a factual basis for a guilty plea. The charges were based on Stewart's presenting forged documents to the writer of a presentence report in a previous criminal proceeding – purported diplomas and a letter from the VA. First, the court found that the facts showed that Stewart represented that the use of the documents was authorized. "The statute does not require an express or verbal representation from the offeror that the document is authorized." ¶22. "...[B]y the act of presenting the documents to show the PSI writer his personal history and character, Stewart was implicitly saying they were real and he had consent to use them." ¶23. Second, he acted with the purpose to receive something of value or benefit – a more favorable sentencing result. The statute is not limited to things of commercial or financial value. ¶26.

Section 940.203(3) provides:

> It is an affirmative defense to a prosecution under this section that the defendant was authorized by law to engage in the conduct that is the subject of the prosecution. A defendant who raises this affirmative defense has the burden of proving the defense by a preponderance of the evidence.

In State v. Ramirez, 2001 WI App 158, ¶17, 246 Wis.2d 802, 633 N.W.2d 656, the court of appeals held that the related offense under § 943.201 defines a "continuing offense" in the sense that the statute is violated when something of value is obtained even if the personal information was put to an unauthorized use at an earlier date.

1. Choose one of the alternatives: "used," "attempted to use," or "possessed with intent to use."

2. Choose one of the alternatives: "identifying information" or "identification document."

3. This statement is derived from the statutory definitions of "entity" and "person." Section 943.203(1)(a) provides: "'Entity' means a person other than an individual." Section 990.01(26) provides: "'Person' includes all partnerships, associations, and bodies politic and corporate."

4. The Committee recommends inserting the appropriate term. For example: "An entity's name is 'identifying information.'" The full list of possible terms is found in § 943.203(1)(c)1. through 8.

5. "Anything of value or benefit" is not limited to things of commercial or financial value. State v. Stewart, 2018 WI App 41, ¶26, 383 Wis 2d 546, 916 N.W.2d 188 [Citing State v. Peters, 2003 WI App 88, 263 Wis 2d , ¶¶16-17, 665 N.W.2d 171.] [Stewart is discussed above in the Comment preceding footnote 1.]

6. The alternatives in parentheses are based on § 943.203(1)(b)1.-3.

7. Section 939.23(3) provides that when the word "intentionally" is used in a criminal statute, it requires "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, . . . the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" Based on the latter requirement, the instruction includes the requirement that the defendant must know the victim did not consent to or authorize the use of the information or document.

8. "The statute does not require an express or verbal representation from the offeror that the document is authorized. Rather, it requires that the user 'represent' that the user is 'acting with the authorization or consent of the entity.' See Wis. Stat. 943.203(2)." State v. Stewart, 2018 WI App 41, ¶22, 383 Wis 2d 546, 916 N.W.2d 188 [Stewart is discussed above in the Comment preceding footnote 1.] Stewart relied on State v. Mason, 2018 WI App 57, ¶26, 384 Wis.2d 111, 918 N.W.2d 78, which concluded that using a stolen debit/credit card is sufficient to satisfy the "representing" requirement under § 943.201, the companion statute addressing theft of identifying information from an individual.

9. Choose one of the alternatives: "(he) (she) was the entity," or "(he) (she) was acting with the authorization or consent of the entity."

10. The Committee concluded that the "mental purpose" alternative for intent is most likely to apply to this offense. For further discussion of the full definition of "intentionally," see Wis JI-Criminal 923A and 923B.

1460 FAILURE TO DISCLOSE MANUFACTURER OF RECORDING – § 943.209

Statutory Definition of the Crime

Section 943.209 of the Criminal Code of Wisconsin is violated by one who, for commercial advantage or private financial gain [knowingly advertises, offers for sale or rent, sells, rents or transports a recording that does not contain the name and address of the manufacturer in a prominent place on the cover, jacket or label of the recording] [possesses with intent to advertise, offer for sale or rent, sell, rent or transport a recording that does not contain the name and address of the manufacturer in a prominent place on the cover, jacket or label of the recording].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [knowingly (advertised) (offered for sale or rent) (sold) (rented) (transported)] [possessed[1] with intent to (advertise) (offer for sale or rent) (sell) (rent) (transport] a recording.[2]
2. The recording did not contain the name and address of the manufacturer[3] in a prominent place on the cover, jacket or label of the recording.
3. The defendant acted for commercial advantage or private financial gain.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

[ADD THE FOLLOWING IN CLASS H FELONY CASES AND INCLUDE THE QUESTION IN THE STANDARD VERDICT FORM][4]

[If you find the defendant guilty, answer the following question:

"Did the defendant [knowingly (advertise) (offer for sale or rent) (sell) (rent)[5] (transport)] [possess with intent to (advertise) (offer for sale or rent) (sell) (rent) (transport)] 100 or more recordings during a 180-day period?"

Answer "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."]

[ADD THE FOLLOWING IN CLASS I FELONY CASES AND INCLUDE THE QUESTION IN THE STANDARD VERDICT FORM][6]

[If you find the defendant guilty, also answer the following question "yes" or "no."

"Did the value of the recordings exceed $2,500?"

Answer "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."]

COMMENT

Wis JI-Criminal 1460 was approved by the Committee in June 2013.

This instruction is drafted for violations of § 940.209, which are punished as a Class A misdemeanor or as Class I or H felonies, depending on the number of recordings involved and their value. See § 940.209(2). The instruction can be used for either misdemeanor or felony offenses – the basic elements are the same; answers to two special questions at the end will determine which penalty applies.

1. For definition of "possess" see Wis JI-Criminal 920.

2. "'Recording' means a medium on or in which sounds or images or both are stored." Section § 943.206(5).

3. "'Manufacturer' means a person who transfers sounds to a recording." Section 943.206(1).

4. The number of recordings involved, along with their value, determines the penalty:

• fewer than 100 recordings valued at less than $2,500 – Class A misdemeanor
• fewer than 100 recordings valued at more than $2,500 – Class I felony.
• more than 100 recordings – Class H felony.

The offense is also a Class H felony if the violation occurs after the person has been convicted under § 940.209. That option is not addressed by the instruction.

The Committee recommends that an extra question be added to determine which penalty applies.

The following form is suggested for the verdict in a case where the Class H felony is charged based on more than 100 recordings being involved:

"We, the jury, find the defendant guilty of failure to disclose the manufacturer of a recording under § 943.209 at the time and place charged in the information."

"We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

[Add the question as adapted in the text of the instruction.]"

5. "[T]he number of recordings that a person rents shall be the sum of the number of times that each individual recording is rented." Section 943.209(3).

6. The number of recordings involved, along with their value, determines the penalty:

• fewer than 100 recordings valued at less than $2,500 – Class A misdemeanor
• fewer than 100 recordings valued at more than $2,500 – Class I felony.
• more than 100 recordings – Class H felony.

The Committee recommends that an extra question be added to determine which penalty applies.

The following form is suggested for the verdict in a case where the Class I felony is charged based on the recordings having a value that exceeds $2,500:

"We, the jury, find the defendant guilty of failure to disclose the manufacturer of a recording under § 943.209 at the time and place charged in the information."

"We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the value of the recordings exceed $2,500?"

1461 FRAUD ON HOTEL OR RESTAURANT KEEPER — § 943.21(1m)(a)

Statutory Definition of the Crime

Fraud on a hotel or restaurant keeper, as defined in § 943.21 of the Criminal Code of Wisconsin, is committed by one who has obtained any beverage, food, lodging, ticket or other means of admission, or other service or accommodation at any campground, hotel, motel, boarding or lodging house, restaurant or recreational attraction and intentionally absconds without paying for it.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained _____[1] at a _____.[2]
2. The defendant knew (he) (she) was obligated to pay for the _____.[3]
3. The defendant intentionally absconded without paying.

   "Intentionally absconded" requires that the defendant left with the mental purpose[4] to avoid paying[5] for the _____.[6]

GIVE THE FOLLOWING WHEN SUPPORTED BY THE EVIDENCE.[7]

[One who absentmindedly leaves without paying or who leaves temporarily without intending to terminate the relationship with the restaurant is not guilty of fraud on a restaurant keeper.]

[If the person who provided the food consented to the defendant's leaving without paying or extended credit, the defendant is not guilty of fraud on a restaurant keeper.]

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge or intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF THE FELONY OFFENSE IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE FOOD OR SERVICES WAS MORE THAN $2,500.[8]

[Finding the Value of the (Food) (Services)]

[If you find the defendant guilty, answer the following question:

"Was the value of (food) (services) more than $2,500?"

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value was more than $2,500.]

COMMENT

Wis JI-Criminal 1461 was originally published in 1969 and revised in 1989, 1992, 1996, 2002, and 2005. The 2005 revision reflected changes made in § 943.21 by 2003 Wisconsin Act 252. This revision was approved by the Committee in February 2010.

This instruction is for violations of § 943.21(1m)(a). Related offenses are defined in subs. (1m)(b), (c), and (d), for which there are no suggested uniform instructions. The basic offense is a Class A misdemeanor. The penalty increases to a Class I felony if the value of the beverage, food, etc., exceeds $2,500. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001.

2003 Wisconsin Act 80 created sub. (1m)(d) which prohibits absconding without paying for gasoline, etc. However, that offense is classified as a Class D forfeiture and thus is not addressed by the uniform jury instructions.

2003 Wisconsin Act 252 amended the statute to apply to tickets or other means of admission to a recreational attraction. Effective date: April 28, 2004.

1. Insert the term describing what was obtained: beverage, food, lodging, ticket or other means of admission, or other service.

2. Insert the term describing the place where the food, etc., was obtained: campground, hotel, motel, boarding or lodging house, restaurant, or recreational attraction. "Recreational attraction" is defined in § 943.21(1c).

3. Insert the term describing what was obtained: beverage, food, lodging, ticket or other means of admission, or other service.

4. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

Subsections (2) and (2g) of § 943.21 provide that certain facts are prima facie evidence of an intent to defraud and of an intent to abscond without payment. Wis JI-Criminal 225 provides a suggested framework for implementing statutory "prima facie" provisions.

5. The 2010 revision changed the definition of "intentionally absconded" from "the mental purpose not to pay" to "the mental purpose to avoid paying." The Committee concluded that this captures the sense of "absconds" most applicable to this offense.

"Abscond" was defined as "to depart clandestinely" in State v. Croy, 32 Wis.2d 118, 121-22, 145 N.W.2d 118 (1966). The Committee has concluded that "departing clandestinely" without paying is one way to commit this offense, but that the statute is also violated, for example, by one who leaves openly without paying by deceiving the proprietor about his having paid for what was received. In the latter case, it is the intent to avoid paying that constitutes the offense, notwithstanding the fact that the actor did not clandestinely depart the premises. This interpretation is consistent with other provisions in § 943.21.

For example, subsec. (2)(a) provides that "the refusal of payment upon presentation when due . . . constitute[s] prima facie evidence of an intent to abscond without payment." Also see subsecs. (2g), (2m), and (2r) which contain similar prima facie provisions. All relate to behavior that does not involve "departing clandestinely."

6. Insert the term describing what was obtained: beverage, food, lodging, ticket or other means of admission, or other service.

7. The statute is not violated if credit has been extended, if the actor simply forgets to pay before leaving, or if the actor leaves with intent to return immediately and pay the bill. See Comment to § 343.22, p. 117, 1953 Report on the Criminal Code.

8. This offense is like theft in that the jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

1462 ABSCONDING WITHOUT PAYING RENT — § 943.215(1)

Statutory Definition of the Crime

Absconding without paying rent, as defined in § 943.215(1) of the Criminal Code of Wisconsin, is committed by one who, after being a tenant of residential property, intentionally absconds without paying all current and past due rent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had obtained tenancy of residential property.[1]

2. The defendant intentionally absconded.

   "Intentionally abscond" means that the defendant left with the mental purpose to avoid paying all current and past due rent.[2]

3. Current or past due rent actually was owed by the defendant.

IF THERE IS EVIDENCE OF AN AFFIRMATIVE DEFENSE UNDER § 943.215(2) OR (3), USE WIS JI-CRIMINAL 1462A HERE IN PLACE OF THE LAST TWO PARAGRAPHS.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1462 was originally published in 1999 and revised in 2008. This revision was approved by the Committee in December 2009.

1. The following definition of "tenancy" is provided in § 704.01(4): "'Tenancy' includes a tenancy under a lease, a periodic tenancy, or a tenancy at will."

"Lease" is defined in sub. (1) of § 704.01, "periodic tenant" in sub. (2), and "tenancy at will" in sub. (5).

2. The 2010 revision changed the definition of "intentionally absconded" from "the mental purpose not to pay" to "the mental purpose to avoid paying." The Committee concluded that this captures the sense of "absconds" most applicable to this offense.

The definition is adapted from the one used in the instruction for violations of § 943.21, Fraud on a hotel or restaurant keeper . . . See Wis JI-Criminal 1461. For that offense, case law had defined "absconds" as "to depart clandestinely." State v. Croy, 32 Wis.2d 118, 121-22, 145 N.W.2d 118 (1966). The Committee concluded that "departing clandestinely" without paying is one way to commit this offense, but that the statute is also violated, for example, by one who leaves openly without paying by deceiving the proprietor about his having paid for what he received. In the latter case, it is the intent to avoid paying that constitutes the offense, notwithstanding the fact that the actor did not clandestinely depart the premises. On the other hand, the statute is not violated if credit has been extended, if the actor simply forgets to pay before leaving, or if the actor leaves with intent to return immediately and pay the bill. See Comment to § 343.22, p. 117, 1953 Report on the Criminal Code. Also see footnote 6, Wis JI-Criminal 1461.

The Committee concluded that the same analysis applies to violations of § 943.215.

1462A ABSCONDING WITHOUT PAYING RENT: AFFIRMATIVE DEFENSE — § 943.215(2) OR (3)

ADD THE FOLLOWING TO WIS JI-CRIMINAL 1462 IF THERE IS EVIDENCE OF THE DEFENSES RECOGNIZED IN § 943.215(2) OR (3).

[Wisconsin law provides that it is a defense to this crime if the defendant had provided the landlord with a security deposit that equaled or exceeded the amount owed to the landlord regarding rent and damage to property, if any.[1]]

[Wisconsin law (also) provides that it is a defense to this crime if, within five days after the day he or she vacates the rental premises, he or she pays all current and past rent due or provides to the landlord, in writing, a complete and accurate forwarding address.[2]]

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, and also are satisfied beyond a reasonable doubt that [this defense did not exist] [neither of these defenses existed], you should find the defendant guilty.[3]

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1462A was originally published in 1999. This revision was approved by the Committee in December 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction should be added to Wis JI-Criminal 1461, Fraud on Hotel or Restaurant Keeper, when there is evidence of the defenses provided in § 943.215(2) and (3). The instruction is drafted to allow submission of either or both defenses through selection of the appropriate bracketed material.

1. Section 943.215(2).

2. Section 943.215(3).

3. Section 943.215(4) provides that if the existence of a defense has been placed in issue, the state must prove beyond a reasonable doubt that the facts constituting the defense do not exist.

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1463 CARJACKING [TAKING A VEHICLE BY USE OR THREAT OF FORCE][1] — § 943.231(1)

Statutory Definition of the Crime

Subsection 943.231(1) of the Criminal Code of Wisconsin is violated by one who, while possessing a dangerous weapon and by the use of, or threat of the use of, force or the weapon against another, intentionally takes any vehicle without the consent of the owner.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally took a vehicle[2] without the consent[3] of the owner.
2. The defendant knew that the owner did not consent to the taking.[4]
3. The defendant took the vehicle while possessing a dangerous weapon.
4. The defendant took the vehicle by the [(use) (threat of the use)][5] of [(force) (a dangerous weapon)] against another.

Meaning of Dangerous Weapon

A dangerous weapon is (any firearm, whether loaded or not) (any device designed as a weapon and capable of producing death or great bodily harm) (any device or instrumentality which in the manner it is used or intended to be used is calculated or likely

to produce death or great bodily harm).[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1465 in 1994 and revised and renumbered as Wis JI-Criminal 1463 in June 2000. The instruction underwent another revision in 2003, which incorporated the modifications introduced by the 2001 Wisconsin Act 109. This revision was approved by the Committee in August 2023, it reflects changes made by 2023 Wisconsin Act 10 [effective date: May 12, 2023].

This instruction is for violations of § 943.231(1), which addresses the offense of carjacking. The 2003 revision deleted text presenting a special question asking whether death or great bodily harm was caused. 2001 Wisconsin Act 109 [effective date: February 1, 2003] repealed sub. (1m) which provided for an increased penalty in those situations while adding violations of § 943.231(1) as a possible predicate felony for felony murder under § 940.03. 2023 Wisconsin Act 10 [effective date: May 12, 2023] increased the penalty from a Class C felony to a Class B felony. It also reorganized the offenses commonly referred to as "carjacking" into a new statutory section titled "carjacking."

1. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. Prior to May 2023, this instruction was titled "Taking a Vehicle by Use or Threat of Force." However, with the enactment of 2023 Wisconsin Act 10, this offense was restructured and now falls under a new statutory section called "carjacking." Therefore, the accurate statutory title is "carjacking," but it might be helpful to include the bracketed language to distinguish this specific offense from other carjacking offenses.

2. For the definition of "vehicle," see § 939.22(44).

3. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

4. When "intentionally" is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3). Thus, the instruction requires knowledge that the taking was without consent.

5. While the instruction recommends selecting the applicable alternative, the Committee did not conclude that the alternatives are so distinct that the election of one or other, or jury agreement on which alternative applies, should be required. This is similar to the result under the robbery statute, which this offense closely resembles. See Wis JI-Criminal 1479, footnote 1.

6. The definition of "dangerous weapon" is based on the one provided in § 939.22(10). The applicable alternative should be selected. See Wis JI-Criminal 910 for suggested instructions for all the statutory alternatives and a discussion of some of the substantive issues relating to the definition of "dangerous weapon."

7. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For a longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly JI 923.1].

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1463A CARJACKING [TAKING A VEHICLE BY USE OR THREAT OF FORCE][1] — § 943.231(2)

Statutory Definition of the Crime

Subsection § 943.231(2) of the Criminal Code of Wisconsin is violated by one who by the use of, or threat of the use of, force against another, intentionally takes any vehicle without the consent of the owner.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally took a vehicle[2] without the consent[3] of (name of owner).
2. The defendant knew that (name of owner) did not consent to the taking of the vehicle.[4]
3. The defendant took the vehicle by the (use) (threat of the use) of force against another.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements,

if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1463A was approved by the Committee in December 2018. This revision was approved by the Committee in August 2023, it reflects changes made by 2023 Wisconsin Act 10 [effective date: May 12, 2023].

This instruction is for violations of § 943.231(2) that provides: "Whoever, by use of force against another or by the threat of the use of force against another, intentionally takes any vehicle without the consent of the owner is guilty of a Class E felony." Section 943.23(1r) was created by 2017 Wisconsin Act 311 [effective date: April 18, 2018]. 2023 Wisconsin Act 10 [effective date: May 12, 2023] renumbered section 943.23(1r) as section 943.231(2). It also reorganized the offenses commonly referred to as "carjacking" into a new statutory section titled "carjacking."

1. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. Prior to May 2023, this instruction was titled "Taking a Vehicle by Use or Threat of Force." However, with the enactment of 2023 Wisconsin Act 10, this offense was restructured and now falls under a new statutory section called "carjacking." Therefore, the accurate statutory title is "carjacking," but it might be helpful to include the bracketed language to distinguish this specific offense from other carjacking offenses.

2. For a definition of "vehicle," see § 939.22(44).

3. See Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

4. When "intentionally" is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3). Thus, the instruction requires knowledge that the taking was without consent.

5. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For a longer description of the intent-finding process, see Wis JI-Criminal 923A.

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1464 TAKING AND DRIVING A (VEHICLE) (COMMERCIAL MOTOR VEHICLE) WITHOUT THE OWNER'S CONSENT – § 943.23(2), § 943.23(2g)

Statutory Definition of the Crime

Taking and driving a (vehicle) (commercial motor vehicle) without the owner's consent, as defined in § 943.23(2) of the Criminal Code of Wisconsin, is committed by one who intentionally takes and drives any (vehicle) (commercial motor vehicle) without the consent of the owner.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally took[1] a (vehicle)[2] (commercial motor vehicle)[3] without the consent of (name of owner).[4]

   ["Commercial motor vehicle" means a motor vehicle designed or used to transport passengers or property and having one or more of the following characteristics (identify a characteristic provided in s. 340.01(8)(a) – (d)).]

2. The defendant intentionally drove the (vehicle) (commercial motor vehicle) without the consent of (name of owner).

   "Drive" means to exercise physical control over the speed and direction of a vehicle while it is in motion.[5]

3. The defendant knew that (name of owner) did not consent to taking and driving the (vehicle) (commercial motor vehicle).[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF THERE IS EVIDENCE OF THE AFFIRMATIVE DEFENSE UNDER SUB. (3m), ADD THE MATERIAL FROM WIS JI-CRIMINAL 1465.[8]

COMMENT

This instruction was originally published as Wis JI-Criminal 1467 in 1982 and revised in 1989, 1994, 2002, 2003, and 2006. The 2002 revision renumbered the instruction as Wis JI-Criminal 1464. This revision was approved by the Committee in December 2018; it added the category of "commercial motor vehicle" to the offense.

This instruction is for violations of § 943.23(2) and § 943.23(2g), which respectively prohibits "taking and driving" a vehicle or commercial motor vehicle without the owner's consent. Section 943.23(2g), which provides; "Except as provided in sub. (3m), whoever intentionally takes and drives any commercial motor vehicle without the consent of the owner is guilty of a Class G felony." was created by 2017 Wisconsin Act 287 [effective date: April 18, 2018].

The 2003 revision reflects changes made in the statute by 2001 Wisconsin Act 109, which created sub. (3m) of § 943.23, recognizing an affirmative defense: abandoning the vehicle without damage within 24 hours of the taking. The defense is addressed by Wis JI-Criminal 1465A, which should be added to this instruction if applicable. See footnote 7, below. The effective date of the Act 109 changes is February 1, 2003. If the misdemeanor offense is charged, this instruction can be used as drafted, without any reference to the affirmative defense. By charging the misdemeanor, the State is conceding that the affirmative defense can be established. To prove that the misdemeanor was committed, the elements of the felony must be proved.

1. Wisconsin case law interpreting § 943.23 prior to its 1988 amendment had concluded that it did not require that the driver of the vehicle be the one who actually took the vehicle from the rightful owner. Edwards v. State, 46 Wis.2d 249,251, 174 N.W.2d 269 (1970). Also see State v. Robbins, 43 Wis.2d 478, 168 N.W.2d 544 (1969), and Bass v. State, 29 Wis.2d 201, 138 N.W.2d 154 (1965).

For example, in the Bass case, a conviction was upheld where the automobile in question was left at a service station overnight to be repaired in the morning. The defendant, an employee of the service station, drove the car after business hours to go to a friend's house to pick up his sleeping bag. He was arrested during this trip and claimed he had limited permission to use the car and therefore there was not a taking without the consent of the owner. His argument was that if one has lawful possession in the first instance, one cannot be convicted of a crime where an essential element is the taking without the consent of the owner. The Wisconsin Supreme Court rejected this argument, holding that the leaving of the car at the station overnight does not constitute implied permission to use the car. When Bass drove the vehicle for his own purposes, not connected with the purposes for which the vehicle had been entrusted to the owner of the station, he committed the offense of operating without the owner's consent.

In the Robbins case, the conviction was affirmed where the defendant was incarcerated in the Milwaukee County House of Correction on the date the vehicle was actually taken from the owner. The defendant was arrested for operating the vehicle some 10 days after the original taking. There was no argument in this case that the defendant did not satisfy the "take and drive" element of the crime, since the court indicated that the only issue in the case was criminal intent.

In the Edwards case, the car in question had been taken from the lot of an auto dealer by the defendant's uncle. The defendant was later arrested for driving that vehicle. Again, the court raised no question about whether the defendant satisfied the "take and drive" requirement. The court stated that "the statutory language 'intentionally takes and drives any vehicle without the consent of the owner' does not require that the driver of the stolen vehicle be the person who actually took the vehicle from the rightful owner."

Each of these cases was decided at the time when the statute had a single section which prohibited "taking and driving without consent." Under the revised statute, of course, there is a second type of offense: "driving or operating without consent." Was the creation of the new offense intended to change the prior case law to require that the defendant charged with "taking and driving" be the one who took the vehicle from the owner? The bill that revised the statute in 1988 gives little guidance as to what the intent of the legislature was. The changes in § 943.23 were part of a bill that made a number of changes in the provisions relating to junked or destroyed vehicles, fraudulent insurance claims, etc. See 1987 Assembly Bill 748.

So, one is left with a situation where the only difference between a Class H and Class I felony is that the more serious crime requires that the defendant "take," as well as "drive," a vehicle without the consent of the owner. The Committee struggled with this matter at great length and finally concluded that it must have been the intent of the legislature that the Class I felony was created to cover the situation where a person is lawfully in possession of a vehicle but operates it in a manner that goes beyond the scope of the use authorized or permitted by the owner. Interpreted in this way, prior law to the effect that the defendant need not be the one who takes the vehicle from the owner would remain intact. One gap in the prior statute, however, would be covered by the new Class I felony offense. That is the situation presented in State v. Mularkey, 195 Wis. 549,218 N.W. 809 (1928). In the Mularkey case, the defendant rented a car from the owner, but drove it beyond the area specified, did not return it at the time designated, and abandoned the car. The Wisconsin Supreme Court held that the defendant had not violated the operating without consent statute, because "the mere unauthorized or extended use of such a vehicle by one who has lawfully obtained the consent of the owner to its taking for use and operation upon the public highway is not a violation of this statute." Because Mularkey's original possession and

use was with the express knowledge and consent of the owner, he was not guilty under the prior statute. This is because the "taking" was not unlawful even though the ultimate use may have been. In the Committee's judgment, a person in the Mularkey situation would be guilty of the Class I felony under the current statute. Defendants in situations like those in the Bass, Edwards, and Robbins cases would be guilty of the Class H felony because they did not gain possession of the car with the consent of the owner. When they asserted control over it without the owner's consent, they "took" within the meaning of the statute, both the prior and the revised versions.

2. For the definition of "vehicle," see § 939.22(44).

3. For definition of "commercial vehicle," see § 340.01(8). At least one of the following characteristics provided in § 340.01(8)(a) through § 340.01(8)(d) must be chosen in order for the vehicle to classify as a "commercial motor vehicle":

(a) The vehicle is a single vehicle with a gross vehicle weight rating of 26,001 or more pounds or the vehicle's registered weight or actual gross weight is more than 26,000 pounds.

(b) The vehicle is a combination vehicle with a gross combination weight rating, registered weight or actual gross weight of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating, registered weight or actual gross weight of more than 10,000 pounds.

(c) The vehicle is designed to transport or is actually transporting the driver and 15 or more passengers. If the vehicle is equipped with bench type seats intended to seat more than one person, the passenger carrying capacity shall be determined under s. 340.01 (31) or, if the vehicle is a school bus, by dividing the total seating space measured in inches by 13.

(d) The vehicle is transporting hazardous materials requiring placarding or any quantity of a material listed as a select agent or toxin under 42 CFR 73.

4. If definition of "without consent" is believed to be necessary, see Wis Il-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

5. This is the definition of "drive" provided in § 943.23(l)(a).

6. When "intentionally" is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3). Thus, the instruction requires knowledge that the taking and driving was without consent. Also see State v. Edwards, note 1, supra at 252, for a discussion of "intentionally" in the context of this offense.

7. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

8. 2001 Wisconsin Act 109 created sub. (3m) of § 943.23, which recognizes an affirmative defense: abandoning the vehicle without damage within 24 hours of the taking reduces felony offenses under subs. (2) or (3) offenses to Class A misdemeanors. The statute places the burden of persuasion on the defendant to prove it by a preponderance of the evidence. The Committee concluded that the defense is best handled by submitting it to the jury as a special question, which is provided by Wis Il-Criminal 1465A.

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1464A TAKING AND DRIVING A (VEHICLE) (COMMERCIAL MOTOR VEHICLE) WITHOUT THE OWNER'S CONSENT: DRIVING OR OPERATING WITHOUT THE OWNER'S CONSENT AS A LESSER INCLUDED OFFENSE – § 943.23(2), (2g) AND (3)

Statutory Definition of the Crime

Taking and driving a vehicle without the owner's consent, as defined in § 943.23(2) of the Criminal Code of Wisconsin, is committed by one who intentionally takes and drives any (vehicle) (commercial motor vehicle) without the consent of the owner.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally took[1] a (vehicle)[2] (commercial motor vehicle)[3] without the consent[4] of the owner.

   ["Commercial motor vehicle" means a motor vehicle designed or used to transport passengers or property and having one or more of the following characteristics (identify a characteristic provided in s. 340.01(8)(a) – (d)).]

2. The defendant intentionally drove the (vehicle) (commercial motor vehicle) without the consent of the owner.

   "Drive" means to exercise physical control over the speed and direction of a vehicle while it is in motion.[5]

3. The defendant knew that the owner of the vehicle did not consent to taking and driving the (vehicle) (commercial motor vehicle).[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty of the charged crime.

If you are not so satisfied, you must find the defendant not guilty of taking and driving a vehicle without the owner's consent, and you should consider whether the defendant is guilty of driving or operating a vehicle without the owner's consent in violation of § 943.23 (3) of the Criminal Code of Wisconsin, which is a lesser included offense of the charged crime.[8]

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on your verdict on the crime charged before considering the lesser included offense. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the crime charged, you should consider whether the defendant is guilty of the lesser included offense.

The Difference Between the Two Crimes

There is a difference between the two crimes. The charged crime requires that the defendant intentionally took and drove the vehicle without the owner's consent, knowing that it was without consent. The lesser included offense requires only that the defendant intentionally drove or operated the vehicle without the owner's consent, knowing that it was without consent.

[A person may drive or operate a vehicle without the owner's consent even though the owner consented to the original taking.][9]

["Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it into motion.][10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intentionally operated a vehicle without the consent of the owner and that the defendant knew that the owner did not consent to the operation, you should find the defendant guilty of the lesser included crime.

If you are not so satisfied, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one offense.

IF THERE IS EVIDENCE OF THE AFFIRMATIVE DEFENSE UNDER SUB.(3m), ADD THE MATERIAL FROM WIS JI-CRIMINAL 1465A.[11]

COMMENT

This instruction was originally published as Wis JI-Criminal 1467.1 in 1982 and revised in 1989, 1994, 2002, and 2018. The 2002 revision renumbered the instruction as Wis JI-Criminal 1464A. This revision was approved by the Committee in December 2018 and reflects changes made in the statute by 2017 Wisconsin Act 287 and 2017 Wisconsin Act 311.

This instruction is for cases where a violation of § 943.23(2) is charged, involving "taking and driving" a vehicle without the owner's consent and where a violation of § 943.23(3), involving "driving or operating" without the owner's consent is submitted as a lesser included offense. The 2003 revision reflects changes made in the statute by 2001 Wisconsin Act 109, which created sub. (3m) of § 943.23, recognizing an affirmative defense to violations of sub. (2) of (3): abandoning the vehicle without damage within 24 hours of the taking. The defense is addressed by Wis Il-Criminal 1465A, which should be added to this instruction if applicable. See footnote 10, below. The effective date of the Act 109 changes is February l, 2003.

Section 943.23(3g) was created by 2017 Wisconsin Act 287 [effective date: April 18, 2018]. It provides: "Except as provided in sub. (3m), whoever intentionally drives or operates any commercial motor vehicle without consent of the owner is guilty of a class H felony."

1. See note 1, Wis JI-Criminal 1464.

2. For definition of "vehicle," see § 939.22(44).

3. For definition of "commercial motor vehicle," see § 340.01(8). At least one of the following characteristics provided in § 340.01(8)(a) through § 340.01(8)(d) must be chosen in order for the vehicle to classify as a "commercial motor vehicle":

(a) The vehicle is a single vehicle with a gross vehicle weight rating of 26,001 or more pounds or the vehicle's registered weight or actual gross weight is more than 26,000 pounds.

(b) The vehicle is a combination vehicle with a gross combination weight rating, registered weight or actual gross weight of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating, registered weight or actual gross weight of more than 10,000 pounds.

(c) The vehicle is designed to transport or is actually transporting the driver and 15 or more passengers. If the vehicle is equipped with bench type seats intended to seat more than one person, the passenger carrying capacity shall be determined under s. 340.01 (31) or, if the vehicle is a school bus, by dividing the total seating space measured in inches by 13.

(d) The vehicle is transporting hazardous materials requiring placarding or any quantity of a material listed as a select agent or toxin under 42 CFR 73.

4. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

5. This is the definition of "drive" provided in § 943.23(1)(a).

6. When "intentionally" is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3). Thus, the instruction requires knowledge that the taking and driving was without consent. Also see State v. Edwards, note 1, supra at 252, for a discussion of "intentionally" in the context of this offense.

7. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

8. This material that follows builds in the usual transitional instruction on moving from the charged crime to the lesser included offense. See Wis JI-Criminal 112 and 112A.

9. The sentence in brackets may be helpful where the evidence might raise a question about whether a person who had consent to the original taking may be guilty of the Class I felony. It is the Committee's conclusion that the Class I felony applies where a person is lawfully in possession of a vehicle but operates it in a manner that goes beyond the scope of the use authorized or permitted by the owner. See Wis JI-Criminal 1464, note 1.

10. This is the definition of "operate" provided by § 943.23(1)(c).

11. 2001 Wisconsin Act 109 created sub. (3m) of § 943.23, which recognizes an affirmative defense: abandoning the vehicle without damage within 24 hours of the taking reduces felony offenses under subs. (2) or (3) offenses to Class A misdemeanors. The statute places the burden of persuasion on the defendant to prove it by a preponderance of the evidence. The Committee concluded that the defense is best handled by submitting it to the jury as a special question, which is provided by Wis JI-Criminal 1465A.

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1465 DRIVING OR OPERATING A (VEHICLE) (COMMERCIAL MOTOR VEHICLE) WITHOUT THE OWNER'S CONSENT – § 943.23(3), § 943.23(3g)

Statutory Definition of the Crime

Driving or operating a (vehicle) (commercial motor vehicle) without the owner's consent, as defined in § 943.23(3) of the Criminal Code of Wisconsin, is committed by one who intentionally drives or operates a (vehicle) (commercial motor vehicle) without the consent of the owner.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (drove) (operated) a (vehicle)[1] (commercial motor vehicle)[2] without the consent of the owner.[3]

   ["Drive" means to exercise physical control over the speed and direction of a vehicle while it is in motion.][4]

   ["Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it into motion.][5]

   ["Commercial motor vehicle" means a motor vehicle designed or used to transport passengers or property and having one or more of the following characteristics (identify a characteristic provided in s. 340.01(8)(a) – (d)).]

[A person (drives) (operates) without consent even though the owner consented to the original taking if the person (drives) (operates) the vehicle in a manner that goes beyond the scope of the use authorized or permitted by the owner.][6]

2. The defendant knew that the owner of the vehicle did not consent to (driving) (operating) the (vehicle) (commercial motor vehicle).[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF THERE IS EVIDENCE OF THE AFFIRMATIVE DEFENSE UNDER SUB. (3m), ADD THE MATERIAL FROM WIS JI-CRIMINAL 1465A.[9]

COMMENT

This instruction was originally published as Wis JI-Criminal 1467.2 in 1989 and revised in 1994, 2002, 2003, 2007, and 2016. The 2002 revision renumbered the instruction as Wis JI-Criminal 1465. This revision was approved by the Committee in December 2018; it added the option of "commercial motor vehicle" to the offense.

This instruction is drafted for a case where the offense defined in § 943.23(3) is charged: "driving or operating" a vehicle without the owner's consent. See the discussion in note 1, Wis JI-Criminal 1464, for an explanation of the Committee's approach to this statute.

Section 943.23(3g) was created by 2017 Wisconsin Act 287 [effective date: April 18, 2018]. It provides: "Except as provided in sub. (3m), whoever intentionally drives or operates any commercial motor vehicle without consent of the owner is guilty of a class H felony."

The 2003 revision reflects changes made in the statute by 2001 Wisconsin Act 109, which created sub. (3m) of § 943.23, recognizing an affirmative defense: abandoning the vehicle without damage within 24 hours of the taking. The defense is addressed by Wis JI-Criminal 1465A, which should be added to this instruction if applicable. See footnote 9, below. The effective date of the Act 109 changes is February 1, 2003. If the misdemeanor offense is charged, this instruction can be used as drafted, without any reference to the affirmative defense. By charging the misdemeanor, the State is conceding that the affirmative defense can be established. To prove that the misdemeanor was committed, the elements of the felony must be proved.

1. For definition of "vehicle," see § 939.22(44).

2. For definition of "commercial motor vehicle," see § 340.01(8). At least one of the following characteristics provided in § 340.01(8)(a) through § 340.01(8)(d) must be chosen in order for the vehicle to classify as a "commercial motor vehicle":

(a) The vehicle is a single vehicle with a gross vehicle weight rating of 26,001 or more pounds or the vehicle's registered weight or actual gross weight is more than 26,000 pounds.

(b) The vehicle is a combination vehicle with a gross combination weight rating, registered weight or actual gross weight of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating, registered weight or actual gross weight of more than 10,000 pounds.

(c) The vehicle is designed to transport or is actually transporting the driver and 15 or more passengers. If the vehicle is equipped with bench type seats intended to seat more than one person, the passenger carrying capacity shall be determined under s. 340.01 (31) or, if the vehicle is a school bus, by dividing the total seating space measured in inches by 13.

(d) The vehicle is transporting hazardous materials requiring placarding or any quantity of a material listed as a select agent or toxin under 42 CFR 73.

3. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

4. This is the definition of "drive" provided in § 943.23(1)(a).

5. This is the definition of "operate" provided by § 943.23(1)(c).

6. The sentence in brackets may be helpful if there is a question whether a person who had consent to the original taking of the vehicle may be guilty of this offense. The Committee concluded that a person "drives or operates a vehicle without the owner's consent" where that person may have been lawfully in possession of a vehicle but operates it in a manner that goes beyond the scope of the use authorized or permitted by the owner. A complete explanation of this conclusion is provided in Wis JI-Criminal 1464, footnote 1.

7. When "intentionally" is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3). Thus, the instruction requires knowledge that the driving or operating was without consent.

8. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

9. 2001 Wisconsin Act 109 created sub. (3m) of § 943.23, which recognizes an affirmative defense: abandoning the vehicle without damage within 24 hours of the taking reduces felony offenses under subs. (2) or (3) offenses to Class A misdemeanors. The statute places the burden of persuasion on the defendant to prove it by a preponderance of the evidence. The Committee concluded that the defense is best handled by submitting it to the jury as a special question, which is provided by Wis JI-Criminal 1465A.

1465A OPERATING WITHOUT OWNER'S CONSENT: AFFIRMATIVE DEFENSE – § 943.23(2), (3), (3m)

Statutory Definition of the Crime

ADD THE FOLLOWING AT THE END OF WIS JI-CRIMINAL 1464, 1464A, OR 1465 IF THERE IS EVIDENCE OF THE AFFIRMATIVE DEFENSE PROVIDED IN SUB. (3m) OF § 943.23

If you find the defendant guilty, you must answer the following question:

"Did the defendant abandon the (vehicle) (commercial motor vehicle) without damage within 24 hours after the (vehicle) (commercial motor vehicle) was taken from the possession of the owner?"

"Abandon" means that the defendant must have freely, voluntarily, and permanently given up possession of the (vehicle) (commercial motor vehicle).[1]

USE THE FOLLOWING PARAGRAPHS IF RAISED BY THE EVIDENCE:[2]

[The giving up of possession is not free and voluntary if it is done because of fear of immediate capture by police.]

[A person who sells or gives the (vehicle) (commercial motor vehicle) to another person has not abandoned it within the meaning of the statute.]

You must answer the question "yes" if the defendant proves by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that the answer is "yes."[3]

If you are not so satisfied, you should answer the question "no."[4]

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.

COMMENT

Wis JI-Criminal 1465A was approved by the Committee in April 2003. This revision was approved by the Committee in December 2018; it adds the option of "commercial motor vehicle" to the language of the instruction.

This instruction addresses the affirmative defense set forth in sub. (3m) of § 943.23, as created by 2001 Wisconsin Act 109. Effective date: February 1, 2003. The defense reduces violations of sub. (2) or (3) to Class A misdemeanor. The statute provides that "the defendant who raises this affirmative defense has the burden of proving the defense by a preponderance of the evidence."

A similar defense existed in § 943.23 until it was repealed by 1993 Wisconsin Act 92. The Committee concluded that the interpretation of that provision applies to the current statute. See the discussion in footnote 1, below.

The Committee concluded that although not specifically enumerated in § 943.23(3m), this affirmative defense applies to "commercial motor vehicles" based on the language provided in § 943.23(2g) and (3g).

The Committee recommends that the affirmative defense be presented to the jury in the form of a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of operating without the owner's consent under Wis. Stat. § 943.23, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant abandon the vehicle without damage within 24 hours after the vehicle was taken from the possession of the owner?"

1. This definition was included in the uniform instruction for a similar defense recognized by the version of the statute in effect until 1993. The Committee believed this to be consistent with State v. Olson, 106 Wis.2d 572, 587, 317 N.W.2d 448 (1982), which held that the term "abandons" requires "voluntary relinquishment of possession." Abandonment does not exist where a defendant leaves the vehicle only when arrest and apprehension appears imminent. 106 Wis.2d 572, 586.

2. The two paragraphs in brackets are believed to be consistent with the discussion of abandonment in State v. Olson, supra, which interpreted the similar defense that applied to § 943 .23 until being repealed in 1993:

> ... Under the defendant's construction of the term "abandons," any person operating a vehicle without the owner's consent who had the foresight to leave the vehicle when his apprehension and arrest appeared imminent would fall under the lesser misdemeanor penalty although he had no intention of relinquishing possession of the vehicle if not for his imminent apprehension. Such a result is clearly contrary to the intent of the statute.
>
> Certainly, if, after a chase and after being ordered to pull over to the side of the road, the driver steps out of the vehicle and hands the keys over to the law enforcement officer, it would be ludicrous for the defendant to argue that a party has abandoned a vehicle.
>
> State v. Olson, 106 Wis.2d 572 ·at 586.

3. Section 943 .23 (3m) provides: "A defendant who raises this affirmative defense has the burden of proving the defense by a preponderance of the evidence." The instruction uses the generally-accepted statement of the civil burden: "to a reasonable certainty by the greater weight of the credible evidence."

If the jury answers the question "yes," the defense is established and the defendant should be found guilty of the misdemeanor offense.

4. If the jury answers the question "no," the defense is not established and the defendant should be found guilty of one of the felony offenses, depending on the jury's original finding.

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1466 INTENTIONALLY ACCOMPANYING A PERSON WHO OPERATES A VEHICLE WITHOUT THE OWNER'S CONSENT — § 943.23(4m)

Statutory Definition of the Crime

Subsection 943.23(4m) of the Criminal Code of Wisconsin is violated by one who knows that the owner does not consent to the driving or operation of a vehicle and intentionally accompanies, as a passenger in the vehicle, another person who intentionally drives or operates any vehicle without the consent of the owner.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of person)[1] intentionally (drove) (operated) a vehicle[2] without the consent[3] of the owner.[4]

   This requires that (name of person) acted with the purpose to (drive) (operate) a vehicle and knew that the owner did not consent to the (driving) (operation).[5]

   ["Drive" means to exercise physical control over the speed and direction of a vehicle while it is in motion.][6]

   ["Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it into motion.][7]

[A person (drives) (operates) without consent even though the owner consented to the original taking if the person (drives) (operates) the vehicle in a manner that goes beyond the scope of the use authorized or permitted by the owner.][8]

2. The defendant intentionally accompanied (name of person) as a passenger in the vehicle.

3. The defendant knew that the owner did not consent to the (driving) (operating) of the vehicle.[9]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1467.4 in 1994. It was revised in 2001 to renumber it as Wis JI-Criminal 1466 and to adopt a new format, make nonsubstantive changes to the text,

and update the comment. The instruction underwent another revision in 2016, which added to the text of element 1 at footnote 8. This revision was approved by the Committee in August 2023; it reflects changes made by 2023 Wisconsin Act 10 [effective date: May 12, 2023].

This offense, a Class A misdemeanor, is one of the so-called carjacking crimes created by 1993 Wisconsin Act 92 [effective date: Dec. 25, 1993]. It applies to one who accompanies a person who violates sub. (2), (3), or (3m) of § 943.23. The first two subsections are the previously existing "operating without the owner's consent" offenses. The instruction uses a violation of sub. (3) as the underlying offense: "intentionally drives or operates any vehicle without the consent of the owner. . ." That violation was selected because it was the simplest and required importing the fewest factual issues into the definition of this offense. Conduct that violates the other subsections will always violate sub. (3).

1. This blank and those that follow call for the name of the person who drove the vehicle and whom the defendant is charged with accompanying.

2. For a definition of "vehicle," see § 939.22(44).

3. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

4. The first element contains the elements for the direct violation of § 943.23(3), "intentionally driving or operating a vehicle without the consent of the owner." This is the simplest of the several different offenses that may serve as predicates for violations of § 943.23(4m). See the discussion preceding note 1, supra.

5. When "intentionally" is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3). Thus, the instruction requires knowledge that the driving or operating was without consent. In the context of this offense, the person actually driving or operating the vehicle must be shown to have had the required purpose and knowledge.

6. This is the definition of "drive" provided in § 943.23(1)(a).

7. This is the definition of "operate" provided by § 943.23(1)(c).

8. The sentence in brackets may be helpful if there is a question about whether a person who had consent to the original taking of the vehicle may be guilty of this offense. The Committee concluded that a person "drives or operates a vehicle without the owner's consent" where that person may have been lawfully in possession of a vehicle but operates it in a manner that goes beyond the scope of the use authorized or permitted by the owner. A complete explanation of this conclusion is provided in Wis JI-Criminal 1464, footnote 1.

9. When "intentionally" is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3). Thus, the

instruction requires knowledge that the driving or operating was without consent. In the context of this element, the defendant — who is charged with accompanying the driver or operator of the vehicle — must be shown to have had the required knowledge.

10. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For a longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

1467 REMOVING A MAJOR PART OF A VEHICLE WITHOUT THE OWNER'S CONSENT — § 943.23(5)[1]

Statutory Definition of the Crime

Subsection 943.23(5) of the Criminal Code of Wisconsin is violated by one who intentionally removes a major part of a vehicle without the consent of the owner.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally removed a major part of a vehicle.[2]

   This requires that the defendant acted with the purpose to remove a (name of part).

   CHOOSE ONE OF THE FOLLOWING:[3]

   [A (name of part) is a major part of a vehicle.]

   [A major part is a part that has a value[4] of more than $500.]

2. The defendant removed the (name of part) without the consent of the owner[5] of the vehicle.

3. The defendant knew that the owner did not consent to the removal.[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1467.5 in 1994. This revision, which renumbered the instruction as Wis JI-Criminal 1467, was approved by the Committee in June 2000 and involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment.

1. This instruction is for the Class E felony offense defined in § 943.23(5): intentionally removing a major part of a vehicle without the owner's consent. That subsection also defines a Class A misdemeanor offense which applies to intentionally removing "any other part or component of a vehicle" without the consent of the owner. This instruction can easily be modified for the misdemeanor charge by substituting "any part or component of a vehicle" for "major part of a vehicle" and by inserting the same phrase where the instruction calls for naming the major part.

Section 943.23(5) was created by 1987 Wisconsin Act 349. There are no reported appellate decisions interpreting the statute.

2. For definition of "vehicle," see § 939.22(44).

3. Subsection (1)(b) of § 943.23 provides that "major part" means any one of eleven listed parts of a vehicle: the engine; the transmission; each door of the passenger compartment; the hood; the grille; each bumper; each front fender; the deck lid, tailgate or hatchback; each rear quarter panel; the trunk floor pan; and, the frame, or the supporting structure which serves as the frame in the case of unitized body. The Committee recommends simply inserting the name of the "major part" involved in the case. Whether a particular part is a "major part" under the statute is a legal conclusion. Whether in fact such a part was involved in the case is for the jury to determine.

Subsection (1)(b)12. of § 943.23(5) provides that the following is also a "major part": "any part not listed under subds. 1 to 11 which has a value exceeding $500." If this option is charged, the second bracketed sentence should be used.

4. "Value" is not specially defined for purposes of § 943.23(5). If a definition is needed, the Committee concluded that the definition provided in § 943.20(2)(d) should be usable.

5. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

6. When "intentionally" is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3). Thus, the instruction requires knowledge that the owner did not consent.

7. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

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1468 ISSUE OF A WORTHLESS CHECK: MISDEMEANOR — § 943.24(1)

Statutory Definition of the Crime

Issue of a worthless check, as defined in § 943.24(1) of the Criminal Code of Wisconsin, is committed by one who issues any check or other order for the payment of money which, at the time of issuance, he or she intends shall not be paid.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant issued a check.[1]

   A check is an unconditional order to pay money.[2]

   A check is issued when it is signed and delivered to another.[3]

2. At the time the check was issued, the defendant intended that it not be paid.

   This requires that the defendant issued the check knowing or believing that it would not be paid.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

READ THE FOLLOWING IF THERE IS EVIDENCE OF ONE OF THE STATUTORILY-RECOGNIZED "PRIMA FACIE" CASES.[5]

[Evidence has been received that at the time the defendant issued the check, there was not enough money in the checking account on which the check was drawn and that the defendant failed to pay the check within five days after receiving written notice that the check was not paid, delivered by regular mail to either the person's last known address or the address provided on the check.

If you find beyond a reasonable doubt that the defendant issued a check and that at the time of issuance there was not enough money in the checking account on which the check was drawn and that the defendant failed to pay the check within five days after receiving written notice that the check was not paid, delivered by regular mail to either the person's last known address or the address provided on the check, you may find that (he) (she) intended that it not be paid. You should not so find unless you are satisfied beyond a reasonable doubt from all the evidence that at the time the defendant issued the check (he) (she) intended that it would not be paid.][6]

READ ONE OF THE FOLLOWING WHEN SUPPORTED BY THE EVIDENCE.[7]

[The statute does not apply to a check given for a past consideration, that is, a check given for a preexisting obligation or debt. Before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the check was not given for a past consideration.]

[The statute does not apply to a postdated check.[8] Before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the check was not a postdated check.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1468 was originally published in 1969 and revised in 1984, 1986, 1990, 1992, and 2002. This revision was approved by the Committee in April 2004 and involved updating the text following footnote 5.

This instruction is for the misdemeanor offense under § 943.24(1). A check or series of checks totaling $2,500 or more is made a felony by § 943.24(2). See Wis JI-Criminal 1469A and 1469B. The amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001.

1. The instruction is drafted for the typical case where a check is involved. However, the statute also applies to any "other order for the payment of money."

2. The definition of "check" is adapted from that used in the Uniform Commercial Code, § 403.104(2)(b).

3. The definition of "issue" is adapted from that used in the Uniform Commercial Code, § 403.102(1)(b): "'Issue' means the first delivery of an instrument to a holder or remitter." The phrase in the instruction — "signed and delivered to another" — is believed to be a more easily understood equivalent of the statutory definition. The delivery must be of a signed check, though the defendant need not be the person who signed it.

4. The explanation of the required intent is adapted from § 939.23(4):

> 'With intent to' or 'with intent that' means that the actor either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result.

The instruction defines intent as "knowing or believing that it [the check] would not be paid." This is believed to be the equivalent of having the mental purpose or being aware that it is practically certain

that the check would not be paid. The two alternatives for defining "with intent that" are discussed at Wis JI-Criminal 923A and 923B.

5. The model paragraphs are drafted for one of the three "prima facie" cases set forth in subsection (3) of § 943.24, namely, that found in (3)(b). If a case involves no account (subsec. (3)(a)) or insufficient funds at the time of presentment (subsec. (3)(c)), the paragraphs must be modified.

The model paraphrases the words of the statute by substituting "enough money in his checking account" for "sufficient funds or credit with the drawer" and "that the check was not paid" for "of nonpayment or dishonor." These paragraphs must be modified for cases involving orders other than checks.

The reference to “written” notice “delivered by regular mail . . .” was added to reflect changes made to § 943.23(3)(b) by 2003 Wisconsin Act 138, effective date: July 1, 2004.

6. This paragraph treats the "prima facie" case as a permissive inference and instructs the jury in the manner suggested by § 903.03. See Wis JI-Criminal 225 for discussion of the Committee's approach to instructing on "presumptions" and "prima facie cases."

7. The following paragraphs provide for the exceptions recognized by subsection (4) of § 943.24: postdated checks and checks given for past consideration (except a payroll check).

8. "Postdated checks are not included in view of the fact that some merchants encourage the giving of postdated checks when the customer does not have sufficient funds on hand to pay for the purchase. The person who takes a postdated check is put on notice that there may not be sufficient funds in the account of the issuer." 1953 Judiciary Committee Report on The Criminal Code, p. 119 (Wis. Legislative Council, February 1953).

1469A ISSUE OF A WORTHLESS CHECK: FELONY: ONE CHECK FOR $2,500 OR MORE — § 943.24(2)

Statutory Definition of the Crime

Issue of a worthless check, as defined in § 943.24(2) of the Criminal Code of Wisconsin, is committed by one who issues any check or other order for the payment of $2,500 or more which, at the time of issuance, he or she intends shall not be paid.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant issued a check.[1]

   A check is an unconditional order to pay money.[2]

   A check is issued when it is signed and delivered to another.[3]

2. The check was for the payment of $2,500 or more.

3. At the time the check was issued, the defendant intended that it not be paid.

   This requires that the defendant issued the check knowing or believing that it would not be paid.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

READ THE FOLLOWING IF THERE IS EVIDENCE OF ONE OF THE STATUTORILY-RECOGNIZED "PRIMA FACIE" CASES.[5]

[Evidence has been received that at the time the defendant issued the check, there was not enough money in the checking account on which the check was drawn and that the defendant failed to pay the check within five days after receiving written notice that the check was not paid, delivered by regular mail to either the person's last known address or the address provided on the check.

If you find beyond a reasonable doubt that the defendant issued a check and that at the time of issuance there was not enough money in the checking account on which the check was drawn and that the defendant failed to pay the check within five days after receiving written notice that the check was not paid, delivered by regular mail to either the person's last known address or the address provided on the check, you may find that (he) (she) intended that it not be paid. You should not so find unless you are satisfied beyond a reasonable doubt from all the evidence that at the time the defendant issued the check (he) (she) intended that it would not be paid.][6]

READ ONE OF THE FOLLOWING WHEN SUPPORTED BY THE EVIDENCE.[7]

[The statute does not apply to a check given for a past consideration, that is, a check given for a preexisting obligation or debt. Before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the check was not given for a past consideration.]

[The statute does not apply to a postdated check.[8] Before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the check was not a postdated check.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1469A was originally published in 1984 and revised in 1992 and 2002. This revision was approved by the Committee in April 2004 and involved changing the text following footnote 5.

This instruction is for the felony offense under § 943.24(2) where a single check is for $2,500 or more. For a felony offense involving a series of checks totaling $2,500 or more, see Wis JI-Criminal 1469B. The amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. For a misdemeanor offense under § 943.24(1), see Wis JI-Criminal 1468.

1. The instruction is drafted for the typical case where a check is involved. However, the statute also applies to any "other order for the payment of money."

2. The definition of "check" is adapted from that used in the Uniform Commercial Code, § 403.104(2)(b).

3. The definition of "issue" is adapted from that used in the Uniform Commercial Code, § 403.102(1)(b): "'Issue' means the first delivery of an instrument to a holder or remitter." The phrase in the instruction – "signed and delivered to another" – is believed to be a more easily understood equivalent

of the statutory definition. The delivery must be of a signed check, though the defendant need not be the person who signed it.

4. The explanation of the required intent is adapted from § 939.23(4):

> 'With intent to' or 'with intent that' means that the actor either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result.

The instruction defines intent as "knowing or believing that it [the check] would not be paid." This is believed to be the equivalent of having the mental purpose or being aware that it is practically certain that the check would not be paid. The two alternatives for defining "with intent that" are discussed at Wis JI-Criminal 923A and 923B.

5. The model paragraphs are drafted for one of the three "prima facie" cases set forth in subsection (3) of § 943.24, namely, that found in (3)(b). If a case involves no account (subsec. (3)(a)) or insufficient funds at the time of presentment (subsec. (3)(c)), the paragraphs must be modified.

The model paraphrases the words of the statute by substituting "enough money in his checking account" for "sufficient funds or credit with the drawer" and "that the check was not paid" for "of nonpayment or dishonor." These paragraphs must be modified for cases involving orders other than checks.

The reference to “written” notice “delivered by regular mail . . .” was added to reflect changes made to § 943.23(3)(b) by 2003 Wisconsin Act 138, effective date: July 1, 2004.

6. This paragraph treats the "prima facie" case as a permissive inference and instructs the jury in the manner suggested by § 903.03. See Wis JI-Criminal 225 for discussion of the Committee's approach to instructing on "presumptions" and "prima facie cases."

7. The following paragraphs provide for the exceptions recognized by subsection (4) of § 943.24: postdated checks and checks given for past consideration (except a payroll check).

8. "Postdated checks are not included in view of the fact that some merchants encourage the giving of postdated checks when the customer does not have sufficient funds on hand to pay for the purchase. The person who takes a postdated check is put on notice that there may not be sufficient funds in the account of the issuer." 1953 Judiciary Committee Report on The Criminal Code, p. 119 (Wis. Legislative Council, February 1953).

1469B ISSUE OF A WORTHLESS CHECK: FELONY: SERIES OF CHECKS TOTALING $2,500 OR MORE — § 943.24(2)

Statutory Definition of the Crime

Issue of a worthless check, as defined in § 943.24(2) of the Criminal Code of Wisconsin, is committed by one who issues any checks or other orders for the payment of money within a 90-day period totaling $2,500 or more which, at the time of issuance, he or she intends shall not be paid.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant issued checks.[1]

   A check is an unconditional order to pay money.[2]

   A check is issued when it is signed and delivered to another.[3]

2. The checks were issued within a 90-day period and totaled $2,500 or more.

3. At the time the checks were issued, the defendant intended that they not be paid.

   This requires that the defendant issued the checks knowing or believing that they would not be paid.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

READ THE FOLLOWING IF THERE IS EVIDENCE OF ONE OF THE STATUTORILY-RECOGNIZED "PRIMA FACIE" CASES.[5]

[Evidence has been received that at the time the defendant issued the checks, there was not enough money in the checking account on which the checks were drawn and that the defendant failed to pay the checks within five days after receiving written notice that the checks were not paid, delivered by regular mail to either the person's last known address or the address provided on the check.

If you find beyond a reasonable doubt that the defendant issued checks and that at the time of issuance there was not enough money in the checking account on which the checks were drawn and that the defendant failed to pay the checks within five days after receiving written notice that the checks were not paid, delivered by regular mail to either the person's last known address or the address provided on the check, you may find that (he) (she) intended that they not be paid. You should not so find unless you are satisfied beyond a reasonable doubt from all the evidence that at the time the defendant issued the check (he) (she) intended that they would not be paid.][6]

READ ONE OF THE FOLLOWING WHEN SUPPORTED BY THE EVIDENCE.[7]

[The statute does not apply to a check given for a past consideration, that is, a check given for a preexisting obligation or debt. Before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the checks were not given for a past consideration.]

[The statute does not apply to a postdated check.[8] Before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the checks were not postdated checks.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1469B was originally published in 1984 and revised in 1992 and 2002. This revision was approved by the Committee in April 2004 and involved changing the time period from 15 to 90 days and changing the text following footnote 5.

This instruction is for the felony offense under § 943.24(2) where a series of checks totaling $2,500 or more is issued in a 90-day period. The time period was changed from 15 days to 90 days by 2003 Wisconsin Act 306, effective date: May 7, 2004. For a felony offense involving a single check for $2,500 or more, see Wis JI-Criminal 1469A. The amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. For a misdemeanor offense under § 943.24(1), see Wis JI-Criminal 1468.

1. The instruction is drafted for the typical case where a check is involved. However, the statute also applies to any "other order for the payment of money."

2. The definition of "check" is adapted from that used in the Uniform Commercial Code, § 403.104(2)(b).

3. The definition of "issue" is adapted from that used in the Uniform Commercial Code, § 403.102(1)(b): "'Issue' means the first delivery of an instrument to a holder or remitter." The phrase in the instruction – "signed and delivered to another" – is believed to be a more easily understood equivalent of the statutory definition. The delivery must be of a signed check, though the defendant need not be the person who signed it.

4. The explanation of the required intent is adapted from § 939.23(4):

> 'With intent to' or 'with intent that' means that the actor either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result.

The instruction defines intent as "knowing or believing that it [the check] would not be paid." This is believed to be the equivalent of having the mental purpose or being aware that it is practically certain that the check would not be paid. The two alternatives for defining "with intent that" are discussed at Wis JI-Criminal 923A and 923B.

5. The model paragraphs are drafted for one of the three "prima facie" cases set forth in subsection (3) of § 943.24, namely, that found in (3)(b). If a case involves no account (subsec. (3)(a)) or insufficient funds at the time of presentment (subsec. (3)(c)), the paragraphs must be modified.

The model paraphrases the words of the statute by substituting "enough money in his checking account" for "sufficient funds or credit with the drawer" and "that the check was not paid" for "of nonpayment or dishonor." These paragraphs must be modified for cases involving orders other than checks.

The reference to “written” notice “delivered by regular mail . . .” was added to reflect changes made to § 943.23(3)(b) by 2003 Wisconsin Act 138, effective date: July 1, 2004.

6. This paragraph treats the "prima facie" case as a permissive inference and instructs the jury in the manner suggested by § 903.03. See Wis JI-Criminal 225 for discussion of the Committee's approach to instructing on "presumptions" and "prima facie cases."

7. The following paragraphs provide for the exceptions recognized by subsection (4) of § 943.24: postdated checks and checks given for past consideration (except a payroll check).

8. "Postdated checks are not included in view of the fact that some merchants encourage the giving of postdated checks when the customer does not have sufficient funds on hand to pay for the purchase. The person who takes a postdated check is put on notice that there may not be sufficient funds in the account of the issuer." 1953 Judiciary Committee Report on The Criminal Code, p. 119 (Wis. Legislative Council, February 1953).

1470 TRANSFER OF ENCUMBERED PERSONAL PROPERTY WITH INTENT TO DEFRAUD — § 943.84(2)

Statutory Definition of the Crime

Fraudulent transfer of encumbered personal property, as defined in § 943.84(2)(a) of the Criminal Code of Wisconsin, is committed by one who, with intent to defraud, (conceals) (removes) (transfers) any personal property in which he knows another has a security interest.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (removed) (transferred) (concealed) personal property.

   [To "remove" means to change the location of property permanently.][1]

   [To "transfer" means to change possession or title of any property.][2]

   [To "conceal" means to hide the property or to do something else which prevents or makes more difficult the discovery of the property.][3]

2. Another party held a security interest in the property.

   A security interest is an interest in property which secures payment or other performance of an obligation.[4]

3. The defendant knew[5] that another held a security interest in the property.

4. The defendant (transferred) (removed) (concealed) the property with intent to defraud.

This requires that when the defendant (transferred) (removed) (concealed) the property, (he) (she) had a purpose to cause someone pecuniary loss[6] or was aware that (his) (her) conduct was practically certain to cause that result.[7]

WHEN EVIDENCE WARRANTS AND WHERE THE HOLDER OF SECURITY INTEREST IS ALLEGED TO HAVE BEEN DEFRAUDED, GIVE THE FOLLOWING INSTRUCTION.[8]

[Evidence has been received that the defendant knew that a security interest existed and (removed) (sold) the property without (the consent of the secured party) (authorization by the security agreement). Evidence has also been received that the defendant failed to return the property within 72 hours of written demand (or, if return of the property is not possible, failed to make full disclosure to the secured party of all information concerning the disposition, location, and possession of the property). If you are satisfied beyond a reasonable doubt that all these facts are established, you may find from this evidence alone that the defendant (transferred) (removed) (concealed) the property with intent to defraud. But you are not required to do so, and you must not so find unless you are satisfied beyond a reasonable doubt from all the evidence in the case that the defendant acted with the intent to defraud.]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and

statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF A FELONY OFFENSE IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[9]

[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of property stolen more than $100,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $10,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $500?"

Answer: "yes" or "no.")

"Value" means the market value of the property at the time of the theft or the replacement cost, whichever is less.[10]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

COMMENT

Wis JI-Criminal 1740 was originally published in 1969 and revised in 1991. This revision was approved by the Committee in August 2007 and involved adoption of a new format, reflection of the renumbering of the statutes, and nonsubstantive changes to the text.

This instruction is drafted for violations of § 943.84(2). The offense was formerly defined in § 943.25, which was renumbered by 2005 Wisconsin Act 212 and moved to the subchapter dealing with crimes against financial institutions.

1. In Jameson v. State, 74 Wis.2d 176, 181, 246 N.W.2d 501 (1976), the court held that "remove" as used in § 943.25(2) [now § 943.84(2)] means more than moving from place to place; it requires "some permanent change in situs."

2. This is based on § 939.22(40) which defines "transfer" as follows: ". . . any transaction involving a change in possession of any property, or a change of right, title or interest to or in any property."

3. See Wis JI-Criminal 1481, Receiving Stolen Property, text at note 5.

4. Section 943.84(4) defines "security interest" as ". . . an interest in property which secures payment or other performance of an obligation." Also see Wis. Uniform Commercial Code 401.201(37). The perfection of the security interest "is not necessary to the creation of a security interest valid between the original parties." State v. Tew, 54 Wis.2d 361, 365, 195 N.W.2d 615 (1972).

In 26 Op. Att'y Gen. 105, 107 (1937), it is stated that the security interest must be an enforceable one.

5. Section 939.23(2) states that "'know' requires only that the actor believes that the specified fact exists."

6. The 1953 Report on the Criminal Code points out that the meaning of "intent to defraud" varies with the context in which it is used and states that for this offense, "it is used in the sense of intent to cause pecuniary loss either to the person whose security interest is endangered or defeated or to the innocent purchaser who has only constructive notice of the security interest." 1953 Report, page 120.

This view was adopted for purposes of subsection (1) of § 943.25 [now § 943.84] in State v. Alles, 106 Wis.2d 368, 382, 316 N.W.2d 378 (1982).

7. Section 939.23(3). See discussion of the two alternative meanings of "intent" in Wis JI-Criminal 923A and 923B.

8. Subsection (3) of § 943.84 sets forth a lengthy set of facts that is to provide "prima facie" evidence of intent to defraud. Providing an understandable instruction on this "prima facie evidence"

provision is difficult. The paragraph in brackets is based on the Committee's standard approach to instructing on "prima facie cases," described at Wis JI-Criminal 225.

The prima facie evidence provision was discussed in Jameson v. State, cited in note 1, supra, 74 Wis.2d 176, 183.

9. The penalty for this offense depends on the value of the property involved, see § 943.91:

• value does not exceed $500	Class A misdemeanor
• value does not exceed $500 and defendant has prior theft-type conviction	Class I felony
• value exceeds $500 but does not exceed $10,000	Class H felony
• value exceeds $10,000 but does not exceed $100,000	Class G felony
• value exceeds $100,000	Class E felony

The questions in the instruction adopt the approach used in theft cases. See Wis JI-Criminal 1441.

10. This is the definition of value used for theft cases. See § 943.20(2)(d) and Wis JI-Criminal 1441, footnote 9.

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1472A LOAN SHARKING (EXTORTIONATE EXTENSION OF CREDIT) — § 943.28(2)

Statutory Definition of the Crime

Loan sharking, as defined in § 943.28(2) of the Criminal Code of Wisconsin, is committed by one who makes any extortionate extension of credit.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant, (name of defendant) , made an extortionate extension of credit.

An "extortionate extension of credit" is any extension of credit made with the understanding of the person making the loan and the person borrowing that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to any person or to the reputation or property of any person.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant made an extortionate extension of credit, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1472A was originally published in 1974 and revised in 1995. This revision was approved by the Committee in April 2008 and involved adoption of a new format and nonsubstantive changes to the text.

1. Section 943.28(2) also makes it a crime to conspire to make any extortionate extension of credit. Conspiracy is a crime in itself under § 939.31. See Wis JI-Criminal 570.

2. This is based on the definition provided in § 943.28(1)(b). The "phrase 'at the time it is made' found in the § 943.28(1)(b) definition of 'extortionate extension of credit' encompasses credit extensions and renewal as well as the initial loan transaction between the parties." State v. Green, 208 Wis.2d 290, 294, 560 N.W.2d 295 (Ct. App. 1997).

1472B LOAN SHARKING (ADVANCEMENTS FOR EXTORTIONATE EXTENSIONS OF CREDIT) — § 943.28(3)

Statutory Definition of the Crime

Loan sharking, as defined in § 943.28(3) of the Criminal Code of Wisconsin, is committed by one who advances money or property for the purpose of making extortionate extensions of credit.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant advanced (money) (property) to another.

   "Advanced" as used here means the supplying or furnishing of money or property before something of equivalent value has been received.[1]

2. The defendant advanced (money) (property) for the purpose of making an extortionate extension of credit.

   An "extortionate extension of credit" is any extension of credit made with the understanding of the person making the loan and the person borrowing that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to any person or to the reputation or property of any person.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1472B was originally published in 1974 and revised in 1995. This revision was approved by the Committee in April 2008 and involved adoption of a new format and nonsubstantive changes to the text.

1. Black's Law Dictionary 72 (4th ed. 1968).

2. This is based on the definition provided in § 943.28(1)(b). The "phrase 'at the time it is made' found in the § 943.28(1)(b) definition of 'extortionate extension of credit' encompasses credit extensions and renewal as well as the initial loan transaction between the parties." State v. Green, 208 Wis.2d 290, 294, 560 N.W.2d 295 (Ct. App. 1997).

1472C LOAN SHARKING (USE OF EXTORTIONATE MEANS) — § 943.28(4)

Statutory Definition of the Crime

Loan sharking, as defined in § 943.28(4) of the Criminal Code of Wisconsin, is committed by one who knowingly participates in any way in the use of any extortionate means (to collect any extension of credit) (to attempt to collect any extension of credit) (to punish any person for the nonpayment of any extension of credit).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant participated in the use of extortionate means.

   An "extortionate means" as used here is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to any person or to the reputation or property of any person.[1]

2. The defendant participated in the use of extortionate means (to collect an extension of credit) (to attempt to collect an extension of credit) (to punish <u>(name of victim)</u> for the nonpayment of an extension of credit).

   ["To collect an extension of credit" means to induce in any way any person to make repayment thereof.[2]]

3. The defendant knew or believed[3] that (he) (she) was participating in the use of extortionate means (to collect an extension of credit) (to attempt to collect an extension of credit) (to punish (name of victim) for the nonpayment of an extension of credit).

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1472C was originally published in 1974 and revised in 1995. This revision was approved by the Committee in April 2008 and involved adoption of a new format and nonsubstantive changes to the text.

1. This is based on the definition provided in § 943.28(1)(c).

2. This is the definition provided in § 943.28(1)(a). Use it only where one or both of the first two phrases in parentheses of element two are read.

3. See § 939.23(2).

1473A EXTORTION: ACCUSE OR THREATEN TO ACCUSE — § 943.30(1)

Statutory Definition of the Crime

Section 943.30(1) of the Criminal Code of Wisconsin is violated by one who (verbally) (by written communication) (by printed communication) maliciously (accuses) (threatens to accuse) (accuses) another of any crime or offense with intent thereby [to extort money] [to compel the person to (do any act against the person's will) (omit to do any lawful act)].[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (verbally) (by written communication) (by printed communication) (accused) (threatened to accuse) another of a crime or offense.[2]

   [The person threatened need not be the one from whom (money) (the doing of an act) (the failure to do a lawful act) is being sought.][3]

2. The defendant made the (accusation) (threat) maliciously.

   This does not mean that the person (accusing) (threatening) must have a feeling of ill will towards the person (accused) (threatened). (An accusation) (A threat) is made "maliciously" if it is made willfully and with an illegal intent.[4]

3. The defendant acted with intent [to extort money] [to compel (name of person) to do any act against the person's will] [to compel (name of person) to omit to do any lawful act].

["To extort" means to obtain from another by coercion or intimidation.][5]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1473A was originally published in 1974 and revised in 1977 and 1994. This revision was approved by the Committee in April 2004 and involved adoption of a new format.

This instruction is drafted for violations of § 943.30(1) involving threats or accusations that another committed a crime. For violations involving injury or threats to injure the person, property, or business of another, see Wis JI-Criminal 1473B.

In State v. Dauer, 174 Wis.2d 418, 497 N.W.2d 766 (Ct. App. 1993), the court of appeals held that extortion is not a lesser included offense robbery because it requires proof of facts in addition to those required for robbery: proof of a threat made by verbal, printed, or written communication.

1. This summary of the offense is a substantial shortening of the full statutory definition. The instruction refers to "intent to extort money," deleting the statute's "or any pecuniary advantage whatever," and would need to be modified if money was not involved.

2. The terms "crime" and "offense" are synonymous. State v. Slowe, 230 Wis. 406, 410, 284 N.W. 4 (1939). If the definition of crime is at issue, § 939.12 should be consulted. It provides:

> A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by forfeiture is not a crime.

3. The Committee concluded that threats to do harm to a third person are covered by the statute. Thus, for example, if the defendant has threatened injury to John Smith's son if John Smith does not perform a certain act, the defendant's conduct falls within the statute.

This result is consistent with the conclusion reached in the previously published versions of this instruction, which cited the following as authority: Baldwin, "Criminal Misappropriations in Wisconsin – Part II," 44 Marq. L. Rev. 430, 443 (1961). This article referred to the version of the extortion statute in effect in 1961, describing it as a codification of the common law version of the crime, in roughly the same terms used in Wisconsin dating back to 1849. The article concluded, without citation to other authority, that "it is not required that the threat be to injure the person from whom the property, advantage or other action is demanded."

The statute was revised in 1969, 1977, 1979, and 1981. The 1977 changes came as part of the legislation which created the criminal penalty classification system and amended the statute to read essentially as it does today. The revisions at one time clarified the threat to harm others issue by treating it in a separate subsection. See § 943.30(2), 1969 Wis. Stats. But that section was merged with present sub. (1) by Chapter 173, Laws of 1977, leaving the matter unclear.

The Committee concluded that the present statute is very much like the 1961 version, which had been interpreted to cover threats to harm third persons. In the absence of any indication of legislative intent to change that interpretation, the present version of the instruction preserves the statement that the person threatened with harm need not be the person from whom the doing of an act or the payment of money is being sought.

4. State v. Compton, 77 Wis. 460, 466, 46 N.W. 535 (1890).

Historically, the meaning of the word "maliciously" was unclear: "Maliciously" . . . hardly ever means what it seems to say, i.e., spite or ill-will, yet it continues to clutter up many penal statutes. . . ." Remington and Helstad, "The Mental Element in Crime – A Legislative Problem," 1952 Wis Law Review 644, 667. Use of the term was generally avoided in the 1956 Criminal Code Revision, but the extortion statute was recodified using its common law terminology. The Committee believes that the essence of the offense is making a threat to get something to which the person is not lawfully entitled. This point is clarified in the definitions of some other offenses. See, for example, § 946.67, Compounding Crime, where subsec. (2) provides that the criminal prohibition does not apply of the person "reasonably believes that he is legally entitled to the property received."

5. This is the definition provided in the American Heritage Dictionary of the English Language (3rd Edition 1992).

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1473B EXTORTION: INJURE OR THREATEN TO INJURE — § 943.30(1)

Statutory Definition of the Crime

Section 943.30(1) of the Criminal Code of Wisconsin is violated by one who (injures) ((verbally) (by written communication) (by printed communication) threatens to injure) the person, property, or business of another, with intent thereby (to extort money) (to compel the person to (do any act against the person's will) (omit to do any lawful act)).[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (injured) (threatened to injure) the person, property,[2] or business of another person.

   [A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][3]

[The person threatened need not be the one from whom (money) (the doing of an act) (the failure to do a lawful act) is being sought.][4]

2. The defendant acted with intent [to extort money] [to compel (name of person) to do any act against the person's will] [to compel (name of person) to omit to do any lawful act].

["To extort" means to obtain from another by coercion or intimidation.][5]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1473B was originally published in 1974 and revised in 1977, 1994, 2004, and 2005. This revision was approved by the Committee in April 2022; it added a definition of "true threat."

This instruction is drafted for violations of § 943.30(1) involving injury or threats to injure the person, property, or business of another. For violations involving threats or accusations that another committed a crime see Wis JI-Criminal 1473A.

In State v. Dauer, 174 Wis.2d 418, 497 N.W.2d 766 (Ct. App. 1993), the court of appeals held that extortion is not a lesser included offense robbery because it requires proof of facts in addition to those required for robbery: proof of a threat made by verbal, printed, or written communication.

1. This summary of the offense is a substantial shortening of the full statutory definition. The instruction refers to a threat or injury to the "person, property, or business," omitting the following that is included in the statute: ". . . calling or trade, or the profits and income of any business, profession, calling or trade . . ." It also refers to "intent to extort money," deleting the statute's "or any pecuniary advantage whatever." The instruction must be modified if the omitted alternatives are involved.

Finally, the word "maliciously" is not used in this instruction. The Committee reads the statute as connecting "maliciously" only with the "threatens to accuse or accuses another of any crime or offense" alternative. The Committee concluded that two alternatives are possible under the statute: "maliciously threatening to accuse or accusing of crime" and "threatening or committing any injury. . . ." The blameworthiness of the conduct covered by this instruction is provided by the requirement that the threat or injury to be done with the intent to extort money or to make the person do an act against the person's will.

2. In State v. Manthey, 169 Wis.2d 673, 689, 487 N.W.2d 44 (Ct. App. 1992), the court held that "property" under § 943.30(1) is "broad enough to encompass an interest in a lawsuit." Thus, a complaint charging extortion was sufficient where it alleged that the defendant threatened to testify falsely unless paid.

Threats "to do everything he could to ensure that the student would have to end his studies in the United States and return to Panama" could constitute threats to the student's profession or to the student's "calling." State v. Kittilstad, 231 Wis.2d 245, ¶ 49-51, 603 N.W.2d 732 (1999).

3. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, 28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats." Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of the statute criminalizing language is much narrower." 2001 WI 46, 43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, 29.

The Committee concluded that the definition in the instruction is equivalent in context and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition

much like the one used in the instruction. See State v. A.S., 2001 WI 48, 23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 2 which requires that "the defendant acted with intent [to extort money]…"

4. The Committee concluded that threats to do harm to a third person are covered by the statute. Thus, for example, if the defendant has threatened injury to John Smith's son if John Smith does not perform a certain act, the defendant's conduct falls within the statute.

This result is consistent with the conclusion reached in the previously published versions of this instruction, which cited the following as authority: Baldwin, "Criminal Misappropriations in Wisconsin – Part II," 44 Marq. L. Rev. 430, 443 (1961). This article referred to the version of the extortion statute in effect in 1961, describing it as a codification of the common law version of the crime, in roughly the same terms used in Wisconsin dating back to 1849. The article concluded, without citation to other authority, that "it is not required that the threat be to injure the person from whom the property, advantage or other action is demanded."

The statute was revised in 1969, 1977, 1979, and 1981. The 1977 changes came as part of the legislation which created the criminal penalty classification system and amended the statute to read essentially as it does today. The revisions at one time clarified the threat to harm others issue by treating it in a separate subsection. See § 943.30(2), 1969 Wis. Stats. But that section was merged with present sub. (1) by Chapter 173, Laws of 1977, leaving the matter unclear.

The Committee concluded that the present statute is very much like the 1961 version, which had been interpreted to cover threats to harm third persons. In the absence of any indication of legislative intent to change that interpretation, the present version of the instruction preserves the statement that the person threatened with harm need not be the person from whom the doing of an act or the payment of money is being sought.

5. This is the definition provided in the American Heritage Dictionary of the English Language (3rd Edition 1992).

1474 THREATS TO COMMUNICATE DEROGATORY INFORMATION — § 943.31

Statutory Definition of the Crime

Section 943.31 of the Criminal Code of Wisconsin is violated by one who maliciously threatens, [with intent to extort money or any pecuniary advantage whatever] [or] [with intent to compel the person so threatened to do any act against the person's will], to disseminate or to communicate to anyone information, whether true or false, that would humiliate or injure the reputation of the threatened person or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant maliciously threatened (name threatened person) to disseminate or to communicate to anyone certain information about [(name threatened person)] [(name other person)]. [(Identify the information) is information.][1]
2. The defendant maliciously[2] threatened to disseminate or communicate information, whether true or false, that would humiliate or injure the reputation of [(name threatened person)] [(name other person)].

3. The defendant made the threat [with intent to extort money or any pecuniary advantage whatever] [with intent to compel the person threatened to do any act against the person's will].

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 474 was originally published in 1974 and revised in 1985, 1995, and 2004. This revision was approved by the Committee in December 2016; it reflects significant changes made to § 943.31 by 2015 Wisconsin Act 335 [effective date: April 1, 2016].

1. Section 943.31 provides in part: "For the purpose of this section, 'information' includes any photograph, exposed film, motion picture, videotape, or data that represents a visual image, a sound recording, or any data that represents or produces an audio signal." The Committee recommends inserting the applicable term in the blank in the instruction.

2. A definition of "maliciously" is found in Wis JI-Criminal 1473A Extortion: Accuse Or Threaten To Accuse. It states: "A threat is made 'maliciously' if it is made willfully and with an illegal intent." See footnote 4 of that instruction for an explanation of the derivation of the definition.

1475 ROBBERY BY THE USE OF FORCE — § 943.32(1)(a)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1475 was originally published in 1966 and revised in 1983 and 1994. It was withdrawn in 2008.

This instruction provided a separate instruction for robbery by the use of force, as distinguished from robbery by the threat of force. It was withdrawn because its substance is included in Wis JI-Criminal 1479.

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1477 ROBBERY BY THREAT OF FORCE — § 943.32(1)(b)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1477 was originally published in 1966 and revised in 1983 and 1994. It was withdrawn in 2008.

This instruction provided a separate instruction for robbery by the threat of force, as distinguished from robbery by the use of force. It was withdrawn because its substance is included in Wis JI-Criminal 1479.

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1479 ROBBERY BY THE USE OR THREAT OF FORCE[1] — § 943.32(1)(a) and (b)

Statutory Definition of the Crime

Robbery, as defined in § 943.32(1) of the Criminal Code of Wisconsin, is committed by one who, with the intent to steal, takes property from the person or presence of the owner by [using force against the person of the owner with intent to overcome physical resistance or physical power of resistance to the taking or carrying away of the property] [or] [by threatening the imminent use of force against the person[2] of the owner with intent to compel the owner to submit to the taking or carrying away of the property].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name) was the owner of property.[3]

   "Owner" means a person in possession of property.[4]

2. The defendant took and carried away[5] property from the person or from the presence[6] of (name).

3. The defendant took the property with the intent to steal.

This requires that the defendant had the mental purpose[7] to take and carry away property of another without consent and that the defendant intended to deprive (name) permanently of possession of the property.

[It further requires that the defendant knew that the property belonged to another and knew that the person did not consent to the taking of the property.][8]

4. The defendant acted forcibly.[9]

Forcibly means that the defendant [actually used force against (name) with the intent to overcome or prevent (his) (her) physical resistance or physical power of resistance to the taking or carrying away of the property][10] [or] [threatened the imminent use of force against (name) [11] with the intent to compel (name) to submit to the taking or carrying away of the property. "Imminent" means "near at hand" or "on the point of happening"[12]].

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1479 was originally published in 1974 and revised in 1983, 1988, and 1994. This revision was approved by the Committee in July 2008 and involved adoption of a new format and nonsubstantive changes to the text.

In 2008, separate instructions for use of force [Wis JI-Criminal 1475] and threat of force [Wis JI-Criminal 1477] were withdrawn and this instruction adapted for use in any one of three possible cases: 1) those alleging robbery by the use of force; 2) those alleging robbery by the threat of force; and, 3) those alleging robbery by the use or threat of force. See footnotes 1 and 9, below.

1. This instruction is for cases where either or both of the alternative ways of committing "unarmed robbery" are submitted. Thus, the instruction is phrased in terms of "use of force" or "threat of imminent force." While election of one alternative or the other is preferable, in some cases election may not be possible. In those cases, submitting both alternatives is not error, and it is not essential for the jury to agree on one alternative as opposed to the other. Manson v. State, 101 Wis.2d 413, 304 N.W.2d 729 (1981). Cheers v. State, 102 Wis.2d 367, 306 N.W.2d 676 (1981). The instruction tries to tie the two alternatives together by relating them to the concept of acting "forcibly." See note 9, below.

2. This instruction is drafted for threats against the person of the one in possession of the property. The statute also prohibits threats against others who are present. In cases where threats are against another, the introductory paragraph and the fourth element of the instruction will have to be modified to make it clear that force is threatened against someone else to compel the person in possession of the property to submit to the taking or carrying away.

3. "Property" for the purposes of robbery is the same as "property" for the purposes of theft; which is defined in § 943.20(2)(a). See Baldwin, "Criminal Misappropriations In Wisconsin — Part II," 44 Marq. L. Rev. 430, 450 (1961). The value of the property is immaterial.

4. "The person who has possession of the property" is the definition of owner provided in § 943.32(3).

In State v. Mosely, 102 Wis.2d 636, 307 N.W.2d 200 (1981), the court held that a person qualifies as an "owner" if his possession of the property is "actual or constructive," citing § 971.33. In Mosely, all employees of a restaurant were held to be "owners" of the restaurant's money kept in an office desk since each had dominion and control over it. As to jewelry and a purse on an office shelf, only the person to whom they actually belonged was an "owner," since only she had any control over or interest in the property.

5. On several occasions, Wisconsin appellate courts have held that "asportation" or "carrying away" is required for a taking to constitute robbery. In State v. Johnson, 207 Wis.2d. 240, N.W.2d (1997), the Wisconsin Supreme Court affirmed the reversal of an armed robbery conviction on the ground that there was no "asportation":

> We hold that a person may not be convicted of armed robbery when the property at issue is an automobile and the person does not move the automobile. 207 Wis.2d. 240, 249.

Johnson declined to overrule prior decisions establishing the asportation requirement. In State v. Moore, 55 Wis.2d 1, 197 N.W.2d 820 (l972), the court first interpreted the armed robbery statute to require asportation. That holding came in the context of justifying the conclusion that theft from person was a lesser included offense of robbery. Three court of appeals decisions have relied on Moore. In State v. Dauer, 174 Wis.2d 418, 497 N.W.2d 766 (Ct. App. 1993), the court relied on the asportation requirement to support its conclusion that convictions for robbery and extortion based on the same conduct were not barred by double jeopardy principles. In Ryan v. State, 95 Wis.2d 83, 289 N.W.2d 349 (Ct. App. 1980), the court found the evidence sufficient to support asportation where the defendant abandoned the stolen purse shortly after taking it from the victim. And in State v. Grady, 93 Wis.2d 1, 286 N.W.2d 607 (Ct. App. 1979), the court relied on the asportation element to support a conclusion that a robbery continued during the "carrying away" because it was at that point that a weapon was used. See note 8, below.

6. When there is a dispute on the facts as to precisely from where the property was taken – the person or the presence of the one in possession – then add this sentence: "It is immaterial whether the property is taken from the person or the presence of the one in possession." "Presence of the owner" means such a proximity to the owner as will enable the defendant when he takes the property to use or threaten the imminent use of force. See Baldwin, "Criminal Misappropriations," supra, 447-48. In certain cases, property may be taken from both the person and the presence of the one in possession. Then the words "or both" should be added at this point.

In State v. Mosely, 102 Wis.2d 636, 307 N.W.2d 200 (1981), the court held that "from his person or presence" did not require that the victim actually be aware of the taking: ". . . where the victim has been intimidated or placed in fear by use or threat of force . . . and the property is taken from an area sufficiently close and under his control that, but for the robber's intimidation or force he could have prevented the taking, the taking is from his "presence" under § 943.32(1); and this conclusion is not defeated by an unawareness of the taking as it occurs." 102 Wis.2d at 649.

7. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one part of the definition. It is the other alternative that changes from "believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

8. The bracketed material should be added if there is evidence that, for example, the defendant believed he was reclaiming his own property. Referred to as "right to recapture," "claim of right," or "self-help," this defensive matter tends to negate either the "property of another" or the "knew it was property of another" elements. The rule applies to robbery. Edwards v. State, 49 Wis.2d 105, 181 N.W.2d 383 (1970); Austin v. State, 86 Wis.2d 213, 271 N.W.2d 668 (1978).

The 1993 revision of this instruction substituted the bracketed material for the following phrase: ". . . knew he had no right to take it." The Committee concluded that the present version is a more accurate statement of the law.

The "right to recapture" is discussed in detail at Wis JI-Criminal 710, Law Note: Right To Recapture.

9. This paragraph restates the statutory requirement that the defendant act "by force or threat of imminent force" by phrasing them as alternative ways of satisfying the core requirement that the defendant act "forcibly." The Committee concluded that this properly emphasizes the intent of the statute to require a link between the taking of the property and the defendant's use of force. The Committee concluded that it is not necessary to elect between "use of force" and "threat of imminent force" alternatives, although in the usual case, election would clarify the issue for the jury and should be done where possible. In support of the proposition that election is not necessary, see Manson v. State, and Cheers v. State, cited in note 1, supra. As to jury unanimity generally, also see State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981), and Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); compare United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

10. It is robbery if force is used to accomplish the "carrying away" of the property as well as the "taking." State v. Grady, 93 Wis.2d 1, 286 N.W.2d 607 (Ct. App. 1979).

11. See note 2, supra.

In State v. Johnson, 231 Wis.2d 58, 604 N.W.2d 902 (Ct. App. 1999), the court held that the statute does not require express threats of bodily harm – "the element is met 'if the taking of the property [is] attended with such circumstances of terror, or such threatening by menace, word, or gesture as in common experience is likely to create an apprehension of danger and induce a [person] to part with property for [his or her] safety.'" 231 Wis.2d 58, 69, citing Washington v. Collinsworth, 966 F.2d 905, 907 (Wash. Ct. App. 1997).

12. The definition of "imminent" is adapted from Black's Law Dictionary, p. 884 (4th Edition, 1951).

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1480 ARMED ROBBERY: BY USE OR THREAT OF USE OF A DANGEROUS WEAPON — § 943.32(2)[1]

Statutory Definition of the Crime

Armed robbery, as defined in § 943.32(2) of the Criminal Code of Wisconsin, is committed by one who, with the intent to steal and by use or threat of use of a dangerous weapon, takes property from the person or presence of the owner by [using force against the person of the owner with intent to overcome physical resistance or physical power of resistance to the taking or carrying away of the property] [or] [by threatening the imminent use of force against the person[2] of the owner with intent to compel the owner to submit to the taking or carrying away of the property].[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. (Name) was the owner of property.[4]

   "Owner" means a person who has possession of property.[5]

2. The defendant took and carried away[6] property from the person or from the presence[7] of (name).

3. The defendant took the property with the intent to steal.

"Intent to steal" means that the defendant had the mental purpose[8] to take and carry away property of another without consent and that the defendant intended to deprive the owner permanently of possession of the property.[9] [It further requires that the defendant knew that the property belonged to another and knew that the person did not consent to the taking of the property.][10]

4. The defendant acted forcibly.[11]

"Forcibly" means that the defendant [used force against _(name)_ with the intent to overcome or prevent physical resistance or physical power of resistance to the taking or carrying away of the property] [or] [threatened the imminent use of force against _(name)_ [12] with the intent to compel _(name)_ to submit to the taking or carrying away of the property].[13]

"Imminent" means "near at hand" or "on the point of happening."[14]

5. At the time of the taking or carrying away,[15] the defendant used or threatened to use a dangerous weapon.[16]

A "dangerous weapon" is (any firearm, whether loaded or not) (any device designed as a weapon and capable of producing death or great bodily harm) (any device or instrumentality which in the manner it is used or intended to be used is calculated or likely to produce death or great bodily harm).[17]

ADD THE FOLLOWING IF THE CASE INVOLVES A THREAT TO USE A WEAPON AND NO WEAPON OR OTHER ARTICLE IS ACTUALLY DISPLAYED:[18]

[This element does not require that a defendant actually display or possess a dangerous weapon. It is sufficient if (name of victim) reasonably believed the defendant had a dangerous weapon at the time of the threat. Whether (name of victim) reasonably believed[19] that the defendant was armed with a dangerous weapon is to be determined from the standpoint of (name of victim) at the time of the alleged offense. The standard is what a person of ordinary intelligence and prudence would have believed under the circumstances that existed at that time.]

Deciding About Intent

The intent to steal and [the intent to overcome resistance] [or] [the intent to compel the one in possession to submit to the taking or carrying away] must be found as facts before you can find the defendant guilty of armed robbery. You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of armed robbery have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1480 was originally published in 1966 and revised in 1974, 1980, 1983, 1988, 1990, 1993, 1997, 1999, and 2009. This revision was approved the Committee in June 2015; it involved nonsubstantive changes to the text and added to footnote 18.

1. This instruction is for cases where a robbery is alleged to have been committed by the use or threat of use of a dangerous weapon. If the case involves "an article used or fashioned in a manner to lead the victim reasonably to believe it is a dangerous weapon," Wis JI-Criminal 1480A should be used.

Section 943.32(2) was amended by 1995 Wisconsin Act 288 (effective date: May 10, 1996) to refer not only to a dangerous weapon but also to "a device or container described under s. 941.26(4)(a)." The reference is to containers of oleoresin of capsicum, commonly referred to as "pepper spray." If that option is presented, the instruction must be modified. The Committee suggests simply substituting "container of oleoresin of capsicum" for "dangerous weapon" and not defining the term further. This is the approach used in the instructions for violations of § 941.26(4); see Wis JI-Criminal 1341, 1341A, and 1341B.

2. This instruction is drafted for threats against the person of the one in possession of the property. The statute also prohibits threats against others who are present. In cases where threats are against another, the introductory paragraph and the definition of "forcibly" will have to be modified to make it clear that force is threatened against someone else to compel the person in possession of the property to submit to the taking or carrying away.

3. The instruction is drafted for a case where both alternative ways of committing robbery are submitted. That is, the instruction is phrased in terms of "use of force" or "threat of imminent force." If only one of the alternatives is indicated by the evidence, only one should be submitted. While election of one alternative or the other is preferable, in some cases election may not be possible. In those cases, submitting both alternatives is not error, and it is not essential for the jury to agree on one alternative as opposed to the other. Manson v. State, 101 Wis.2d 413, 304 N.W.2d 729 (1981). Cheers v. State, 102 Wis.2d 367, 306 N.W.2d 676 (1981). This instruction tries to tie the two alternatives together by relating them to the concept of acting "forcibly."

4. "Property" for the purposes of robbery is the same as "property" for the purposes of theft; the latter is defined in § 943.20(2)(a). See Baldwin, "Criminal Misappropriations In Wisconsin – Part II," 44 Marq. L. Rev. 430, 450 (1961). The value of the property is immaterial.

5. "The person who has possession of the property" is the definition of owner provided in § 943.32(3).

In State v. Mosely, 102 Wis.2d 636, 307 N.W.2d 200 (1981), the court held that a person qualifies as an "owner" if his possession of the property is "actual or constructive," citing § 971.33. In Mosely, all employees of a restaurant were held to be "owners" of the restaurant's money kept in an office desk since each had dominion and control over it. As to jewelry and a purse on an office shelf, only the person to whom they actually belonged was an "owner," since only she had any control over or interest in the property.

6. On several occasions, Wisconsin appellate courts have held that "asportation" or "carrying away" is required for a taking to constitute robbery. In State v. Johnson, 207 Wis.2d. 240, N.W.2d (1997), the Wisconsin Supreme Court affirmed the reversal of an armed robbery conviction on the ground that there was no "asportation":

> We hold that a person may not be convicted of armed robbery when the property at issue is an automobile and the person does not move the automobile. 207 Wis.2d. 240, 249.

Johnson declined to overrule prior decisions establishing the asportation requirement. In State v. Moore, 55 Wis.2d 1, 197 N.W.2d 820 (l972), the court first interpreted the armed robbery statute to require asportation. That holding came in the context of justifying the conclusion that theft from person was a lesser included offense of robbery. Three court of appeals decisions have relied on Moore. In State v. Dauer, 174 Wis.2d 418,

497 N.W.2d 766 (Ct. App. 1993), the court relied on the asportation requirement to support its conclusion that convictions for robbery and extortion based on the same conduct were not barred by double jeopardy principles. In Ryan v. State, 95 Wis.2d 83, 289 N.W.2d 349 (Ct. App. 1980), the court found the evidence sufficient to support asportation where the defendant abandoned the stolen purse shortly after taking it from the victim. And in State v. Grady, 93 Wis.2d 1, 286 N.W.2d 607 (Ct. App. 1979), the court relied on the asportation element to support a conclusion that a robbery continued during the "carrying away" because it was at that point that a weapon was used. See note 8, below.

7. When there is a dispute on the facts as to precisely from where the property was taken – the person or the presence of the one in possession – then add this sentence: "It is immaterial whether the property is taken from the person or the presence of the one in possession." "Presence of the owner" means such a proximity to the owner as will enable the defendant when he takes the property to use or threaten the imminent use of force. See Baldwin, "Criminal Misappropriations," supra, 447-48. In certain cases, property may be taken from both the person and the presence of the one in possession. Then the words "or both" should be added at this point.

In State v. Mosely, 102 Wis.2d 636, 307 N.W.2d 200 (1981), the court held that "from his person or presence" did not require that the victim actually be aware of the taking: ". . . where the victim has been intimidated or placed in fear by use or threat of force . . . and the property is taken from an area sufficiently close and under his control that, but for the robber's intimidation or force he could have prevented the taking, the taking is from his "presence" under § 943.32(1); and this conclusion is not defeated by an unawareness of the taking as it occurs." 102 Wis.2d at 649.

8. "With intent to" is defined in § 939.23(4). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one part of the definition. It is the other alternative that changes from "believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

9. This is intended to be a summary of the necessary components of "intent to steal." See Wis JI-Criminal 1441, THEFT.

10. The bracketed material should be added if there is evidence that, for example, the defendant believed he was reclaiming his own property. Referred to as "right to recapture," "claim of right," or "self-help," this defensive matter tends to negate either the "property of another" or the "knew it was property of another" elements. The rule applies to armed robbery. Edwards v. State, 49 Wis.2d 105, 181 N.W.2d 383 (1970); Austin v. State, 86 Wis.2d 213, 271 N.W.2d 668 (1978).

The 1993 revision of this instruction substituted the bracketed material for the following phrase: ". . . knew he had no right to take it." The Committee concluded that the present version is a more accurate statement of the law.

The "right to recapture" is discussed in detail at Wis JI-Criminal 710, Law Note: RIGHT TO RECAPTURE.

11. This restates the statutory requirement that the defendant act "by force or threat of imminent force" by phrasing them as alternative ways of satisfying the core requirement that the defendant act "forcibly." "Forcibly" is defined in the text preceding footnotes 16 and 17.

12. See note 2, supra.

13. It is robbery if force is used to accomplish either the "carrying away" of the property or the "taking." State v. Grady, 93 Wis.2d 1, 6, 286 N.W.2d 607 (Ct. App. 1979).

The Committee concluded that it is not necessary to elect between "use of force" and "threat of imminent force" alternatives, although in the usual case, election would clarify the issue for the jury and should be done where possible. In support of the proposition that election is not necessary, see Manson v. State, and Cheers v. State, cited in note 3, supra. As to jury unanimity generally, also see State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981), and Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); compare United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

14. The definition of "imminent" is adapted from Black's Law Dictionary, p. 884 (4th Edition, 1951).

15. It is robbery if force is used to accomplish either the "carrying away" of the property or the "taking." State v. Grady, 93 Wis.2d 1, 286 N.W.2d 607 (Ct. App. 1979).

16. This instruction is drafted for cases involving the use or threat of use of a dangerous weapon and is intended to cover one of several options possible under the present version of the armed robbery statute.

Prior to 1980, § 943.32(2) applied to violations of sub. (1) of the statute committed "while armed with a dangerous weapon." The Wisconsin Supreme Court had interpreted the statute to require that the defendant actually possess something that qualified as a "dangerous weapon." In Dickenson v. State, 75 Wis.2d 47, 248 N.W.2d 447 (1977), an armed robbery conviction was reversed because there was no evidence that the object in the waistband on his trousers was a firearm or was an object of such size that it could be used as a bludgeon. Also see Davis v. State, 93 Wis.2d 319, 286 N.W.2d 570 (1980); Beamon v. State, 93 Wis.2d 215, 286 N.W.2d 592 (1980); and McKissick v. State, 78 Wis.2d 176, 254 N.W.2d 218 (1977).

Section 943.32(2) was amended by Chapter 114, Laws of 1979 (effective date: March 1, 1980), to replace "while armed" with "by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon." Several points should be noted relating to how the statute is implemented in the instructions for armed robbery.

First, even if the defendant has possession of a weapon, he must use it or threaten to use it before the statute is violated. In State v. Moriarty, 107 Wis.2d 622, 321 N.W.2d 324 (Ct. App. 1982), the court held that it is no longer sufficient for the state to prove that a defendant was merely armed; rather, it must be proved that the defendant actually used or threatened to use the weapon during the robbery.

Second, the "use" or "threat of use" alternatives do not appear to be conceptually distinct and neither election of one alternative nor jury agreement on which applies should be required. This is consistent with the analysis of the "use of force" and "threat of imminent use of force" in subsecs. (1)(a) and (b) of § 943.32. See cases discussed in note 3, supra. There is no reason to require the jury to decide, for example, whether the display of a gun is "use" or just a "threat to use" that weapon.

Third, there appear to be at least two different types of "threat to use a weapon or article" cases. One is where the defendant has something in his possession that looks like a weapon but actually is not. Wis JI-

Criminal 1480A is intended for this kind of case and treats it as "use or threat of use of an article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon." The other type of threat case occurs where there is a pure verbal threat to use a weapon, but no weapon or article is present. This instruction addresses that problem at footnote 10, below.

A case which might be handled under either approach is State v. Hopson, 122 Wis.2d 395, 362 N.W.2d 166 (Ct. App. 1984). Hopson had shoplifted several packages of luncheon meat, which he had stuffed in the waistband of his trousers. The store manager stopped him near the door and asked if he had forgotten to pay for something. Hopson put his hand under his shirt and said, "I got a gun. You better move." The manager stepped aside and later testified that he could not tell whether Hopson actually had a gun because the meat "caused a considerable bulge" under Hopson's shirt. The court of appeals concluded that Hopson's conduct violated the statute, emphasizing "that a victim who is threatened with a supposed weapon which is concealed is put in the same degree of fear and feels as strongly compelled to comply with the robber's demands as a victim who is threatened with a weapon which is openly displayed." 122 Wis.2d 395, 403. The court characterized this as the "subjective" view of armed robbery, as distinguished from the "objective" view, which requires that the robber actually be armed with a dangerous weapon. The court says that the legislature rejected the objective view by amending the statute in 1979 and "see[s] no reason to partially reinstate the 'objective' approach . . . by construing sec. 943.32(2) to require that the robber produce and display to the victim a dangerous-appearing article." 122 Wis.2d 395, 404. The court concluded that sub. (2), as amended by Chapter 114, Laws of 1979, "should be construed to focus upon the reasonable perception of the victim that he or she was in danger and not upon the defendant's possession or display of dangerous weapons or other dangerous-appearing articles." 122 Wis.2d 395, 401-02.

Hopson could be considered a pure "verbal threat" case and Wis JI-Criminal 1480 could be used. Or, the bulge in the trousers could be considered an "article" and Wis JI-Criminal 1480A could be used. In either case, the important fact would be whether the victim reasonably believed that the defendant was armed.

17. The Committee suggests using the part of the statutory definition that applies to the facts of the case. The definition in the instruction does not include all the alternatives provided in § 939.22(10), which, as amended by 2007 Wisconsin Act 127, defines "dangerous weapon" as follows:

> "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede partially or completely, breathing or circulation of blood; any electric weapon as defined in § 941.295(4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

See Wis JI-Criminal 910 for suggested instructions for all the statutory alternatives and a discussion of some of the substantive issues relating to "dangerous weapons."

Section 943.32(2) was amended by 1995 Wisconsin Act 288 (effective date: May 10, 1996) to refer not only to a dangerous weapon but also to "a device or container described under s. 941.26(4)(a)." The reference is to containers of oleoresin of capsicum, commonly referred to as "pepper spray." See note 1, supra.

18. This material should be added when the case involves a verbal threat to use a weapon, but no weapon or other "article" is actually present. If the case involves an "article" that the victim believed to be a weapon, use Wis JI-Criminal 1480A. Also see the discussion at note 16, supra.

This paragraph is intended to reflect the rule recognized in State v. Witkowski, 143 Wis.2d 216, 420 N.W.2d 420 (Ct. App. 1988). The facts were as follows:

> Sharon Plambeck, a bartender at the Lean-To Tavern in Portage, served drinks and a meal to Witkowski while he sat at the bar. He appeared to be intoxicated. When she gave him the check, he told her that "he wanted all the money out of the [cash] register and that he had a gun and don't be cute." Plambeck backed slowly down the bar to where two other patrons, Gordon and Micki Kluth, were seated. She wrote a note stating "Man is holding me up now" and handed it to Micki Kluth who left the bar to call the police. Witkowski then approached Gordon Kluth, stating that "he was having trouble holding up this tavern." The telephone rang and Plambeck answered it, telling the caller to call the police. At that moment, Witkowski took some cash lying on the bar in front of Gordon Kluth and grabbed Micki Kluth's purse. Gordon Kluth struck Witkowski, knocking him to the floor. Shortly thereafter, the police arrived and searched Witkowski. The search did not reveal a gun or any weapon.
>
> Plambeck testified that she felt her "life was threatened" when Witkowski told her he had a gun and wanted the money, and she backed away from him because she was afraid to turn her back on him. She described herself as "very scared and nervous, shaking all over." She stated on cross-examination, however, that she did not comply with Witkowski's demands and had no intention of doing so "unless he pulled a gun out." Gordon Kluth was unaware of Witkowski's statement about a gun until the incident was over.
>
> The court affirmed the conviction for armed robbery, holding that:
>
> We believe that a victim may be threatened with the use of a weapon within the letter and the spirit of sec. 943.32(2), Stats., by verbal threats alone. We hold, therefore, that if, under all the circumstances, the victim could reasonably believe the defendant's verbal representation that he or she was armed, that representation, standing alone, may be enough to meet the "threat of use of a dangerous weapon" requirement of sec. 943.32(2), regardless of whether the representation is accompanied by physical gesture or other visual evidence indicating the presence of a weapon.

Also see State v. Rittman, 2010 WI App 41, 324 Wis.2d 273, 781 N.W.2d 545, where the court found the evidence sufficient to support a conviction for armed robbery despite the fact that no weapon was present and the defendant did not say he had one – under all the circumstances the victim could have reasonably believed that the defendant was armed with a dangerous weapon. Rittman also discusses the difference between this offense – threat to use a dangerous weapon – and the offense addressed by Wis JI-Criminal 1480A – use or threat of use of an article reasonably believed to be a dangerous weapon. 324 Wis.2d 273, 281, footnote 2.

19. "Reasonably believes" is defined by § 939.22(32) to mean "that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous."

1480A ARMED ROBBERY: BY USE OF AN ARTICLE THE VICTIM REASONABLY BELIEVES IS A DANGEROUS WEAPON[1] — § 943.32(2)

Statutory Definition of the Crime

Armed robbery, as defined in § 943.32(1) of the Criminal Code of Wisconsin, is committed by one who, with the intent to steal and by use or threat of use of an article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon, takes property from the person or presence of the owner by [using force against the person of the owner with intent to overcome physical resistance or physical power of resistance to the taking or carrying away of the property] [or] [by threatening the imminent use of force against the person[2] of the owner with intent to compel the owner to submit to the taking or carrying away of the property].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. (Name) was the owner of property.[3]

   "Owner" means a person in possession of property.[4]

2. The defendant took and carried away[5] property from the person or from the presence[6] of (name) .

3. The defendant took the property with the intent to steal.

This requires that the defendant had the mental purpose[7] to take and carry away property of another without consent and that the defendant intended to deprive (name) permanently of possession of the property.

[It requires that the defendant knew that the property belonged to another and knew that the person did not consent to the taking of the property.][8]

4. The defendant acted forcibly.[9]

Forcibly means that the defendant [actually used force against (name) with the intent to overcome or prevent (his) (her) physical resistance or physical power of resistance to the taking or carrying away of the property[10]] [or] [threatened the imminent use of force against (name) [11] with the intent to compel (name) to submit to the taking or carrying away of the property. "Imminent" means "near at hand" or "on the point of happening"[12]].

5. At the time of the taking or carrying away,[13] the defendant used or threatened to use an article used or fashioned in a manner to lead (name) reasonably to believe[14] it was capable of producing death or great bodily harm.[15]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of armed robbery have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1480A was originally published in 1983 and revised in 1988, 1990, 1994, and 2009. This revision was approved by the Committee in June 2015; it updated footnote 1.

1. This instruction is for a case where a robbery is alleged to have been committed "by use or threat of use of any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon." This alternative to "use of a dangerous weapon" was added to the armed robbery statute in 1980. If the case involves "use or threat of use of a dangerous weapon," Wis JI-Criminal 1480 should be used.

This instruction is for cases where either or both of the alternative ways of committing robbery are submitted. Thus, the instruction is phrased in terms of "use of force" or "threat of imminent force." While election of one alternative or the other is preferable, in some cases election may not be possible. In those cases, submitting both alternatives is not error, and it is not essential for the jury to agree on one alternative as opposed to the other. Manson v. State, 101 Wis.2d 413, 304 N.W.2d 729 (1981). Cheers v. State, 102 Wis.2d 367, 306 N.W.2d 676 (1981). The instruction tries to tie the two alternatives together by relating them to the concept of acting "forcibly." See note 9, below.

In State v. Rittman, 2010 WI App 41, 324 Wis.2d 273, 781 N.W.2d 545, discusses the difference between this offense – use or threat of use of an article reasonably believed to be a dangerous weapon – and the offense addressed by Wis JI-Criminal 1480A – threat to use a dangerous weapon. 324 Wis.2d 273, 281, footnote 2, citing this footnote with apparent approval.

2. This instruction is drafted for threats against the person of the one in possession of the property. The statute also prohibits threats against others who are present. In cases where threats are against another, the introductory paragraph and the fourth element of the instruction will have to be modified to make it clear that force is threatened against someone else to compel the person in possession of the property to submit to the taking or carrying away.

3. "Property" for the purposes of robbery is the same as "property" for the purposes of theft; which is defined in § 943.20(2)(a). See Baldwin, "Criminal Misappropriations In Wisconsin – Part II," 44 Marq. L. Rev. 430, 450 (1961). The value of the property is immaterial.

4. "The person who has possession of the property" is the definition of owner provided in § 943.32(3).

In State v. Mosely, 102 Wis.2d 636, 307 N.W.2d 200 (1981), the court held that a person qualifies as an "owner" if his possession of the property is "actual or constructive," citing § 971.33. In Mosely, all employees of a restaurant were held to be "owners" of the restaurant's money kept in an office desk since each had

dominion and control over it. As to jewelry and a purse on an office shelf, only the person to whom they actually belonged was an "owner," since only she had any control over or interest in the property.

5. On several occasions, Wisconsin appellate courts have held that "asportation" or "carrying away" is required for a taking to constitute robbery. In State v. Johnson, 207 Wis.2d. 240, N.W.2d (1997), the Wisconsin Supreme Court affirmed the reversal of an armed robbery conviction on the ground that there was no "asportation":

> We hold that a person may not be convicted of armed robbery when the property at issue is an automobile and the person does not move the automobile. 207 Wis.2d. 240, 249.

Johnson declined to overrule prior decisions establishing the asportation requirement. In State v. Moore, 55 Wis.2d 1, 197 N.W.2d 820 (l972), the court first interpreted the armed robbery statute to require asportation. That holding came in the context of justifying the conclusion that theft from person was a lesser included offense of robbery. Three court of appeals decisions have relied on Moore. In State v. Dauer, 174 Wis.2d 418, 497 N.W.2d 766 (Ct. App. 1993), the court relied on the asportation requirement to support its conclusion that convictions for robbery and extortion based on the same conduct were not barred by double jeopardy principles. In Ryan v. State, 95 Wis.2d 83, 289 N.W.2d 349 (Ct. App. 1980), the court found the evidence sufficient to support asportation where the defendant abandoned the stolen purse shortly after taking it from the victim. And in State v. Grady, 93 Wis.2d 1, 286 N.W.2d 607 (Ct. App. 1979), the court relied on the asportation element to support a conclusion that a robbery continued during the "carrying away" because it was at that point that a weapon was used. See note 8, below.

6. When there is a dispute on the facts as to precisely from where the property was taken – the person or the presence of the one in possession – then add this sentence: "It is immaterial whether the property is taken from the person or the presence of the one in possession." "Presence of the owner" means such a proximity to the owner as will enable the defendant when he takes the property to use or threaten the imminent use of force. See Baldwin, "Criminal Misappropriations," supra, 447-48. In certain cases, property may be taken from both the person and the presence of the one in possession. Then the words "or both" should be added at this point.

In State v. Mosely, 102 Wis.2d 636, 307 N.W.2d 200 (1981), the court held that "from his person or presence" did not require that the victim actually be aware of the taking: ". . . where the victim has been intimidated or placed in fear by use or threat of force . . . and the property is taken from an area sufficiently close and under his control that, but for the robber's intimidation or force he could have prevented the taking, the taking is from his "presence" under § 943.32(1); and this conclusion is not defeated by an unawareness of the taking as it occurs." 102 Wis.2d at 649.

7. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one part of the definition. It is the other alternative that changes from "believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

8. The bracketed material should be added if there is evidence that, for example, the defendant believed he was reclaiming his own property. Referred to as "right to recapture," "claim of right," or "self-help," this defensive matter tends to negate either the "property of another" or the "knew it was property of another" elements. The rule applies to robbery. Edwards v. State, 49 Wis.2d 105, 181 N.W.2d 383 (1970); Austin v. State, 86 Wis.2d 213, 271 N.W.2d 668 (1978).

The "right to recapture" is discussed in detail at Wis JI-Criminal 710, Law Note: Right To Recapture.

9. This paragraph restates the statutory requirement that the defendant act "by force or threat of imminent force" by phrasing them as alternative ways of satisfying the core requirement that the defendant act "forcibly." The Committee concluded that this properly emphasizes the intent of the statute to require a link between the taking of the property and the defendant's use of force. The Committee concluded that it is not necessary to elect between "use of force" and "threat of imminent force" alternatives, although in the usual case, election would clarify the issue for the jury and should be done where possible. In support of the proposition that election is not necessary, see Manson v. State, and Cheers v. State, cited in note 1, supra. As to jury unanimity generally, also see State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981), and Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); compare United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

10. It is robbery if force is used to accomplish the "carrying away" of the property as well as the "taking." State v. Grady, 93 Wis.2d 1, 286 N.W.2d 607 (Ct. App. 1979).

11. See note 2, supra.

In State v. Johnson, 231 Wis.2d 58, 604 N.W.2d 902 (Ct. App. 1999), the court held that the statute does not require express threats of bodily harm – "the element is met 'if the taking of the property [is] attended with such circumstances of terror, or such threatening by menace, word, or gesture as in common experience is likely to create an apprehension of danger and induce a [person] to part with property for [his or her] safety.'" 231 Wis.2d 58, 69, citing Washington v. Collinsworth, 966 F.2d 905, 907 (Wash. Ct. App. 1997).

12. The definition of "imminent" is adapted from Black's Law Dictionary, p. 884 (4th Edition, 1951).

13. It is robbery if force is used to accomplish the "carrying away" of the property as well as the "taking." State v. Grady, 93 Wis.2d 1, 286 N.W.2d 607 (Ct. App. 1979).

14. "Reasonably believes" is defined by § 939.22(32) to mean "that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous."

15. The instruction recommends using the general part of the statutory definition of "dangerous weapon" in § 939.22(10) – anything which is capable of producing death or great bodily harm. If one of the specific items listed in the definition is alleged, that specific term should be used. Section 939.22(14) reads as follows, as amended by 2007 Wisconsin Act 127:

> "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede partially or completely, breathing or circulation of blood; any electric weapon as defined in § 941.295(4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

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1481 RECEIVING STOLEN PROPERTY — § 943.34

Statutory Definition of the Crime

Receiving stolen property, as defined in § 943.34 of the Criminal Code of Wisconsin, is committed by one who knowingly or intentionally receives or conceals stolen property.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (knowingly) (intentionally) (received) (concealed)[1] the (describe property) .

   ["Intentionally" requires that the defendant had the mental purpose to (receive) (conceal) the property.][2]

   ["Knowingly" requires that the defendant believed (he) (she) (received) (concealed) the property.][3]

   GIVE ONE OR BOTH OF THE FOLLOWING INSTRUCTIONS IN BRACKETS AS REQUIRED BY THE EVIDENCE:[4]

   ["To receive" means to acquire possession or control over the property.][5]

   ["To conceal" means to hide the property or to do something else which prevents or makes more difficult the discovery of the property.][6]

2. The (describe property) was stolen property.[7]

Property is stolen property when it has intentionally been taken from the owner without consent and with the intent to deprive the owner of its possession permanently.[8]

3. When the property was (received) (concealed), the defendant knew that it was stolen property.[9]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF A FELONY OFFENSE IS CHARGED BASED ON THE PROPERTY BEING A FIREARM, ADD THE FOLLOWING.[11]

[If you find the defendant guilty, answer the following question:

"Was the property a firearm?"

A firearm is a weapon that acts by force of gunpowder.[12]

Answer: "yes" or "no."]

IF A FELONY OFFENSE IS CHARGED, BASED ON THE VALUE OF THE PROPERTY, A JURY DETERMINATION OF VALUE MUST BE MADE.

ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[13]

[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of the property more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the property more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the property more than $2,500?"

Answer: "yes" or "no.")

"Value" means the market value of the property or the replacement cost, whichever is less.[14] Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

COMMENT

Wis JI-Criminal 1481 was originally published in 1966 and revised in 1981, 1989, 1991, and 2003. The 2003 revision adopted a new format and made nonsubstantive changes in the text and reflected changes in the amount determining the penalty made by 2001 Wisconsin Act 109. This revision was approved by the Committee in February 2012; it reflects changes made by 2011 Wisconsin Act 99.

2011 Wisconsin Act 99 [effective date: December 21, 2011] amended § 943.34(1) to refer to "knowingly or intentionally" receiving stolen property and amended § 943.34(1)(bm) to apply the Class H felony penalty to receiving a stolen firearm as well as to property whose value exceeds $5,000.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003]. See footnote 10, below.

The purpose of the 1989 revision was to reflect a change made in § 943.34 by 1987 Wisconsin Act 332. Effective July 1, 1989, § 943.34 is amended to eliminate receipt of stolen property from a child as a fact increasing the penalty for this offense. A separate statute now addresses that offense. See § 948.62 and Wis JI-Criminal 2180.

1. The Committee recommends that either "receives" or "conceals" be used in the instruction where the evidence makes that election possible. There is no authority specific to this statute requiring election of one alternative. However, cases interpreting the theft statute, § 943.20, address a closely comparable situation and hold that the statute identifies different ways of committing the offense: by taking and carrying way, or by using, by transferring, by concealing, or by retaining possession of property of another. The alternatives may not be charged in the disjunctive, Jackson v. State, 92 Wis.2d 1, 284 N.W.2d 685 (Ct. App. 1979); the jury must unanimously agree on the manner in which the statute was violated, State v. Seymour, 183 Wis.2d 682, 515 N.W.2d 874 (1994). See Wis JI-Criminal 517 for an instruction on jury agreement.

2. "Intentionally" is defined in § 939.23(3). The definition changed effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changed from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

3. This was added to the instruction as part of the 2012 revision because "knowingly" was added to § 943.34 by 2011 Wisconsin Act 99. See § 939.23(2): "'Know' requires only that the actor believes that the specified fact exists." Because "intentionally" already requires knowledge (see § 939.23(3)), the purpose of the change is not apparent to the Committee.

4. See note 1, supra.

5. Control over the property constitutes receipt within the meaning of the Code. 2 Wharton Criminal Law and Procedure (Anderson ed. 1957) § 569, pp. 287-88; Baldwin, "Criminal Misappropriations in Wisconsin—Part II," 44 Marq. L. Rev. 430, 454 (1961).

6. The 2002 revision changed this definition to make it more understandable; no change in meaning was intended. As revised, the definition conforms to the one used in Wis JI-Criminal 2168 for violations of § 948.31(3)(a) involving concealing a child from a parent. That definition was termed "correct" in State v. Inglin, 224 Wis.2d 764, 592 N.W.2d 666 (Ct. App. 1999).

7. A prior theft or other misappropriation in violation of the Criminal Code is an essential element of the crime. Accordingly, the state must prove beyond a reasonable doubt that the property was stolen property. State v. Godsey, 272 Wis. 406, 75 N.W.2d 572 (1956). The term "stolen" is not defined in the Criminal Code. Necessarily, the term includes all forms of theft covered by § 943.20(1) of the Criminal Code. See note 8, below.

8. The definition of "stolen property" provided in the instruction is appropriate for the usual case where the property was obtained by theft under § 943.20(1)(a). The standard instruction must be

modified if the property was obtained by fraudulent representation or other type of criminal misappropriation.

9. Section 939.23(3) provides that when the word "intentionally" is used in a statute, it requires "knowledge of those facts which are necessary to make the conduct criminal and which are set forth after the word 'intentionally'." Also see, State v. Godsey, 272 Wis. 406, 75 N.W.2d 572 (1956); Oosterwyk v. State, 242 Wis. 398, 8 N.W.2d 346 (1943); Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1956); Meath v. State, 174 Wis. 80, 82, 83, 182 N.W. 334 (1921).

10. Evidence that the defendant was in "unexplained possession of recently stolen property" will often be offered as evidence tending to prove knowledge that the property was stolen. Caution should be exercised in instructing the jury on this issue, see Wis JI-Criminal 173, Circumstantial Evidence – Unexplained Possession of Recently Stolen Property, and the Comment to that instruction.

11. 2011 Wisconsin Act 99 [effective date December 21, 2011] amended § 943.34(1)(bm) to provide that a violation of the statute is a Class H felony "if the property is a firearm." Formerly, the Class H felony penalty applied only if the value of the property exceeded $5,000. The Committee has concluded that addressing these penalty-increasing facts by submitting a special question is the most efficient approach.

12. Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

13. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003]. The revised penalties are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of the property exceeds $10,000, the offense is a Class G felony.

The questions in the instruction omit the upper limits of the categories for Class I and Class H felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted. The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

14. This is based on the definition provided in § 943.20(2)(d). See note 9, Wis JI-Criminal 1441.

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1485 FRAUDULENT WRITINGS: FALSIFYING A CORPORATE RECORD — § 943.39(1)

Statutory Definition of the Crime

Subsection 943.39(1) of the Wisconsin Criminal Code is violated by (a director) (an officer) (a manager) (an agent) (an employee) of a (corporation) (limited liability company) who, with intent to injure or defraud, CHOOSE ONE OF THE FOLLOWING[1]

[falsifies a (record) (account) (document) belonging to the (corporation) (limited liability company) by (alteration) (false entry) (omission).]

[(makes) (circulates) (publishes) a written statement regarding the (corporation) (limited liability company) which the defendant knew was false].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was (a director) (an officer) (a manager) (an agent) (an employee) of a (corporation) (limited liability company).[2]
2. The defendant CHOOSE ONE OF THE FOLLOWING:

[falsified any (record) (account) (document) belonging to the (corporation) (limited liability company). An item may be falsified by altering it, by making a false entry on it, or by omitting something that should be included.]

[(made) (circulated) (published) a written statement regarding the (corporation) (limited liability company) which the defendant knew was false].

3. The defendant acted with intent to (injure) (defraud).[3]

["Intent to injure" means that the defendant intended to cause harm of any kind.]

["Intent to defraud" means that the defendant intended to obtain property that (he) (she) was not entitled to receive.][4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1485 was originally published in 2001. This revision updated footnote 3 and was approved by the Committee in October 2003.

This instruction is drafted for violations of sub. (1) of § 943.39. For violations of sub. (2) of that statute, see Wis JI-Criminal 1486, Fraudulent Writings: Obtaining A Signature By Means of Deceit. There is no uniform instruction for violations of § 943.39(3), which prohibits making a false written statement with knowledge that it is false and with intent that it shall ultimately appear to have been signed under oath.

1. One of the two alternatives in brackets should be selected. They state the two different ways of violating § 943.39(1).

2. One of the two alternatives in brackets should be selected. They paraphrase the two different ways of violating § 943.39(1).

3. The offense is defined as engaging in one of the prohibited acts "with intent to injure or defraud." The instruction puts the alternative intents in parentheses on the assumption that one or the other is likely to be supported by the evidence. However, the Committee concluded that it would be permissible to instruct on both types of intent, if supported by the evidence, and that jury agreement on the intent involved would not be required. In State v. Norman, 2003 WI 72, 262 Wis.2d 506, 664 N.W.2d 97, the Wisconsin Supreme Court noted that the Committee's conclusion does not "provide persuasive authority" on the jury agreement issue because it did not reflect a complete analysis. Id., at footnote 51. The proper method for a complete analysis is set forth in Norman at ¶¶ 59-64. Also see Wis JI-Criminal 517, Jury Agreement . . . , which collects the Wisconsin appellate decisions which have addressed the issue under specific statutes.

4. The definition of "intent to defraud" is based on the one used in Wis JI-Criminal 1491, Forgery (By Making Or Altering A Check). See footnote 5 in that instruction, indicating that intent to defraud is "a term whose meaning varies according to the context in which it is used."

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1486 FRAUDULENT WRITINGS: OBTAINING A SIGNATURE BY MEANS OF DECEIT — § 943.39(2)

Statutory Definition of the Crime

Subsection 943.39(2) of the Wisconsin Criminal Code is violated by one who, with intent to injure or defraud, and by means of deceit, obtains a signature to a writing by which legal rights or obligations are created or transferred.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained a signature to a writing by means of deceit.

   ["By means of deceit" requires that the defendant obtained a signature by (making a false statement) (giving a false impression).][2]

2. The writing was one by which legal rights or obligations are created or transferred.[3]

3. The defendant acted with intent to (injure) (defraud).[4]

   ["Intent to injure" means that the defendant intended to cause harm of any kind.]

   ["Intent to defraud" means that the defendant intended to obtain property that (he) (she) was not entitled to receive.][5]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1486 was approved by the Committee in October 2000.

This instruction is drafted for violations of sub. (2) of § 943.39. For violations of sub. (1) of that statute, see Wis JI-Criminal 1485, Fraudulent Writings: Falsifying a Corporate Record. There is no uniform instruction for violations of § 943.39(3), which prohibits making a false written statement with knowledge that it is false and with intent that it shall ultimately appear to have been signed under oath.

1. The instruction uses the phrase "writing by which legal rights or obligations are created or transferred" in place of the statute's "writing which is the subject of forgery under s. 943.38(1)." The phrase used is the most general part of the definition of writings that can be the subject of forgery under § 943.38(1). The other options: "any writing commonly relied upon in business or commercial transactions as evidence of debt or property rights" [sub. (1)(a)]; "a public record or a certified or authenticated copy thereof" [sub. (1)(b)]; "an official authentication or certification of a copy of a public record" [sub. (1)(c)]; and "an official return or certificate entitled to be received as evidence of its contents" [sub. (1)(d)].

2. The definition of "by means of deceit" was developed by the Committee after research indicated that there is no direct Wisconsin authority interpreting the term as used in § 943.39(2). The statute was created in the 1956 Criminal Code revision, recodifying the offense previously found in § 343.25. The revision substituted "by means of deceit" for "by privy or false token" that formerly appeared in § 343.25.

The term "deceit" is used in at least one other Criminal Code statute – § 940.31(1)(c), Kidnapping by deceit. State v. Dalton, 98 Wis.2d 725, 298 N.W.2d 398 (Ct. App. 1980). Dalton appealed his conviction, claiming that he could not be convicted absent proof of express or implied misrepresentations. The court rejected his argument, holding that the use of "deceit," without further statutory definition show legislative intent to avoid limiting it to express or implied misrepresentations. Rather, the legislature

intended to proscribe "wily and cunning stratagems that are contrived to delude the victim and conceal the violator's intent to effectuate the crime" of kidnapping. 98 Wis.2d 725, 741.

At common law, "deceit" was generally used as an equivalent of "fraud" and typically had the following elements: a false representation; made with intent to induce another to act; relied on by another person; to the damage of that person. In general, see Wis JI-Civil 2401 and cases cited therein. Also see 37 Am.Jur.2d Fraud and Deceit (1968). As to the false representation aspect, the common law typically included not only false statements but also the suppression of facts by one who had a duty to disclose them. The elements of the common law concept overlap with or are covered by other elements of the crime defined in § 943.39(2): "made with intent to induce another to act" is covered by the intent to injure or defraud element; "relied on by another person" is covered by the requirement that a signature be obtained "by means of" deceit; "to the damage of that person" is covered by the statute's recognition that obtaining a signature on the required type of document is criminal conduct.

This leaves little more than using a false representation or other deceptive practice. The Committee concluded the two alternatives in parentheses adequately cover the likely application of "by means of deceit." Garner, A Dictionary of Modern Legal Usage, 2d Edition (Oxford University Press 1995), defines deceit as the "act of giving a false impression."

3. The instruction uses the phrase "writing by which legal rights or obligations are created or transferred" in place of the statute's "writing which is the subject of forgery under s. 943.38(1)." The phrase used is the most general part of the definition of writings that can be the subject of forgery under § 943.38(1). The other options are set forth in note 1, supra.

This element does not require proof of a forgery; it requires only that the writing be one which, if falsely made, could be the basis for a forgery prosecution under § 943.38(1). State v. Weister, 125 Wis.2d 54, 58, 370 N.W.2d 278 (Ct. App. 1985). Weister involved obtaining a Shopko employee's signature on refund slips relating to shoplifted merchandise.

4. The offense is defined as engaging in one of the prohibited acts "with intent to injure or defraud." The instruction puts the alternative intents in parentheses on the assumption that one or the other is likely to apply. However, the Committee concluded that it would be permissible to instruct on both types of intent and that jury agreement on the intent involved would not be required. The Wisconsin Supreme Court has reached that conclusion with offenses under § 948.07, Child enticement. State v. Derango, 2000 WI 89, 236 Wis.2d 721, 613 N.W.2d 833.

5. The definition of "intent to defraud" is based on the one used in Wis JI-Criminal 1491, Forgery (By Making Or Altering A Check). See footnote 5 in that instruction, indicating that intent to defraud is "a term whose meaning varies according to the context in which it is used."

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1488 POSSESSION OF PROPERTY WITH ALTERED IDENTIFICATION MARKS — § 943.37(3)

Statutory Definition of the Crime

Possession of property with altered identification marks, as defined in § 943.37(3) of the Criminal Code of Wisconsin, is committed by one who possesses any personal property with knowledge that the manufacturer's identification number has been removed or altered and with intent to prevent the identification of the property.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed personal property.[1]

   "Possessed" means that the defendant knowingly[2] had the property under (his) (her) actual physical control.[3]

2. The defendant possessed personal property on which the manufacturer's identification number had been removed or altered.

3. The defendant knew[4] that the manufacturer's identification number had been removed or altered.[5]

4. The defendant intended[6] to prevent the identification of the property.

[ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE DEFENDANT POSSESSED TWO OR MORE SIMILAR ITEMS OF PERSONAL PROPERTY WITH THE MANUFACTURER'S IDENTIFICATION NUMBER ALTERED OR REMOVED:[7]]

[Evidence has been received that the defendant possessed similar[8] items of personal property with the manufacturer's identification number altered or removed. If you are satisfied beyond a reasonable doubt that the defendant did possess similar items with the manufacturer's identification numbers altered or removed, you may find from that fact alone that the defendant knew that the numbers had been altered or removed and that he intended to prevent the identification of the property. But you are not required to do so. You are the sole judges of the facts, and you must not find that the defendant knew the identification numbers had been altered or removed or that the defendant intended to prevent the identification of the property unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent or knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent or knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1488 was originally published in 1990. This revision was approved by the Committee in April 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Section 943.37 has four subsections. This instruction is drafted for one of the two offenses defined in subsec. (3), which the Committee concluded was likely to be the most common type of offense. The crime is a Class A misdemeanor.

1. The Committee does not believe it is necessary to define "personal property" for the jury. A definition of the term is provided in § 990.01(27):

> "Personal property" includes money, goods, chattels, things in action, evidences of debt and energy.

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis.2d 414, 418, 212 N.W.2d 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

3. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains additional optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another.

4. Section 939.23(2) provides that "know" requires only that the defendant believes that the specified fact exists.

5. Section 943.37(3) provides a "prima facie evidence" provision relating to the knowledge element. See the text of the instruction at note 7, below.

6. If further definition of "intent" is necessary, defining intent as "mental purpose" is most likely to be accurate in the context of this offense. See Wis JI-Criminal 923A and 923B for complete discussion of the definition of "with intent to" under § 939.23(4).

7. Section 943.37(3) provides that "[p]ossession of two or more similar items of personal property with the manufacturer's identification number altered or removed is prima facie evidence of knowledge of the alteration or removal and of an intent to prevent identification of the property." The bracketed paragraph which follows in the instruction attempts to implement this provision in the manner required by § 903.03 of the Wis. Rules of Evidence, which applies to instructions on presumptions, inferences, and prima facie cases. See Wis JI-Criminal 225 for an explanation of the Committee's approach to these provisions. Especially note the two cautions discussed in the Comment to Wis JI-Criminal 225: (1) the instruction should not be given unless the evidence, as a whole, would allow the jury to be satisfied beyond a reasonable doubt that the ultimate fact (here, knowledge and intent) exists; and (2) no instruction should be given in a particular case unless, based on the facts of that case, the presumed fact (here, knowledge and intent) is "more likely than not" to follow from the basic fact (here, possession of two or more similar items with identification numbers altered or removed).

The prima facie evidence provision is essentially the same as one found in the 1953 Draft of the Criminal Code in § 343.31. The comment to that section described its purpose as follows:

> In subsection (2) possession of 2 or more similar items of personal property with the identification marks altered or removed is prima facie evidence of knowledge that this has been done and of an intent to prevent identification of the property. While a person may innocently have a refrigerator in his home with the serial number removed, there is an inference that a car dealer, who has a number of cars with the motor numbers filed off, is selling stolen cars.
>
> 1953 Legislative Council Report on the Criminal Code, p. 129.

8. In State v. Hamilton, 146 Wis.2d 426, 432 N.W.2d 108 (Ct. App. 1988), the court found that the word "similar" in § 943.37(3) "can be understood in different ways by reasonable people and that the statute is therefore ambiguous." The court then went on to define it: ". . . within the context of sec. 943.37(3), items must be comparable, substantially alike or capable of standing in the place of the other before they are similar." 146 Wis.2d 426, 433.

1491 FORGERY (BY MAKING OR ALTERING A CHECK) — § 943.38(1)

Statutory Definition of the Crime

Forgery, as defined in § 943.38(1) of the Criminal Code of Wisconsin, is committed by one who with intent to defraud falsely makes or alters a writing or object whereby legal rights or obligations are created or transferred so that it purports to have been made (by another) (at another time) (with different provisions) (by authority of one who did not give such authority).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The document in this case was a writing by which legal rights or obligations are created or transferred.[1] A bank check is such a writing.[2]
2. The defendant falsely [(made) (altered)] [(the check) (an endorsement on the check).][3]

   The (check) (endorsement) must have been falsely (made) (altered) to appear to have been made (by another person) (at another time) (with different terms) (by authority of someone who did not give such authority).[4]

3. The defendant falsely [(made) (altered)] [(a check) (an endorsement)] with intent to defraud.

"Intent to defraud" means that the defendant had the purpose to obtain property that (he) (she) was not entitled to receive.[5]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of forgery have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal was originally published in 1966 and revised in 1991. This revision was approved by the Committee in April 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Under § 943.38(1) and (2), three forms of conduct are made felonies: the forging of a writing or object (Wis JI-Criminal 1491), the uttering of a forged writing or object (Wis JI-Criminal 1492), and the possession of a forged writing or object with intent to utter (Wis JI-Criminal 1493). Though these forms of conduct are distinct, they constitute only one offense, so that the person who both forges and utters an instrument is punishable for but one offense. State v. Nichols, 7 Wis.2d 126, 95 N.W.2d 765 (1959), cited in Little v. State, 85 Wis.2d 558, 562, 271 N.W.2d 105 (1978).

While the forgery statute and the statute defining credit card crimes (§ 943.41) overlap, they are not identical and have different elements. The existence of the credit card crime statute does not impliedly repeal the forgery statute nor does it deny equal protection to those who are charged with forgery for writing another's name on a credit card slip. Mack v. State, 93 Wis.2d 287, 286 N.W.2d 563 (1980).

A factual basis for guilty pleas to charges of forgery under § 943.38(1) was provided by evidence that the defendant opened checking accounts under a false name and issued worthless checks under that false name. State v. Mata, 2001 WI App 184, 247 Wis.2d 1, 632 N.W.2d 872.

1. The instruction is drafted for cases involving a "writing" (and is further limited to "checks," see note 2). But the forgery statute applies to a variety of items, defined in § 943.38(1)(a) as follows:

> A writing or object whereby legal rights or obligations are created, terminated or transferred, or any writing commonly relied upon in business or commercial transactions as evidence of debt or property rights.

Other public records and copies or authentications of public records are also included, see subsecs. (1)(b)-(d). This approach was intended to adopt a functional definition of what instruments could be forged, replacing a detailed list of writings in the original forgery statute, sec. 343.56, 1953 Stats. State v. Davis, 105 Wis.2d 690, 694-95, 314 N.W.2d 907 (Ct. App. 1981). Davis held that a receipt evidencing payment for a magazine subscription is a "writing" under the current statute. While the writing must be one that is commonly relied upon in business, forgery does not require that any specific person rely on the genuineness of the writing. Davis, 105 Wis.2d 690, 698.

2. Since bank checks are the writings used in most forgery cases, the rest of the uniform instruction uses only the term "check." If the offense involved a different kind of writing or an "object," the Committee suggests naming the writing or object and using that name whenever "check" appears in the instruction. Whether a particular writing or object is one by which "legal rights or obligations are created or transferred" is a question of fact for the jury to determine. Where the law establishes that a particular writing or object has that effect, it is permissible to communicate that legal rule to the jury. With regard to the definition of "check" and other instruments, see § 403.104.

State v. Perry, 215 Wis.2d 690, 631 N.W.2d 651 (1997), held that "Transchecks" used by truckers for unexpected expenses are writings covered by the forgery statute.

3. A forged endorsement of a check constitutes forgery. 37 C.J.S. Forgery, § 34. Federal forgery statutes referring to falsely making or altering any writing have been interpreted as covering the forgery of an endorsement. See, for example, United States v. Henderson, 298 F.2d 522 (7th Cir. 1962), citing Prussian v. United States, 282 U.S. 675 (1931).

4. The second element combines what might be separated into two elements: the requirement that the writing be falsely made or altered and the requirement that the altered writing purport to have been made by another or with different terms, etc. In the Committee's judgment, this is a single concept. The alternatives following "purports" describe specifically the necessary effects of the false making or altering. This analysis is supported by the legislative history. What is now § 943.38 was drafted as part of the 1950 and 1953 revisions of the Criminal Code. The 1950 draft did not include the word "falsely," explaining that the term "false making"

> . . . is not used here because it raises the problem of what is a false making. Instead the subsection describes just what effect the making or alteration must have in order to be a forgery. The writing must be made or altered so that it purports to have been made by another, at another time, with different terms, or by authority of one who did not give such authority.

1950 Report on the Criminal Code, p. 105.

The 1953 draft used the same construction, but "falsely" was added before the statute was enacted. Thus, "falsely" must be retained as part of the definition of the offense but in the Committee's judgment should be defined in terms of the more specific ways in which it must affect the document.

Examples of the kinds of conduct covered are given in the Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 131 (Wis. Legislative Council, February 1953).

> Signing a check with another's name (an example of making a writing purporting to have been made by another); raising a check (an example of making a writing purporting to have been made with different terms); filling in blanks over the signature of another either without authority or with unauthorized terms (an example of making a writing appearing to have been made by authority of one who did not give such authority).

"Falsely made" does not apply to writing someone else's name as the payer on a postal money order. "Wisconsin requires that a false making must relate to the genuineness of execution of a document, not to the genuineness of its contents." State v. Entringer, 2001 WI App 157, 246 Wis.2d 851, 631 N.W.2d 651.

5. "Intent to defraud" is a term whose meaning varies according to the context in which it is used. 1953 Report on the Criminal Code, page 130, citing United States v. Cohn, 270 U.S. 330 (1925). The Committee concluded that the most understandable explanation of "intent to defraud" in the context of the typical forgery case is "the purpose to obtain property he or she was not entitled to receive." However, the concept is substantially broader, as explained in the 1953 Report:

> In the context of this section, "intent to defraud" means an intent either to obtain property from another or to cause him to do some act or refrain from some act in reliance on the writing or object being genuine. For example, if someone signs another's name to a nomination petition intending that the officials believe it is a genuine one and count it in the number necessary to nominate a candidate, he does not intend to steal from the officials; but there would be no question that he intended that they be deceived and act on that signature.

In defining intent to defraud solely in terms of "purpose," the instruction uses only one of the two alternative definitions of "intent" provided in § 939.23(4). The other alternative, "or is aware that his or her conduct is practically certain to cause that result" could be used if raised by the facts of a particular case. See Wis JI-Criminal 923A and 923B for further discussion of the definition of intent.

The sufficiency of the evidence on intent to defraud is discussed in State v. Christopherson, 36 Wis.2d 574, 153 N.W.2d 631 (1967).

1492 UTTERING A FORGED WRITING (CHECK) — § 943.38(2)

Statutory Definition of the Crime

Uttering a forged writing, defined in § 943.38(2) of the Criminal Code of Wisconsin, is committed by one who utters as genuine a forged writing or object by which legal rights or obligations are created or transferred, knowing that the writing or object was falsely made or altered.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The document in this case was a writing[1] by which legal rights or obligations are created or transferred.

   (A bank check) (An endorsement on a bank check) is such a writing.[2]

2. The (check) (endorsement) was forged, that is, falsely (made) (altered).

   The check must have been falsely (made) (altered) to appear to have been made (by another person) (at another time) (with different terms) (by authority of someone who really did not give such authority).[3]

3. The (check) (endorsement) was uttered as genuine by the defendant.

"To utter (a check) (an endorsement) as genuine" simply means that the check is presented for payment (or cashed) with the representation that the (check) (endorsement) is genuine.[4]

4. The defendant knew the (check) (endorsement) was falsely (made) (altered) at the time it was presented.[5]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of uttering a forged writing have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1492 was originally published in 1980 and revised in 1985 and 1995. This revision was approved by the Committee in April 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Under § 943.38(1) and (2), three forms of conduct are made felonies: the forging of a writing or object (Wis JI-Criminal 1491), the possession of a forged writing or object with intent to utter (Wis JI-Criminal 1493), and the uttering of a forged writing or object (Wis JI-Criminal 1492). Though these forms of conduct are distinct, they constitute only one offense, so that the person who both forges and utters an instrument is punishable for but one offense. State v. Nichols, 7 Wis.2d 126, 95 N.W.2d 765 (1959), cited in Little v. State, 85 Wis.2d 558, 562, 271 N.W.2d 105 (1978).

1. The instruction has been drafted using "writing" only. If the offense involved an "object," the Committee suggests naming the object and using that name in the instruction in place of "writing" and "check."

2. Since bank checks are the writings used in most forgery cases, the rest of the uniform instruction uses only the term "check." If the offense involved a different kind of writing or an "object," the Committee suggests naming the writing or object and using that name whenever "check" appears in the instruction. Whether a particular writing or object is one by which "legal rights or obligations are created or transferred" is a question of fact for the jury to determine. Where the law establishes that a particular writing or object has that effect, it is permissible to communicate that legal rule to the jury. With regard to the definition of "check" and other instruments, see § 403.104.

State v. Perry, 215 Wis.2d 690, 631 N.W.2d 651 (1997), held that "Transchecks" used by truckers for unexpected expenses are writings covered by the forgery statute.

3. Examples of the kinds of conduct covered are given in the Vol. V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 131 (February 1953):

> Signing a check with another's name (an example of making a writing purporting to have been made by another); raising a check (an example of making a writing purporting to have been made with different terms); filling in blanks over the signature of another either without authority or with unauthorized terms (an example of making a writing appearing to have been made by authority of one who did not give such authority).

The fact that the writing is nonnegotiable is immaterial. The absence of the maker's signature may mean the check is not a negotiable instrument, but presenting such a check for payment may constitute uttering a forged writing. See State v. Machon, 112 Wis.2d 47, 331 N.W.2d 665 (Ct. App. 1983).

"Falsely made" does not apply to writing someone else's name as the payer on a postal money order. "Wisconsin requires that a false making must relate to the genuineness of execution of a document, not to the genuineness of its contents." State v. Entringer, 2001 WI App 157, 246 Wis.2d 851, 631 N.W.2d 651.

4. "The virtually universal rule is that 'a forged instrument is uttered when it is offered as genuine by words or conduct indicating that it is genuine, without regard to whether it is accepted.' 2 Wharton's Criminal Law and Procedure, § 650, p. 441 (1957)." Little v. State, 85 Wis.2d 558, 564, 271 N.W.2d 105 (1978).

Depositing a forged check via an automated teller machine is "uttering," since it "introduced the forged check into the stream of financial commerce." State v. Tolliver, 149 Wis.2d 166, 440 N.W.2d 571 (Ct. App. 1989).

5. The Committee concluded that "intent to defraud" is not a statutorily-required element for a violation of sec. 943.38(2). Knowledge that the writing is forged and uttering it (or possessing it with intent to utter) is all that is required. The clearest support for this conclusion is the statutory language itself: "intent to defraud" appears in subsecs. (1) and (3), but not in (2). This difference between the subsections appears to be intentional: the parallel section in the 1953 draft of the proposed Criminal Code had "intent to defraud" as an element; as enacted in 1955, that element had been eliminated and the statute read essentially as it does today. (The 1953 version is found in the 1953 Report On The Criminal Code, Wisconsin Legislative Council, 1953; the Code was enacted as Chapter 696, Laws of 1955.)

The interpretation in the instruction is consistent with a policy of penalizing those who introduce forged writings into the stream of commerce, which the Committee concluded is the likely purpose of sec. 943.38(2).

1493 POSSESSION OF A FORGED WRITING (CHECK) WITH INTENT TO UTTER — § 943.38(2)

Statutory Definition of the Crime

Possession of a forged writing with intent to utter, as defined in § 943.38(2) of the Criminal Code of Wisconsin, is committed by one who possesses a writing or object by which legal rights or obligations are created or transferred with intent to utter it as false or as genuine with knowledge that the writing or object has been falsely made or altered.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a writing.[1]

   "Possessed" means that the defendant knowingly[2] had actual physical control[3] of the writing.

2. The writing was one by which legal rights or obligations are created or transferred.

   (A bank check) (An endorsement on a bank check) is such a writing.[4]

3. The writing was falsely (made) (altered).

The (check) (endorsement) must have been falsely (made) (altered) to appear to have been made (by another person) (at another time) (with different terms) (by authority of someone who really did not give such authority).[5]

4. The defendant knew the writing was falsely (made) (altered).[6]

5. The defendant intended to utter the writing.

(It is immaterial whether the defendant intended to utter the writing as genuine or as false.)[7]

"To utter" simply means to (present it for payment)[8] (transfer it to another).[9]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent or knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1493 was originally published in 1980 and revised in 1985, 1987, and 1995. This revision was approved by the Committee in April 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Under § 943.38(1) and (2), three forms of conduct are made felonies: the forging of a writing or object (Wis JI-Criminal 1491), the possession of a forged writing or object with intent to utter (Wis JI-Criminal 1493), and the uttering of a forged writing or object (Wis JI-Criminal 1492). Though these forms of conduct are distinct, they constitute only one offense, so that the person who both forges and utters an instrument is punishable for but one offense. State v. Nichols, 7 Wis.2d 126, 95 N.W.2d 765 (1959), cited in Little v. State, 85 Wis.2d 558, 562, 271 N.W.2d 105 (1978).

1. The instruction has been drafted using "writing" only. If the offense involved an "object," the Committee suggests naming the object and using that name in the instruction in place of "writing" and "check."

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

3. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called "constructive possession."

4. Since bank checks are the writings used in most forgery cases, the rest of the uniform instruction uses only the term "check." If the offense involved a different kind of writing or an "object," the Committee suggests naming the writing or object and using that name whenever "check" appears in the instruction. Whether a particular writing or object is one by which "legal rights or obligations are created or transferred" is a question of fact for the jury to determine. Where the law establishes that a particular writing or object has that effect, it is permissible to communicate that legal rule to the jury. With regard to the definition of "check" and other instruments, see § 403.104.

State v. Perry, 215 Wis.2d 690, 631 N.W.2d 651 (1997), held that "Transchecks" used by truckers for unexpected expenses are writings covered by the forgery statute.

5. Examples of the kinds of conduct covered are given in the Vol. V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 131 (February 1953):

> Signing a check with another's name (an example of making a writing purporting to have been made by another); raising a check (an example of making a writing purporting to have been made with different terms); filling in blanks over the signature of another either without authority or with unauthorized terms (an example of making a writing appearing to have been made by authority of one who did not give such authority).

The fact that the writing is nonnegotiable is immaterial. The absence of the maker's signature may mean the check is not a negotiable instrument but presenting such a check for payment may constitute uttering a forged writing. See State v. Machon, 112 Wis.2d 47, 331 N.W.2d 665 (Ct. App. 1983).

"Falsely made" does not apply to writing someone else's name as the payer on a postal money order. "Wisconsin requires that a false making must relate to the genuineness of execution of a document, not to the genuineness of its contents." State v. Entringer, 2001 WI App 157, 246 Wis.2d 851, 631 N.W.2d 651.

6. The Committee concluded that "intent to defraud" is not a statutorily-required element for a violation of sec. 943.38(2). Knowledge that the writing is forged and uttering it (or possessing it with intent to utter) is all that is required. The clearest support for this conclusion is the statutory language itself: "Intent to defraud" appears in subsecs. (1) and (3), but not in (2). This difference between the subsections appears to be intentional: The parallel section in the 1953 draft of the proposed Criminal Code had "intent to defraud" as an element; as enacted in 1955, that element had been eliminated and the statute read essentially as it does today. (The 1953 version is found in the 1953 Report On The Criminal Code, Wisconsin Legislative Council, 1953; the Code was enacted as Chapter 696, Laws of 1955.)

The interpretation in the instruction is consistent with a policy of penalizing those who introduce forged writings into the stream of commerce, which the Committee concluded is the likely purpose of sec. 943.38(2).

7. The Committee recommends that the sentence in parentheses be read only when the facts of the case suggest that the defendant possessed the forged writing with intent to utter it as false. One example of such possession would be the "middleman" who passes forged checks to others who utter them as genuine. The middleman possesses the writings with intent to utter as false.

Section 943.38(2) prohibits the possession of a forged writing "with intent to utter as false or as genuine." (Emphasis added.) The reason for drafting the statute in this way is explained in the 1953 Judiciary Committee Report on the Criminal Code, at page 131: "The phrase to 'utter as true or false' does away with the necessity of proving that the actor possessed the forged article with intent to utter it as true."

Thus, there are two aspects to the mental purpose of the possessor of a forged writing under this statute: (1) the possessor must have the intent to utter the writing C to pass it along to someone else; but (2) whether or not the possessor intends to pass the writing along as a false writing or as genuine is immaterial. In the usual case where the possessor intends to utter the writing as genuine, the immateriality of the possessor's purpose need not be brought to the attention of the jury. But where the possessor intends to pass the writings along as false, the immateriality of the purpose should be brought to the jury's attention. This will carry out the intent of the statute to eliminate the defense that the possessor did not intend to present the writing as genuine.

8. The alternative "present it for payment" should be used where the facts show that the defendant intended to present the check for payment himself. This would be applicable to the most common situation, that where the defendant possessed the forged writing with intent to utter it as true.

9. The alternative "transfer it to another" should be used where the facts show that the defendant intended to transfer the check to another person, which other person would be expected to present the check for payment. In this situation, the common definition of "utter," presenting for payment, is not suitable, and the Committee suggests substituting the "transfer to another" definition. This alternative may apply in the case where the defendant is acting as a middleman, passing on forged writings to others who will eventually present them as genuine. Such a case would be one where the defendant possessed the writings "with intent to utter as false"; see note 7, supra.

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1494 FRAUDULENT INSURANCE CLAIM: PRESENTING A FALSE OR FRAUDULENT CLAIM — § 943.395(1)(a)

Statutory Definition of the Crime

Section 943.395 of the Criminal Code of Wisconsin is violated by one who presents a false or fraudulent claim to be paid under any contract or certificate of insurance, knowing the claim to be false or fraudulent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant presented a claim to be paid under a contract or certificate of insurance.
2. The claim was false or fraudulent.
3. The defendant knew the claim was false or fraudulent.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF A FELONY OFFENSE IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE CLAIM WAS MORE THAN $2,500.[1]

[Determining the Value of the Claim]

[If you find the defendant guilty, answer the following question:

"Was the value of the claim more than $2,500?"

Answer: "yes" or "no."

"Value" means the amount of the entire claim.[2]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than $2,500.]

COMMENT

Wis JI-Criminal 1494 was originally published in 1996. This revision was approved by the Committee in February 2003; it involved adoption of a new format and nonsubstantive changes in the text.

This instruction is for violations of § 943.395(1)(a), which are punished as Class A misdemeanors if the amount of the false claim does not exceed $2,500 and as Class I felonies if the amount does exceed $2,500. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The felony class was changed to Class I by 2001 Wisconsin Act 109, effective date: February 1, 2003.

1. By analogy to theft cases, the Committee concluded that the jury must make a finding of the value of the claim if the felony offense is charged and if the evidence supports a finding that the required

amount is involved. Regarding theft cases, see Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The felony class was changed to Class I by 2001 Wisconsin Act 109, effective date: February 1, 2003. While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

2. Whether the felony amount is exceeded is determined by reference to the value of the full claim. See State v. Briggs, 214 Wis.2d 281, 288-89, 571 N.W.2d 881 (Ct. App. 1997), where the court of appeals rejected the defendant's argument that the statute required that the false portion of the claim exceed the designated amount, which at the time of Briggs was $1,000.

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1495 THEFT OF TELECOMMUNICATIONS SERVICE — § 943.45(1)(a) and (3)(c)

Statutory Definition of the Crime

Theft of telecommunications service, as defined in § 943.45(1)(a) of the Criminal Code of Wisconsin, is committed by one who intentionally obtains or attempts to obtain telecommunications service by charging the service to an existing telephone number or credit card number without the consent of the subscriber or legitimate holder and does so for direct or indirect commercial advantage or private financial gain.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (obtained) (attempted to obtain) telecommunications service.[1]
2. The defendant (obtained) (attempted to obtain) service by charging it to a (telephone number) (credit card number) belonging to another person.
3. The (subscriber) (holder) of the (telephone number) (credit card) did not consent to the charges alleged to have been made by the defendant.
4. The defendant acted intentionally.

This requires that the defendant acted with the mental purpose[2] to obtain telecommunications service without paying for it by charging that service to the (telephone number) (credit card) of another person without consent.

5. The defendant (obtained) (attempted to obtain) telecommunications service for (direct or indirect commercial advantage) (private financial gain).

["Private financial gain" requires that the defendant received a financial benefit beyond simply receiving telecommunications service without paying for it.][3]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of theft of telecommunications service have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1495 was originally published in 1992 and revised in 1999 and 2009. This revision was approved by the Committee in December 2013. It updated the reference to penalties in the Comment.

This instruction is for violations of subsection (1)(a) of § 943.45. Four other violations are defined in subsections (1)(b) through (e). The penalties for violations of § 943.45(1)(a) are specified in sub. (3)(a)-d) as amended by 2013 Wisconsin Act 89:

- first offenses are Class C misdemeanors;
- second or subsequent offenses are Class B misdemeanors;
- offenses committed for "direct or indirect commercial advantage or private financial gain" are Class A misdemeanors; and,
- offenses committed for "direct or indirect commercial advantage or private financial gain" as second or subsequent offenses are Class I felonies.

This instruction may be used for Class A misdemeanors under sub. (3)(c) or Class I felonies under sub (3)(d). As to the latter, the Committee concluded that the fact of prior conviction need not be submitted to the jury. "Other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. United States, 530 U.S. 466, 490 (2000) [emphasis added.]

Subsection (2) of § 943.45 provides that the statute applies when the telecommunications service either originates or terminates in this state, or when it would have been billable by a provider of service in this state, except for the fraud involved in a violation of the statute.

1. The statute refers to "telecommunications service as defined in s. 196.01(9m)." That definition reads as follows:

> "Telecommunications service" means the offering for sale of the conveyance of voice, data or other information at any frequency over any part of the electromagnetic spectrum, including the sale of service for collection, storage, forwarding, switching and delivery incidental to such communication and including the regulated sale of customer premises equipment. "Telecommunications service" does not include cable television service or broadcast service.

2. See § 939.23(3), which defines "intentionally." That definition includes being "aware that his or her conduct is practically certain" to cause the prohibited result. That alternative was not included in the instruction because the Committee concluded that violations of § 943.45 will usually involve the "mental purpose" alternative. If an instruction on "practically certain" is needed, see Wis JI-Criminal 923B.

3. The definition of "private financial gain" is based on the one provided in § 943.46, Theft of Cable Television Service, which deals with conduct that is very similar to the conduct covered by § 943.45 and has the same penalty structure. Sub. (1)(b) of § 943.46 reads as follows:

> "Private financial gain" does not include the gain resulting to any individual from the private use in that individual's dwelling unit of any programming for which the individual has not obtained authorization.

While the statute's failure to provide that the same definition applies in § 943.45 can be interpreted in different ways, the Committee concluded that the more persuasive approach calls for using the definition. Because theft of telecommunications service is an offense [a Class C forfeiture] without a showing of "private financial gain," that term must require more than the benefit of receiving free service. The contrary interpretation would mean there would be no conduct that constitutes the forfeiture offense, making part of the statute meaningless. An interpretation that gives meaning and effect to all parts of a statute is preferred.

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1496 THEFT OF A FINANCIAL TRANSACTION CARD — § 943.41(3)(a)

Statutory Definition of the Crime

Theft of a financial transaction card, as defined in § 943.41(3)(a)[1] of the Criminal Code of Wisconsin, is committed by one who acquires a financial transaction card from the person, possession, custody, or control of another without the cardholder's consent and with intent to (use it) (sell it) (transfer it to a person other than the issuer).[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant acquired[3] a financial transaction card from the person, possession, custody, or control of another.

   A financial transaction card is an instrument or device issued by a business organization or financial institution for the use of the cardholder in (obtaining anything on credit) (certifying or guaranteeing the availability of funds sufficient to honor a draft or check) (gaining access to an account).[4]

2. The defendant acquired the card without the consent of the cardholder.[5]

   "Without consent" means that there was no consent in fact.[6]

3. The defendant acquired the card with intent to (use it) (sell it) (transfer it to a person other than the issuer).[7]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of theft of a financial transaction card have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1496 was originally published in 1989 and revised in 1991. This revision was approved by the Committee in October 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is drafted for violations of § 943.41(3)(a), which are Class A misdemeanors. For offenses involving fraudulent use of a card under sub. (5) see Wis JI Criminal 1497, 1497A, and 1497B.

1. This instruction is drafted for one type of offense defined in § 943.41(3)(a), which provides:

> (3) Theft by taking card. (a) No person shall acquire a financial transaction card from the person, possession, custody or control of another without the cardholder's consent or, with knowledge that it has been so acquired, receive the financial transaction card with intent to use it or sell it to or transfer it to a person other than the issuer. Acquiring a financial transaction card without consent includes obtaining it by conduct defined as statutory theft. . . .

2. One of the alternatives in parentheses should be selected. The alternatives appear at the end of the first sentence of § 943.41(3)(a). Although the statute is not explicit in this regard, the Committee has interpreted it as providing that the "with intent to use it or sell it . . ." phrase modifies both prohibited acts: acquiring a card without the cardholder's consent; or receiving a card acquired without the cardholder's consent.

3. Section 943.41(3)(a) provides that "[a]cquiring a financial transaction card without consent includes obtaining it by conduct defined as statutory theft." Wisconsin's theft statute identifies the following means of obtaining property: takes and carries away, uses, transfers, conceals, retains possession of property without consent and with intent to deprive the owner permanently of possession. See § 943.20(1)(a).

The last sentence of § 943.41(3)(a) provides:

> If a person has in his or her possession or under his or her control financial cards issued in the names of two or more other persons it is prima facie evidence that the person acquired them in violation of this subsection.

See Wis JI-Criminal 225 for a pattern instruction for implementing a statutory "prima facie evidence" provision.

4. This definition is adapted from the one provided in § 943.41(1)(em).

5. "Cardholder" is defined in § 943.41(1)(b) as "the person to whom or for whose benefit a financial transaction card is issued." In most cases, the cardholder is likely to be the owner of the card.

6. See § 939.22(48) for further definition of "without consent" appropriate where consent is given but is not legally effective because it resulted from coercion, purported legal authority, or lack of understanding.

7. See note 2, supra. "Issuer" is defined in § 943.41(1)(f) as "the business organization or financial institution which issues a financial transaction card or its duly authorized agent."

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1497 FRAUDULENT USE OF A FINANCIAL TRANSACTION CARD — § 943.41(5)(a)1.a.

Statutory Definition of the Crime

Fraudulent use of a financial transaction card, as defined in § 943.41(5)(a) of the Criminal Code of Wisconsin, is committed by one who, with intent to defraud another,[1] uses a financial transaction card that is stolen[2] for the purpose of obtaining money, goods, services, or anything else of value.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant used a financial transaction card.[3]

   A "financial transaction card" is an instrument or device issued by a business organization or financial institution for the use of the cardholder in (obtaining anything on credit) (certifying or guaranteeing the availability of funds sufficient to honor a draft or check) (gaining access to an account).[4]

2. The card was stolen.[5]

   [A "stolen" card is one that has been intentionally taken from its owner without consent and with intent permanently to deprive the owner of its possession.][6]

3. The defendant used the card for the purpose of obtaining (money) (goods) (service) (anything of value).

[Actual possession of the card is not required.][7]

4. The defendant acted with intent to defraud another.

"Another" includes the issuer of the card or any person or organization providing money, goods, services, or anything else of value.[8]

"Intent to defraud" is an intent to obtain something of value by deception or representation known to be false.[9]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF A FELONY OFFENSE IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[10]

[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of the (money) (goods) (service) (_____) obtained more than $10,000?" Answer: "yes" or "no.")

("Was the value of the (money) (goods) (service) (_____) obtained more than $5,000?" Answer: "yes" or "no.")

("Was the value of the (money) (goods) (service) (_____) obtained more than $2,500?" Answer: "yes" or "no.")

"Value" means the amount of the transaction(s).

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."].

COMMENT

Wis JI-Criminal 1497 was originally published in 1989 and revised in 1991. This revision was approved by the Committee in February 2003; it limited the instruction to violations of sub. (5)(a)1.a., adopted a new format, made nonsubstantive changes in the text, and reflected the penalty changes made by 2001 Wisconsin Act 109.

In State v. Shea, 221 Wis.2d 418, 585 N.W.2d 662 (Ct. App. 1998), the court held that § 943.41(5)(a)1.a. could be applied to a case where the defendant used a credit card number without authorization but did not have possession of the card itself. Conduct of that type might be a better fit under § 943.41(5)(a)1.b. C See Wis JI-Criminal 1497A.

1. The full statement in the statute is "intent to defraud the issuer, a person or organization providing money, goods or services or anything else of value or any other person." The general term "another" is used in the initial statement of the offense in the opening paragraph but all possible targets of the intent to defraud are included in the third element.

2. The statute defines many different types of fraudulent use. This instruction addresses what the Committee believed to be one of the most common situations C the use of a stolen card. It is based on that part of the statute which refers to a card "obtained or retained in violation of sub. (3)." The reference to "sub. (3)" is to subsection (3) of § 943.41 which defines the offense of "theft by taking card." See Wis JI-Criminal 1496 and note 5, below.

If the case involves the use of a card other than a stolen card, use a different characterization wherever the word "stolen" appears. Other alternatives would include, for example, a forged card, a

revoked card, or an expired card (see § 943.41(5)(a)), or a card otherwise "acquired in violation of sub. (3)," see note 5, below.

3. In State v. Shea, 221 Wis.2d 418, 585 N.W.2d 662 (Ct. App. 1998), the court held that § 943.41(5)(a)1.a. could be applied to a case where the defendant used a credit card number without authorization but did not have possession of the card itself. Thus, the defendant did not "use" the card as required by this element. Conduct of that type might be a better fit under § 943.41(5)(a)1.b. – See Wis JI-Criminal 1497A.

4. The definition of "financial transaction card" is based on the one provided in § 943.41(1)(em).

5. See note 2, supra. In State v. Shea, 221 Wis.2d 418, 585 N.W.2d 662 (Ct. App. 1998), the court held that § 943.41(5)(a)1.a. could be applied to a case where the defendant used a credit card number without authorization but did not have possession of the card itself. Thus, the card was not "stolen" as required by this element. Conduct of that type might be a better fit under § 943.41(5)(a)1.b. – See Wis JI-Criminal 1497A.

6. The definition of "stolen" is based on the facts necessary to constitute theft under § 943.20(1)(a): an intentional taking, without consent, and with intent to deprive the owner permanently of possession. Use of a stolen card, with "stolen" defined in this manner, would constitute "use of a card obtained in violation of sub. (3)" as prohibited by § 943.41(5). See note 2, supra. However, a card could be "obtained in violation of sub. (3)" without having been obtained in a way that would make the card a "stolen" card under this definition. See Wis JI-Criminal 1496.

7. In State v. Shea, 221 Wis.2d 418, 585 N.W.2d 662 (Ct. App. 1998), the court held that § 943.41(5)(a)1.a. could be applied to a case where the defendant used a credit card number without authorization but did not have possession of the card itself.

8. This statement presents the alternative targets of the intent to defraud as set forth in § 943.41(5). See note 1, supra.

9. The definition of "intent to defraud" is based on those provided in other instructions, tailored for this defense. See, for example, Wis JI-Criminal 1405 and 1470.

10. By analogy to theft cases, the Committee concluded that the jury must make a finding of the value of the claim if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Regarding theft cases, see Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003]. The revised penalties, determined by reference to a single transaction or separate transactions within a period of 6 months, are as follows:

- if the value of goods, etc., obtained exceeds $2,500 but not $5,000, the offense is a Class I felony;

- if the value of goods, etc., obtained exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of goods, etc., obtained exceeds $10,000, the offense is a Class G felony.

The questions in the instruction omits the upper limits of the categories for Class I and Class H felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

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1497A FRAUDULENT USE OF A FINANCIAL TRANSACTION CARD — § 943.41(5)(a)1.b.

Statutory Definition of the Crime

Fraudulent use of a financial transaction card, as defined in § 943.41(5)(a) of the Criminal Code of Wisconsin, is committed by one who, with intent to defraud another,[1] obtains money, goods, services, or anything else of value by representing without consent of the cardholder that the person is the holder of a specified card.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained (money) (goods) (service) (anything of value) by representing that (he) (she) was the holder of a financial transaction card.

   A "financial transaction card" is an instrument or device issued by a business organization or financial institution for the use of the cardholder in (obtaining anything on credit) (certifying or guaranteeing the availability of funds sufficient to honor a draft or check) (gaining access to an account).[3]

2. The defendant was not the person to whom the card was issued[4] and acted without that person's consent.[5]

3. The defendant acted with intent to defraud another.

"Another" includes the issuer of the card or any person or organization providing money, goods, services, or anything else of value, or any other person.[6]

"Intent to defraud" is an intent to obtain something of value by deception or representation known to be false.[7]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF A FELONY OFFENSE IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OBTAINED WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[8]

[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of the (money) (goods) (service) (_____) obtained more than $10,000?" Answer: "yes" or "no.")

("Was the value of the (money) (goods) (service) (_____) obtained more than $5,000?" Answer: "yes" or "no.")

("Was the value of the (money) (goods) (service) (_____) obtained more than $2,500?" Answer: "yes" or "no.")

"Value" means the amount of the transaction(s).

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."]

COMMENT

Wis JI-Criminal 1497A was approved by the Committee in February 2003.

This instruction is for violations of sub. (5)(a)1.b. of § 943.41. For violations of sub. (5)(a)1.a., see Wis JI-Criminal 1497.

The penalty structure for § 943.41 was revised by 2001 Wisconsin Act 109 [effective date: February 1, 2003]. The revised penalties, determined by reference to a single transaction or separate transactions within a period of 6 months, are as follows:

- if the value of goods, etc., obtained exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of goods, etc., obtained exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of goods, etc., obtained exceeds $10,000, the offense is a Class G felony.

1. The full statement in the statute is "intent to defraud the issuer, a person or organization providing money, goods or services or anything else of value or any other person." The general term "another" is used in the initial statement of the offense in the opening paragraph but all possible targets of the intent to defraud are included in the third element.

2. The statute also prohibits representing that one is the holder of a card when a card has not in fact been issued. That alternative is not addressed by this instruction.

3. The definition of "financial transaction card" is based on the one provided in § 943.41(1)(em).

4. This is based on the definition of "cardholder" provided in § 943.41(1)(b): "'Cardholder' means the person to whom or for whose benefit a financial transaction card is issued."

5. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948.

6. This statement presents the alternative targets of the intent to defraud as set forth in § 943.41(5). See note 1, supra.

7. The definition of "intent to defraud" is based on those provided in other instructions, tailored for this defense. See, for example, Wis JI-Criminal 1405 and 1470.

8. By analogy to theft cases, the Committee concluded that the jury must make a finding of the value of the claim if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Regarding theft cases, see Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003]. The revised penalties, determined by reference to a single transaction or separate transactions within a period of 6 months, are as follows:

- if the value of goods, etc., obtained exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of goods, etc., obtained exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of goods, etc., obtained exceeds $10,000, the offense is a Class G felony.

The questions in the instruction omits the upper limits of the categories for Class I and Class H felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

1497B FINANCIAL TRANSACTION CARD FACTORING — § 943.41(6m)

Statutory Definition of the Crime

Section 943.41(6m) of the Criminal Code of Wisconsin is violated by a person who is authorized to furnish goods, services, or anything else of value[1] upon presentation of a financial transaction card and who deposits, assigns, endorses, or presents for payment a financial transaction card transaction record if the person did not furnish or agree to furnish the goods, services, or anything else of value represented to be furnished by the transaction record.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a person authorized to furnish goods, services, or anything else of value upon presentation of a financial transaction card.

   A "financial transaction card" is issued by a business organization or financial institution for the use of the cardholder in obtaining anything on credit.[2]

2. The defendant (deposited) (assigned) (endorsed) (presented for payment) a record of the use of a financial transaction card.[3]

This requires that the defendant presented the record for payment to an issuer or to any other person authorized to acquire transaction records for presentation to an issuer.

"Issuer" means the business organization or financial institution which issues a financial transaction card (or its duly authorized agent).[4]

3. The defendant did not furnish or agree to furnish the goods, services, or anything else of value described by the transaction record.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1497B was originally published as JI 1497.1 in 1994. This revision was approved by the Committee in May 2002; it renumbered the instruction, adopted a new format, and made nonsubstantive changes in the text.

Section 943.41(6m), which defines the offense of "credit card factoring" is very difficult to understand. The Committee's understanding was aided by the following example:

> A legitimate merchant has an account with a credit card company. A person without his own account wants to accept credit card charges for sales of his merchandise.
>
> Somehow, the person gets credit card charge slips and uses them for his sales. He then sells the slips to the merchant at a discount, say 90%. The merchant then forwards those slips for payment along with his own and receives say, 95% on the dollar from the regular issuer. He thus makes a 5% commission on the factoring.
>
> This merchant has violated the statute because:
>
> 1) he is authorized to accept credit cards;

2) he presented a credit card charge slip for payment;

3) he did not furnish the goods or services represented on the slip.

Note that sub. (6m)(b) provides several exceptions to the applicability of the prohibition on factoring, excluding certain franchisors, authorized general merchandise retailers, and issuers or organizations of issuers.

The instruction makes some substitutions for the statutory language in an attempt to simplify the explanation of the offense. Those changes are identified in the footnotes below.

This offense is a Class E felony regardless of the value involved.

1. The statute includes "money" in the list of that which might be furnished. The Committee decided not to include "money" in the instruction because an example of a factoring offense involving money could not be imagined. Promising to provide money and then failing to do so would be a different offense; see, for example, the offense defined in sub. (6)(b) of § 943.41.

2. This definition is adapted from the one provided in § 943.41(1)(em).

3. "A record of the use of a financial transaction card" is substituted for the statute's "financial transaction card transaction record."

4. This is the definition provided in § 943.41(1)(f).

5. "Described by the transaction record" is substituted for the statute's "represented to be furnished by the transaction record."

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1498 RETAIL THEFT[1] — § 943.50(1m)(a) (e)

Statutory Definition of the Crime

Retail theft, as defined in § 943.50(1m) of the Criminal Code of Wisconsin, is committed by one who intentionally (alters the indicated price or value of) (takes and carries away) (transfers) (conceals) (retains possession of)[2] merchandise held for resale[3] by a merchant without consent and with the intent to deprive the merchant permanently of possession or the full purchase price of such merchandise.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (altered the indicated price or value of) (took and carried away) (transferred) (concealed) (retained possession of) (property involved).[4]
2. The (property involved) was merchandise held for resale[5] by a merchant.[6]
3. The defendant knew that (property involved) was merchandise held for resale[7] by a merchant.
4. The merchant did not consent[8] to (altering the indicated price or value of) (taking and carrying away) (transferring) (concealing) (retaining possession of) (property involved).

5. The defendant knew that the merchant did not consent.[9]

6. The defendant intended to deprive the merchant permanently of (possession) (any portion of its purchase price) of the merchandise.[10]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY RETAIL THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE MERCHANDISE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[11]

Determining Value

If you find the defendant guilty, answer the following question:

("Was the value of the merchandise more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the merchandise more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the merchandise more than $500?"

Answer: "yes" or "no.")

"Value" means the (merchant's stated price of the merchandise) (the difference between the merchant's stated price of the merchandise and the altered price).[12]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

COMMENT

Wis JI-Criminal 1498 was originally published in 1974 and revised in 1977, 1980, 1983, 1991, 1999, 2002, 2003, 2012, and 2019. This revision was approved by the Committee in December 2019; it adds to the comment.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. The amount distinguishing misdemeanors from felonies was decreased from $2,500 to $500 by 2011 Wisconsin Act 174. [Effective date: April 17, 2012.]

Act 174 also created ss. 943.50(4m) which provides that "[W]hoever violates sub. (1m) (a), (b), (c), (d), (e), or (f) is guilty of a Class I felony if all of the following apply:

(a) The value of the merchandise does not exceed $500.
(b) The person agree or combines with another to commit the violation.
(c) The person intends to sell the merchandise by means of the Internet."

2011 Wisconsin Act 110 amended § 943.50 to cover theft of services. See Wis JI-Criminal 1498C.

The 1999 revision reflected changes made in § 943.50 by 1997 Wisconsin Act 262, effective date: June 23, 1998. This instruction covers the alternative ways of committing retail theft that were prohibited by § 943.50 before the changes made by Act 262. These alternatives are defined in sub. (1m) (a) through (e) of the amended statute. New alternatives relating to "theft detection devices," "theft detection shielding devices" and "theft detection device removers" are defined in new subs. (1m)(f), (g), and (h). See Wis JI-Criminal 1498A and 1498B.

Act 262 also repealed former sub. (2) which had provided that intentional concealment of merchandise "beyond the last station for receiving payments," for example, was "evidence of intent. . . ." Paragraphs addressing those provisions [and treating them in the same way as "prima facie evidence" provisions] have been deleted from the instruction.

In State v. Lopez, 2019 WI 101, 389 Wis.2d 156, 936 N.W.2d 125**,** the Wisconsin Supreme Court affirmed the court of appeals decision in State v. Lopez, 2019 WI App 2, 385 Wis.2d 482, 922 N.W.2d 855, which held that the State may charge multiple acts of retail theft as one continuous offense pursuant

to § 971.36(3)(a). Nothing in § 971.36(3)(a) indicates that the legislature intended to limit the provision to a specific type or types of theft, therefore the statute is applicable to various types of theft, including retail theft under § 943.50(1m)(a)-(e).

1. The title of § 943.50 was changed from "shoplifting" to "retail theft" by Chapter 270, Laws of 1981. The change was effective April 27, 1981. Additional changes made by Chapter 270 were: extending the statute's coverage "to include" property of the merchant; cross referencing the definition of "merchant" in the Uniform Commercial Code; providing a new definition of value; expanding the immunity of one who detains a suspected violator of the statute; and providing for the admission of photographs of the merchandise in lieu of producing the merchandise itself.

2011 Wisconsin Act 110 changed the title of § 943.50 to "Retail Theft; Theft of Services."

2. The Committee recommends using only the verb or verbs which appropriately describe the form of retail theft alleged or indicated by the evidence. There is no authority specific to this statute requiring election of one alternative. However, cases interpreting the theft statute, § 943.20, address a closely comparable situation and hold that the statute identifies different ways of committing the offense: by taking and carrying way, or by using, by transferring, by concealing, or by retaining possession of property of another. The alternatives may not be charged in the disjunctive, Jackson v. State, 92 Wis.2d 1, 284 N.W.2d 685 (Ct. App. 1979); the jury must unanimously agree on the manner in which the statute was violated, State v. Seymour, 183 Wis.2d 682, 515 N.W.2d 874 (1994). See Wis JI-Criminal 517 for an instruction on jury agreement.

3. The amendment of § 943.50 by Chapter 270, Laws of 1981, extended the coverage of the statute to include "property of the merchant." In a case where the merchant's personal property was taken, substitute "property of the merchant" for "merchandise held for resale."

4. "Intentionally" requires that the defendant acted with the purpose to do the thing or cause the result specified "or is aware that his or her act is practically certain to cause that result." § 939.23(3). See Wis JI-Criminal 923A and 923B. "Intentionally" also requires knowledge of those facts necessary to make the conduct criminal that follow the word in the statute. See § 939.23(3).

5. See note 3, supra.

6. Section 943.50(1), as created by Chapter 270, Laws of 1981, provides that "merchant" includes those identified in § 402.104(3) as well as any innkeeper, motelkeeper, or hotelkeeper.

Section 402.104(3) defines "merchant" as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.

7. See note 4, supra.

8. The phrase "without consent" is defined in § 939.22(48)(a)-(c). That definition should be read to the jury at this point if consent is at issue. See Wis JI-Criminal 948.

9. See note 4, supra.

10. When appropriate add: "or is aware that his conduct is practically certain to cause that result." See § 939.23(4) and Wis JI-Criminal 923B.

When appropriate add: "or creates a serious risk of permanent loss by acts which manifest a gross indifference to the permanent loss of the property," Sartin v. State, 44 Wis.2d 138, 147, 170 N.W.2d 727 (1969), citing Baldwin, "Criminal Misappropriations in Wisconsin—Part I," 44 Marq. L. Rev. 253, 267 (1960).

11. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty are set forth in § 943.50(4):

- if the value of the property does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of the property exceeds $10,000, the offense is a Class G felony.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for Class I and Class H felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

12. Section 943.50(1)(b), as created by Chapter 270, Laws of 1981, provides a definition of "value" for the purposes of "retail theft" cases:

> (b) "Value of merchandise" means:
>
> 1. For property of the merchant, the value of the property; or
> 2. For merchandise held for resale, the merchant's stated price of the merchandise or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales devise to reflect less than the merchant's stated price, the difference between the merchant's stated price of the merchandise and the altered price.

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1498A RETAIL THEFT: REMOVING A THEFT DETECTION DEVICE — § 943.50(1m)(f)

Statutory Definition of the Crime

Section 943.50(1m)(f) of the Criminal Code of Wisconsin is violated by one who, while anywhere in a merchant's store, intentionally removes a theft detection device from merchandise held for resale[1] without the merchant's consent and with intent to deprive the merchant permanently of possession[2] of the merchandise.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant, while in the merchant's store, intentionally removed a theft detection device from (property involved).

   "Theft detection device" means any tag or other device that is used to prevent or detect theft and that is attached to merchandise held for resale by a merchant.[3]

2. (Property involved) was merchandise held for resale by a merchant.[4]

3. The defendant knew that (property involved) was merchandise held for resale[5] by a merchant.

4. The merchant did not consent[6] to removal of a theft detection device.

5. The defendant knew that the merchant did not consent.

6. The defendant intended to deprive the merchant permanently of possession of the merchandise.[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY RETAIL THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE MERCHANDISE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[9]

Determining Value

If you find the defendant guilty, answer the following question:

("Was the value of the merchandise more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the merchandise more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the merchandise more than $500?"

Answer: "yes" or "no.")

["Value" means the (merchant's stated price of the merchandise) (the difference between the merchant's stated price of the merchandise and the altered price).[10]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

COMMENT

Wis JI-Criminal 1498A was originally published in November 1998 and revised in 2003, 2012, and 2019. This revision was approved by the Committee in December 2019; it adds to the comment.

This instruction is for the offense defined in sub. (1m)(f) of § 943.50, which was created by 1997 Wisconsin Act 262 [effective date: June 23, 1998].

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount distinguishing misdemeanors from felonies was decreased from $2,500 to $500 by 2011 Wisconsin Act 174. [Effective date: April 17, 2012.]

Act 174 also created ss. 943.50(4m) which provides that "[W]hoever violates sub. (1m) (a), (b), (c), (d), (e), or (f) is guilty of a Class I felony if all of the following apply:

(a) The value of the merchandise does not exceed $500.
(b) The person agree or combines with another to commit the violation.
(c) The person intends to sell the merchandise by means of the Internet."

In State v. Lopez, 2019 WI 101, 389 Wis.2d 156, 936 N.W.2d 125**,** the Wisconsin Supreme Court affirmed the court of appeals decision in State v. Lopez, 2019 WI App 2, 385 Wis.2d 482, 922 N.W.2d 855, which held that the State may charge multiple acts of retail theft as one continuous offense pursuant to § 971.36(3)(a). Nothing in § 971.36(3)(a) indicates that the legislature intended to limit the provision to a specific type or types of theft, therefore the statute is applicable to various types of theft, including retail theft under § 943.50(1m)(a) (e).

1. Section 943.50(1m)(f) prohibits removing a theft detection device "from merchandise held for resale by a merchant or property of a merchant." The instruction is drafted for an offense involving "property held for resale by a merchant" and must be modified if "property of a merchant" was involved.

2. The instruction does not include the following alternative from the statute: intent to deprive the merchant permanently of "the full purchase price" of the merchandise. The Committee concluded that a shielding device would be used only to steal the merchandise, not to reduce its stated price.

3. This is the definition provided in § 943.50(1)(ar).

4. Section 943.50(1), as created by Chapter 270, Laws of 1981, provides that "merchant" includes those identified in § 402.104(3) as well as any innkeeper, motelkeeper, or hotelkeeper.

Section 402.104(3) defines "merchant" as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.

5. See note 1, supra.

6. The phrase "without consent" is defined in § 939.22(48)(a)-(c). That definition should be read to the jury at this point if consent is at issue. See Wis JI-Criminal 948.

7. When appropriate add: "or is aware that his conduct is practically certain to cause that result." See § 939.23(4) and Wis JI-Criminal 923B.

8. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee has concluded that this shorter version is appropriate for most cases. The complete, traditional, statement is found at Wis JI-Criminal 923A.

9. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty are set forth in § 943.50(4):

- if the value of the property does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of the property exceeds $10,000, the offense is a Class G felony.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for Class I and Class H felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

10. Section 943.50(1)(b), as created by Chapter 270, Laws of 1981, provides a definition of "value" for the purposes of "retail theft" cases:

(b) "Value of merchandise" means:

1. For property of the merchant, the value of the property; or

2. For merchandise held for resale, the merchant's stated price of the merchandise or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales devise to reflect less than the merchant's stated price, the difference between the merchant's stated price of the merchandise and the altered price.

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1498B RETAIL THEFT: USING A THEFT DETECTION SHIELDING DEVICE — § 943.50(1m)(g)

Statutory Definition of the Crime

Section 943.50(1m)(g) of the Criminal Code of Wisconsin is violated by one who uses [or possesses with intent to use] a theft detection shielding device to shield merchandise held for resale[1] from being detected by a theft alarm sensor and does so without the merchant's consent and with intent to deprive the merchant permanently of possession[2] of the merchandise.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant used [or possessed with intent to use] a theft detection shielding device to shield (property involved) from being detected by a theft alarm sensor.

   "Theft detection shielding device" means any laminated or coated bag or device designed to shield merchandise held for resale by a merchant from being detected by an electronic or magnetic theft alarm sensor.[3]

2. (Property involved) was merchandise held for resale by a merchant.[4]

3. The defendant knew that (property involved) was merchandise held for resale[5] by a merchant.

4. The merchant did not consent[6] to use of [or possession with intent to use] a theft detection shielding device to shield (property involved) from being detected by a theft alarm sensor.
5. The defendant knew that the merchant did not consent.
6. The defendant intended to deprive the merchant permanently of possession of the merchandise.[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY RETAIL THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE MERCHANDISE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[9]

Determining Value

If you find the defendant guilty, answer the following question:

("Was the value of the merchandise more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the merchandise more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the merchandise more than $500?"

Answer: "yes" or "no.")

["Value" means the (merchant's stated price of the merchandise) (the difference between the merchant's stated price of the merchandise and the altered price).[10]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

COMMENT

Wis JI-Criminal 1498B was originally published in 1998 and revised in 2003, 2012, and 2019. This revision was approved by the Committee in December 2019; it adds to the comment.

This instruction is for the offense defined in sub. (1m)(g) of § 943.50, which was created by 1997 Wisconsin Act 262 [effective date: June 23, 1998].

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount distinguishing misdemeanors from felonies was decreased from $2,500 to $500 by 2011 Wisconsin Act 174. [Effective date: April 17, 2012.]

Act 174 also created ss. 943.50(4m) which provides that "[W]hoever violates sub. (1m) (a), (b), (c), (d), (e), or (f) is guilty of a Class I felony if all of the following apply:

(a) The value of the merchandise does not exceed $500.
(b) The person agree or combines with another to commit the violation.
(c) The person intends to sell the merchandise by means of the Internet."

In State v. Lopez, 2019 WI 101, 389 Wis.2d 156, 936 N.W.2d 125**,** the Wisconsin Supreme Court affirmed the court of appeals decision in State v. Lopez, 2019 WI App 2, 385 Wis.2d 482, 922 N.W.2d 855, which held that the State may charge multiple acts of retail theft as one continuous offense pursuant to § 971.36(3)(a). Nothing in § 971.36(3)(a) indicates that the legislature intended to limit the provision to a specific type or types of theft, therefore the statute is applicable to various types of theft, including retail theft under § 943.50(1m)(a) (e).

1. Section 943.50(1m)(g) prohibits using, or possessing with intent to use, a theft detection shielding device to shield "merchandise held for resale by a merchant or property of a merchant." The instruction is drafted for an offense involving "property held for resale by a merchant" and must be modified if "property of a merchant" was involved.

2. The instruction does not include the following alternative from the statute: intent to deprive the merchant permanently of "the full purchase price" of the merchandise. The Committee concluded that a shielding device would be used only to steal the merchandise, not to reduce its stated price.

3. This is the definition provided in § 943.50(1)(at).

4. Section 943.50(1), as created by Chapter 270, Laws of 1981, provides that "merchant" includes those identified in § 402.104(3) as well as any innkeeper, motelkeeper, or hotelkeeper.

Section 402.104(3) defines "merchant" as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.

5. See note 1, supra.

6. The phrase "without consent" is defined in § 939.22(48)(a)-(c). That definition should be read to the jury at this point if consent is at issue. See Wis JI-Criminal 948.

7. When appropriate add: "or is aware that his conduct is practically certain to cause that result." See § 939.23(4) and Wis JI-Criminal 923B.

8. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee has concluded that this shorter version is appropriate for most cases. The complete, traditional, statement is found at Wis JI-Criminal 923A.

9. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty are set forth in § 943.50(4):

- if the value of the property does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of the property exceeds $10,000, the offense is a Class G felony.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for Class I and Class H felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

10. Section 943.50(1)(b), as created by Chapter 270, Laws of 1981, provides a definition of "value" for the purposes of "retail theft" cases:

> (b) "Value of merchandise" means:
>
> 1. For property of the merchant, the value of the property; or
> 2. For merchandise held for resale, the merchant's stated price of the merchandise or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales devise to reflect less than the merchant's stated price, the difference between the merchant's stated price of the merchandise and the altered price.

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1498C THEFT OF SERVICES — § 943.50(1r)

Statutory Definition of the Crime

Theft of services, as defined in § 943.50(1r) of the Criminal Code of Wisconsin, is committed by one who, having obtained a service from a service provider, absconds and intentionally fails or refuses to pay for the service and does so without the service provider's consent and with intent to deprive the service provider permanently of the full price of the service.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained a service from a service provider.

   "Service provider" means a merchant who provides a service to retail customers without a written contract with the expectation that the service will be paid for by the customer upon completion of the service.[2]

2. The defendant intentionally absconded without paying for the service.

   "Intentionally absconded" means that the defendant left with the mental purpose to avoid paying for the service.[3]

3. The service provider did not consent to the defendant leaving without paying for the service.

4. The defendant intended to deprive the service provider permanently of the full price of the service.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY THEFT OF SERVICES IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE SERVICE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[4]

Determining Value

If you find the defendant guilty, answer the following question:

("Was the value of the service more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the service more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the service more than $500?"

Answer: "yes" or "no.")

["Value" means the price that the service provider stated for the service before the service was provided.][5]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the service was more than the amount stated in the question.]

COMMENT

Wis JI-Criminal 1498C was originally published by the Committee in 2012 and revised in 2019. This revision was approved in December 2019; it adds to the comment.

The crime of "theft of services" was created by 2011 Wisconsin Act 110 [effective date: December 21, 2011]. Act 110 added subsection (1r) to § 943.50, which is now titled: "Retail theft; theft of services."

As with other retail theft violations, the basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. The instruction provides for a jury finding of the amount for felony cases. See footnote 4 and the accompanying text. The amount distinguishing misdemeanors from felonies was reduced from $1,500 to $500 by 2011 Wisconsin Act 174.

Act 174 also created ss. 943.50(4m) which provides that "[W]hoever violates sub. (1m) (a), (b), (c), (d), (e), or (f) is guilty of a Class I felony if all of the following apply:

(a) The value of the merchandise does not exceed $500.
(b) The person agree or combines with another to commit the violation.
(c) The person intends to sell the merchandise by means of the Internet."

In State v. Lopez, 2019 WI 101, 389 Wis.2d 156, 936 N.W.2d 125**,** the Wisconsin Supreme Court affirmed the court of appeals decision in State v. Lopez, 2019 WI App 2, 385 Wis.2d 482, 922 N.W.2d 855, which held that the State may charge multiple acts of retail theft as one continuous offense pursuant to § 971.36(3)(a). Nothing in § 971.36(3)(a) indicates that the legislature intended to limit the provision to a specific type or types of theft, therefore the statute is applicable to various types of theft, including retail theft under § 943.50(1m)(a) (e).

1. This statement reorders the statutory language to make it more understandable for the jury; no change in meaning is intended.

2. This is the definition provided in § 943.50(1)(am).

3. The definition of "abscond" is adapted from the one used in Wis JI-Criminal 1461, Fraud on Hotel or Restaurant Keeper. See footnote 5, Wis JI-Criminal 1461. For definition of "intentionally," see Wis JI-Criminal 923A and 923B.

4. The jury must make a finding of the value of the stolen property [or services] if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty are set forth in § 943.50(4):

- if the value of the service does not exceed $500, the offense is a Class A misdemeanor;

- if the value of the service exceeds $500 but not $5,000, the offense is a Class I felony;
- if the value of the service exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of the service exceeds $10,000, the offense is a Class G felony.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for the felony penalties; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

5. This is the definition provided in § 943.50(1)(b)3.

1499 CRIMINAL SLANDER OF TITLE — § 943.60

Statutory Definition of the Crime

Criminal slander of title, as defined in § 943.60 of the Criminal Code of Wisconsin, is committed by a person who submits for filing, docketing, or recording any instrument relating to a security interest in or title to real or personal property, and who knows or should have known that the contents or any part of the contents of the instrument are false, a sham, or frivolous.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements[1] were present.

Elements of the Crime That the State Must Prove

1. The defendant submitted an instrument for (filing) (docketing) (recording) that related to (a security interest[2] in) (title to) real or personal property.

   "Instrument" means a document that appears to have some legal effect.[3]

   ["Real property" means real estate.]

2. The contents or any part of the contents of the instrument were false, a sham, or frivolous.

This requires that, while the instrument may have been represented to be a legal document, it had no proper legal significance either because its contents were false or because it related to no legitimate legal claim, interest, or remedy.[4]

3. The defendant knew or should have known[5] that the contents or any part of the contents of the instrument were false, a sham, or frivolous.

In determining what the defendant should have known, consider what an ordinary, reasonable, and prudent person would have known about the contents of the document under the same or similar circumstances.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of criminal slander of title have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1499 was originally published in 1988 and revised in 1995, and 1998. This revision was approved by the Committee in October 2008 and involved adoption of a new format and nonsubstantive changes to the text.

The following changes were made in § 943.60 by 1997 Wisconsin Act 27 (effective date: October 14, 1997):

(1) the penalty was increased to a Class D felony [changed to a Class I felony by 2001 Wisconsin Act 109];

(2) "financing statement" was added to the list of instruments;

(3) the coverage was expanded to include instruments relating to a security interest in real or personal property; and,

(4) the mental element was changed to refer to "or should have known" that the contents of the instrument are false.

1. The three elements in the instruction are essentially the same as those set forth in State v. Leist, 141 Wis.2d 34, 414 N.W.2d 45 (Ct. App. 1987). However, the Leist summary of the elements included "intentionally" in the first element. See 141 Wis.2d 34 at 36. "Intentionally" is not included in the instruction because it does not appear in the statute defining the crime. Because that issue was not really before the court in Leist, the Committee concluded that the decision did not explicitly hold that "intentionally" does apply to violations of § 943.60.

2. "Security interest" was added to the statute by 1997 Wisconsin Act 27. The term is defined as follows in § 943.84(4): "'Security interest' means an interest in property which secures payment of or other performance of an obligation." Other definitions are provided in §§ 234.907(1)(h), 401.201(37), and 421.301.

3. The definition of "instrument" is based on dictionary definitions of the word. The Committee concluded that in the context of this offense, there was also the connotation of a written document purporting to have legal significance. See, on the latter point, Garner, A Dictionary of Modern Legal Usage, Second Edition, Oxford University Press, 1995. For general definitions, the Committee referred to Black's Law Dictionary and Webster's Third New International Dictionary (Unabridged).

4. The question whether the document was false, a sham, or frivolous must be left for the jury to determine:

> We agree that it is within the province of a trial court to define an element for the jury's enlightenment. In fact, the trial court here did just that when it defined a frivolous document as one "without legal significance." It is not within the province of the trial court, however, to determine as a matter of law that certain facts before the jury fit within the given definition. In that case, the trial court is applying the facts to the law, thus invading the province of the jury.
>
> . . . . We hold that the unambiguous intent of the legislature was to place upon the government the responsibility of convincing the jury that a document is without legal significance.

State v. Leist, 141 Wis.2d 34, 37, 38-39, 414 N.W.2d 45 (Ct. App. 1987), emphasis in original.

The definition of "false, sham, or frivolous" in the instruction is based on the one ("without legal significance") used in Leist, though it was adapted to directly recognize that while the document may purport to have legal significance (and in fact, is often filed precisely because it will have legal effect), it in fact does not have a legitimate legal effect.

5. The alternative "or should have known" was added to § 943.60 by 1997 Wisconsin Act 27.

1500-1529 CRIMES AGAINST SEXUAL MORALITY

[INSTRUCTIONS WITHDRAWN]

1500 Rape – § 944.01

1502 Attempted Rape: Rape Not Charged – §§ 944.01 And 939.32

1503 Attempted Rape as a Lesser Included Offense – §§ 944.01 and 939.32

1520 Sexual Intercourse with a Child – § 944.10

1522 Sexual Intercourse by Male Over Age 18 with a Child (Female Under Age 16 or Age 12) – § 944.10

1525 Indecent Behavior with a Child – § 944.11(1)

1527 Indecent Behavior with a Child – Indecent Liberties with the Privates of a Person Under 18 – § 944.11(2)

1529 Indecent Behavior with a Child – Consent to Use of Private Parts by a Minor – § 944.11(3).

COMMENT

Wis. Stat. §§ 944.01, 944.10, and 944.11 were repealed by Chapter 184, Laws of 1975. Wis JI Criminal 1500, 1502, 1503, 1520, 1522, 1525, 1527, and 1529 dealt with offenses under the repealed statutes and were withdrawn in 1980.

The repealed statutes were originally replaced by § 940.225, which defines sexual assault. See Wis JI Criminal 1200 through 1219 for instructions for offenses under § 940.225. Sexual offenses against children were moved to Chapter 948 in 1989. See Wis JI Criminal 2102, et al.

This note was republished in 1995.

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1504 COMPUTER CRIME — § 943.70(2)(a)1. - 5.

Statutory Definition of the Crime

Computer crime, as defined by § 943.70(2)(a) of the Criminal Code of Wisconsin, is committed by one who willfully, knowingly, and without authorization (modifies) (destroys) (accesses) (takes possession of) (copies) computer data or programs.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (modified) (destroyed) (accessed) (took possession of) (copied) computer data or programs.
2. The defendant had no authorization to (modify) (destroy) (access) (take possession of) (copy) computer data or programs.
3. The defendant acted intentionally.[1]

   This requires that the defendant acted with the purpose of (modifying) (destroying) (accessing) (taking possession of) (copying) computer data or programs. It further requires that the defendant knew that (he) (she) did not have authorization.

[Meaning of "Computer Program"]

["Computer program"[2] means an ordered set of instructions or statements that, when executed by a computer, causes the computer to process data.]

[Meaning of "Computer Data"]

["Computer data"[3] means a representation of information, knowledge, facts, concepts, or instructions that has been prepared or is being prepared in a formalized manner and has been processed, is being processed, or is intended to be processed in a computer system[4] or computer network.[5] Data may be in any form, including computer printouts, magnetic storage media, punched cards, and as stored in the memory of the computer.]

[Meaning of "Computer"]

["Computer"[6] means an electronic device that performs logical, arithmetic, and memory functions by manipulating electronic or magnetic impulses and includes all input, output, processing, storage, computer software,[7] and communications facilities that are connected or related to a computer in a computer system or computer network.]

Deciding About Purpose and Knowledge

You cannot look into a person's mind to find purpose and knowledge. Purpose and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING IF A FACT INCREASING THE PENALTY AS SET FORTH IN § 943.70(2)(b)2., 3g., 3r., or 4. IS ALLEGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT IT IS PRESENT:[8]

[If you find the defendant guilty, you must answer the following question:

["Was the offense committed (to defraud) (to obtain property[9])?"][10]

["Did the offense result in damage valued at more than $2,500?"][11]

["Did the offense cause an interruption or impairment of (governmental operations) (public communication) (transportation) (a supply of water, gas, or other public service)?"][12]

["Did the offense create a situation of unreasonable risk and high probability of death or great bodily harm to another?"][13]

Before you may answer this question "yes," the State must prove by evidence which satisfies you beyond a reasonable doubt that the answer to the question is "yes."

If you are not so satisfied, you must answer the question "no."]

COMMENT

Wis JI-Criminal 1504 was originally published in 1987 and revised in 1995. This revision was approved by the Committee in October 2006 and involved adoption of a new format and nonsubstantive changes to the text.

Wis JI Criminal 1504 is drafted for any of the offenses defined in Sec. 943.70(2)(a)1.-5. Those offenses are all the same except for the verb used. The instruction places the alternative verbs in parentheses. For a violation of § 943.70(2)(a)6., which defines a different type of act – disclosing restricted access codes or other restricted access information to unauthorized persons – see Wis JI Criminal 1505. For violations of § 943.70(3)(a)2., see Wis JI Criminal 1506.

Wisconsin's computer crime statute is apparently based on proposed legislation drafted by the National Association for State Information Systems Standing Committee on Security, Privacy, and Confidentiality (per Drafting File for 1981 Assembly Bill 744, Legislative Reference Bureau). For a general discussion of the statute, see Levy, "Criminal Liability for Computer Offenses and the New Wisconsin Computer Crimes Act," Wisconsin Bar Bulletin, March 1983.

In State v. Corcoran, 186 Wis.2d 616, 522 N.W.2d 226 (Ct. App. 1994), the court rejected constitutional challenges to § 943.70 based on claims of impairment of contract, involuntary servitude, vagueness, and overbreadth. Because it found that the defendant did not have the protected copyright interest he claimed, the court found it unnecessary to decide whether the federal Copyrights Act preempts the enforcement of § 943.70. 186 Wis.2d 616, 628.

1. The instruction substitutes the word "intentionally," which is well defined in the Wisconsin Criminal Code, for the statute's "willfully, knowingly." The meaning of "intentionally," which requires purpose and knowledge, ought to adequately cover the intended meaning of "willfully, knowingly." This is consistent with the approach taken in several cases where Wisconsin appellate courts have interpreted "willfully" as having the same meaning as "intentionally." See, for example, State v. Hurd, 135 Wis.2d 266, 400 N.W.2d 42 (Ct. App. 1986), and State v. Cissell, 127 Wis.2d 205, 378 N.W.2d 691 (1985).

2. This definition is the one provided in § 943.70(1)(c). Use when the case involves a "computer program."

3. This definition is the one provided in § 943.70(1)(f). Use when the case involves "computer data."

4. "Computer system" is defined in § 943.70(1)(e) as "a set of related computer equipment, hardware or software."

5. "Computer network" is defined in § 943.70(1)(b) as "the interconnection of communication lines with a computer through remote terminals or a complex consisting of 2 or more interconnected computers."

6. This is the definition provided in § 943.70(1)(a).

7. "Computer software" is defined in § 943.70(1)(d) as "a set of computer programs, procedures or associated documentation used in the operation of a computer system."

8. The basic penalty for a violation of § 943.70(2) is that of a Class A misdemeanor. But the penalty increases in seriousness if facts identified in § 943.70(2)(b)2.-4. are present. A violation is a Class I felony if the offense is committed to defraud or to obtain property B sub. (2)(b)2. A violation is a Class F felony if the damage is greater than $2,500 B sub. (2)(b)3g. B or if it causes an interruption or impairment of governmental operations or public communication, of transportation, or of a supply of

water, gas, or other public service B sub. (2)(b)3r. B or if the offense creates a situation of unreasonable risk and high probability of death or great bodily harm to another B sub. (2)(b)4.

The instruction suggests handling these penalty-increasing facts by submitting special questions to the jury.

9. "Property," as it applies to this offense, is defined as follows in § 943.70(1)(h):

"Property" means anything of value, including but not limited to financial instruments, information, electronically produced data, computer software and computer programs.

10. See sub. (2)(b)2.

11. See sub. (2)(b)3g.

12. See sub. (2)(b)3r.

13. See sub. (2)(b)4.

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1505 COMPUTER CRIME — § 943.70(2)(a)6.

Statutory Definition of the Crime

Computer crime, as defined by § 943.70(2)(a)6. of the Criminal Code of Wisconsin, is committed by one who willfully, knowingly, and without authorization discloses restricted access codes or other restricted access information to unauthorized persons.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant disclosed restricted access codes or other restricted access information[1] to (name of person).
2. (Name of person) was not authorized to receive the restricted information.
3. The defendant had no authorization to disclose restricted access codes or other restricted access information to (name of person).
4. The defendant acted intentionally.[2]

   This requires that the defendant acted with the purpose of disclosing restricted access codes or other restricted access information to an unauthorized person. It further requires that the defendant knew that (he) (she) did not have authorization and knew that the disclosure was to an unauthorized person.

Deciding About Purpose and Knowledge

You cannot look into a person's mind to find purpose and knowledge. Purpose and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING IF A FACT INCREASING THE PENALTY AS SET FORTH IN § 943.70(2)(b)2., 3g., 3r., or 4. IS ALLEGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT IT IS PRESENT:[3]

[If you find the defendant guilty, you must answer the following question:

["Was the offense committed (to defraud) (to obtain property[4])?"][5]

["Did the offense result in damage valued at more than $2,500?"][6]

["Did the offense cause an interruption or impairment of (governmental operations) (public communication) (transportation) (a supply of water, gas, or other public service)?"][7]

["Did the offense create a situation of unreasonable risk and high probability of death or great bodily harm to another?"][8]

Before you may answer this question "yes," the State must prove by evidence which satisfies you beyond a reasonable doubt that the answer to the question is "yes."

If you are not so satisfied, you must answer the question "no."]

COMMENT

Wis JI-Criminal 1505 was approved by the Committee in October 2006. Non-substantive editorial corrections were approved in October 2008.

Wis JI Criminal 1505 is drafted for a violation of § 943.70(2)(a)6. For any of the offenses defined in Sec. 943.70(2)(a)1. 5. see Wis JI Criminal 1504. For violations of § 943.70(3)(a)2., see Wis JI Criminal 1506.

Wisconsin's computer crime statute is apparently based on proposed legislation drafted by the National Association for State Information Systems Standing Committee on Security, Privacy, and Confidentiality (per Drafting File for 1981 Assembly Bill 744, Legislative Reference Bureau). For a general discussion of the statute, see Levy, "Criminal Liability for Computer Offenses and the New Wisconsin Computer Crimes Act," Wisconsin Bar Bulletin, March 1983.

In State v. Corcoran, 186 Wis.2d 616, 522 N.W.2d 226 (Ct. App. 1994), the court rejected constitutional challenges to § 943.70 based on claims of impairment of contract, involuntary servitude, vagueness, and overbreadth. Because it found that the defendant did not have the protected copyright interest he claimed, the court found it unnecessary to decide whether the federal Copyrights Act preempts the enforcement of § 943.70. 186 Wis.2d 616, 628.

1. The Wisconsin Supreme Court interpreted the phrase "other restricted access information" as "referring to another type of information that is not 'data,' yet is critical to the protection of computers." Burbank Grease Services v. Sokolowski, 2006 WI 103, par. 37, 294 Wis.2d 274, 717 N.W.2d 781. The reference to "data" is to "data" as defined in s. 943.70(1)(f). "A plain reading of terms stated in the alternative leads us to conclude that subd. 6 was meant to prohibit disclosing information that would permit an unauthorized persons to access restricted or confidential information." Par. 38

2. The instruction substitutes the word "intentionally," which is well defined in the Wisconsin Criminal Code, for the statute's "willfully, knowingly." The meaning of "intentionally," which requires purpose and knowledge, ought to adequately cover the intended meaning of "willfully, knowingly." This is consistent with the approach taken in several cases where Wisconsin appellate courts have interpreted "willfully" as having the same meaning as "intentionally." See, for example, State v. Hurd, 135 Wis.2d 266, 400 N.W.2d 42 (Ct. App. 1986), and State v. Cissell, 127 Wis.2d 205, 378 N.W.2d 691 (1985).

3. The basic penalty for a violation of § 943.70(2) is that of a Class A misdemeanor. But the penalty increases in seriousness if facts identified in § 943.70(2)(b)2.-4. are present. A violation is a Class I felony if the offense is committed to defraud or to obtain property – sub. (2)(b)2. A violation is a Class F felony if the damage is greater than $2,500 – sub. (2)(b)3g. – or if it causes an interruption or impairment of governmental operations or public communication, of transportation, or of a supply of

water, gas, or other public service – sub. (2)(b)3r. – or if the offense creates a situation of unreasonable risk and high probability of death or great bodily harm to another – sub. (2)(b)4.

The instruction suggests handling these penalty-increasing facts by submitting special questions to the jury.

4. "Property," as it applies to this offense, is defined as follows in § 943.70(1)(h):

"Property" means anything of value, including but not limited to financial instruments, information, electronically produced data, computer software and computer programs.

5. See sub. (2)(b)2.

6. See sub. (2)(b)3g.

7. See sub. (2)(b)3r.

8. See sub. (2)(b)4.

1506 COMPUTER CRIME — § 943.70(3)(a)2.

Statutory Definition of the Crime

Computer crime, as defined by § 943.70(3)(a)2. of the Criminal Code of Wisconsin, is committed by one who willfully, knowingly, and without authorization (destroys) (uses) (takes) (damages) a computer system or computer network.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (destroyed) (used) (took) (damaged) a computer (system) (network).
2. The defendant had no authorization to (destroy) (use) (take) (damage) the computer (system) (network).
3. The defendant acted intentionally.[1]

   This requires that the defendant acted with the purpose of (destroying) (using) (taking) (damaging) the computer (system) (network). It further requires that the defendant knew that (he) (she) did not have authorization.

[Meaning of "Computer System"]

["Computer system"[2] means a set of related computer equipment, hardware, or software.]

[Meaning of "Computer Network"]

["Computer network"[3] means the interconnection of communication lines with a computer through remote terminals or a complex consisting of 2 or more interconnected computers.

[Meaning of "Computer"]

["Computer"[4] means an electronic device that performs logical, arithmetic, and memory functions by manipulating electronic or magnetic impulses and includes all input, output, processing, storage, computer software,[5] and communications facilities that are connected or related to a computer in a computer system or computer network.]

Deciding About Purpose and Knowledge

You cannot look into a person's mind to find purpose and knowledge. Purpose and knowledge must be found, if found at all, from the defendant=s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING IF A FACT INCREASING THE PENALTY AS SET FORTH IN § 943.70(3)(b)2., 3., or 4. IS ALLEGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT IT IS PRESENT:[6]

[If you find the defendant guilty, you must answer the following question:

["Was the offense committed (to defraud) (to obtain property[7])?"][8]

["Did the offense result in damage valued at more than $2,500?"][9]

["Did the offense create a situation of unreasonable risk and high probability of death or great bodily harm to another?"][10]

Before you may answer this question "yes," the State must prove by evidence which satisfies you beyond a reasonable doubt that the answer to the question is "yes."

If you are not so satisfied, you must answer the question "no."].

COMMENT

Wis JI-Criminal 1506 was originally published in 1987 and revised in 1995. This revision was approved by the Committee in October 2006 and involved adoption of a new format and nonsubstantive changes to the text.

Wis JI Criminal 1506 is drafted for the offenses defined in Sec. 943.70(3)(a)2. For violations of § 943.70(2)(a)2. - 5., see Wis JI Criminal 1506. For a violation of § 943.70(2)(a)6., see Wis JI Criminal 1505.

Wisconsin's computer crime statute is apparently based on proposed legislation drafted by the National Association for State Information Systems Standing Committee on Security, Privacy, and Confidentiality (per Drafting File for 1981 Assembly Bill 744, Legislative Reference Bureau). For a general discussion of the statute, see Levy, "Criminal Liability for Computer Offenses and the New Wisconsin Computer Crimes Act," Wisconsin Bar Bulletin, March 1983.

In State v. Corcoran, 186 Wis.2d 616, 522 N.W.2d 226 (Ct. App. 1994), the court rejected constitutional challenges to § 943.70 based on claims of impairment of contract, involuntary servitude, vagueness, and overbreadth. Because it found that the defendant did not have the protected copyright interest he claimed, the court found it unnecessary to decide whether the federal Copyrights Act preempts the enforcement of § 943.70. 186 Wis.2d 616, 628.

1. The instruction substitutes the word "intentionally," which is well defined in the Wisconsin Criminal Code, for the statute's "willfully, knowingly." The meaning of "intentionally," which requires purpose and knowledge, ought to adequately cover the intended meaning of "willfully, knowingly." This is consistent with the approach taken in several cases where Wisconsin appellate courts have interpreted "willfully" as having the same meaning as "intentionally." See, for example, State v. Hurd, 135 Wis.2d 266, 400 N.W.2d 42 (Ct. App. 1986), and State v. Cissell, 127 Wis.2d 205, 378 N.W.2d 691 (1985).

2. This definition is the one provided in § 943.70(1)(e). Use when the case involves a "computer system."

3. This definition is the one provided in § 943.70(1)(b). Use when the case involves "computer network."

4. This is the definition provided in § 943.70(1)(a).

5. "Computer software" is defined in § 943.70(1)(d) as "a set of computer programs, procedures or associated documentation used in the operation of a computer system."

6. The basic penalty for a violation of § 943.70(3) is that of a Class A misdemeanor. But the penalty increases in seriousness if facts identified in § 943.70(3)(b)2.-4. are present. A violation is a Class I felony if the offense is committed to defraud or to obtain property – sub. (3)(b)2. A violation is a Class H felony if the damage is greater than $2,500 – sub. (2)(b)3. – or if the offense creates a situation of unreasonable risk and high probability of death or great bodily harm to another – sub. (3)(b)4.

The instruction suggests handling these penalty-increasing facts by submitting special questions to the jury.

7. "Property," as it applies to this offense, is defined as follows in § 943.70(1)(h):

> "Property" means anything of value, including but not limited to financial instruments, information, electronically produced data, computer software and computer programs.

8. See sub. (3)(b)2.

9. See sub. (3)(b)3.

10. See sub. (2)(b)4.

1508 CRIMES AGAINST FINANCIAL INSTITUTIONS: §§ 943.80 - 943.92

Subchapter IV, Chapter 943, comprises statutes defining crimes against financial institutions. It was created by 2005 Wisconsin Act 212. Effective date: April 11, 2006.

There are published instructions for four offenses in this subchapter:

JI 1512 Fraud Against A Financial Institution – § 943.82(1)

JI 1470 Transfer Of Encumbered Property – § 943.84

NOTE: This is former § 943.25, renumbered by 2005 Wisconsin Act 212.

JI 1522 Robbery Of A Financial Institution – § 943.87

JI 1524-26 Money Laundering – § 943.895

Most of the other crimes in the subchapter define conduct directed at financial institutions that is also prohibited by general criminal statutes for which there are published instructions.

The following crimes against financial institutions have counterparts in the referenced general criminal statutes:

943.81	Theft from a financial institution	943.20(1)(a) Theft Wis JI-Criminal 1441
943.82(2)	Fraud to obtain another's personal Identifying information	943.201 "Identity theft" Wis JI-Criminal 1458, 1459
943.83	Loan fraud	943.20(1)(a) Theft by fraud Wis JI-Criminal 1453 A & B
943.85	Bribery involving a financial institution	946.10 Bribery of public officers a and employees

		Wis JI-Criminal 1720, 1721, 1723
943.86	Extortion against a financial institution	943.30 Threat to injure or accuse of crime Wis JI-Criminal 1473B

CAUTION: Before using any of the general instructions referenced above, compare carefully the elements of the general crimes and the elements of the financial institution crimes. There are significant differences in some of the crime definitions. Further, a different penalty structure applies to the financial institution crimes. See § 943.91.

There are three crimes against financial institutions for which instructions have not been drafted that do not have counterparts in the general criminal statutes:

943.88 Organizer of financial crimes

943.895 Money laundering

943.89 Mail fraud

943.90 Wire fraud

COMMENT

Wis JI-Criminal 1508 was originally published in 2008. This revision was approved by the Committee in October 2022. It reflects the addition of § 943.895 "money laundering" as created by 2019 Wisconsin Act 161 [effective date: March 5, 2020].

1510 INCEST: SEXUAL INTERCOURSE BETWEEN BLOOD RELATIVES — § 944.06)

INSTRUCTION RENUMBERED C

SEE WIS JI-CRIMINAL 1532

COMMENT

Wis JI-Criminal 1510 was originally published in 1983 and revised in 1989. It was revised and renumbered as Wis JI Criminal 1532 in 2008.

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1512 FRAUD AGAINST A FINANCIAL INSTITUTION — § 943.82(1)

Statutory Definition of the Crime

Fraud against a financial institution, as defined in § 943.82(1) of the Criminal Code of Wisconsin, is committed by one who obtains money, funds, credits, assets, securities, or other property owned by or under the custody or control of a financial institution by means of false pretenses, representations, or promises, or by use of any fraudulent device, scheme, artifice, or monetary instrument.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained (money) (funds) (credits) (assets) (securities) (property) owned by or under the custody or control of a financial institution.[1]

   "Financial institution" means a (bank) (savings bank) (savings and loan association) (trust company) (credit union) (mortgage banker) (mortgage broker)[2] chartered under the laws of this state, another state or territory, or under the laws of the United States.[3]

2. The defendant obtained (specify what was obtained) [4] [by means of false (pretenses) (representations) (promises)] [by use of any fraudulent (device) (scheme) (artifice) (monetary instrument)].[5]

A person obtains (money) (specify what was obtained) [6] [by means of false (pretenses) (representations) (promises)] [by use of any fraudulent (device) (scheme) (artifice) (monetary instrument)] when [they are made] [it is used] with knowledge that [they are] [it is] false and with the intent to obtain money.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1512 was approved by the Committee in October 2008.

This instruction is drafted for violations of § 943.82(1), which is part of Subchapter IV, Chapter 943, created by 2005 Wisconsin Act 212. Effective date: April 11, 2006.

Penalties for violations of § 943.82(1) are provided in § 943.91. Note that the penalties are higher than for similar violations of § 943.2)(1)(d), the general theft by fraud statute.

1. The options in parentheses are those set forth in the offense definition. Choose the option that matches the evidence in the case.

2. The options in parentheses are the most common of the alternatives included in the definition of "financial institution" provided in § 943.80(2). The definition also includes "a company that controls, is controlled by, or is under common control" of the specified institutions. The definition includes cross-references to other definitions for some of the specified institutions:

- bank – §214.01(1)(c)
- savings bank – §214.01(1)(t)

- credit union – §186.01(2)
- mortgage banker – §224.71(3)(a)
- mortgage broker – §224.71(4)(a)

3. Proof of chartered status was an issue in State v. Eady, 2016 WI App 12, 366 Wis.2d 711, 875 N.W.2d 139, which dealt with a violation of § 943.87. In Eady, the court of appeals apparently agreed with the defendant's contention that "chartered" status was an element of the crime, but found that it was established by circumstantial evidence.

4. Use the term selected for the first element.

5. Choose one of the two bracketed alternatives and choose one of the terms in parentheses from the bracket selected.

6. Use the term selected for the first element.

7. The Committee added this statement even though the statute does not specifically provide for it. Section 943.82(1) does not use the word "intentionally," or other "intent terms," as the regular theft by fraud statute does. Compare § 943.20(1)(d): "Obtains title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made."

Section 939.23(1) provides: "When criminal intent is an element of a crime in chs. 939 to 951, such intent is indicated by the term 'intentionally', the phrase 'with intent to', the phrase 'with intent that', or some form of the verbs 'know' or 'believe'." The Committee generally applies the converse of this rule. That is, when one of the "intent terms" is not used, the statute does not require criminal intent as an element of the crime. However, that interpretation may lead to harsh results under § 943.82(1) in that inadvertent minor errors in, for example, a loan application, could be the basis for criminal liability.

In the Committee's judgment, the added statement assures that the "false representation" alternative is treated consistently with the fair implication of the other alternatives in the statute. There are two categories of conduct prohibited by § 943.82(1):

- obtaining funds, etc., "by means of false pretenses, representations, or promises. . ." "Pretense" is defined as "a false appearance or action intended to deceive." American Heritage Dictionary of the English Language, 3rd Ed. (1992). A "false promise" strongly implies a promise made with an intent to deceive. To be consistent, the "false representation" should also be construed to include knowledge that the representation was false and an intent to use it to obtain funds.

- obtaining funds, etc., "by use of any fraudulent device, scheme, artifice, or monetary instrument . . ." Preceding these alternatives with "fraudulent" indicates an intentional act done with intent to obtain funds.

There is a basis in the text of the statute for adding a mental element in that it applies to "one who obtains funds . . . **by means of** false . . . representations . . ." [Emphasis added.] This suggests a connection between the making of a false representation and obtaining the funds. In a roughly similar

situation, appellate courts have required a connection [a "nexus"] between the possession of a dangerous weapon and the underlying crime for purposes of the dangerous weapon penalty enhancer under § 939.63.

See State v. Peete, 185 Wis.2d 4, 517 N.W.2d 149 (1994).

1522 ROBBERY OF A FINANCIAL INSTITUTION — § 943.87

Statutory Definition of the Crime

Robbery of a financial institution, as defined in section 943.87 of the Criminal Code of Wisconsin, is committed by one who by use of force or threat to use imminent force takes from an individual or in the presence of an individual money or property that is owned by or under the custody or control of a financial institution.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name financial institution) was a financial institution.

   "Financial institution" means a (bank) (savings bank) (savings and loan association) (trust company) (credit union) (mortgage banker) (mortgage broker)[1] chartered under the laws of this state, another state or territory, or under the laws of the United States.[2]

2. (Name financial institution) was the owner of or had the custody or control of [money] [property].[3]

   "Owner" means a person in possession of property.[4]

3. The defendant took and carried away[5] [money] [property] from an individual or from the presence[6] of an individual.

4. The defendant acted forcibly.[7]

"Forcibly" means that the defendant [actually used force against (name) with the intent to overcome or prevent (his) (her) physical resistance or physical power of resistance to the taking or carrying away of the property][8] [or] [threatened the imminent use of force against (name) with the intent to compel (name) to submit to the taking or carrying away of the property. "Imminent" means "near at hand" or "on the point of happening"[9]].

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1522 was approved by the Committee in July 2016.

This instruction is drafted for violations of § 943.87, Robbery of a financial institution. The offense definition is similar to that for unarmed robbery under § 943.32(1), but differs in at least one significant way: "intent to steal" is not required. In addition, a violation of § 943.87 is a Class C felony; a violation of § 943.32(1) is a Class E felony.

1. The options in parentheses are the most common of the alternatives included in the definition of "financial institution" provided in § 943.80(2). The definition also includes "a company that controls, is controlled by, or is under common control" of the specified institutions. The definition includes cross-references to other definitions for some of the specified institutions:

- bank – §214.01(1)(c)
- savings bank – §214.01(1)(t)

- credit union – §186.01(2)
- mortgage banker – §224.71(3)(a)
- mortgage broker – §224.71(4)(a)

2. Proof of chartered status was an issue in State v. Eady, 2016 WI App 12, 366 Wis.2d 711, 875 N.W.2d 139. In Eady, the court of appeals apparently agreed with the defendant's contention that "chartered" status was an element of the crime, but found that it was established by circumstantial evidence.

3. "Property" for the purposes of robbery under § 943.32 is the same as "property" for the purposes of theft; which is defined in § 943.20(2)(a). See Baldwin, "Criminal Misappropriations In Wisconsin – Part II," 44 Marq. L. Rev. 430, 450 (1961). The value of the property is immaterial. The Committee concluded that the definition should be carried over to this offense.

4. "The person who has possession of the property" is the definition of owner provided in § 943.32(3). The Committee concluded that the definition should be carried over to this offense.

In State v. Mosely, 102 Wis.2d 636, 307 N.W.2d 200 (1981), a case dealing with robbery under § 943.32, the court held that a person qualifies as an "owner" if his possession of the property is "actual or constructive," citing § 971.33. In Mosely, all employees of a restaurant were held to be "owners" of the restaurant's money kept in an office desk since each had dominion and control over it. As to jewelry and a purse on an office shelf, only the person to whom they actually belonged was an "owner," since only she had any control over or interest in the property.

5. See Wis JI-Criminal 1480, the instruction for armed robbery under § 943.32, footnote 6, pointing out that case law has established that robbery requires "carrying away" – "asportation" is the term used. The Committee concluded that the requirement should be carried over to this offense.

6. When there is a dispute on the facts as to precisely from where the property was taken – the person or the presence of the one in possession – then add this sentence: "It is immaterial whether the property is taken from the person or the presence of the one in possession." "Presence of the owner" means such a proximity to the owner as will enable the defendant when he takes the property to use or threaten the imminent use of force. See Wis JI-Criminal 1480, footnote 7. In certain cases, property may be taken from both the person and the presence of the one in possession. Then the words "or both" should be added at this point.

In State v. Mosely, 102 Wis.2d 636, 307 N.W.2d 200 (1981), the court held that "from his person or presence" did not require that the victim actually be aware of the taking: ". . . where the victim has been intimidated or placed in fear by use or threat of force . . . and the property is taken from an area sufficiently close and under his control that, but for the robber's intimidation or force he could have prevented the taking, the taking is from his "presence" under § 943.32(1); and this conclusion is not defeated by an unawareness of the taking as it occurs." 102 Wis.2d at 649.

7. This paragraph restates the statutory requirement that the defendant act "by force or threat to use imminent force" by phrasing them as alternative ways of satisfying the core requirement that the defendant act "forcibly." This is how the use/threat of force issue is handled for purposes of robbery under

§ 943.32. The Committee concluded that it carried over to this offense. Footnote 13 to Wis JI-Criminal 1480 provides in part:

> The Committee concluded that this properly emphasizes the intent of the statute to require a link between the taking of the property and the defendant's use of force. The Committee concluded that it is not necessary to elect between "use of force" and "threat of imminent force" alternatives, although in the usual case, election would clarify the issue for the jury and should be done where possible. In support of the proposition that election is not necessary, see Manson v. State, and Cheers v. State, cited in note 1, supra. As to jury unanimity generally, also see State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981), and Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); compare United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

8. It is robbery under § 943.32 if force is used to accomplish the "carrying away" of the property as well as the "taking." State v. Grady, 93 Wis.2d 1, 286 N.W.2d 607 (Ct. App. 1979). The Committee concluded the same rule applies here.

9. The definition of "imminent" is adapted from Black's Law Dictionary, p. 884 (4th Edition, 1951).

1524 MONEY LAUNDERING — § 943.895(2)(a)1 - 2.

Statutory Definition of the Crime

Money laundering, as defined by § 943.895(2)(a) of the Criminal Code of Wisconsin, is committed by one who knowingly [(receives or acquires) (conducts a transaction involving)] [(directs) (plans) (organizes) (initiates) (finances) (manages) (supervises) (facilitates) the transportation or transfer of] proceeds that the person knows are derived from unlawful activity.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly [(received or acquired) (conducted a transaction[1] involving)] [(directed) (planned) (organized) (initiated) (financed) (managed) (supervised) (facilitated) the transportation or transfer of] proceeds.

   "Proceeds" means property or anything of value acquired or derived directly or indirectly from, produced through, realized through, or caused by an act or omission.[2]

2. The proceeds were derived from unlawful activity.[3]

   ADD THE FOLLOWING IF THE ALLEGED UNLAWFUL ACTIVITY INVOLVES THE COMMISSION OF A CRIME AND A

UNIFORM INSTRUCTION FOR THAT UNLAWFUL ACTIVITY EXISTS.

[The State alleges that the proceeds were derived from the unlawful activity of (insert unlawful activity). The State must prove by evidence which satisfies you beyond a reasonable doubt that the proceeds were derived from (insert unlawful activity).

(Insert unlawful activity) is committed by one who

LIST THE ELEMENTS OF THE UNLAWFUL ACTIVITY AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.][4]

3. The defendant knew that the proceeds were derived from unlawful activity.

Knowledge that the proceeds were derived from unlawful activity does not require knowledge of the specific nature of the unlawful activity involved.[5]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY MONEY LAUNDERING IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[6]

[Determining Value]

[If you find the defendant guilty, you must answer the following question:

("Was the value of the proceeds involved in the transaction more $100,000?"

Answer: "yes" or "no.")

("Was the value of the proceeds involved in the transaction more than $10,000?"

Answer "yes" or "no.")

("Was the value of the proceeds involved in the transaction more than $5,000?"

Answer "yes" or "no.")

("Was the value of the proceeds involved in the transaction more than $2,500?"

Answer "yes" or "no.")

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the proceeds was more than the amount stated in the question.

If you are not so satisfied, you must answer the question "no."]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE VIOLATION "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 943.895(2)(c).[7]

[In determining the value of the total proceeds involved in the transaction, you may consider all violations that you are satisfied beyond a reasonable doubt were committed by the defendant pursuant to a single intent and design.]

COMMENT

Wis JI-Criminal 1524 was approved by the Committee in October 2022.

Section 943.895(2)(a) was created by 2019 Wisconsin Act 161 [effective date: March 5, 2020].

Wis JI-Criminal 1524 was drafted for the offense defined in Sec. 943.895(2)(a)1 -2. For violations of § 943.895(2)(a)3., see Wis JI-Criminal 1525. For a violation of § 943.895(2)(a)4., see Wis JI-Criminal 1526.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the total proceeds involved in the transaction exceeds specific amounts. See footnote 4, below.

A financial institution that has complied with all applicable money laundering reporting requirements under federal law is not criminally liable under § 943.895(4).

1. Sec. 943.895(1)(a) provides that "'transaction' has the meaning given in § 946.79(1)(f)."

2. This is the definition of "proceeds" provided in § 943.895(1)(a).

3. The statute does not define "unlawful activity," and a review of the legislative history indicates that there was a decision not to do so. If a definition is requested, guidance as to its meaning may be gained from the Black's Law Dictionary (2nd ed.) definition, which in part defines the term as follows:

"An act that is contrary to or violates a law that exists."

The Committee concluded that the term clearly includes criminal conduct, and if criminal conduct is alleged as the unlawful activity the crime should be defined for the jury.

4. The Committee recommends that a complete listing of the elements of the "unlawful activity" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)]. In the absence of a uniform instruction, the court must develop and present the elements of the alleged unlawful activity.

5. See § 943.895(2)(b).

6. The jury must make a finding of the value of the proceeds if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The penalties provided in subs. (3)(a) through (e) are as follows:

- if the total value of the proceeds involved in the transaction does not exceed $2,500, the offense is a Class A misdemeanor;
- if the total value of the proceeds involved in the transaction exceeds $2,500 but not $5,000, the

offense is a Class I felony;
- if the total value of the proceeds involved in the transaction exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the total value of the proceeds involved in the transaction exceeds $10,000, the offense is a Class G felony; and,
- if the total value of the proceeds involved in the transaction exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

7. Section 943.895(2)(c) sets forth the rule relating to the pleading and prosecution of money laundering cases. This subsection allows the prosecution of more than one violation as a single crime if "the violations were pursuant to a single intent and design."

The material in the instruction addresses the situation defined in subsec. (2)(c): more than one violation, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 943.895(2)(c). But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 943.895(2)(c), so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis. 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

1525 MONEY LAUNDERING — § 943.895(2)(a)3.

Statutory Definition of the Crime

Money laundering, as defined by § 943.895(2)(a)3 of the Criminal Code of Wisconsin, is committed by one who knowingly (gives) (sells) (transfers) (trades) (invests) (conceals) (transports) or otherwise makes available proceeds that the person knows are intended to be used for the purpose of committing or furthering the commission of unlawful activity.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly (gave) (sold) (transferred) (traded) (invested) (concealed) (transported) or otherwise made proceeds available.

   "Proceeds" means property or anything of value acquired or derived directly or indirectly from, produced through, realized through, or caused by an act or omission.[1]

2. The proceeds were derived from unlawful activity.[2]

   ADD THE FOLLOWING IF THE ALLEGED UNLAWFUL ACTIVITY INVOLVES THE COMMISSION OF A CRIME AND A UNIFORM INSTRUCTION FOR THAT UNLAWFUL ACTIVITY EXISTS.

[The State alleges that the proceeds were derived from the unlawful activity of (insert unlawful activity). The State must prove by evidence which satisfies you beyond a reasonable doubt that the proceeds were derived from (insert unlawful activity).

(Insert unlawful activity) is committed by one who

LIST THE ELEMENTS OF THE UNLAWFUL ACTIVITY AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.][3]

3. The defendant knew that the proceeds were intended to be used for committing or furthering unlawful activity.

Knowledge that the proceeds are derived from unlawful activity does not require knowledge of the specific nature of the unlawful activity involved.[4]

Deciding About Purpose and Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY MONEY LAUNDERING IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[5]

[Determining Value]

[If you find the defendant guilty, you must answer the following question:

("Was the value of the proceeds involved in the transaction more $100,000?"

Answer: "yes" or "no.")

("Was the value of the proceeds involved in the transaction more than $10,000?"

Answer "yes" or "no.")

("Was the value of the proceeds involved in the transaction more than $5,000?"

Answer "yes" or "no.")

("Was the value of the proceeds involved in the transaction more than $2,500?"

Answer "yes" or "no.")

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the proceeds was more than the amount stated in the question.

If you are not so satisfied, you must answer the question "no."]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE VIOLATION "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 943.895(2)(c).[6]

[In determining the value of the total proceeds involved in the transaction, you may consider all violations that you are satisfied beyond a reasonable doubt were committed by the defendant pursuant to a single intent and design.]

COMMENT

Wis JI-Criminal 1525 was approved by the Committee in October 2022.

Section 943.895(2)(a) was created by 2019 Wisconsin Act 161 [effective date: March 5, 2020].

Wis JI-Criminal 1525 is drafted for the offense defined in Sec. 943.895(2)(a)3. For violations of § 943.895(2)(a)1-2., see Wis JI-Criminal 1524. For a violation of § 943.895(2)(a)4., see Wis JI-Criminal 1526.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the total proceeds involved in the transaction exceeds specific amounts. See footnote 2, below.

A financial institution that has complied with all applicable money laundering reporting requirements under federal law is not criminally liable under § 943.895(4).

1. This is the definition of "proceeds" provided in § 943.895(1)(a).

2. The statute does not define "unlawful activity," and a review of the legislative history indicates that there was a decision not to do so. If a definition is requested, guidance as to its meaning may be gained from the Black's Law Dictionary (2nd ed.) definition, which in part defines the term as follows:

"An act that is contrary to or violates a law that exists."

The Committee concluded that the term clearly includes criminal conduct, and if criminal conduct is alleged as the unlawful activity the crime should be defined for the jury.

3. The Committee recommends that a complete listing of the elements of the "unlawful activity" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)]. In the absence of a uniform instruction, the court must develop and present the elements of the alleged unlawful activity.

4. See § 943.895(2)(b).

5. The jury must make a finding of the value of the proceeds if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The penalties provided in subs. (3)(a) through (e) are as follows:

- if the total value of the proceeds involved in the transaction does not exceed $2,500, the offense is a Class A misdemeanor;
- if the total value of the proceeds involved in the transaction exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the total value of the proceeds involved in the transaction exceeds $5,000 but not $10,000, the

offense is a Class H felony;
- if the total value of the proceeds involved in the transaction exceeds $10,000, the offense is a Class G felony; and,
- if the total value of the proceeds involved in the transaction exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

6. Section 943.895(2)(c) sets forth the rule relating to the pleading and prosecution of money laundering cases. This subsection allows the prosecution of more than one violation as a single crime if "the violations were pursuant to a single intent and design."

The material in the instruction addresses the situation defined in subsec. (2)(c): more than one violation, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 943.895(2)(c). But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 943.895(2)(c), so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis. 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.
>
> 71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

1526 MONEY LAUNDERING — § 943.895(2)(a)4.

Statutory Definition of the Crime

Money laundering, as defined by § 943.895(2)(a)4 of the Criminal Code of Wisconsin, is committed by one who knowingly conducts a transaction designed in whole or in part to [(conceal) (disguise) the nature, location, source, ownership, or control of proceeds obtained through unlawful activity] [avoid a transaction reporting requirement under federal law], and the person knows the proceeds are derived from unlawful activity.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly conducted a transaction[1] involving proceeds.

   "Proceeds" means property or anything of value acquired or derived directly or indirectly from, produced through, realized through, or caused by an act or omission.[2]

2. The proceeds were derived from unlawful activity.[3]

   ADD THE FOLLOWING IF THE ALLEGED UNLAWFUL ACTIVITY INVOLVES A COMMISSION OF A CRIME AND THE UNIFORM INSTRUCTION FOR THAT UNLAWFUL ACTIVITY EXISTS.

   [The State alleges that the proceeds were derived from the unlawful activity of

(insert unlawful activity). The State must prove by evidence which satisfies you beyond a reasonable doubt that the proceeds were derived from (insert unlawful activity).

(Insert unlawful activity) is committed by one who

LIST THE ELEMENTS OF THE UNLAWFUL ACTIVITY AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.][4]

3. The defendant knew that the proceeds were derived from unlawful activity.

Knowledge that the proceeds were derived from unlawful activity does not require knowledge of the specific nature of the unlawful activity involved.[5]

4. The transaction made by the defendant was designed in whole or in part to [(conceal) (disguise) the nature, location, source, ownership, or control of the proceeds obtained through unlawful activity.] [avoid a transaction reporting requirement under federal law.]

Deciding About Purpose and Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY MONEY LAUNDERING IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[6]

[Determining Value]

[If you find the defendant guilty, you must answer the following question:

("Was the value of the proceeds involved in the transaction more $100,000?"

Answer: "yes" or "no.")

("Was the value of the proceeds involved in the transaction more than $10,000?"

Answer "yes" or "no.")

("Was the value of the proceeds involved in the transaction more than $5,000?"

Answer "yes" or "no.")

("Was the value of the proceeds involved in the transaction more than $2,500?"

Answer "yes" or "no.")

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the proceeds was more than the amount stated in the question.

If you are not so satisfied, you must answer the question "no."]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE VIOLATION "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 943.895(2)(c).[7]

[In determining the value of the total proceeds involved in the transaction, you may consider all violations that you are satisfied beyond a reasonable doubt were committed by

the defendant pursuant to a single intent and design.]

COMMENT

Wis JI-Criminal 1526 was approved by the Committee in October 2022.

Section 943.895(2)(a) was created by 2019 Wisconsin Act 161 [effective date: March 5, 2020].

Wis JI-Criminal 1526 is drafted for the offense defined in Sec. 943.895(2)(a)4. For violations of § 943.895(2)(a)1-2., see Wis JI-Criminal 1524. For a violation of § 943.895(2)(a)3., see Wis JI-Criminal 1525.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the total proceeds involved in the transaction exceeds specific amounts. See footnote 4, below.

A financial institution that has complied with all applicable money laundering reporting requirements under federal law is not criminally liable under § 943.895(4).

1. Sec. 943.895(1)(a) provides that "'transaction' has the meaning given in § 946.79(1)(f)."

2. This is the definition of "proceeds" provided in § 943.895(1)(a).

3. The statute does not define "unlawful activity," and a review of the legislative history indicates that there was a decision not to do so. If a definition is requested, guidance as to its meaning may be gained from the Black's Law Dictionary (2nd ed.) definition, which in part defines the term as follows:

"An act that is contrary to or violates a law that exists."

The Committee concluded that the term clearly includes criminal conduct, and if criminal conduct is alleged as the unlawful activity the crime should be defined for the jury.

4. The Committee recommends that a complete listing of the elements of the "unlawful activity" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)]. In the absence of a uniform instruction, the court must develop and present the elements of the alleged unlawful activity.

5. See § 943.895(2)(b).

6. The jury must make a finding of the value of the proceeds if the felony offense is charged

and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The penalties provided in subs. (3)(a) through (e) are as follows:

- if the total value of the proceeds involved in the transaction does not exceed $2,500, the offense is a Class A misdemeanor;
- if the total value of the proceeds involved in the transaction exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the total value of the proceeds involved in the transaction exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the total value of the proceeds involved in the transaction exceeds $10,000, the offense is a Class G felony; and,
- if the total value of the proceeds involved in the transaction exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

7. Section 943.895(2)(c) sets forth the rule relating to the pleading and prosecution of money laundering cases. This subsection allows the prosecution of more than one violation as a single crime if "the violations were pursuant to a single intent and design."

The material in the instruction addresses the situation defined in subsec. (2)(c): more than one violation, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 943.895(2)(c). But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 943.895(2)(c), so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

Since variances between the allegations and the proof may be beyond the control of the state, see:

People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis. 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

1530 ENTICING CHILDREN FOR IMMORAL PURPOSES — § 944.12)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1530 was originally published in 1966 and was revised in 1979, 1980, and 1983. It was withdrawn in 1989.

This instruction is withdrawn because the statute with which it deals was repealed by 1987 Wisconsin Act 332, effective July 1, 1989. That Act created a new offense with the same name but differently defined. See§ 948.07 and Wis JI Criminal 2134.

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1532 INCEST: SEXUAL INTERCOURSE BETWEEN BLOOD RELATIVES — § 944.06)

Statutory Definition of the Crime

Incest, as defined in § 944.06 of the Criminal Code of Wisconsin, is committed by one who has nonmarital sexual intercourse with a person (he) (she) knows is a blood relative and such relative is in fact related in a degree within which the marriage of the parties is prohibited by the law of this state.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse with (name of victim).

REFER TO WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.[1]

2. The defendant knew that (name of victim) was related to (him) (her) by blood.[2]

3. (Name of victim) was related to the defendant in a degree of kinship closer than second cousin.[3]

Deciding About Knowledge

You cannot look into a person's mind to find out knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and

circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1510 in 1983 and was revised in 1989. It was renumbered Wis JI-Criminal 1532 and revised in 2007. It was revised again in 2008, 2010, and 2021. The 2010 revision changed the definition of "sexual intercourse" as described in footnote 1. The 2021 revision added the table showing degrees of kinship found at s. 990.001(16) of the Wisconsin Statutes to the comment. This revision was approved by the Committee in December 2023; it added the paragraph "Deciding About Knowledge" to the main text of the instruction.

Wis JI-Criminal 1510 was originally drafted to apply to incest offenses involving father and daughter. The 2007 revision revised it to apply generally to all "blood relatives" as provided by the statute.

Incest offenses involving children as victims are covered by a separate statute – see § 948.06, Incest With A Child, and Wis JI-Criminal 2130 and 2131.

1. 2009 Wisconsin Act 13 amended§ 944.06 to provide that "sexual intercourse" has the meaning provided in § 948.01(6). Wis JI-Criminal 2101B provides definitions for the alternatives presented by the statutory definition.

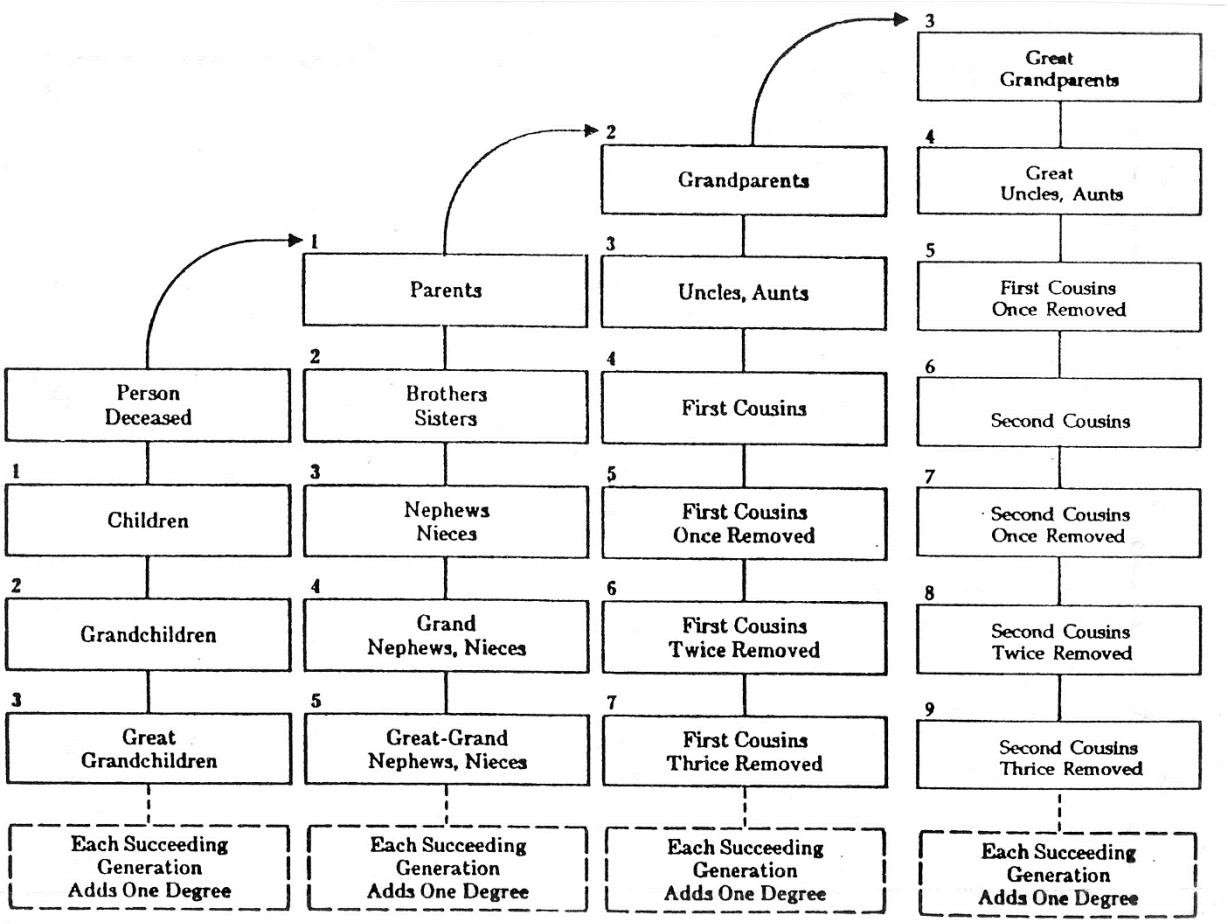
2. The knowledge requirement is included in the statutory definition of the offense. Note that the knowledge required is that the defendant and the victim are "related." The statute further requires that they be related "in a degree closer than second cousin," but the knowledge requirement apparently does not extend to the degree of relation.

3. This restates the requirement of the statutory definition that refers to "related in a degree within which the marriage of the parties is prohibited by the law of this state." Section 765.03 provides that "[n]o marriage shall be contracted . . . between persons who are nearer of kin than second cousins . . ." "Second cousin" is defined in Black's Law Dictionary (7th Edition) as follows: "A person related to another by descending from the same great-grandfather or great-grandmother." For a chart showing the degrees of kinship see § 990.001(16) and the Comment of Wis JI-Criminal 2130.

Degree of Kinship

The following chart is based on the table showing degrees of kinship found at s. 990.001(16) of the

Wisconsin Statutes. The column at the far right has been added to show how the various degrees of kinship compare to second cousins. The added column is based on the chart appearing at page 48, Decedents' Estates and Trusts, by Ritchie, Alford, and Effland, 4th Edition, © 1971, Foundation Press. Note that the degree of kinship of second cousins is indicated by the number "6." Thus, all those degrees indicated by the number "5" or less are "related in a degree closer than second cousin" and fall within the prohibition of s. 948.096(1).



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1535 PUBLIC FORNICATION: SEXUAL INTERCOURSE IN PUBLIC — § 944.15

Statutory Definition of the Crime

Public fornication, as defined in § 944.15 of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse in public.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse with (name other person).

   "Sexual intercourse" means the penetration of the penis of the male into the genital organ of the female. Only vulvar penetration, however slight, is required. Emission of semen is not required.[1]

2. The alleged act of sexual intercourse took place in public.

   "In public" means in a place where other people are present or where other people can observe the act.[2]

3. The defendant knew or had reason to know the alleged act was observable by or in the presence of others.[3]

Deciding About Knowledge

You cannot look into a person's mind to find out knowledge. Knowledge must be found, if

found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1535 was originally published in 1983 and revised in 1996, 2008, and 2016. The 2008 revision involved adoption of a new format and nonsubstantive changes to the text. This revision was approved by the Committee in December 2023; it added the paragraph "Deciding About Knowledge" to the main text of the instruction.

This instruction is for the only remaining offense defined by § 944.15(2) sexual intercourse in public. An offense formerly covered by the same statute, sexual intercourse with a person 16 years old or older but younger than 18, is now defined in § 948.09, see Wis JI Criminal 2138.

Section 944.15 was created in roughly its present form by 1983 Wisconsin Act 17. The statute was revised by 1987 Wisconsin Act 332 to remove the offense involving minors to § 948.09. The statute reads as follows:

> 944.15 Public fornication.
> (1) In this section, "in public" means in a place where or in a manner such that the person knows or has reason to know that his or her conduct is observable by or in the presence of persons other than the person with whom he or she is having sexual intercourse.
> (2) Whoever has sexual intercourse in public is guilty of a Class A misdemeanor.

1. The definition of "sexual intercourse" is adapted from that found in § 939.22(36). The definition of "sexual intercourse" in § 940.225(5)(b) applies only to sexual assaults under § 940.225; it does not apply to crimes defined in Chapter 944.

2. The definition of "in public" found in subsec. (1) of § 944.15, see above, appears to create two elements of this offense. One element is that the act take place in the presence of others or where observable by others. The second element is that the defendant know or have reason to know that the act is in the presence of or observable by others. Rather than lump the knowledge requirement in with the definition of "in public," the Committee decided it was preferable to treat it as a separate element.

The definition of "in public" used in the instruction is adapted from the statutory definition. No change in meaning is intended.

3. See note 2, supra.

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1536 FORNICATION: SEXUAL INTERCOURSE WITH A PERSON YOUNGER THAN 18 YEARS — § 944.15)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1536 was originally published in 1983. It was withdrawn in 1989.

This instruction was withdrawn because the statute with which it deals was repealed by 1987 Wisconsin Act 332, effective July 1, 1989. Essentially the same offense was recreated as § 948.09. See Wis JI Criminal 2138.

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1537 SEXUAL GRATIFICATION IN PUBLIC — § 944.17(2)

Statutory Definition of the Crime

Sexual gratification, as defined in § 944.17(2) of the Criminal Code of Wisconsin, is committed by one who commits an act of sexual gratification in public involving the sex organ of one person and the mouth or anus of another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant committed an act of sexual gratification with (name other person) involving the sex organ of one person and the (mouth) (anus) of another.[1]
2. The alleged act of sexual gratification took place in public.

   "In public" means in a place where other people are present or where other people can observe the act.[2]
3. The defendant knew or had reason to know the alleged act was observable by or in the presence of others.[3]

Deciding About Knowledge

You cannot look into a person's mind to find out knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and

circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1537 was originally published in 1985 and revised in 1996, 1998, 2008, and 2020. This revision was approved by the Committee in December 2023; it added the paragraph "Deciding About Knowledge" to the main text of the instruction. Additionally, the statutory citation within the document was updated in accordance with the changes made by the 2019 Wisconsin Act 162.

This instruction is for the offense defined by § 944.17 — sexual gratification in public. Offenses involving acts of sexual gratification with a person younger than 18 were formerly covered by § 944.17(2)(b). That subsection was repealed by 1989 Wisconsin Act 332, which created Chapter 948, Crimes Against Children. Conduct formerly prohibited by § 944.17(2)(b) involving children under the age of 16 is likely to constitute sexual assault of a child under § 948.02. Offenses involving sexual gratification with an animal were formerly covered by § 944.17(2)(c) and (d). Those subsections were repealed by 2019 Wisconsin Act 162 [effective: March 5, 2020].

Section 944.17 was extensively revised by 1983 Wisconsin Act 17. Before the 1983 revision, § 944.17 (1981 82 Stat.) was titled "Sexual Perversion."

Section 944.17(3) was created by 1995 Wisconsin Act 165 to read: "Subsection (2) does not apply to a mother's breast-feeding of her child." [Effective date: April 6, 1996.]

1. "Sexual gratification" is not defined in the instruction or in the Wisconsin Criminal Code. Guidance as to its meaning may be gained from the context in which it is used in other statutes. See, for example, §§ 940.225 and 944.31.

For the purposes of this offense, it should not be relevant for whose "sexual gratification" the act was committed. Committing the act "in public" is the key fact making the conduct criminal.

2. "In public" is defined as follows in subsec. (1) of 944.17:

(1) In this section, "in public" means in a place where or in a manner such that the person knows or has reason to know that his or her conduct is observable by or in the presence of persons other than the person with whom he or she is having sexual gratification.

This definition appears to create two separate elements. One element is that the act take place in the presence of others or where observable by others. The second element is that the defendant know or have reason to know that the act is in the presence of or observable by others. Rather than lump the knowledge requirement in with the definition of "in public," the Committee decided it was preferable to treat it as a separate element.

The definition of "in public" used in the instruction is adapted from the statutory definition. No change in meaning is intended.

3. See note 2, supra.

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1538 SEXUAL GRATIFICATION WITH A PERSON YOUNGER THAN 18 YEARS — § 944.17(2)(b)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1538 was originally published in 1985. It was withdrawn in 1989.

This instruction was withdrawn because the statute with which it deals was repealed by 1987 Wisconsin Act 332, effective July 1, 1989. The conduct formerly covered by this offense is covered by § 948.09, Sexual Intercourse With A Child Age 16 Or Older. The definition of "sexual intercourse" applicable to that offense is broad enough to include all conduct falling within former § 944.17(2)(b). See Wis JI Criminal 2138.

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1544A LEWD AND LASCIVIOUS BEHAVIOR: INDECENT ACT OF SEXUAL GRATIFICATION WITH ANOTHER — § 944.20(1)(a)

Statutory Definition of the Crime

Lewd and lascivious behavior, as defined in § 944.20(1)(a) of the Criminal Code of Wisconsin, is committed by one who commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant committed an act of indecent sexual gratification[1].

   This requires that the defendant's conduct offends the sense of decency of the community. It does not include conduct that is generally tolerated by the community at large, but that might disturb an overly sensitive person.

2. The defendant committed the act with another person.

3. The defendant committed the act with knowledge they were in the presence of others.

   This requires that the defendant knew or believed the act occurred in the presence of other persons.[2]

Deciding About Knowledge

You cannot look into a person's mind to find out knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1544A was approved by the Committee in December 2023.

This instruction is for the offense defined by § 944.20(1) — lewd and lascivious behavior — committing an indecent act of sexual gratification with another with knowledge that they are in the presence of others. For lewd and lascivious behavior — exposing genitals or pubic area, See Wis JI Criminal 1544B.

1. "Sexual gratification" is not defined in the instruction or in the Wisconsin Criminal Code. Guidance as to its meaning may be gained from the context in which it is used in other statutes. See, for example, §§ 940.225 and 944.31.

For the purposes of this offense, it should not be relevant for whose "sexual gratification" the act was committed.

2. This definition is adapted from the one provided for "in public" provided in §§ 944.15(1) and 944.17(1). Though that definition is not directly applicable to § 944.20, the Committee concluded that it was appropriate to refer to statutes in pari materia to define the common term.

1544B LEWD AND LASCIVIOUS BEHAVIOR: EXPOSING GENITALS OR PUBIC AREA — § 944.20(1)(b)

Statutory Definition of the Crime

Lewd and lascivious behavior, as defined in § 944.20(1)(b) of the Criminal Code of Wisconsin, is committed by one who publicly and indecently exposes genitals or pubic area.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant exposed (genitals) (pubic area).

   "Expose" means to exhibit to the view of another person or persons.

2. The defendant exposed (genitals) (pubic area) publicly, that is, not in a hidden manner, but open to view.

   ["Publicly" means in such a place or manner that the person knows or has reason to know that the conduct is observable by or in the presence of other persons.][1]

3. The defendant exposed (genitals) (pubic area) indecently.

   IF THE COURT FINDS IT IS NECESSARY TO DEFINE "INDECENTLY," ADD THE FOLLOWING

[This requires that the defendant's conduct offends the sense of decency of the community. It does not include conduct that is generally tolerated by the community at large but that might disturb an overly sensitive person.][2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1544B was originally published as Wis JI-Criminal 1544 in 1987 and revised in 1989, 1998, and 2007. The instruction was renumbered and republished without substantive change in December 2023.

This instruction was revised in 1989 to reflect a change made in § 944.20 by 1989 Wisconsin Act 31, (section 2828m). The terms "genitals or pubic area" were substituted for "sex organ." The effective date of the change was August 9, 1989.

Section 944.20(2) was created by 1995 Wisconsin Act 165 to read: "Subsection (1) does not apply to a mother's breast-feeding of her child." [Effective date: April 6, 1996.]

1. The definition of "publicly" is adapted from the one provided for "in public" in §§ 944.15(1) and 944.17(1). Though that definition is not directly applicable to § 944.20, the Committee concluded that it was appropriate to refer to statutes in pari materia to define the common term.

2. The Committee concluded that a dictionary definition of "indecently" would not be helpful. If description of what "indecently" requires is believed to be necessary, the Committee concluded that the jury should be guided in applying a community standard. The material suggested is adapted from the description of "otherwise disorderly conduct" in Wis JI-Criminal 1900.

1545 LEWD AND LASCIVIOUS BEHAVIOR BY COHABITATION WITH A PERSON NOT HIS SPOUSE

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1545 was originally published in 1967. It was withdrawn by the Committee in June 1983. This note was republished in 1995.

This instruction was withdrawn because the statute with which it dealt, § 944.20(3), was repealed by 1983 Wisconsin Act 17. The effective date of the repeal was May 12, 1983.

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1550-1553 COMMITMENT AND CONTINUANCE OF CONTROL UNDER THE SEX CRIMES LAW

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1550 1553 dealt with commitment and continuance of control under the Sex Crimes Law, Chapter 975, Wis. Stats. They were withdrawn by the Committee in 1982. This note was republished in 1995.

Chapter 184, Laws of 1979, modified Chapter 975 with the effect that new commitments and new continuance proceedings could not be initiated after July 1, 1980.

Instructions for commitment as a "sexual predator" are found at Wis JI Criminal 2501-2503, Commitment as a Sexually Violent Person Under Chapter 980, Wis. Stats.

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1560 PROSTITUTION: NONMARITAL SEXUAL INTERCOURSE — § 944.30(1)

Statutory Definition of the Crime

Prostitution, as defined in § 944.30(1) of the Criminal Code of Wisconsin, is committed by a person who intentionally has, offers to have, or requests to have nonmarital sexual intercourse for anything of value.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (had) (offered to have) (requested to have) nonmarital sexual intercourse[1] for anything of value.
2. The defendant acted intentionally.

"Intentionally" means that the defendant acted with the purpose to have nonmarital sexual intercourse for anything of value.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 1560 was originally published in 1986 and revised in 1995 and 2006. This revision was approved by the Committee in July 2015; it involved adoption of a new footnote 1.

Wis JI Criminal 1560 is drafted for a violation of subsec. (1) of § 944.30, an offense involving sexual intercourse. Other subsections prohibit acts of sexual gratification (subsec. (2)), being an inmate of a place of prostitution (subsec. (3)), acts of masturbation (subsec (4)), and acts of sexual contact (subsec. (5)). Uniform instructions have not been prepared for violations of subsecs. (2) (5); it is assumed that Wis JI Criminal 1560 can easily be modified for those cases.

1. If a definition of sexual intercourse is necessary, the following definition provided in § 939.22(36) is suggested:

Sexual intercourse requires only vulvar penetration and does not require emission.

The definition of "sexual intercourse" in § 940.225(5)(c) applies only to sexual assaults under § 940.225; it does not apply to crimes defined in Chapter 944. Likewise, the definition of "sexual intercourse" in § 948.01(6) applies only to offenses in Chapter 948.

2. The statute as originally enacted used the term "money." It was amended to refer to "anything of value" by Chapter 252, Laws of 1969, along with other changes intended to address the "suppression of organized crime."

1561 PROSTITUTION: ACT OF SEXUAL GRATIFICATION — § 944.30(2)

Statutory Definition of the Crime

Prostitution, as defined in § 944.30(2) of the Criminal Code of Wisconsin, is committed by a person who intentionally commits, offers to commit, or requests to commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another for anything of value.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (committed) (offered to commit) (requested to commit) an act of sexual gratification involving the sex organ of one person and the mouth or anus of another for anything of value.
2. The defendant acted intentionally.

   "Intentionally" means that the defendant acted with the purpose to commit the act of sexual gratification for anything of value.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1561 was approved by the Committee in August 2005.

Wis JI Criminal 1561 is drafted for a violation of subsec. (2) of § 944.30, an offense involving an act of sexual gratification. Other subsections prohibit acts of sexual intercourse (subsec. (1) – see Wis JI Criminal 1560), being an inmate of a place of prostitution (subsec. (3)), acts of masturbation (subsec (4)), and acts of sexual contact (subsec. (5)). Uniform instructions have not been prepared for violations of subsecs. (3) (5); it is assumed that Wis JI Criminal 1560 or 1561 can easily be modified for those cases.

1564 PATRONIZING PROSTITUTES — § 944.31

Statutory Definition of the Crime

Section 944.31 of the Criminal Code of Wisconsin is violated by one who enters or remains in any place of prostitution with intent to have nonmarital sexual intercourse or to commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another, masturbation or sexual contact with a prostitute.

State's Burden of Proof

Before the defendant may be found guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant entered or remained in a place of prostitution.

   "Place of prostitution" means any place where persons habitually engage in or offer to engage in nonmarital acts of sexual intercourse or sexual contact for anything of value.[1]

2. The defendant entered or remained in the place with intent to (have nonmarital sexual intercourse) (commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another) (commit an act of masturbation) (to have sexual contact) with a prostitute.

A prostitute is a person who intentionally engages in sexual intercourse or other sexual acts for anything of value.[2]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1564 was approved by the Committee in February 2018.

Wis JI Criminal 1564 is drafted for a violation of § 944.31, created by 2017 Wisconsin Act 131 [effective date: December 10, 2017]. First and second violations are Class A misdemeanors; third and subsequent violations are Class I felonies. In the Committee's judgment, the fact that the case involves a third or subsequent violation need not be submitted to the jury, even though it increases the penalty. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

1. "Place of prostitution" is defined in § 939.22(24) as "a place where a person habitually engages, in public or in private, in nonmarital acts of sexual intercourse, sexual gratification . . ., masturbation, or sexual contact for anything of value." The Committee concluded that referring to "acts of sexual intercourse or sexual contact" would make the instruction more understandable to the jury.

If further explanation is required, see § 939.22(36) for a definition of "sexual intercourse" and § 939.22(34) for a definition of "sexual contact."

While the "state must . . . prove 'habitual use' of the premises [as a place of prostitution] beyond a reasonable doubt . . . [it] need not be established by specifically proving a number of incidents beyond a

reasonable doubt. Rather, what is required is that evidence be adduced at trial from which the jury can infer 'habitual use.'" Johnson v. State, 76 Wis.2d 672, 678, 251 N.W.2d 834 (1977).

"Habitual" is defined as "customary . . . resorted to on a regular basis." Webster's New Collegiate Dictionary.

2. The definition of "prostitute" is the one used in Wis JI-Criminal 1568A, which is in turn derived from the definition of "practice prostitution" in Wis JI-Criminal 1562.

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1566 SOLICITING TO PRACTICE PROSTITUTION — § 944.32)

Statutory Definition of the Crime

Soliciting to practice prostitution, as defined in § 944.32 of the Criminal Code of Wisconsin, is committed by one who intentionally solicits or causes any person to practice prostitution.

State's Burden of Proof

Before the defendant may be found guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant solicited or caused a person to practice prostitution.

   "To solicit" means to command, encourage, or request another person to engage in specific conduct that constitutes the practice of prostitution.[1]

   "To practice" prostitution means intentionally engaging in sexual intercourse[2] or other sexual acts for anything of value on an ongoing basis.[3]

2. The defendant acted intentionally.

   This requires that the defendant engaged in solicitation intending that the crime of prostitution be committed.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1566 was originally published in 1986 and was revised in 1989 and 2006. This revision was approved by the Committee in July 2015; it involved adoption of a new footnote 2.

Wis JI Criminal 1566 is drafted for a violation of § 944.32, which prohibits soliciting the practice of prostitution. Also see § 948.08, Soliciting A Child For Prostitution, and Wis JI Criminal 2136.

Section 944.32 begins: "Except as provided in s. 948.08 . . ." This is not a reference to a real exception to the coverage of the statute; it refers to a separate statute that prohibits soliciting a child for prostitution. The Committee concluded that it need not be addressed in the instruction.

Section 944.32 applies to a person who solicits two other people to engage in acts of sexual intercourse for money on multiple occasions. The defendant need not be a direct participant in the sexual acts. State v. Kittilstad, 231 Wis.2d 245, 603 N.W.2d 732 (1999).

1. The definition of "solicit" is adapted from the one used in § 5.02(1), Model Penal Code.

2. If a definition of sexual intercourse is necessary, the following definition provided in § 939.22(36) is suggested:

Sexual intercourse requires only vulvar penetration and does not require emission.

The definition of "sexual intercourse" in § 940.225(5)(c) applies only to sexual assaults under § 940.225; it does not apply to crimes defined in Chapter 944. Likewise, the definition of "sexual intercourse" in § 948.01(6) applies only to offenses in Chapter 948.

3. In State v. Johnson, 108 Wis.2d 703, 324 N.W.2d 447 (Ct. App. 1982), the court distinguishes the offense defined by § 944.32 from other prostitution crimes where "solicitation" may be involved:

> Section 944.32, Stats., therefore, proscribes solicitation of ongoing criminal conduct. By contrast, sec. 944.30, Stats., punishes a single act of prostitution, and sec. 939.30, Stats., punishes solicitation of a single felony. It is reasonable for the state to punish solicitation of repeated acts of prostitution more severely than it punishes one act of prostitution.

The definition of "practice prostitution" in the instruction attempts to explain this distinction.

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1568 PANDERING — § 944.33(2)

Statutory Definition of the Crime

Pandering, as defined in § 944.33(2) of the Criminal Code of Wisconsin, is committed by a person who, with intent to facilitate another in [having nonmarital sexual intercourse] [or] [committing an act of (sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another) (or) (masturbation) (or) (sexual contact)] with a prostitute, directs or transports the person to a prostitute or directs or transports a prostitute to the person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [directed or transported a person to a prostitute] [or] [directed or transported a prostitute to a person].

   A prostitute is a person who intentionally engages in sexual intercourse[1] or other sexual acts for anything of value.[2]

2. The defendant [directed or transported a person to a prostitute] [or] [directed or transported a prostitute to a person] with intent to facilitate the person in [having nonmarital intercourse] [or] [committing an act of (sexual gratification involving

the sex organ of one person and the mouth or anus of another) (or) (masturbation) (or) (sexual contact[3])] with a prostitute.

"With intent to facilitate" requires that the defendant acted with the mental purpose[4] to assist the person in (use the term selected for element 2.) .[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1568 was originally published in 2012. This revision was approved by the Committee in March 2015; it reflects changes made by 2013 Wisconsin Act 362.

Wis JI Criminal 1568 is drafted for a violation of sub. (2) of § 944.33 which are Class A misdemeanors. Before 2013 Wisconsin Act 362 [effective date: April 25, 2014] sub. (2) of § 944.33 provided that the offense was a Class F felony if the defendant received compensation from the earnings of the prostitute. Act 362 revised that provision and moved it to § 940.302(2)(c), the statute addressing human trafficking. See Wis JI Criminal 1276.

1. If a definition of sexual intercourse is necessary, the following is suggested.

> Sexual intercourse means the penetration of the penis of the male into the genital organ of the female. Only vulvar penetration, however slight, is required. Emission of semen is not required.

The above is based on the definition provided in § 939.22(36). The definition of "sexual intercourse" in § 940.225(5)(c) applies only to sexual assaults under § 940.225; it does not apply to crimes defined in Chapter 944.

2. This is based on part of the definition of "practice prostitution" in Wis JI-Criminal 1562.

3. If a definition of sexual contact is necessary, see § 939.22(34) and Wis JI-Criminal 934. The definition of "sexual contact" in § 940.225(5)(b) applies only to sexual assaults under § 940.225; it does not apply to crimes defined in Chapter 944.

4. "With intent to" requires either mental purpose to cause the result specified or being aware that his or her conduct is practically certain to cause that result. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B for elaboration on the two alternatives.

5. Select the term used in element 2. For example: "'With intent to facilitate' requires that the defendant acted with the mental purpose to assist the person in having nonmarital sexual intercourse with a prostitute."

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1568A PANDERING — § 944.33(1)

Statutory Definition of the Crime

Pandering, as defined in § 944.33(1) of the Criminal Code of Wisconsin, is committed by a person who solicits another to [have nonmarital sexual intercourse] [or] [to commit an act of (sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another) (or) (masturbation) (or) (sexual contact)] with a person the actor knows is a prostitute.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant solicited (name of person) to [have nonmarital sexual intercourse] [or] [to commit an act of (sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another) (or) (masturbation) (or) (sexual contact)] with (name of alleged prostitute).

   "Solicit" means to command, encourage, or request another person to engage in conduct that constitutes a crime.[1]

2. The defendant knew that (name of alleged prostitute) was a prostitute.

A prostitute is a person who intentionally engages in sexual intercourse[2] or other sexual acts for anything of value.[3]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1568A was approved by the Committee in July 2015.

Wis JI Criminal 1568A is drafted for a violation of § 944.33(1) – a Class A misdemeanor. For violations of § 944.33(2) see Wis JI Criminal 1568B.

1. The definition of "solicit" is the one used in Wis JI-Criminal 1566, Soliciting To Practice Prostitution, which is based on the definition used in § 5.02(1), Model Penal Code.

2. If a definition of sexual intercourse is necessary, the following definition provided in § 939.22(36) is suggested:

Sexual intercourse requires only vulvar penetration and does not require emission.

The definition of "sexual intercourse" in § 940.225(5)(c) applies only to sexual assaults under § 940.225; it does not apply to crimes defined in Chapter 944. Likewise, the definition of "sexual intercourse" in § 948.01(6) applies only to offenses in Chapter 948.

3. This is based on part of the definition of "practice prostitution" in Wis JI-Criminal 1562.

1568B PANDERING — § 944.33(2)

Statutory Definition of the Crime

Pandering, as defined in § 944.33(2) of the Criminal Code of Wisconsin, is committed by a person who, with intent to facilitate another in [having nonmarital sexual intercourse] [or] [committing an act of (sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another) (or) (masturbation) (or) (sexual contact)] with a prostitute, directs or transports the person to a prostitute or directs or transports a prostitute to the person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [directed or transported a person to a prostitute] [or] [directed or transported a prostitute to a person].

   A prostitute is a person who intentionally engages in sexual intercourse[1] or other sexual acts for anything of value.[2]

2. The defendant [directed or transported a person to a prostitute] [or] [directed or transported a prostitute to a person] with intent to facilitate the person in [having nonmarital intercourse] [or] [committing an act of (sexual gratification involving

the sex organ of one person and the mouth or anus of another) (or) (masturbation) (or) (sexual contact[3])] with a prostitute.

"With intent to facilitate" requires that the defendant acted with the mental purpose[4] to assist the person in (use the term selected for element 2.) .[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1568 was originally published in 2012 and revised in 2015 to reflect changes made by 2013 Wisconsin Act 362. This revision was approved by the Committee in 2016; it renumbered the instruction Wis JI Criminal 1568B and revised the Comment.

Wis JI Criminal 1568B is drafted for violations of sub. (2) of § 944.33, which are Class A misdemeanors. Before 2013 Wisconsin Act 362 [effective date: April 25, 2014] sub. (2) of § 944.33 provided that the offense was a Class F felony if the defendant received compensation from the earnings of the prostitute. Act 362 revised that provision and moved it to § 940.302(2)(c), the statute addressing human trafficking. See Wis JI Criminal 1276.

For violations of sub. (1) of § 944.33, see Wis JI Criminal 1568A.

1. The definition of "solicit" is the one used in Wis JI-Criminal 1566, Soliciting To Practice Prostitution which is based on the definition used in § 5.02(1), Model Penal Code.

2. This is based on part of the definition of "practice prostitution" in Wis JI-Criminal 1562.

3. If a definition of sexual contact is necessary, see § 939.22(34) and Wis JI-Criminal 934. The definition of "sexual contact" in § 940.225(5)(b) applies only to sexual assaults under § 940.225; it does not apply to crimes defined in Chapter 944.

4. "With intent to" requires either mental purpose to cause the result specified or being aware that his or her conduct is practically certain to cause that result. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B for elaboration on the two alternatives.

5. Select the term used in element 2. For example: "'With intent to facilitate' requires that the defendant acted with the mental purpose to assist the person in having nonmarital sexual intercourse with a prostitute."

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1570 KEEPING A PLACE OF PROSTITUTION — § 944.34(1)

Statutory Definition of the Crime

Section 944.34(1) of the Criminal Code of Wisconsin is violated by one who intentionally keeps a place of prostitution.

State's Burden of Proof

Before the defendant may be found guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of place) was a place of prostitution.

   "Place of prostitution" means any place where persons habitually engage in or offer to engage in nonmarital acts of sexual intercourse or sexual contact for anything of value.[1]

2. The defendant was a keeper of a place of prostitution.

   To keep a place of prostitution is to exercise management or control over its operation.[2] This element does not require that the defendant owned (name of place), but it does require that the defendant maintained management or control of the place in question.

3. The defendant intentionally kept a place of prostitution.

This requires that the defendant acted with the purpose to keep a place of prostitution and knew that (name of place) was a place of prostitution.[3]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1570 was originally published in 1990. This revision involved adoption of a new format and was approved by the Committee in August 2005.

Wis JI Criminal 1570 is drafted for a violation of subsec. (1) of § 944.34, which applies to one who "keeps" a place of prostitution. Subsection (2) of the statute applies to one who "grants the use or allows the continued use" of a place of prostitution. See Wis JI Criminal 1571.

1. "Place of prostitution" is defined in § 939.22(24) as "a place where a person habitually engages, in public or in private, in nonmarital acts of sexual intercourse, sexual gratification . . ., masturbation, or sexual contact for anything of value." The Committee concluded that referring to "acts of sexual intercourse or sexual contact" would make the instruction more understandable to the jury.

If further explanation is required, see § 939.22(36) for a definition of "sexual intercourse" and § 939.22(34) for a definition of "sexual contact."

While the "state must . . . prove 'habitual use' of the premises [as a place of prostitution] beyond a reasonable doubt . . . [it] need not be established by specifically proving a number of incidents beyond a reasonable doubt. Rather, what is required is that evidence be adduced at trial from which the jury can infer 'habitual use.'" Johnson v. State, 76 Wis.2d 672, 678, 251 N.W.2d 834 (1977).

"Habitual" is defined as "customary . . . resorted to on a regular basis." Webster's New Collegiate Dictionary.

2. "Keep" is not defined in statutes or case law. The Committee concluded that it implies the exercise of management or control over the operation of the place.

3. Section 939.23(3) provides that when the word "intentionally" is used, it requires knowledge of all the facts which make the conduct criminal and which appear after the word "intentionally" in the statute.

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1571 GRANTING THE USE[1] OF A PLACE AS A PLACE OF PROSTITUTION — § 944.34(2)

Statutory Definition of the Crime

Section 944.34(2) of the Criminal Code of Wisconsin is violated by one who intentionally grants the use of a place as a place of prostitution.

State's Burden of Proof

Before the defendant may be found guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of place) was a place of prostitution.

   "Place of prostitution" means any place where persons habitually engage in or offer to engage in nonmarital acts of sexual intercourse or sexual contact for anything of value.[2]

2. The defendant granted the use of (name of place) as a place of prostitution.

   To grant the use of a place of prostitution means to give permission to another person to use a place for prostitution.[3]

3. The defendant intentionally granted the use of (name of place) as a place of prostitution.

   This requires that the defendant acted with the purpose to grant the use of a place of prostitution and knew that (name of place) was a place of prostitution.[4]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1571 was originally published in 1990. This revision involved adoption of a new format and was approved by the Committee in August 2005.

Wis JI Criminal 1571 is drafted for a violation of subsec. (2) of § 944.34, which applies to one who "grants the use or allows the continued use" of a place of prostitution. Subsection (1) of the statute applies to one who "keeps" a place of prostitution. See Wis JI Criminal 1570.

1. Subsection (2) of § 944.34 prohibits "granting the use" or "allowing the continued use" of a place of prostitution. This instruction is drafted for "granting the use" because the Committee concluded that would be the more common charge.

The Wisconsin Supreme Court discussed the difference between the two alternatives in Johnson v. State, 76 Wis.2d 672, 251 N.W.2d 834 (1977). The court concluded that "grants" requires "affirmative approval of the use of the premises for the purpose of prostitution on a single occasion," while "allows the continued use" requires "intentional but passive acquiescence or toleration of the use of the premises for prostitution purposes on more than one occasion." 76 Wis.2d at 677.

2. "Place of prostitution" is defined in § 939.22(24) as "a place where a person habitually engages, in public or in private, in nonmarital acts of sexual intercourse, sexual gratification . . ., masturbation, or sexual contact for anything of value." The Committee concluded that referring to "acts of sexual intercourse or sexual contact" would make the instruction more understandable to the jury.

If further explanation is required, see § 939.22(36) for a definition of "sexual intercourse" and § 939.22(34) for a definition of "sexual contact."

While the "state must . . . prove 'habitual use' of the premises [as a place of prostitution] beyond a reasonable doubt . . . [it] need not be established by specifically proving a number of incidents beyond a reasonable doubt. Rather, what is required is that evidence be adduced at trial from which the jury can infer 'habitual use.'" Johnson v. State, 76 Wis.2d 672, 678, 251 N.W.2d 834 (1977).

"Habitual" is defined as "customary . . . resorted to on a regular basis." Webster's New Collegiate Dictionary.

3. The definition of "grant" is based on the discussion of that term in Johnson v. State, 76 Wis.2d 672, 251 N.W.2d 834 (1977). See note 1, supra.

4. Section 939.23(3) provides that when the word "intentionally" is used, it requires knowledge of all the facts which make the conduct criminal and which appear after the word "intentionally" in the statute.

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1601 COMMERCIAL GAMBLING: OPERATING A GAMBLING PLACE FOR GAIN — § 945.03(1m)(a)

Statutory Definition of the Crime

Commercial gambling, as defined in § 945.03(1m)(a) of the Criminal Code of Wisconsin, is committed by one who intentionally operates a gambling place for gain.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. (Name of place) was a gambling place.

   A "gambling place" is any building[1] or any room within it, one of whose principal uses is any of the following: making and settling bets; receiving, holding, recording, or forwarding bets or offers to bet.[2]

2. The defendant intentionally operated a gambling place for gain.

   "Intentionally" requires that the defendant had the mental purpose[3] to operate a gambling place and to operate that gambling place for gain.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1601 was originally published in 1985 and revised in 1995. This revision was approved by the Committee in March 2002 and involved adoption of a new format and nonsubstantive editorial changes.

1. The instruction uses the term "building," but the statutory definition covers other areas as well. Section 945.01(4) defines "gambling place" as follows:

> (4) Gambling place. (a) A gambling place is any building or tent, any vehicle (whether self-propelled or not) or any room within any of them, one of whose principal uses is any of the following: making and settling bets; receiving, holding, recording or forwarding bets or offers to bet; conducting lotteries; or playing gambling machines.
> (am) "Gambling place" does not include a place where bingo or raffle is conducted under ch. 563, where a lottery is conducted under ch. 565, or where a race is conducted under ch. 562.

Prior gambling activity is necessary to establish a "gambling place." State v. Nixa, 121 Wis.2d 160, 360 N.W.2d 52 (Ct. App. 1984). Also see State v. Dahlk, 111 Wis.2d 287, 330 N.W.2d 611 (Ct. App. 1983), and State v. Morrissy, 25 Wis.2d 638, 131 N.W.2d 366 (1964).

2. "Bet" is defined as follows in § 945.01(1):

> (1) Bet. A bet is a bargain in which the parties agree that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value specified in the agreement. But a bet does not include:
> (a) Bona fide business transactions which are valid under the law of contracts including without limitation:
> 1. Contracts for the purchase or sale at a future date of securities or other commodities, and
> 2. Agreements to compensate for loss caused by the happening of the chance including without limitation contracts of indemnity or guaranty and life or health and accident insurance;
> (b) Offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength, or endurance or to the bona fide owners of animals or vehicles entered in such contest;
> (cm) Participation in bingo or a raffle conducted under Ch. 563.
> (d) Pari mutuel wagering subject to Ch. 562.
> (e) Participation in a lottery conducted under Ch. 565.

3. The instruction uses the "mental purpose" alternative for the definition of "intentionally." A second alternative is that the defendant be "aware that his or her conduct is practically certain to cause" the result. See § 939.23(3) and Wis JI-Criminal 923.1 and 923.2.

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1602 COMMERCIAL GAMBLING: RECEIVING A BET FOR GAIN — § 945.03(1m)(b)

Statutory Definition of the Crime

Commercial gambling, as defined in § 945.03(1m)(b) of the Criminal Code of Wisconsin, is committed by one who intentionally receives a bet for gain.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally received a bet.

   A bet is an agreement in which one stands to win or lose something of value dependent upon chance, even though accompanied by some skill.[1]

2. The defendant intentionally received a bet for gain.

   "Intentionally" requires that the defendant had the mental purpose[2] to receive a bet and to receive that bet for gain.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1602 was originally published in 1985 and revised in 1995. This revision was approved by the Committee in March 2002 and involved adoption of a new format and nonsubstantive editorial changes.

This instruction is drafted for violations of § 945.03(1m)(b) involving "receiving" a bet. The statute also applies to "recording" or "forwarding" a bet.

1. The definition of "bet" is adapted from the lengthy statutory definition found in § 945.01(1). See note 2, Wis JI-Criminal 1601.

2. The instruction uses the "mental purpose" alternative for the definition of "intentionally." A second alternative is that the defendant be "aware that his or her conduct is practically certain to cause" the result. See § 939.23(3) and Wis JI-Criminal 923.1 and 923.2.

1605 COMMERCIAL GAMBLING: SETTING UP OR COLLECTING THE PROCEEDS OF A GAMBLING MACHINE — § 945.03(1m)(e)

Statutory Definition of the Crime

Commercial gambling, as defined in § 945.03(1m)(e) of the Criminal Code of Wisconsin, is committed by one who intentionally [sets up a gambling machine for use for the purpose of gambling] [or] [collects the proceeds of a gambling machine].[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [two] [three][2] elements are present.

Elements of the Crime That the State Must Prove

1. The machine in question was a gambling machine.

   A "gambling machine" is a device which for a consideration[3] affords the player an opportunity to obtain something of value, the award of which is determined by chance, even though accompanied by some skill and whether or not the prize is automatically paid by the machine.[4]

   [The phrase "chance, even though accompanied by some skill," means that chance must predominate over skill in determining the outcome of the game.][5]

   ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

["Gambling machine" does not include an amusement device if it rewards the player exclusively with one or more nonredeemable free replays for achieving certain scores and does not change the ratio or record the number of the free replays so awarded.][6]

2. The defendant intentionally [set up the gambling machine for use for the purpose of gambling] [or] [collected the proceeds of the gambling machine].[7]

This means that the defendant knew that the machine was being used for gambling and knew that the proceeds were derived from gambling.[8]

ADD THE FOLLOWING AS A THIRD ELEMENT IF THE CHARGE INDICATES OR THERE IS EVIDENCE THAT THE ALLEGED VIOLATION OCCURRED ON LICENSED PREMISES.[9]

[3. The defendant intentionally (set up for the purpose of gambling) (or) (collected the proceeds of) six or more gambling machines.]

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that [both] [all three][10] elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1605 was originally published in 1996 and revised in 1999, 2000, and 2002. The 2002 revision adapted the instruction to the new format and added the third element for certain types of cases. This revision was approved by the Committee in October 2022; it added to the comment.

This instruction is drafted for violations of § 945.03(1m)(e). It is set up to include either two or three elements, depending on whether the alleged violations took place on a licensed premises. The two element version should be used for offenses on non-licensed premises; setting up or collecting the proceeds of a single machine violates the statute in that situation. The three element version should be used either when the charge identifies the site as a licensed premises or evidence is introduced to that effect. The penalty provisions in § 945.03(2m) punish offenses on Class "B" or "Class B" premises as forfeitures if one to five machines are involved. The criminal penalty applies only if six or more machines are involved.

1. The bracketed alternative supported by the evidence should be selected. If the evidence supports both alternatives, both may be submitted, joined with "or." The Committee concluded that jury agreement on one alternative or the other is not required; the alternatives are believed to be like the "use or threat of force" required for robbery – see Manson v. State, 101 Wis.2d 413, 304 N.W.2d 729 (1981); Cheers v. State, 102 Wis.2d 367, 306 N.W.2d 676 (1981).

2. The instruction is set up to include either two or three elements, depending on whether the alleged violations took place on a licensed premises. The two element version should be used for offenses on non-licensed premises; setting up or collecting the proceeds of a single machine violates the statute in that situation. The three element version should be used either when the charge identifies the site as a licensed premises or evidence is introduced to that effect. The penalty provisions in § 945.03(2m) punish offenses on Class "B" or "Class B" premises as forfeitures if one to five machines are involved. The criminal penalty applies only if six or more machines are involved.

3. Wis. Stat. § 945.01(3) does not further define the term "consideration." However, the Wisconsin Supreme Court has applied the definition provided in Black's Law Dictionary (11th ed. 2019), and concluded that it is consistent with the meaning of consideration in common law. See Quick Charge Kiosk LLC v. Kaul, 2020 WI 54, ¶18, 392 Wis. 2d 35, 944 N.W.2d 598. See also, DOR v. River City Refuse Removal, Inc., 2007 WI 27, ¶¶50-51, 299 Wis. 2d 561, 729 N.W.2d 396, for a discussion on various formulations Wisconsin courts have utilized to define consideration.

4. This is based on the definition provided in § 945.01(3)(a). The Committee concluded that "device" should be substituted for the statutory term "contrivance." Subsection (3)(b) provides three exceptions. The instruction addresses one of the exceptions – an amusement device rewarding the player exclusively with free replays. See text at note 5.

One of the bases for the defendant's challenge to the definition of "gambling machine" used in State v. Hahn, 221 Wis.2d 670, 586 N.W.2d 5 (Ct. App. 1998) [Hahn II], was to the word "contrivance," which

is not used in this instruction. Hahn II held that the portion of the statutory definition referring to "affording an opportunity . . ." and "automatically paid by the machine . . ." is not ambiguous. Relying on the words' usual meanings, the court held that "this portion of the statute requires that the machine, or contrivance, has a role in providing the opportunity to obtain something of value, but that something of value need not be provided by the machine alone without external influence or control." 221 Wis.2d 670, 682.

A machine is not exempt from this definition simply because it has uses other than illegal gambling. As the Wisconsin Supreme Court noted in Quick Charge Kiosk LLC, "Wisconsin Stat. § 945.01(3) does not define a gambling machine as a contrivance whose sole use is gambling. It says the opposite, namely, that a 'gambling machine is a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance.' (emphasis added)." Quick Charge Kiosk LLC, supra, at ¶21. Therefore, the fact that a machine has non-gambling features, such as cellphone charging capabilities or limited free use functions, does not negate the fact that the results of its games are determined completely by chance. The same reasoning applies to machines that offer preview features that allow players the ability to determine in advance the outcome of any particular game. See JD Prime Games Kiosk, LLC v. DOR, 2022 WI App 6, ¶¶14-16, 400 Wis.2d 499, 969 N.W.2d 778.

5. The material in brackets is based on the state's requested instruction in State v. Hahn, 203 Wis.2d 450, 453, fn. 3, 553 N.W.2d 292 (Ct. App. 1996). It was not expressly approved or disapproved by the court in Hahn, but the Committee concluded it was a correct interpretation of the phrase "determined by chance, even though accompanied by some skill."

In Hahn II, the court explicitly adopted the equivalent of the bracketed material: the phrase means that "chance rather than skill must be the dominant factor controlling the award." 221 Wis.2d 670, 679. The court relied in part on the interpretation of similar language in the lottery statute, as interpreted in State v. Dahlk, 111 Wis.2d 287, 330 N.W.2d 611 (Ct. App. 1983).

6. This is based on the exception to the definition of "gambling machine" set forth in § 945.01(3)(b)2. It was discussed in State v. Hahn, 203 Wis.2d 450, 553 N.W.2d 292 (Ct. App. 1996). Arcade games, such as pinball machines and Pac Man fall under this exception. See JD Prime Games Kiosk, LLC v. DOR, 2022 WI App 6, ¶15, 400 Wis.2d 499, 969 N.W.2d 778.

7. See note 1, supra.

8. This is based on the holding in State v. Hahn, 203 Wis.2d 450, 455, 553 N.W.2d 292 (Ct. App. 1996).

9. The third element should be added for violations that took place on a licensed premises. In some cases, the charge may indicate as much; in others the issue may be raised by the evidence. The penalty provisions in § 945.03(2m) punish offenses on Class "B" or "Class B" premises as forfeitures if one to five machines are involved. The criminal penalty then applies only if six or more machines are involved.

The statute sets this up by providing, in sub. (2m), an exception to the generally applicable criminal penalty. The Committee concluded that this should be handled in the same manner as similar statutory exceptions. For example, the offense of carrying concealed weapon applies to "any person except a peace officer." § 941.23. The Wisconsin Supreme Court has concluded that whether the defendant is a peace

officer, and thus exempted from the statute, is an issue that must be raised by the defendant as an affirmative defense. See, State v. Williamson, 58 Wis.2d 514, 524, 206 N.W.2d 613 (1973), and the discussion in footnote 1, Wis JI-Criminal 1335.

Factual disputes about the applicability of the exception for licensed premises are likely to be determined by pretrial motion. The Committee concluded that it is not an issue at trial until there is some evidence of the existence of a valid license. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the exception is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981). This requires, in this situation, proof that six or more machines are involved.

10. See note 2, supra.

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1607 COMMERCIAL GAMBLING: USING WIRE COMMUNICATION TO PLACE A BET — § 945.03(1m)(g)

Statutory Definition of the Crime

Commercial gambling, as defined in § 945.03(1m)(g) of the Criminal Code of Wisconsin, is committed by one who intentionally, for gain, uses a wire communication facility for the transmission or receipt of information assisting in the placing of a bet on a sporting event.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements are present.

Elements of the Crime That the State Must Prove

1. The defendant used a wire communication facility[1] for the transmission or receipt of information.
2. The information transmitted or received assisted the placing of a bet on a sporting event.

   A bet is an agreement in which one stands to win or lose something of value dependent upon chance even though accompanied by some skill.[2]

   A sporting event is any contest of skill, speed, strength, or endurance.
3. The defendant acted intentionally, for gain.

"Intentionally" requires that the defendant had the mental purpose[3] to use a wire communication facility to transmit or receive information to assist in the placing of a bet on a sporting event for gain.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1607 was originally published in 1985 and revised in 1995. This revision was approved by the Committee in March 2002 and involved adoption of a new format and nonsubstantive editorial changes.

1. The statutory definition of "wire communication facility" is found in § 945.01(6) and reads as follows:

> "Wire communication facility" means any and all instrumentalities, personnel and services, and among other things the receipt, forwarding or delivery of communications used or useful in the transmission of writings, signs, pictures and sounds of all kinds by means of wire, cable, microwave or other like connection between the points of origin and reception of such transmission.

2. The definition of "bet" is adapted from the lengthy statutory definition found in § 945.01(1). See note 2, Wis JI-Criminal 1601.

3. The instruction uses the "mental purpose" alternative for the definition of "intentionally." A second alternative is that the defendant be "aware that his or her conduct is practically certain to cause" the result. See § 939.23(3) and Wis JI-Criminal 923.1 and 923.2.

1610 PERMITTING REAL ESTATE TO BE USED AS A GAMBLING PLACE — § 945.04(1m)(a)

Statutory Definition of the Crime

A person violates § 945.04(1m)(a) of the Criminal Code of Wisconsin if the person intentionally permits any real estate owned or occupied by that person, or under that person's control, to be used as a gambling place.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant owned, occupied, or controlled real estate.
2. The real estate was used as a gambling place.[1]
3. The defendant intentionally permitted the real estate to be used as a gambling place.

   This requires that the defendant acted with the purpose to permit the use of the real estate as a gambling place and knew that it was being used in such a way.[2]

Meaning of "Gambling Place"

A gambling place is any building or any room within it, one of whose principal uses is any of the following: making and settling bets or receiving, holding, recording or forwarding bets or offers to bet.[3]

Meaning of "Principal Use"

"A principal use" means one of the more important uses of the real estate. It need not be the only use or even 50% of the total usage of the real estate. No mathematical definition can be given. The use of any place or room at any given time may determine its principal use at that time, but for purposes of this offense, that use must be considered in light of the overall or other uses of the place or room. In order to constitute one of the principal uses, the usage must be more than incidental. You must view the character of the alleged gambling place over a sufficient period of time to determine whether gambling constituted one of the principal uses.[4]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1610 was originally published in 1990. This revision was approved by the Committee in October 2008 and involved adoption of a new format and nonsubstantive changes to the text.

1. This offense requires the use of real estate as a "gambling place"; proof of use for "commercial gambling" is not required, even though "commercial gambling" appears in the title to § 945.04. "'Gambling place' is defined by § 945.01(4) without reference to 'commercial gambling.' Because § 945.04(1) is unambiguous in this respect, we ignore its title." State v. Dahlk, 111 Wis.2d 287, 294, 330 N.W.2d 611 (Ct. App. 1985).

2. "Intentionally" is divided into two parts: purpose and knowledge. Having the mental purpose to cause the result is one of the two definitions of "intentionally" provided in § 939.23(3) and is believed to be most likely to apply in the context of this offense. The other alternative is being "aware that his or her conduct is practically certain to cause the result." See the discussion in Wis JI-Criminal 923A and 923B.

The knowledge requirement is based on § 939.23(3), which provides that when the word "intentionally" is used, it requires knowledge of all the facts which make the conduct criminal and which appear after the word "intentionally" in the statute.

In State v. Dahlk, cited in note 1, supra, the defendant contended that because he did not know that his pyramid club was an illegal lottery, the jury could not find he permitted the warehouse to be used as a gambling place. The court of appeals rejected this claim, emphasizing that mistake as a defense requires an honest error of fact or law other than criminal law. See § 939.43(1). "Defendant's mistake as to the legality of the pyramid club under the criminal laws of this state does not negate the existence of criminal intent." 111 Wis.2d 287, 305.

3. The definition of "gambling place" is adapted from the one provided in § 945.01(4)(a):

> (4) Gambling place. (a) A gambling place is any building or tent, any vehicle (whether self-propelled or not) or any room within any of them, one of whose principal uses is any of the following: making and settling bets; receiving, holding, recording or forwarding bets or offers to bet; conducting lotteries; or playing gambling machines.

4. Three decisions of the Wisconsin appellate courts have discussed the "principal use" requirement. The definition in the instruction is based on those cases.

In State v. Morrissy, 25 Wis.2d 638, 131 N.W.2d 366 (1969), the Wisconsin Supreme Court rejected the defendant's argument that "principal" required that the use be the "single, main, chief, or dominant" use, or that it be given a meaning of "more than 50 percent of the use."

> The term "one of the principal uses" contemplates a comparison of the degree of use between a class of principal uses and incidental uses. No mathematical definition can be given, and admittedly the line of demarcation is difficult to draw. . . .

> The use of a place or room at any given time may determine its principal use at that time but for the purpose of sec. 945.01(4), Stats., such use must be considered in light of the overall or other uses of the place or room. A sufficient period of time must be considered to fairly ascertain the character of the alleged gambling place in terms of principal uses.

25 Wis.2d 638, 642-43.

The Morrissy court found the evidence to be sufficient to establish that a tavern was a gambling place where Monday night poker games were conducted 25 or 26 times a year.

In State v. Dahlk, note 1, supra, the court of appeals found that the definition of "gambling place" was constitutional in the face of the defendant's claim that it was vague and overbroad. The court held that a person of ordinary intelligence can be expected to understand the distinction between principal and incidental uses of premises. 111 Wis.2d 287, 304. The Dahlk court applied the Morrissy definition of "principal use" to find that a warehouse qualified as a gambling place where it was used over a three-week period for meetings of a club engaged in an illegal pyramid investment scheme.

In State v. Nixa, 121 Wis.2d 160, 360 N.W.2d 52 (Ct. App. 1984), the court of appeals reversed a conviction under § 945.02(2) for illegally remaining in a gambling place. The court concluded that a one-time use of an apartment recreational building for gambling did not make gambling a principal use of the premises; prior gambling activity must be shown. The court found that the phrase "one of whose principal uses" was ambiguous and therefore investigated the intent of the legislature and reviewed Morrissy and Dahlk: "This case law, combined with the statute and its legislative history, convinces us that evidence of prior gambling activity is necessary to prove the existence of a gambling place." 121 Wis.2d 160, 166. The court referred to the Judiciary Committee Report on the 1953 Criminal Code which states that a "tavern where customers occasionally play cards for money is not a gambling place because that is not one of its principal uses." 1953 Report at 153. "This language indicates that, even with multiple event gambling evidence, the statute is not violated if a principal use for gambling purposes is not demonstrated." 111 Wis.2d 160, 164-65.

1650 ALTERING A LOTTERY TICKET — § 565.50(2)

Statutory Definition of the Crime

Section 565.50(2) of the Wisconsin Statutes is violated by one who alters[1] a lottery ticket

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant altered[2] a lottery ticket.[3]

   A lottery ticket is altered when it has been changed from the form in which it was originally issued by the State of Wisconsin.

2. The defendant altered a lottery ticket with intent to defraud.[4]

   This requires that the defendant altered the lottery ticket with the purpose to use it to obtain money (he) (she) was not entitled to receive.[5]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1650 was originally published in 1990. This revision was approved by the Committee in October 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of subsection (2) of § 565.50 which provides as follows:

(2) Any person who alters or forges a lottery ticket or share or intentionally utters or transfers an altered or forged lottery ticket or share is guilty of a Class I felony.

For violations of sub. (2) involving intentionally uttering or transferring an altered or forged lottery ticket, see Wis JI Criminal 1651. Violations of § 565.50 (3) are addressed by Wis JI Criminal 1652.

1. The statute refers to "alters or forges" a lottery ticket or share. The instruction uses the term "alter" throughout. If there is an intended difference between the two terms, the term "alter" appears to be the broader one.

2. See note 1, supra.

3. "Lottery ticket" is not defined in the statutes relating to the state lottery. It is defined in the Wisconsin Administrative Code at Chapter Tax 61, § Tax 61.02(3), but that definition is not easily adaptable for use in a standard instruction.

4. The Committee concluded that this offense requires "intent to defraud" even though the statute does not expressly provide for it. Subsection (2) of § 565.50 defines this offense without referring to "intent to defraud" and provides that a violation is a Class I felony. Subsection (3) of the same statute prohibits possessing an altered or forged lottery ticket with intent to defraud and provides for a maximum penalty of a $10,000 fine or 9 months imprisonment or both. The Committee concluded that the offense with the more severe penalty should also include a culpable mental element.

Further, the use of the word "forges" carries with it the connotation of an intent to defraud. "The knowledge of the falsity of the instrument and the intent to defraud are of the very essence of the crime of forgery." 37 C.J.S. Forgery § 4. Also see Wells v. State, 195 Wis. 551, 218 N.W. 811 (1929).

Several Wisconsin cases have interpreted criminal statutes to include criminal intent where it was not expressly required. In State v. Alfonsi, 33 Wis.2d 469, 147 N.W.2d 550 (1967), the court noted that "the element of scienter is the rule rather than the exception in our criminal jurisprudence." (Also see United States v. U.S. Gypsum, 438 U.S. 422, 436 (1978): "the existence of mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.") The Alfonsi court found

that the crime of bribery, as defined in § 946.10, required "corrupt intent" even though not explicitly included in the statutory definition of the offense. The court relied on the general rule noted above, as well as on the fact that the crime of bribery "by its inherent nature has traditionally required a corrupt motivation." One of the cases relied on in Alfonsi was State v. Croy, 32 Wis.2d 118, 145 N.W.2d 118 (1966). In Croy, the court found that "intent to defraud" remained an element of defrauding an innkeeper under § 943.21 despite the fact that the statute had been revised to eliminate "intent to defraud" from the definition of the crime. The Wisconsin Supreme Court applied the Alfonsi rationale to an offense defined outside the Criminal Code in State v. Collova, 79 Wis.2d 473, 255 N.W.2d 581 (1977). The court held that the legislature did not intend operating after revocation to be a strict liability offense because of the "severe consequences attached to a violation." An "objective standard of care" was added to the statutory definition of the offense: the defendant must have cause to believe his license might be revoked or suspended.

There are also decisions declining to read a mental element into a statute that does not expressly require one. See, for example, State v. Stoehr, 134 Wis.2d 66, 396 N.W.2d 177 (Ct. App. 1986), and State v. Temby, 108 Wis.2d 521, 322 N.W.2d 522 (Ct. App. 1982).

5. Lottery prizes are generally in the form of payment of money, though the prize may be a trip or some other type of noncash award. If the prize is for other than money, this definition of "intent to defraud" must be changed to refer, for example, to "something of value." In any event, it is the purpose to obtain something the person is not entitled to receive that the Committee concluded is the essence of "intent to defraud" in the context of this offense.

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1651 UTTERING AN ALTERED LOTTERY TICKET — § 565.50(2)

Statutory Definition of the Crime

Section 565.50(2) of the Wisconsin Statutes is violated by one intentionally utters or transfers an altered[1] lottery ticket.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (uttered) (transferred) a lottery ticket.[2]

   ("Utter" means to present for payment.)[3]

   ("Transfer" means to give possession to another person.)[4]

2. The lottery ticket was altered.[5]

   A lottery ticket is altered when it has been changed from the form in which it was originally issued by the State of Wisconsin.

3. The defendant intentionally (uttered) (transferred) an altered lottery ticket.

   This requires that the defendant knew that the lottery ticket was altered and acted with the purpose to (present it for payment) (transfer possession to another person).[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1651 was originally published in 1990. This revision was approved by the Committee in October 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of subsection (2) of § 565.50 which provides as follows:

> (2) Any person who alters or forges a lottery ticket or share or intentionally utters or transfers an altered or forged lottery ticket or share is guilty of a Class I felony.

For violations of sub. (2) involving intentionally altering or forging a lottery ticket, see Wis JI Criminal 1651. Violations of § 565.50 (3) are addressed by Wis JI Criminal 1652.

1. The statute refers to an "altered or forged" lottery ticket or share. The instruction uses the term "alter" throughout. If there is an intended difference between the two terms, the term "alter" appears to be the broader one.

2. "Lottery ticket" is not defined in the statutes relating to the state lottery. It is defined in the Wisconsin Administrative Code at Chapter Tax 61, § Tax 61.02(3), but that definition is not easily adaptable for use in a standard instruction.

3. This is based on the definition of "utter" used for forgery offenses under § 943.38(2). See Wis JI-Criminal 1492 at note 4. Also see State v. Tolliver, 149 Wis.2d 166, 440 N.W.2d 571 (Ct. App. 1989): a forged check is uttered when it is introduced into the stream of commerce.

4. The Committee believes this definition explains the plain and ordinary meaning of "transfer."

5. See note 1, supra.

6. "Intentionally" is divided into two parts: purpose and knowledge. Having the mental purpose to cause the result is one of the two definitions of "intentionally" provided in § 939.23(3) and is believed to be most likely to apply in the context of this offense. The other alternative is being "aware that his or her conduct is practically certain to cause the result." See the discussion in Wis JI-Criminal 923A and 923B.

The knowledge requirement is based on § 939.23(3), which provides that when the word "intentionally" is used, it requires knowledge of all the facts which make the conduct criminal and which appear after the word "intentionally" in the statute.

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1652 POSSESSION OF AN ALTERED LOTTERY TICKET WITH INTENT TO DEFRAUD — § 565.50(3)

Statutory Definition of the Crime

Section 565.50(3) of the Wisconsin Statutes is violated by one who possesses an altered[1] lottery ticket with intent to defraud.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a lottery ticket.[2]

   "Possessed" means that the defendant knowingly had the lottery ticket under his actual physical control.[3]

2. The lottery ticket was altered.[4]

   A lottery ticket is altered when it has been changed from the form in which it was originally issued by the State of Wisconsin.[5]

3. The defendant possessed an altered lottery ticket with the intent to defraud.

   This requires that the defendant knew the lottery ticket was altered and had the purpose to use it to obtain money (he) (she) was not entitled to receive.[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1652 was originally published in 1990. This revision was approved by the Committee in October 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of subsection (3) of § 565.50 which provides as follows:

> (3) Any person who possesses an altered or forged lottery ticket or share with intent to defraud shall be fined not less than $10,000 or imprisoned for not more than 9 months or both.

For violations involving altering or forging a lottery ticket under § 565.50(2) , see Wis JI Criminal 1650. For violations of § 565.50(2) , involving intentionally uttering or transferring an altered or forged lottery ticket, see Wis JI Criminal 1651.

1. The statute refers to possession of "an altered or forged" lottery ticket or share. The instruction uses the broader term "altered" throughout. If there is an intended difference between the two terms, the term "altered" appears to be the broader one.

2. "Lottery ticket" is not defined in the statutes relating to the state lottery. It is defined in the Wisconsin Administrative Code at Chapter Tax 61, § Tax 61.02(3), but that definition is not easily adaptable for use in a standard instruction.

3. See Wis JI-Criminal 920 for a more complete definition of "possess."

4. See note 1, supra.

5. The instruction assumes that the statute applies only to conduct involving the lottery tickets issued by the State of Wisconsin, as opposed to privately produced documents relating to something that might qualify as a "lottery" broadly defined.

6. Lottery prizes are generally in the form of payment of money, though the prize may be a trip or some other type of noncash award. If the prize is for other than money, this definition of "intent to defraud" must be changed to refer, for example, to "something of value." In any event, it is the purpose to obtain something the person is not entitled to receive that the Committee concluded is the essence of "intent to defraud" in the context of this offense.

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1705 SABOTAGE — § 946.02(1)(a)

Statutory Definition of the Crime

Sabotage, as defined in § 946.02(1)(a) of the Criminal Code of Wisconsin, is committed by one who intentionally damages, interferes with, or tampers with any property with reasonable grounds to believe that his act will hinder, delay, or interfere with (the prosecution of war or other military action) (the preparation for defense) by the United States.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally damaged property.[2]

   "Intentionally" means that the defendant acted with the mental purpose to damage property or was aware that (his) (her) conduct was practically certain to cause that result.[3]

2. The defendant had reasonable grounds to believe that (his) (her) act would hinder, delay, or interfere with the preparation for defense by the United States.

"Reasonable grounds to believe" means that a reasonable person in the defendant's position would have believed that (his) (her) act would hinder, delay or interfere with the preparation for defense by the United States.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of sabotage have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1705 was originally published in 1990. This revision was approved by the Committee in October 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of subsec. (1)(a) of § 946.02. Subsection (1)(b) of the statute defines a different type of offense: intentionally making a defective article that is to be used in national defense. Subsection (2) explains that nothing in the statute should be construed to impair the rights of employees to engage in lawful collective bargaining or other labor activities.

The only reported Wisconsin decision dealing with the sabotage statute is State v. Ostenson, cited in note 4, below. Ostenson involved damage to the United States Navy ELF (extremely low frequency) communication facility in Ashland County.

1. The rest of the instruction refers only to the "preparation for defense" alternative on the assumption that it would be the most commonly used.

2. The instruction refers to "damage to property" throughout, although two other alternatives are also prohibited by the statute: interfering with property or tampering with property.

3. "Intentionally" is defined in § 939.23(3). For more extensive definition of the term, see Wis JI-Criminal 923A and 923B.

4. The definition of "reasonable grounds to believe" is based on the decision in State v. Ostenson, 150 Wis.2d 656, 442 N.W.2d 501 (Ct. App. 1989), where the court held that "the statute does not require proof of the actor's subjective intent to interfere. Rather, it requires merely that a reasonable person, acting with the defendant's knowledge, has grounds to believe it will." 150 Wis.2d 656, 661. Also see State v. Hurd, 135 Wis.2d 266, 400 N.W.2d 42 (Ct. App. 1986), which discusses the related phrase, "reasonable cause to suspect" as used in § 48.981, the statute requiring the reporting of suspected child abuse. Hurd is discussed in footnote 3 to Wis JI-Criminal 2119.

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1720 BRIBERY: TRANSFERRING PROPERTY TO A PUBLIC EMPLOYEE TO INDUCE ACTION OR FAILURE TO ACT — § 946.10(1)

Statutory Definition of the Crime

Section 946.10(1) of the Criminal Code of Wisconsin is violated by one who, with the intent to induce a public employee[1] to act[2] in violation of the employee's lawful duty, transfers[3] property[4] to the employee which the employee is not authorized to receive.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name of employee) was a public employee.

   A (title of employee) is a public employee.[5]

2. The defendant transferred property to (name of employee).[6]

3. (Name of employee) was not authorized to receive the property for the performance of official duties.[7]

4. The defendant intended to induce (name of employee) to act[8] in violation of the employee's lawful duty.

   "Intent to induce" means that the defendant had the mental purpose to induce (name of employee) to act.[9]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of bribery have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1720 was originally published in 1966 and revised in 1995. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

There are two instructions for violations of subsec. (1) of § 946.10: Wis JI Criminal 1720 is for offering a bribe with intent to "induce a public officer or employee to do or omit to do any act in violation of the officer's or employee's lawful duty"; Wis JI Criminal 1721 is for offering a bribe with intent to "influence the conduct of any public officer or public employee in relation to any matter which by law is pending or might come before the officer or employee in the officer's or employee's capacity as such officer or employee."

The instruction has selected from the several alternatives offered by the statutory definition of the offense in the interest of providing a clearer and more easily understood model. Wis JI Criminal 1720 uses "public employee" instead of "public officer," "act" instead of "omit to do any act," "transfers" instead of "promises," and "property" instead of "personal advantage." Where necessary, of course, the instruction should be modified to use the appropriate alternative.

1. The instruction is drafted for cases involving "public employees." The statute also applies to "public officials." Both terms are defined in § 939.22(30). See note 5, below.

2. The instruction is drafted for cases involving inducements to "act." The statute also applies to inducements to "omit to do any act" in violation of the employee's lawful duty.

3. The instruction is drafted for cases involving the transfer of property. The statute also applies to promises to transfer.

4. The instruction is drafted for cases involving transfer of property. The statute also covers transfer or promise of any "personal advantage."

5. In the Committee's judgment, the jury may be told, for example, that a police officer is a public employee. It is still for the jury to be satisfied that, in fact, the individual was a police officer. The same would be true for cases involving "public officers."

"Public officer" and "public employee" are defined as follows in § 939.22(30):

> A "public officer" is any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.
>
> A "public employee" is any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

A juror is a "public employee" for purposes of § 946.10. State v. Sammons, 141 Wis.2d 833, 417 N.W.2d (Ct. App. 1987).

6. The wording of § 946.10 is essentially the same as that proposed in the 1953 draft of the revised Criminal Code. The Comment to the bribery statute in the 1953 draft included the following:

> The bribe may be either property or a personal advantage, which covers anything that can be used to bribe someone. "Personal advantage" includes such things as a job or some social advancement.

1953 Report on the Criminal Code, page 171.

7. The Comment to the bribery statute in the 1953 draft of the Criminal Code revision (see note 6, supra) included the following:

> . . . . The requirement that the property or personal advantage be one which the actor is not authorized to receive was made to exclude the case of the officer or employee who is on a fee basis and who might come within the wording of the statute because the fee is given to influence him to perform certain acts in his official capacity.

1953 Report on the Criminal Code, page 171.

8. See note 2, supra.

9. Under the Criminal Code, the phrase "with intent to" means that the defendant either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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1721 BRIBERY: TRANSFERRING PROPERTY TO A PUBLIC OFFICER TO INFLUENCE A DECISION — § 946.10(1)

Statutory Definition of the Crime

Section 946.10(1) of the Criminal Code of Wisconsin is violated by one who, with the intent to influence the conduct of any public officer[1] in relation to any matter which by law is pending or might come before the officer in the officer's official capacity,[2] transfers[3] property[4] to a public officer which the officer is not authorized to receive.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name of officer) was a public officer.

   A (title of officer) is a public officer.[5]

2. The defendant transferred property to (name of officer).[6]

3. (Name of officer) was not authorized to receive the property for the performance of official duties.[7]

4. The defendant intended to influence the conduct of (name of officer) in relation to any matter which by law was pending or might have come before (name of officer) in an official capacity.

"Intent to influence" means that the defendant had the mental purpose to influence the conduct of (name of officer) .[8]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of bribery have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1721 was originally published in 1966 and revised in 1996. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

There are two instructions for violations of subsec. (1) of § 946.10: Wis JI Criminal 1720 is for offering a bribe with intent to "induce a public officer or employee to do or omit to do any act in violation of the officer's or employee's lawful duty"; Wis JI Criminal 1721 is for offering a bribe with intent to "influence the conduct of any public officer or public employee in relation to any matter which by law is pending or might come before the officer or employee in the officer's or employee's capacity as such officer or employee."

The instruction has selected from the several alternatives offered by the statutory definition of the offense in the interest of providing a clearer and more easily understood model. Wis JI Criminal 1721 uses "public officer" instead of "public employee," "transfers" instead of "promises," and "property" instead of "personal advantage." Where necessary, of course, the instruction should be modified to use the appropriate alternative.

1. The instruction is drafted for cases involving "public officer." The statute also applies to a "public employee." Both terms are defined in § 939.22(30). See note 5, below.

2. The instruction uses the term "official capacity" instead of the statute's phrase: "in the officer's or employee's capacity as such officer or employee." No change in meaning is intended.

3. The instruction is drafted for cases involving the transfer of property. The statute also applies to promises to transfer.

4. The instruction is drafted for cases involving transfer of property. The statute also covers transfer or promise of any "personal advantage."

5. In the Committee's judgment, the jury may be told, for example, that a member of the county board is a public officer. It is still for the jury to be satisfied that, in fact, the individual was a member of the county board.

"Public officer" and "public employee" are defined as follows in § 939.22(30):

> A "public officer" is any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.
>
> A "public employee" is any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

A juror is a "public employee" for purposes of § 946.10. State v. Sammons, 141 Wis.2d 833, 417 N.W.2d (Ct. App. 1987).

6. The wording of § 946.10 is essentially the same as that proposed in the 1953 draft of the revised Criminal Code. The Comment to the bribery statute in the 1953 draft included the following:

> The bribe may be either property or a personal advantage, which covers anything that can be used to bribe someone. "Personal advantage" includes such things as a job or some social advancement.

1953 Report on the Criminal Code, page 171.

7. The Comment to the bribery statute in the 1953 draft of the Criminal Code revision (see note 6, supra) included the following:

> . . . . The requirement that the property or personal advantage be one which the actor is not authorized to receive was made to exclude the case of the officer or employee who is on a fee basis and who might come within the wording of the statute because the fee is given to influence him to perform certain acts in his official capacity.

1953 Report on the Criminal Code, page 171.

8. Under the Criminal Code, the phrase "with intent to" means that the defendant either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

For a discussion of the sufficiency of the evidence on the "intent to influence" element, see State v. Rosenfeld, 93 Wis.2d 325, 286 N.W.2d 596 (1980).

1723 BRIBERY: ACCEPTING A BRIBE — § 946.10(2)

Statutory Definition of the Crime

Section 946.10(2) of the Criminal Code of Wisconsin is violated by a public officer or employee who directly or indirectly accepts any property[1] which the officer or employee is not authorized to receive, pursuant to an understanding that the officer or employee will act in a certain manner in relation to any matter which by law is pending or might come before the officer or employee in an official capacity.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a (public officer) (public employee).

   A (title of officer) is a public (officer) (employee).[2]

2. The defendant directly or indirectly accepted property.[3]

3. The defendant was not authorized to receive the property for the performance of official duties.[4]

4. The defendant accepted property pursuant to an understanding that the defendant would act in a certain manner in relation to a matter which, by law, was pending or might come before the defendant in an official capacity.

[This understanding must exist at the time the acceptance of property occurred. The term "understanding" refers to the defendant's state of mind. It does not require that there was an agreement between the defendant and another person. It requires that the defendant determined in (his) (her) own mind to accept property in return for acting in a certain manner with respect to a matter which was pending or which might come before the defendant in an official capacity.]

5. The defendant acted with a corrupt understanding.

A "corrupt understanding" means that the defendant accepted property knowing that it was given to influence the defendant's conduct as a public (officer) (employee).[5]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of bribery have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1723 was originally published in 1976 and revised in 1996. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for violations of subsec. (2) of § 946.10, which involves accepting or offering to accept a bribe. There are also two instructions for violations of subsec. (1) of § 946.10: Wis JI Criminal 1720 is for offering a bribe with intent to "induce a public officer or employee to do or omit to do any act in violation of the officer's or employee's lawful duty"; Wis JI Criminal 1721 is for offering a bribe with intent to "influence the conduct of any public officer or public employee in relation to any matter which by law is pending or might come before the officer or employee in the officer's or employee's capacity as such officer or employee."

1. The statute applies to anyone who "accepts or offers to accept any property or personal advantage." The instruction is drafted for "accepting property" and would have to be modified if a case involves "offering to accept" or "personal advantage."

2. In the Committee's judgment, the jury may be told, for example, that a member of the county board is a public officer. It is still for the jury to be satisfied that, in fact, the individual was a member of the county board.

"Public officer" and "public employee" are defined as follows in § 939.22(30):

> A "public officer" is any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.
>
> A "public employee" is any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

A juror is a "public employee" for purposes of § 946.10. State v. Sammons, 141 Wis.2d 833, 417 N.W.2d (Ct. App. 1987).

3. See note 1, supra. The wording of § 946.10 is essentially the same as that proposed in the 1953 draft of the revised Criminal Code. The Comment to the bribery statute in the 1953 draft included the following:

> The bribe may be either property or a personal advantage, which covers anything that can be used to bribe someone. "Personal advantage" includes such things as a job or some social advancement.

1953 Report on the Criminal Code, page 171.

4. The Comment to the bribery statute in the 1953 draft of the Criminal Code revision (see note 3, supra) included the following:

> . . . . The requirement that the property or personal advantage be one which the actor is not authorized to receive was made to exclude the case of the officer or employee who is on a fee basis and who might come within the wording of the statute because the fee is given to influence him to perform certain acts in his official capacity.

1953 Report on the Criminal Code, page 171.

5. This element is intended to reflect the interpretation of § 946.10(2) found in State v. Alfonsi, 33 Wis.2d 469, 147 N.W.2d 550 (1967). The Alfonsi decision reversed a state legislator's bribery conviction, holding that it was error for the trial court to refuse a requested instruction to the effect that bribery requires "a corrupt understanding." The decision did not directly define what a "corrupt understanding" is, but a later decision suggested that it involves a transfer of property with intent to influence a public official's conduct. See State v. Duda, 60 Wis.2d 431, 210 N.W.2d 763 (1973), interpreting § 946.61, Bribery Of A Witness, and treating it as analogous to the general bribery statute. Duda referred to several cases cited in Alfonsi, emphasizing parts of those decisions that tied "corrupt" to "intent to influence." 60 Wis.2d 431, 436-37. The Committee concluded that when applied to the individual who allegedly accepted a bribe, this requires that the property was accepted with knowledge that the property was given with intent to influence.

1730 MISCONDUCT IN PUBLIC OFFICE (BY FAILURE OR REFUSAL TO PERFORM DUTY) — § 946.12(1)

Statutory Definition of the Crime

Misconduct in public office, as defined in § 946.12(1) of the Criminal Code of Wisconsin, is committed by a (public officer) (public employee) who intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of (his) (her) (office) (employment) within the time or in the manner required by law.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. At the time of the alleged offense, the defendant was a (public officer) (public employee). A (position) is a (public officer) (public employee).[1]

2. The defendant failed to perform a mandatory, nondiscretionary, ministerial duty of (his) (her) office.

   [The mandatory, nondiscretionary, ministerial duties of a (position) include: _____ .][2]

3. The defendant intentionally did not (describe duty) .[3]

   This requires that the defendant had the mental purpose[4] to fail or refuse to perform the duty.

4. The defendant knew (he) (she) was required to (describe duty) (in the manner) (within the time) required by law.[5]

Deciding About Purpose and Knowledge

You cannot look into a person's mind to find purpose and knowledge. Purpose and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1730 was originally published in 1966 and revised in 1990. This revision was approved by the Committee in February 2008 and involved adoption of a new format and changes to the text and footnotes.

1. The Committee believes that it is clearer to the members of the jury if they are simply instructed that, for example, "A member of the county board is a public officer."

"Public officer" and "public employee" are defined as follows in § 939.22(30):

> "Public officer" means any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.
>
> "Public employee" means any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

2. The nondiscretionary duties of some public officers and public employees are set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's nondiscretionary duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person failed or refused to perform a nondiscretionary duty in the particular case. But see, State v. Jensen, 2007 WI App 256, ___ Wis.2d ___, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, ___ Wis.2d ___, 743 N.W.2d 823.

In State v. Schwarze, 120 Wis.2d 453, 355 N.W.2d 842 (Ct. App. 1984), the court (in interpreting subsec. (3) of § 946.12) held that the question of legal duty of a public employee presents an issue of law and that it is proper for the trial court to instruct the jury that such a duty existed.

In State v. Dekker, 112 Wis.2d 304, 332 N.W.2d 816 (Ct. App. 1983), the court held that a police officer's responsibility to provide first aid to an injured person in police custody is not a "mandatory, nondiscretionary, ministerial duty" under subsection (1) of § 946.12. The court discussed the meanings of those terms, referring to the Black's Law Dictionary definition of "mandatory": "[c]ontaining a command; preceptive; imperative; preemptory; obligatory." Black's Law Dictionary 867 (5th ed. 1979). "Nondiscretionary" was identified as the opposite of "discretionary" and the latter defined as: "[t]hose acts wherein there is no hard and fast rule as to course of conduct that one must or must not take and, if there is clearly defined rule, such would eliminate discretion." Black's Law Dictionary 419 (5th ed. 1979).

The Dekker court referred to statutes and case law for definition of "ministerial":

> The code of ethics for public officials defines "ministerial action" as: "an action that a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to the exercise of the person's own judgment as to the propriety of the action being taken." [citing § 19.42(8), Stats.]
>
> Our supreme court has stated that "[a] public officer's duty is ministerial only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." [Citing Cords v. Anderson, 80 Wis.2d 525, 541, 259 N.W.2d 672, 679 (1977).]

112 Wis.2d 304, 311-12.

3. See note 2, supra.

4. "Intentionally" is defined in § 939.23(3) to include not only "mental purpose," but also "is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

5. Section 946.12(1) specifically refers to failure to perform a known duty, emphasizing the presence of a knowledge requirement that also flows from the use of the word "intentionally." See § 939.23(3). The defendant must know that the duty in question was mandatory, nondiscretionary, and ministerial and that it had to be performed within a specified time or in a certain manner. The 1953 Report on the Criminal Code described the knowledge requirement as follows: "[I]t is necessary to find that the officer or employee, at the time of his refusal or failure, knew the duty existed or knew that the duty was supposed to be performed within a certain time or in a particular manner. . . . [B]ut if the officer believes in good faith that the law imposes no duty on him in the particular case, he is not guilty, for such a mistake negatives the existence of the mental element required for the crime." [Citing the rules now found in §§ 939.23 and 939.43]. 1953 Report at 175.

1731 MISCONDUCT IN PUBLIC OFFICE (BY PERFORMANCE OF UNAUTHORIZED OR FORBIDDEN ACT) — § 946.12(2)

Statutory Definition of the Crime

Misconduct in public office, as defined in § 946.12(2) of the Criminal Code of Wisconsin, is committed by a (public officer) (public employee) who, in (his) (her) capacity as an (officer) (employee), does an act which (he) (she) knows is in excess of (his) (her) lawful authority or which (he) (she) knows (he) (she) is forbidden by law to do in an official capacity.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. At the time of the alleged offense, the defendant was a (public officer) (public employee). A (position) is a (public officer) (public employee).[1]
2. The defendant, in (his) (her) capacity[2] as a public (officer) (employee) (describe conduct) .
3. (Describe conduct) was (in excess of the defendant's lawful authority) (conduct in which the defendant was forbidden by law to engage in (his) (her) official capacity).[3]

4. The defendant knew (that the conduct was in excess of (his) (her) lawful authority) (that (he) (she) was forbidden by law to engage in the conduct in (his) (her) official capacity).

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1731 was originally published in 1966 and revised in 1990. This revision was approved by the Committee in February 2008 and involved adoption of a new format and nonsubstantive changes to the text.

1. The Committee believes that it is clearer to the members of the jury if they are simply instructed that, for example, "A member of the county board is a public officer."

"Public officer" and "public employee" are defined as follows in § 939.22(30):

> "Public officer" means any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.
>
> "Public employee" means any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

2. In State v. Schmit, 115 Wis.2d 657, 340 N.W.2d 752 (Ct. App. 1983), the court of appeals addressed the connection between the conduct and the defendant's official capacity. The court concluded

that § 946.12(2) was not violated by a prison guard who engaged in consensual sexual relations with an inmate. The court emphasized that there must be a "material connection" between the forbidden act and the public office, that it must be "inherently related to the duties of the office." 115 Wis.2d 657, 665.

3. It may be helpful to refer to any statutes defining the particular officer's duties in instructing on whether the acts claimed to have been committed by the defendant violated a lawful duty or were in excess of lawful authority.

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1732 MISCONDUCT IN PUBLIC OFFICE (BY EXERCISE OF DISCRETIONARY POWER FOR A DISHONEST ADVANTAGE) — § 946.12(3)

Statutory Definition of the Crime

Misconduct in public office, as defined in § 946.12(3) of the Criminal Code of Wisconsin, is committed by one who is a (public officer) (public employee) and who, in (his) (her) capacity as an (officer) (employee), exercises a discretionary power in a manner inconsistent with the duties of (his) (her) (office) (employment) (the rights of others) and with intent to obtain a dishonest advantage for (himself) (herself) or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. At the time of the alleged offense, the defendant was a (public officer) (public employee). A (position) is a (public officer) (public employee).[1]
2. The defendant, in (his) (her) capacity as a public (officer) (employee) exercised a discretionary power of (his) (her) office.[2] The defendant may exercise discretionary power either by doing something or by failing to do something.[3]

   [The discretionary powers of a (position) include: _____ .][4]

3. The defendant exercised a discretionary power in a manner inconsistent with (the duties of (his) (her) office) (the duties of (his) (her) employment) (the rights of others).

[The duties of a (position) include _____.][5]

4. The defendant exercised discretionary power with intent to obtain a dishonest advantage for (himself) (herself) (or) (another).[6]

The phrase "with intent to" means that the defendant had the mental purpose to obtain a dishonest advantage or was aware that (his) (her) conduct was practically certain to cause that result.[7] You cannot look into a person's mind to find intent. While this intent to obtain a dishonest advantage must be found as a fact before you can find the defendant guilty, it must be found, if found at all, from acts and words and statements, if any, bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1732 was originally published in 1966 and revised in 1990. This revision was approved by the Committee in February 2008 and involved adoption of a new format and changes to the text and footnotes.

1. The Committee believes that it is clearer to the members of the jury if they are simply instructed that, for example, "A member of the county board is a public officer."

"Public officer" and "public employee" are defined as follows in § 939.22(30):

> "Public officer" means any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.
>
> "Public employee" means any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

2. "Discretionary powers of office" are not limited to expressly conferred powers but apply to de facto powers which arise by custom and usage. State v. Tronca, 84 Wis.2d 68, 80, 267 N.W.2d 216 (1978). Tronca held that an "alderman's privilege" allowing the veto of any liquor license in his district constituted a discretionary power of office under the statute. Tronca also upheld the constitutionality of § 946.12(3) in the face of challenges claiming it was vague and overbroad.

In State v. Schwarze, 120 Wis.2d 453, 457, 355 N.W.2d 842 (Ct. App. 1984), the court discussed the difference between mandatory and discretionary powers, citing State v. Dekker, 112 Wis.2d 304, 332 N.W.2d 816 (Ct. App. 1983).

3. This statement is intended to be a more understandable equivalent of the statutory phrase: "whether by act of commission or omission."

4. The discretionary powers of some public officers and public employees are set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the powers in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's discretionary powers are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was exercising the powers in the particular case. But see, State v. Jensen, 2007 WI App 256, ___ Wis.2d ___, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, ___ Wis.2d ___, 743 N.W.2d 823.

5. The duties of some public officers and public employees are set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case.

In State v. Schwarze, 120 Wis.2d 453, 355 N.W.2d 842 (Ct. App. 1984), the court held that the question of legal duty of a public employee presents an issue of law and that it is proper for the trial court to instruct the jury that a duty existed. But see, State v. Jensen, 2007 WI App 256, ___ Wis.2d ___, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, ___ Wis.2d ___, 743 N.W.2d 823.

6. In State v. Jensen, 2007 WI App 256, ___ Wis.2d ___, 743 N.W.2d 468, the court of appeals reversed a conviction under § 946.12(3) because it concluded that the trial court erred in adding the following to the jury instruction on the fourth element: "The use of a state resource to promote a candidate in a political campaign or to raise money for a candidate provides to that candidate a dishonest advantage." The court held that this had the effect of directing a verdict against the defendant on the

element of the crime requiring that the defendant exercise discretionary power with intent to obtain a dishonest advantage. Jensen, ¶14.

Jensen also held that ". . . the court erred in excluding Jensen's testimony as to his understanding of the use of state resources for campaigns by other legislators, because the testimony was relevant to the contested issue of Jensen's intent." Jensen, supra, ¶40.

7. "Intentionally" is defined in § 939.23(3). See Wis JI-Criminal 923A and 923B.

1733 MISCONDUCT IN PUBLIC OFFICE (BY FALSE ENTRY, RETURN, CERTIFICATE, REPORT, OR STATEMENT) — § 946.12(4)

Statutory Definition of the Crime

Misconduct in public office, as defined in § 946.12(4) of the Criminal Code of Wisconsin, is committed by one who is a (public officer) (public employee) and who, in (his) (her) capacity as an (officer) (employee), makes an entry in (an account or record book) (a return) (a certificate) (a report) (a statement) which (he) (she) intentionally falsifies in a material respect.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. At the time of the alleged offense, the defendant was a (public officer) (public employee). A (position) is a (public officer) (public employee).[1]
2. The defendant, in (his) (her) capacity as a public (officer) (employee) made an entry in (an account or record book) (a return) (a certificate) (a report) (a statement).
3. The entry was false in a material respect.[2]
4. The defendant intentionally falsified the entry in a material respect.

"Intentionally" means that the defendant had the mental purpose[3] to falsify the entry in (an account or record book) (a return) (a certificate) (a report) (a statement) in a material respect and knew that the entry was false when (he) (she) made it.

Deciding About Purpose and Knowledge

You cannot look into a person's mind to find purpose and knowledge. Purpose and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1733 was originally published in 1966 and revised in 1990. This revision was approved by the Committee in February 2008 and involved adoption of a new format and nonsubstantive changes to the text.

1. The Committee believes that it is clearer to the members of the jury if they are simply instructed that, for example, "A member of the county board is a public officer."

"Public officer" and "public employee" are defined as follows in § 939.22(30):

> "Public officer" means any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.

"Public employee" means any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

2. If it is believed to be necessary to define "material," the original version of this instruction suggested that a material false entry may be defined as "an entry which causes the instrument to speak differently in legal effect than it spoke originally." Wis JI-Criminal 1733 8 1966. Black's Law Dictionary (7th ed. 1999) defines "Material alteration" as follows: "A significant change in something; esp., a change in a legal instrument sufficient to alter the instrument's legal meaning or effect."

3. "Intentionally" is defined in § 939.23(3) to include not only "mental purpose," but also "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

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1734 MISCONDUCT IN PUBLIC OFFICE (BY UNLAWFUL SOLICITATION OR ACCEPTANCE OF ANYTHING OF VALUE) — § 946.12(5)

Statutory Definition of the Crime

Misconduct in public office, as defined in § 946.12(5) of the Criminal Code of Wisconsin, is committed by one who is a (public officer) (public employee) and who, under color of (his) (her) (office) (employment) intentionally solicits or accepts for the performance of any service or duty anything of value which (he) (she) knows is greater or less than fixed by law.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. At the time of the alleged offense, the defendant was a (public officer) (public employee). A (position) is a (public officer) (public employee).[1]
2. The defendant intentionally solicited or accepted anything of value[2] for the performance of any service or duty.

   "Intentionally" means that the defendant had the mental purpose[3] to solicit or accept anything of value for the performance of any service or duty.

   [The (services) (duties) of a (position) include _____.][4]

3. The defendant knew that the amount (solicited) (accepted) was greater or less than is fixed by law.

4. The defendant acted under color of (his) (her) (office) (employment).[5]

"Under color of (office) (employment)" means to act under the apparent authority of the (office) (employment).[6]

Deciding About Purpose and Knowledge

You cannot look into a person's mind to find purpose and knowledge. Purpose and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1734 was originally published in 1966 and revised in 1990. This revision was approved by the Committee in February 2008 and involved adoption of a new format and nonsubstantive changes to the text.

The constitutionality of subsec. (5) of § 946.12 was upheld in Ryan v. State, 79 Wis.2d 83, 255 N.W.2d 910 (1977). See notes 2 and 5, below.

1. The Committee believes that it is clearer to the members of the jury if they are simply instructed that, for example, "A member of the county board is a public officer."

"Public officer" and "public employee" are defined as follows in § 939.22(30):

"Public officer" means any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.

"Public employee" means any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

2. The "anything of value" standard is specific enough to be constitutional. Ryan v. State, 79 Wis.2d 83, 255 N.W.2d 910 (1977). "There is a standard and it is simple. Anything of value which is accepted and known to be greater or lesser than what is fixed by law for a particular duty or service subjects the public officeholder to prosecution for violation of this section. This does not mean that the public officeholder can never accept a gift. Section 946.12(5), Stats., is only violated when that which was accepted was 'for the performance of any service or duty.'" 79 Wis.2d 83, 92.

3. "Intentionally" is defined in § 939.23(3) to include not only "mental purpose" but also "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

4. The duties of some public officers and public employees are set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case.

In State v. Schwarze, 120 Wis.2d 453, 355 N.W.2d 842 (Ct. App. 1984), the court held that the question of legal duty of a public employee presents an issue of law and that it is proper for the trial court to instruct the jury that a duty existed. But see, State v. Jensen, 2007 WI App 256, ___ Wis.2d ___, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, ___ Wis.2d ___, 743 N.W.2d 823.

5. Ryan v. State, note 2, supra, involved the acceptance of $600 worth of gift certificates by an alderman allegedly in return for his not exercising his veto power over liquor license applications. The court rejected Ryan's claim that the statute did not apply to him because no fees were set by law for aldermanic approval of licenses and that the statute was intended to cover only public employees holding administrative positions. The court concluded that "Ryan had a duty as an alderman to vote upon the recommendations of the license committee, which he did. His salary was fixed by law. The jury could infer that he accepted $600 worth of certificates as a greater compensation than was fixed by law for his services as an alderman." 79 Wis.2d 83, 93.

6. Black's Law Dictionary, (7th ed., 1999), offers the following definition of "color of office": "The authority or power that is inherent in an office, esp. a public office. Acts taken under the color of an office are vested with, or appear to be vested with, the authority entrusted to that office."

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1740 PRIVATE INTEREST IN A PUBLIC CONTRACT: ENTERING INTO A CONTRACT IN A PRIVATE CAPACITY AND BEING AUTHORIZED BY LAW TO PARTICIPATE IN THE MAKING OF THE CONTRACT AS A PUBLIC OFFICER[1] — § 946.13(1)(a)

Statutory Definition of the Crime

Private interest in a public contract, as defined in § 946.13(1)(a) of the Criminal Code of Wisconsin, is committed by a public officer or public employee who, in a private capacity, negotiates, bids for, or enters into a contract in which the officer or employee has a private pecuniary interest and at the same time is authorized or required by law to participate in a capacity as a public officer or employee in the making of the contract.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a public (officer) (employee).

   [A _____ is a public (officer) (employee).][2]

2. The defendant (negotiated) (bid for) (entered into) a contract[3] in a private capacity.

   IF THERE IS EVIDENCE THAT THE CONTRACT DID NOT INVOLVE RECEIPTS OR DISBURSEMENTS OF MORE THAN $15,000[4] IN ANY YEAR ADD THE FOLLOWING:[5]

[This element also requires that the contract involved receipts or disbursements of more than $15,000 in any year.]

3. The defendant had a private pecuniary interest in the contract.

A "pecuniary interest" is one involving money (or one that can be valued in money).[6]

4. The defendant was authorized or required by law to participate in the making of the contract in a capacity as a public (officer) (employee).

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1740 was originally published in 1988 and revised in 1995. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of subsection (1)(a) of § 946.13. Violations of subsection (1)(b) are covered by Wis JI Criminal 1741 and 1742.

The elements of the crime as set forth in this instruction were cited with approval in State v. Venema, 2002 WI App 202, 257 Wis.2d 491, 650 N.W.2d 898 (1986). Venema also analyzed the application of § 946.13(1)(a) to a situation where the defendant participated in the making of a contract but left office before it was executed.

The offenses defined in § 946.13(1)(b) were discussed by the Wisconsin Supreme Court in State v. Stoehr, 134 Wis.2d 66, 396 N.W.2d 177 (1986). The case involved a director of a state technical institute who received payments in excess of his regular salary from a contract between the institute and entities representing foreign nations. The court held that § 946.13(1)(b) is a strict liability statute in the sense that it does not require the proof of any unlawful intent or corrupt purpose. (The specific offense involved in Stoehr was the type covered by Wis JI Criminal 1742, but the court's holding applies to the statute generally.)

For a discussion of the defense of good faith reliance on the advice of governmental counsel in connection with a violation of § 946.13, see State v. Davis, 63 Wis.2d 75, 216 N.W.2d 31 (1974).

The scope of § 946.13 appears to be very broad. The extent of its application is discussed in several Opinions of the Attorney General. See Op. Att'y Gen. 44 87 (August 24, 1987), Op. Att'y Gen. 42 87 (August 21, 1987), Op. Att'y Gen. 22 87 (April 21, 1987), Op. Att'y Gen. 4 87 (February 25, 1987), Op. Att'y Gen. 33 86 (September 12, 1986), 64 Op. Att'y Gen. 108 (1975), 63 Op. Att'y Gen. 44 (1974), 60 Op. Att'y Gen. 98, 310, and 367 (1971), and 52 Op. Att'y Gen. 367 (1963). One point emphasized by several of the opinions is that a county board member, for example, would be able to avoid liability under § 946.13(1)(b) by abstaining from voting on matters relating to their private contracts. See, for example, Op. Att'y Gen. 44 87, Op. Att'y Gen. 42 87, and Op. Att'y Gen. 22 87. However, those opinions advise that abstaining from voting does not avoid a violation of subsec. (1)(a) of the statute (which is covered by this instruction).

A number of exceptions are provided in subsections (2), and (5) - (12). The most common exception is the one found in subsection (2)(a), which excludes contracts which do not involve public receipts or disbursements of more than $15,000 in any year. See notes 4 and 5, below.

1. Section 946.13(1)(a) prohibits public officers or employees from negotiating, etc., any contract in a private capacity when they will be involved in that contract in a public capacity in either of two ways: by participating in the making of the contract; or by performing some discretionary function in regard to the contract. The first alternative – participating in the making – is addressed by this instruction. If the "discretionary function" alternative is involved, the fourth element would have to be changed; the third element of Wis JI-Criminal 1742 may be helpful as a guide.

2. In the Committee's judgment, the jury may be told, for example that a member of the county board is a public officer. It is still for the jury to be satisfied that, in fact, the individual was a member of the county board.

"Public officer" and "public employee" are defined as follows in § 939.22(30):

> "Public officer" means any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.
>
> "Public employee" means any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

3. Section 946.13(4) provides that "contract," as used in this statute, includes a conveyance.

4. 1995 Wisconsin Act 435 (effective date: June 25, 1996) increased the amount from $7,500 to $15,000.

5. A number of exceptions are set forth in subsections (2), and (5) - (12) of § 946.13. Most are quite specialized and are unlikely to apply to most cases. However, the exception that will apply to all cases is the one found in subsec. (2)(a), excluding contracts which do not involve public receipts or disbursements of more than $15,000 in any year.

The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477,204 N.W. 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

6. Webster's Third New International Dictionary (Unabridged) defines "pecuniary" as follows: "taking the form of or consisting of money; of or relating to money." Black's Law Dictionary (Fourth Edition) adds: "consisting of money or that which can be valued in money." Although "pecuniary" has apparently not been defined in Wisconsin case law, the Committee believes the meaning should include not only actual money but also "that which can be valued in money" per the Black's definition. For example, if a public officer exchanged land parcels with the county, such an exchange might not involve the transfer of money but "could be valued in money."

The statute extends to both "direct and indirect" pecuniary interests. In a case involving an indirect interest, it may be helpful to elaborate. The 1953 Report on the Criminal Code stated: "The private pecuniary interest may be either direct or indirect, i.e., it may be a pecuniary interest which the actor as an individual expects to get directly, or it may be one which he expects to get indirectly, as when he is an officer or stockholder of a corporation in whose behalf the contract is made." 1953 Report, page 180.

1741 PRIVATE INTEREST IN A PUBLIC CONTRACT: PARTICIPATING IN THE MAKING OF A CONTRACT IN WHICH ONE HAS A PRIVATE PECUNIARY INTEREST[1] — § 946.13(1)(b)

Statutory Definition of the Crime

Private interest in a public contract, as defined in § 946.13(1)(a) of the Criminal Code of Wisconsin, is committed by a public officer or public employee who, in a capacity as a public officer or public employee, participates in the making of a contract in which the officer or employee has a private pecuniary interest.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a public (officer) (employee).

   [A _____ is a public (officer) (employee).][2]

2. The defendant participated in the making of a contract in a capacity as a public (officer) (employee).

   IF THERE IS EVIDENCE THAT THE CONTRACT DID NOT INVOLVE RECEIPTS OR DISBURSEMENTS OF MORE THAN $15,000[3] IN ANY YEAR ADD THE FOLLOWING:[4]

   [This element also requires that the contract involved receipts or disbursements of more than $15,000 in any year.]

3. The defendant had a private pecuniary interest in the contract.

A "pecuniary interest" is one involving money (or one that can be valued in money).[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI Criminal 1741A in 1988. It was revised and the number changed to 1741 in 1995. This revision was approved by the Committee in December 2008.

This instruction is for one type of violation of subsection (1)(b) of § 946.13. For a second type, see Wis JI Criminal 1742. Violations of subsection (1)(a) are covered by Wis JI Criminal 1740.

The offenses defined in § 946.13(1)(b) were discussed by the Wisconsin Supreme Court in State v. Stoehr, 134 Wis.2d 66, 396 N.W.2d 177 (1986). The case involved a director of a state technical institute who received payments in excess of his regular salary from a contract between the institute and entities representing foreign nations. The court held that § 946.13(1)(b) is a strict liability statute in the sense that it does not require the proof of any unlawful intent or corrupt purpose. (The specific offense involved in Stoehr was the type covered by Wis JI Criminal 1742, but the court's holding applies to the statute generally.)

For a discussion of the defense of good faith reliance on the advice of governmental counsel in connection with a violation of § 946.13, see State v. Davis, 63 Wis.2d 75, 216 N.W.2d 31 (1974).

The scope of § 946.13 appears to be very broad. The extent of its application is discussed in several Opinions of the Attorney General. See Op. Att'y Gen. 44 87 (August 24, 1987), Op. Att'y Gen. 42 87 (August 21, 1987), Op. Att'y Gen. 22 87 (April 21, 1987), Op. Att'y Gen. 4 87 (February 25, 1987), Op. Att'y Gen. 33 86 (September 12, 1986), 64 Op. Att'y Gen. 108 (1975), 63 Op. Att'y Gen. 44 (1974), 60 Op. Att'y Gen. 98, 310, and 367 (1971), and 52 Op. Att'y Gen. 367 (1963). One point emphasized by several of the opinions is that a county board member, for example, would be able to avoid liability under § 946.13(1)(b) by abstaining from voting on matters relating to their private contracts. See, for example, Op. Att'y Gen. 44 87, Op. Att'y Gen. 42 87, and Op. Att'y Gen. 22 87. However, those opinions advise that abstaining from voting does not avoid a violation of subsec. (1)(a) of the statute (which is covered by this instruction).

A number of exceptions are provided in subsections (2), and (5) - (12). The most common exception is the one found in subsection (2)(a), which excludes contracts which do not involve public receipts or disbursements of more than $1,500 in any year. See notes 3 and 4, below.

1. Section 946.13(1)(b) prohibits two types of activities on the part of public officers or employees: participating in the making of a contract in which one has a private pecuniary interest (Wis JI-Criminal 1741 is drafted for this situation); and performing a discretionary function with regard to a contract in which one has a private pecuniary interest (Wis JI-Criminal 1742 is drafted for this situation).

2. In the Committee's judgment, the jury may be told, for example that a member of the county board is a public officer. It is still for the jury to be satisfied that, in fact, the individual was a member of the county board.

"Public officer" and "public employee" are defined as follows in § 939.22(30):

> "Public officer" means any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.
>
> "Public employee" means any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

3. 1995 Wisconsin Act 435 (effective date: June 25, 1996) increased the amount from $7,500 to $15,000.

4. A number of exceptions are set forth in subsections (2), and (5) - (12) of § 946.13. Most are quite specialized and are unlikely to apply to most cases. However, the exception that will apply to all cases is the one found in subsec. (2)(a), excluding contracts which do not involve public receipts or disbursements of more than $15,000 in any year.

The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477,204 N.W. 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

5. Webster's Third New International Dictionary (Unabridged) defines "pecuniary" as follows: "taking the form of or consisting of money; of or relating to money." Black's Law Dictionary (Fourth Edition) adds: "consisting of money or that which can be valued in money." Although "pecuniary" has apparently not been defined in Wisconsin case law, the Committee believes the meaning should include not only actual money but also "that which can be valued in money" per the Black's definition. For example, if a public officer exchanged land parcels with the county, such an exchange might not involve the transfer of money but "could be valued in money."

The statute extends to both "direct and indirect" pecuniary interests. In a case involving an indirect interest, it may be helpful to elaborate. The 1953 Report on the Criminal Code stated: "The private pecuniary interest may be either direct or indirect, i.e., it may be a pecuniary interest which the actor as an individual expects to get directly, or it may be one which he expects to get indirectly, as when he is an officer or stockholder of a corporation in whose behalf the contract is made." 1953 Report, page 180.

1742 PRIVATE INTEREST IN A PUBLIC CONTRACT: PERFORMING A DISCRETIONARY FUNCTION IN REGARD TO A CONTRACT IN WHICH ONE HAS A PRIVATE PECUNIARY INTEREST[1] — § 946.13(1)(b)

Statutory Definition of the Crime

Private interest in a public contract, as defined in § 946.13(1)(a) of the Criminal Code of Wisconsin, is committed by a public officer or public employee who, in a capacity as a public officer or public employee, performs some function requiring the exercise of discretion in regard to a contract in which the officer or employee has a private pecuniary interest.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a public (officer) (employee).

   [A _____ is a public (officer) (employee).][2]

2. The defendant in a capacity as a public (officer) (employee), performed a function requiring the exercise of discretion[3] in regard to a contract.[4]

   IF THERE IS EVIDENCE THAT THE CONTRACT DID NOT INVOLVE RECEIPTS OR DISBURSEMENTS OF MORE THAN $15,000[5] IN ANY YEAR ADD THE FOLLOWING:[6]

[This element also requires that the contract involved receipts or disbursements of more than $15,000 in any year.]

3. The defendant had a private pecuniary interest in the contract.

A "pecuniary interest" is one involving money (or one that can be valued in money).[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI Criminal 1741B in 1988. It was revised and the number changed to 1742 in 1995. This revision was approved by the Committee in December 2008.

This instruction is for one type of violation of subsection (1)(b) of § 946.13. For a second type, see Wis JI Criminal 1741. Violations of subsection (1)(a) are covered by Wis JI Criminal 1740.

The offenses defined in § 946.13(1)(b) were discussed by the Wisconsin Supreme Court in State v. Stoehr, 134 Wis.2d 66, 396 N.W.2d 177 (1986). The case involved a director of a state technical institute who received payments in excess of his regular salary from a contract between the institute and entities representing foreign nations. The court held that § 946.13(1)(b) is a strict liability statute in the sense that it does not require the proof of any unlawful intent or corrupt purpose. (The specific offense involved in Stoehr was the type covered by Wis JI Criminal 1742, but the court's holding applies to the statute generally.)

For a discussion of the defense of good faith reliance on the advice of governmental counsel in connection with a violation of § 946.13, see State v. Davis, 63 Wis.2d 75, 216 N.W.2d 31 (1974).

The scope of § 946.13 appears to be very broad. The extent of its application is discussed in several Opinions of the Attorney General. See Op. Att'y Gen. 44 87 (August 24, 1987), Op. Att'y Gen. 42 87 (August 21, 1987), Op. Att'y Gen. 22 87 (April 21, 1987), Op. Att'y Gen. 4 87 (February 25, 1987), Op. Att'y Gen. 33 86 (September 12, 1986), 64 Op. Att'y Gen. 108 (1975), 63 Op. Att'y Gen. 44 (1974), 60 Op. Att'y Gen. 98, 310, and 367 (1971), and 52 Op. Att'y Gen. 367 (1963). One point emphasized by several of the opinions is that a county board member, for example, would be able to avoid liability under

§ 946.13(1)(b) by abstaining from voting on matters relating to their private contracts. See, for example, Op. Att'y Gen. 44 87, Op. Att'y Gen. 42 87, and Op. Att'y Gen. 22 87. However, those opinions advise that abstaining from voting does not avoid a violation of subsec. (1)(a) of the statute (which is covered by this instruction).

A number of exceptions are provided in subsections (2), and (5) - (12). The most common exception is the one found in subsection (2)(a), which excludes contracts which do not involve public receipts or disbursements of more than $15,000 in any year. See notes 5 and 6, below.

1. Section 946.13(1)(b) prohibits two types of activities on the part of public officers or employees: participating in the making of a contract in which one has a private pecuniary interest (Wis JI-Criminal 1741 is drafted for this situation); and performing a discretionary function with regard to a contract in which one has a private pecuniary interest (Wis JI-Criminal 1742 is drafted for this situation).

2. In the Committee's judgment, the jury may be told, for example that a member of the county board is a public officer. It is still for the jury to be satisfied that, in fact, the individual was a member of the county board.

"Public officer" and "public employee" are defined as follows in § 939.22(30):

> "Public officer" means any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.
>
> "Public employee" means any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

3. The "discretionary acts" requirement was discussed briefly in State v. Stoehr, 134 Wis.2d 66, 396 N.W.2d 177 (1986). The criminal complaint alleged that the defendant, as a director of a state technical institute, "authorized and received . . . monies, over and above his normal salary, for work performed in connection with" four public contracts. The court in Stoehr held that the words "authorized and received" denote the performance of a function requiring the exercise of discretion.

If a definition of "discretionary" is necessary, an adaptation of the following might be helpful: "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction." Davis, Administrative Law, § 4.02 (3d ed. 1972).

4. Section 946.13(4) provides that "contract," as used in this section, includes a conveyance.

5. 1995 Wisconsin Act 435 (effective date: June 25, 1996) increased the amount from $7,500 to $15,000.

6. A number of exceptions are set forth in subsections (2), and (5) - (12) of § 946.13. Most are quite specialized and are unlikely to apply to most cases. However, the exception that will apply to all cases is the one found in subsec. (2)(a), excluding contracts which do not involve public receipts or disbursements of more than $15,000 in any year.

The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477,204 N.W. 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

7. Webster's Third New International Dictionary (Unabridged) defines "pecuniary" as follows: "taking the form of or consisting of money; of or relating to money." Black's Law Dictionary (Fourth Edition) adds: "consisting of money or that which can be valued in money." Although "pecuniary" has apparently not been defined in Wisconsin case law, the Committee believes the meaning should include not only actual money but also "that which can be valued in money" per the Black's definition. For example, if a public officer exchanged land parcels with the county, such an exchange might not involve the transfer of money but "could be valued in money."

The statute extends to both "direct and indirect" pecuniary interests. In a case involving an indirect interest, it may be helpful to elaborate. The 1953 Report on the Criminal Code stated: "The private pecuniary interest may be either direct or indirect, i.e., it may be a pecuniary interest which the actor as an individual expects to get directly, or it may be one which he expects to get indirectly, as when he is an officer or stockholder of a corporation in whose behalf the contract is made." 1953 Report, page 180.

1750 PERJURY — § 946.31

Statutory Definition of the Crime

Perjury, as defined in § 946.31 of the Criminal Code of Wisconsin, is committed by one who, while under (oath) (affirmation) orally makes a false material statement which the person does not believe to be true, in any proceeding[1] before a court.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant orally made a statement while under (oath) (affirmation).[3]
2. The statement was false when made.
3. The defendant did not believe the statement to be true when made.

   [It is not a defense to a prosecution under this section that testimony that constituted perjury at the time it was given was subsequently corrected or retracted.][4]
4. The statement was made in a proceeding before a court.[5]
5. The statement was material to the proceeding.

   A material statement is one that tends to prove or disprove any fact that is of consequence to the determination of the proceeding in which the statement was

made.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1750 was originally published in 1966 and revised in 1994, 1995, 2004, and 2020. This revision was approved by the Committee in October 2023. It removed a footnote that addressed the matter of the defendant's knowledge of whether the statement was true or false.

This instruction is for a violation of § 946.31, Perjury. Related offenses are covered by § 946.32, False Swearing. See Wis JI-Criminal 1754, 1755, and 1756.

The doctrine of issue preclusion does not bar the State from prosecuting a defendant for perjury allegedly committed at a criminal trial where the defendant was acquitted on a single issue but where the State claims to have discovered new evidence that the defendant falsely testified regarding that issue. The State must show that the evidence meets the four requirements of the newly discovered evidence test. State v. Canon, 2001 WI 11, ¶¶1, 25, 241 Wis.2d 164, 622 N.W.2d 270.

Multiple counts of perjury based on statements in a single proceeding are permissible where each requires proof of a fact the other does not and each required a new "volitional departure." State v. Warren, 229 Wis.2d 172, 599 N.W.2d 379 (Ct. App. 1999).

Regarding solicitation of perjury, see State v. Manthey, 169 Wis.2d 673, 487 N.W.2d 44 (Ct. App. 1992). The court held that a solicitation of perjury charge was established where the defendant solicited another to pay money to the defendant for false testimony (referring to this as a "double inchoate crime"). 169 Wis.2d 673, 687.

The problem of perjury prosecutions of witnesses after an acquittal in a criminal case is discussed in Shellenberger, "Perjury Prosecutions After Acquittals. . . ." 71 Marquette Law Review 703 (1988).

1. Section 946.31(1) applies to statements made in "any matter, cause, action or proceeding." The instruction uses the term "proceeding" throughout based on the Committee's conclusion that it is a general term that includes the other alternatives. (See, for example, § 801.01(1), which provides: "Proceedings in the courts are divided into actions and special proceedings." Emphasis added.)

2. "Court" is selected from the list of alternatives set forth in § 946.31(1):

(a) A court;
(b) A magistrate;
(c) A judge, referee or court commissioner;
(d) An administrative agency or arbitrator authorized by statute to determine issues of fact;
(e) A notary public while taking testimony for use in an action or proceeding pending in court;
(f) An officer authorized to conduct inquests of the dead;
(g) A grand jury;
(h) A legislative body or committee.

The instruction must be modified if an alternative other than "court" is involved. See text at notes 6 and 8 below.

See Layton School of Art & Design v. WERC, 82 Wis.2d 324, 262 N.W.2d 218 (1978), for a discussion of the alternative set forth in § 946.31(1)(d): ". . . an . . . arbitrator authorized by statute to determine issues of fact."

Omitted from the instruction's definition of the offense is the statutory language: "whether legally constituted or exercising powers as if legally constituted." That phrase was added to § 946.31(1) in 1980 to replace "whether de jure or de facto." (See Chapter 110, section 58, Laws of 1979.) The previous version of this instruction included definitions of "de jure" and "de facto" and followed them with a statement that there is no reason to distinguish between the two for purposes of this offense. The same is true for the current statute's "legally constituted" phrase and, therefore, the Committee concluded that it is not necessary to include it in the instruction.

This interpretation is supported by State v. Petrone, 166 Wis.2d 220, 479 N.W.2d 212 (Ct. App. 1991). Petrone challenged her perjury conviction on the ground that the reserve judge who conducted the John Doe proceeding at which she made a false statement had not been properly appointed by the chief justice under § 753.075(1). The court rejected the argument, citing the statute: ". . . legally constituted or exercising powers as if legally constituted." The court held that the judge was acting with what was formerly referred to as de facto powers and, therefore, was covered by the statute. The court cited footnote 7 to the 1966 version of Wis JI-Criminal 1750, which, as explained above, instructed the jury that the distinction between de facto and de jure made no difference. That principle has not changed; the Committee concluded that it is not a matter that needs to be communicated to the jury. As illustrated by the Petrone case, it is a legal matter relating to the scope of the statute, not a factual question for the jury to decide.

3. "Oath" is defined to include "affirmation" in § 990.01(24). The form of the testimonial oath is described in §§ 906.03(2) and 990.01(24). Section 887.01 identifies those who may administer oaths.

Section 906.03(3) provides for taking a statement under affirmation where a person has conscientious scruples against taking an oath and sets forth the form.

4. This instruction should be given when warranted by the evidence. § 946.31(2).

5. See notes 1 and 2, supra.

6. This definition of "material" was cited with approval in State v. Munz, 198 Wis.2d 379, 382, 541

N.W.2d 821 (Ct. App. 1995). The court held that testimony is material if the court could have relied on it, "irrespective of whether the court ultimately relied upon the testimony in reaching its decision." 198 Wis.2d 379, 385.

The definition of "material" is adapted from part of the definition of "relevant evidence," in § 904.01. The Judicial Council Committee's Note indicates § 904.01 is consistent with recent Wisconsin cases, including State v. Becker, 51 Wis.2d 659, 188 N.W.2d 449 (1971), which "adopted McCormick's view of the distinction between materiality and relevancy which is imported into § 904.01 by the phrase 'that is of consequence to the determination of the action.'" 59 Wis.2d R67 (1973).

Federal Rule of Evidence 404 is identical. "The rule uses the phrase 'fact that is of consequence to the determination of the action'. . .; it has the advantage of avoiding the loosely used and ambiguous word 'material.'" Federal Advisory Committee's Note, 59 Wis.2d R69.

The 1966 version of Wis JI-Criminal 1750 included the following in parentheses in the text of the instruction:

(In a proper case, the court may instruct the jury that the statement is material, as a matter of law.)

There was no explanation that identified "a proper case" and no citation of authority for the proposition that materiality was a matter of law.

The Committee decided to delete the parenthetical sentence from the 1993 revision of the instruction because there is no direct authority in Wisconsin for having the judge, as opposed to the jury, decide whether a statement was material.

The history of the Wisconsin perjury statute shows that the 1953 Criminal Code draft eliminated "materiality" altogether. However, it was restored by the Criminal Code Advisory Committee during the 1954-55 discussions of the draft, which essentially reestablished the common law definition of the crime. During those discussions, the minutes indicate that there was a motion to add a definition of "materiality" and include a statement that "materiality is a question of law for the court." The motion failed. (See Minutes of the Criminal Code Advisory Committee, May 26, 1955, pages 2-6.)

Prior to the decision of the United States Supreme Court in United States v. Gaudin, 515 U.S. 506 (1995), the rule in the majority of federal circuits was that materiality is a matter of law for the court to decide. The statement in United States v. Watson, 623 F.2d 1198 (7th Cir. 1980), was typical:

> Although proof of a statement's materiality, . . . is an essential element of the crime charged in the indictment, it is well settled that the determination of materiality is a question of law for the court. . . . Since the issue of materiality is a legal question, not a question of fact, the government need not prove materiality beyond a reasonable doubt. . . .

The Gaudin decision rejected this view, holding that it was error for a trial court to refuse to submit the question of materiality to the jury. Gaudin was charged with violating 18 U.S.C. § 1001 by making false representations on HUD forms in connection with real estate transactions. The government conceded that the statute is violated only when the false representations go to "material facts." The court stated the basic principles that apply to resolving the question presented in this case and rejected government arguments

that the basic principles should not apply:

> The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.

515 U.S 506, 511.

The court found no basis in law or history for treating the materiality differently than other elements of other crimes. It repudiated the decision in Sinclair v. United States, 279 U.S. 263 (1929), which had held that the issue of whether questions were "pertinent" under a statute penalizing the refusal to answer questions "pertinent" to a congressional inquiry was for the court, not the jury.

Gaudin, though involving a federal statute, articulated basic constitutional principles that ought to apply to the analysis of the Wisconsin perjury statute. Its holding confirms the Committee's conclusion the parenthetical reference in the 1966 version of Wis JI-Criminal 1750 was insufficient authority for removing the materiality element from the jury's consideration. Wisconsin cases have been strict in refusing to approve trial court actions that arguably remove an element from the jury's consideration, even where an element involves largely a "legal" conclusion. See, for example, State v. Leist, 141 Wis.2d 34, 414 N.W. 2d 45 (Ct. App. 1987), where the court held it was error for the trial court to tell the jury that the document involved in the case was "false, sham, or frivolous." (Leist is discussed in the Comment to Wis JI-Criminal 1499.)

This conclusion is further supported by the decision in State v. Williams, 179 Wis.2d 80, 505 N.W.2d 468 (Ct. App. 1993), which involved medical assistance fraud under § 49.49(1)(a). That offense also requires "material" false statements and the court held that it was error for the trial court to deny the defendant the opportunity to introduce evidence relevant to the materiality of the statements made. "If the statements had no legal effect, the court could determine as a matter of law that the false statements were not material. At the very least, the jury should be given the opportunity to determine whether the false statements were material based upon the evidence concerning the legal effect of the statements." 179 Wis.2d 80, 87-88. Thus, if it is error to limit evidence as to "materiality," it should be error to withdraw the "materiality" issue from the jury's consideration.

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1754 FALSE SWEARING: FALSE STATEMENT UNDER OATH: FELONY — § 946.32(1)(a)

Statutory Definition of the Crime

False swearing, as defined in § 946.32(1)(a) of the Criminal Code of Wisconsin, is committed by one who under (oath) (affirmation) makes or subscribes a false statement which (he) (she) does not believe is true, when such (oath) (affirmation) is (authorized or required by law)[1] (required by any public officer or governmental agency as a prerequisite to such officer or agency taking some official action).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (made) (subscribed)[2] a false statement.
2. The defendant did not believe the statement to be true when (made) (subscribed).
3. The statement was (made) (subscribed) under (oath) (affirmation).[3]

USE THE FOLLOWING IF WRITTEN STATEMENTS ARE INVOLVED.[4]

[The meaning of being under (oath) (affirmation) is usually well understood, as when the witnesses in this case were put under oath before you. A written statement is under (oath) (affirmation) when it is subscribed or signed by a person

who swears that it is the truth before some person authorized[5] to administer an (oath) (affirmation).]

4. The (oath) (affirmation) was (authorized or required by law) (required by any public officer or governmental agency as a prerequisite to the officer or agency taking some official action).

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1754 was originally published in 1994 and revised in 2004. This revision was approved by the Committee in October 2023. It removed a footnote that addressed the matter of the defendant's knowledge of whether the statement was true or false.

This instruction is for a violation of § 946.32(1)(a); violations of sub. (1)(b) are addressed in Wis JI Criminal 1755. Violations of sub. (1) are felonies. The misdemeanor offense defined in sub. (2) is addressed by Wis JI Criminal 1756.

1. One alternative is that the sworn statement must be "authorized or required" by law. An affidavit made for no reason or for a purpose for which the law does not specifically authorize or require an oath, e.g., endorsement of a product, is not within the statute. See State v. Zisch, 243 Wis. 175, 9 N.W.2d 625 (1943). The unauthorized affidavit, if false, is covered by § 946.32(2), the misdemeanor false swearing offense.

In State v. Devitt, 82 Wis.2d 262, 270, 262 N.W.2d 73 (1978), the court concluded that "authorized by law" must "be narrowly construed in light of a penal statute, the definition of 'permitted' [urged by the state] is inappropriate." The court cited the definition provided in Black's Law Dictionary, 4th ed., p. 169, as indicating "that 'authorize' means more than consistent with the general scheme. Among its definitions: 'To empower; to give a right or authority to act . . . It has a mandatory effect or meaning, implying a direction to act. Authorized is sometimes construed as equivalent to directed.'" The court found that the filing of the statements in question were not "authorized" by the state Corrupt Practices Act (§ 12.09(5)(b),

1971 Wis. Stats.). The court also noted that the alleged misconduct was "not a wrong without a remedy. The misdemeanor false swearing statute, see § 946.32(2), would clearly apply in this case because it has no requirement that the false statement be made under oath or affirmation required or authorized by law." 82 Wis.2d 262, 270-71.

2. The meanings of "make" and "subscribe" were discussed in State v. Devitt, 82 Wis.2d 262, 262, N.W.2d 73 (1978). Both parties and, apparently, the Wisconsin Supreme Court agreed that "subscribes" refers to signing a written document. The defendant argued that "makes" is limited to preparing or drawing up a writing. The court rejected this narrow definition, favoring a more general concept that includes making an oral statement in a judicial proceeding. 82 Wis.2d 262, 271-75.

3. "Oath" is defined to include "affirmation" in § 990.01(24). The form of the testimonial oath is described in §§ 906.03(2) and 990.01(24). Section 887.01 identifies those who may administer oaths.

Section 906.03(3) provides for taking a statement under affirmation where a person has conscientious scruples against taking an oath and sets forth the form.

4. The bracketed material is provided for possible use where one or more written statements are involved. Jurors are familiar with testimony made under oath but may be less clear about how written statements are sworn to or affirmed.

5. Section 887.01 identifies those who may administer oaths.

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1755 FALSE SWEARING: INCONSISTENT STATEMENTS — § 946.32(1)(b)

Statutory Definition of the Crime

False swearing, as defined in § 946.32(1)(b) of the Criminal Code of Wisconsin, is committed by one who makes or subscribes two inconsistent statements under (oath) (affirmation) in regard to any matter respecting which an (oath) (affirmation) is, in each case, (authorized or required by law)[1] (required by any public officer or governmental agency as a prerequisite to such officer or agency taking some official action) under circumstances which demonstrate that the witness or subscriber knew at least one of the statements to be false when made.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (made) (subscribed)[2] inconsistent statements.

   Statements are inconsistent when they are contrary or contradictory to each other, so that the truth of one implies the negation and falsity of the other.[3]

2. The statements were (made) (subscribed) under (oath) (affirmation).[4]

   USE THE FOLLOWING IF WRITTEN STATEMENTS ARE INVOLVED.[5]

[The meaning of being under (oath) (affirmation) is usually well understood, as when the witnesses in this case were put under oath before you. A written statement is under (oath) (affirmation) when it is subscribed or signed by a person, who swears that it is the truth, before some person authorized[6] to administer an (oath) (affirmation).]

3. The (oath) (affirmation) was (authorized or required by law)[7] (required by any public officer or governmental agency as a prerequisite to the officer or agency taking some official action).

4. The defendant (made) (subscribed) the statements under circumstances which demonstrate that the defendant knew at least one of the statements was false when (made) (subscribed).

"Knew" requires only that the defendant believed that at least one of the statements was false when made.[8]

You need not determine which statement the defendant knew was false as long as you are satisfied beyond a reasonable doubt that the defendant knew that at least one of the statements was false when made.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1755 was originally published in 1966 and revised in 1993 and 1997. This revision was approved by the Committee in August 2003 and involved adoption of a new format.

This instruction is for a violation of § 946.32(1)(b); violations of sub. (1)(a) are addressed in Wis JI Criminal 1754. Violations of sub. (1) are felonies. The misdemeanor offense defined in sub. (2) is addressed by Wis JI Criminal 1756.

If a statement was made in each of two different counties within Wisconsin, venue lies in either county. § 971.19(2). If one of the statements was made out of the state, an issue of jurisdiction under § 939.03 may arise. See Wis JI Criminal 268.

Section 946.32(1)(b) also provides: "The period of limitations within which the prosecution may be commenced runs from the time of the first statement." In State v. Slaughter, 200 Wis.2d 190, 198, 546 N.W.2d 490 (Ct. App. 1996), the court held the statute of limitations language "refers to an affirmative defense, which means it must be raised by the defendant." The Committee interprets this to mean that the limitations issue would be raised by a pretrial motion and not submitted to the jury. This is consistent with the court's statement that the limitations language in the false swearing statute "simply clarifies the point at which the statute should begin running." 200 Wis.2d 190, 197. Slaughter also held that the tolling provisions of the regular statute of limitations, § 939.74, apply in this situation.

1. The sworn statement must be "authorized or required" by law. An affidavit made for no reason for a purpose for which the law does not specifically authorize or require an oath, e.g., endorsement of a product, is not within the statute. See State v. Zisch, 243 Wis. 175, 9 N.W.2d 625 (1943). The unauthorized affidavit, if false, is covered by § 946.32(2).

In State v. Devitt, 82 Wis.2d 262, 270, 262 N.W.2d 73 (1978), the court concluded that "authorized by law" must "be narrowly construed in light of a penal statute, the definition of 'permitted' [urged by the state] is inappropriate." The court cited the definition provided in Black's Law Dictionary, 4th ed., p. 169, as indicating "that 'authorize' means more than consistent with the general scheme. Among its definitions: 'To empower; to give a right or authority to act . . . It has a mandatory effect or meaning, implying a direction to act. Authorized is sometimes construed as equivalent to directed.'" The court found that the filing of the statements in question were not "authorized" by the state Corrupt Practices Act (§ 12.09(5)(b), 1971 Wis. Stats.). The court also noted that the alleged misconduct was "not a wrong without a remedy. The misdemeanor false swearing statute, see § 946.32(2), would clearly apply in this case because it has no requirement that the false statement be made under oath or affirmation required or authorized by law." 82 Wis.2d 262, 270-271.

2. The meanings of "make" and "subscribe" were discussed in State v. Devitt, 82 Wis.2d 262, 262 N.W.2d 73 (1978). Both parties and, apparently, the Wisconsin Supreme Court, agreed that "subscribes" refers to signing a written document. The defendant argued that "makes" is limited to preparing or drawing up a writing. The court rejected this narrow definition, favoring a more general concept that includes making an oral statement in a judicial proceeding. 82 Wis.2d 262, 271-75.

3. This definition is a slightly revised version of the one provided in the 1966 version of the instruction. The 1966 instruction cited 20-A, Words & Phrases, pp. 341-44.

4. "Oath" is defined to include "affirmation" in § 990.01(24). The form of the testimonial oath is described in §§ 906.03(2) and 990.01(24).

Section 906.03(3) provides for taking a statement under affirmation where a person has conscientious scruples against taking an oath and sets forth the form.

5. The bracketed material is provided for possible use where one or more written statements is involved. Jurors are familiar with testimony made under oath but may be less clear about how written statements are sworn to or affirmed.

6. Section 887.01 identifies those who may administer oaths.

7. In State v. Slaughter, 200 Wis.2d 190, 199, 546 N.W.2d 490 (Ct. App. 1996), the court cited Wis JI-Criminal 1755 as support for its conclusion that it is the oath or affirmation that must be "required by law," not the making of the statement.

8. Section 939.23(2).

1756 FALSE SWEARING: FALSE STATEMENT UNDER OATH: MISDEMEANOR — § 946.32(2)

Statutory Definition of the Crime

False swearing, as defined in § 946.32(2) of the Criminal Code of Wisconsin, is committed by one who under (oath) (affirmation) makes or subscribes a false statement which (he) (she) does not believe is true.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (made) (subscribed)[1] a false statement.
2. The defendant did not believe the statement to be true when (made) (subscribed).
3. The statement was (made) (subscribed) under (oath) (affirmation).[2]

[USE THE FOLLOWING IF WRITTEN STATEMENTS ARE INVOLVED.][3]

[The meaning of being under (oath) (affirmation) is usually well understood, as when the witnesses in this case were put under oath before you. A written statement is under (oath) (affirmation) when it is subscribed or signed by a person who swears that it is the truth before some person authorized[4] to administer an (oath) (affirmation).]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1756 was originally published in 1994 and revised in 2004. This revision was approved by the Committee in October 2023. It removed a footnote that addressed the matter of the defendant's knowledge of whether the statement was true or false.

This instruction is for the misdemeanor offense defined in § 946.32(2). The felony offenses defined in sub. (1) are addressed by Wis JI Criminal 1754 and 1755.

1. The meanings of "make" and "subscribe" were discussed in State v. Devitt, 82 Wis.2d 262, 262 N.W.2d 73 (1978). Both parties and, apparently, the Wisconsin Supreme Court agreed that "subscribes" refers to signing a written document. The defendant argued that "makes" is limited to preparing or drawing up a writing. The court rejected this narrow definition, favoring a more general concept that includes making an oral statement in a judicial proceeding. 82 Wis.2d 262, 271-75.

2. "Oath" is defined to include "affirmation" in § 990.01(24). The form of the testimonial oath is described in §§ 906.03(2) and 990.01(24). Section 887.01 identifies those who may administer oaths.

Section 906.03(3) provides for taking a statement under affirmation where a person has conscientious scruples against taking an oath and sets forth the form.

If further elaboration in the oath or affirmation requirement is desired, see the text at note 5, Wis JI-Criminal 1755.

3. The bracketed material is provided for possible use where one or more written statements are involved. Jurors are familiar with testimony made under oath but may be less clear about how written statements are sworn to or affirmed.

4. Section 887.01 identifies those who may administer oaths.

1765 RESISTING AN OFFICER — § 946.41(1)

Statutory Definition of the Crime

Resisting an officer, as defined in § 946.41 of the Criminal Code of Wisconsin, is committed by one who knowingly resists an officer while the officer is doing any act in an official capacity and with lawful authority.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant resisted an officer.

   A (title – e.g., sheriff) is an officer.[1]

   To resist an officer means to oppose the officer by force or threat of force. The resistance must be directed to the officer personally.[2]

2. The officer was doing an act in an official capacity.[3]

   _____[4] act in an official capacity when they perform duties that they are employed to perform.[5] [The duties of a _____ include: _____.][6]

3. The officer was acting with lawful authority.

_____[7] act with lawful authority if their acts are conducted in accordance with the law. In this case, it is alleged that the officer was _____.[8]

4. The defendant knew that (officer) was an officer acting in an official capacity and with lawful authority and that the defendant knew (his) (her) conduct would resist the officer.[9]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING[10] IF THE DEFENDANT HAS BEEN CHARGED WITH THE FELONY OFFENSE UNDER § 946.41(2r): SUBSTANTIAL BODILY HARM OR A SOFT TISSUE INJURY WAS CAUSED TO AN OFFICER:

If you find the defendant guilty, you must consider the following question:

Did the defendant cause (substantial bodily harm) (a soft tissue injury) to an officer?

"Cause" means that the defendant's act was a substantial factor in producing (substantial bodily harm) (a soft tissue injury).[11]

["Substantial bodily harm" means bodily injury that causes [a laceration that requires (stitches) (staples) (a tissue adhesive)] [any fracture of a bone] [a broken nose] [a burn] [a petechia] [a temporary loss of consciousness, sight, or hearing] [a concussion] [a loss or fracture of a tooth].][12]

["Soft tissue injury" means an injury that requires medical attention to a tissue that connects, supports, or surrounds other structures and organs of the body and includes tendons, ligaments, fascia, skin, fibrous tissues, fat, synovial membranes, muscles, nerves, and blood vessels.[13]]

Before you may answer the question "yes," the State must satisfy you beyond a reasonable doubt that the defendant caused (substantial bodily harm) (a soft tissue injury) to an officer.

If you are not so satisfied, you must answer this question "no."

ADD THE FOLLOWING[14] IF THE DEFENDANT HAS BEEN CHARGED WITH THE FELONY OFFENSE UNDER § 946.41(2t): GREAT BODILY HARM WAS CAUSED TO AN OFFICER:

If you find the defendant guilty, you must consider the following question:

Did the defendant cause great bodily harm to an officer?

"Cause" means that the defendant's act was a substantial factor in producing great bodily harm.[15]

"Great bodily harm" means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[16]

Before you may answer the question "yes," the State must satisfy you beyond a reasonable doubt that the defendant caused great bodily harm to an officer.

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 1765 was originally published in 1966 and revised in 1985, 1990, 1992, 1999, 2004, 2008, 2010, and 2011. This revision was approved by the Committee in December 2011; it revised the instruction to reflect changes made by 2011 Wisconsin Act 74.

2011 Wisconsin Act 74 amended § 946.41 in two ways: it added reference to "soft tissue injury" to subsec. (2r); and, it created subsec. (2t) which makes it a Class G felony to cause great bodily harm by violating subsec. (1). See footnotes 10 and 14, below. The effective date of Act 74 is December 2, 2011.

The 1990 revision split former Wis JI Criminal 1765 into three instructions. Wis JI Criminal 1765 is limited to offenses involving "resisting" an officer, which is interpreted to require physical interference. Wis JI Criminal 1766 is limited to offenses involving "obstructing," interpreted to involve nonphysical interference. Wis JI Criminal 1766A is limited to offenses involving the giving of false information.

Section 946.41 was amended by 2009 Wisconsin Act 251 [effective date: May 22, 2010]. Subsection (2r) was created to read: "Whoever violates sub. (1) and causes substantial bodily harm to an officer is guilty of a Class H felony." A special question has been added to the instruction to account for the fact increasing the penalty.

In State v. Hobson, 218 Wis.2d 550, 577 N.W.2d 825 (1998), the Wisconsin Supreme Court concluded that Wisconsin has historically recognized the common law privilege to forcibly resist an unlawful arrest. However, based on public policy considerations, the court abrogated that common law defense prospectively. Hobson involved a defendant charged with battery to a law enforcement officer who sought to invoke a true "affirmative defense" in the sense that the privilege would have provided a defense that prevented conviction even though all the elements of the crime charged were present. That is, Hobson did commit a battery against a law enforcement officer, but claimed a defense to that crime based on facts that were not inconsistent with the presence of any of the elements of the crime. Notwithstanding the Hobson decision, the fact that a police officer was acting unlawfully in making an arrest would be inconsistent with the proof of an element of resisting or obstructing an officer. An

element of the crime is that the officer was acting "with lawful authority." See element 3. and note 8. An officer making an unlawful arrest would not be acting with lawful authority, thus negating an element of the crime. For a more complete discussion, see Wis JI Criminal 795 Law Note: Privilege: Resisting An Unlawful Arrest.

In State v. Ferguson, 2009 WI 50, 317 Wis.2d 587, 767 N.W.2d 187, the court concluded that a jury instruction for a charge of obstructing an officer should include a definition of "lawful authority" and that the definition should include description of "exigent circumstances" when the obstructing occurs directly after a warrantless entry of a dwelling. However, the failure to so instruct in this case was not error, or, if error, was harmless, because the evidence supported conviction for obstructing after the defendant was arrested and had been removed from the dwelling.

Four justices also concluded that the decision of the court of appeals in State v. Mikkelson, 2002 WI App 152, 256 Wis.2d 132, 647 N.W.2d 421, is overruled. Mikkelson was characterized as holding that exigent circumstances could not justify a warrantless entry to arrest for a misdemeanor. Ferguson holds that a warrantless entry, based on probable cause and exigent circumstances, may be made for any jailable offense.

The general definition of "lawful authority" provided in Wis JI Criminal 1766 was used in the Ferguson case, though the standard instruction was not cited. A model description of what "lawful authority" involves where there is an "exigent circumstances" entry has been added to footnote 8.

1. The Committee believes that it is clearer to the members of the jury if they are simply instructed that, for example, a sheriff is an officer. "Officer" is defined as follows in sec. 946.41(2)(b):

> "Officer" means a peace officer or other public officer or public employee having the authority by nature of his office or employment to take another into custody.

2. The only Wisconsin case that directly discusses the meaning of "resist" is State v. Welch, 37 Wis. 196 (1875). Welch analyzed the predecessor to present § 946.41, a statute that prohibited only "resisting." Welch said: "To resist, is to oppose by direct, active and quasi-forcible means." 37 Wis. at 201. The 1966 version of Wis JI-Criminal 1765 used the Welch definition. The revised definition in this instruction is intended to be a more understandable expression of the same basic concept.

3. Acting "in an official capacity" and acting "with lawful authority" are two separate questions. State v. Barrett, 96 Wis.2d 174, 180-81, 291 N.W.2d 498 (1980). For the purposes of sec. 940.20(2), Battery To A Law Enforcement Officer, the court in Barrett adopted the following test for "in his official capacity": "whether the official is acting in the scope of his employment as opposed to being engaged in a personal act of his own." Barrett, supra. "Lawful authority" goes to whether the officer's actions "are conducted in accordance with the law." Barrett, 96 Wis.2d at 181. See note 8, below.

4. Use the plural form in the blank, e.g., "sheriffs," "police officers," etc.

5. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

6. The duties, powers, or responsibilities of some peace officers are set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the

duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

7. Use the plural form in the blank, e.g., "sheriffs," "police officers," etc.

8. The Committee suggests specifying the lawful function being performed and, if raised by the evidence, instructing the jury on the applicable legal standard. For example, if a "stop and question" situation is involved, something like the following may be helpful:

> In this case, it is alleged that the officer was conducting a lawful stop to investigate a suspected crime. A stop is lawful when the officer has reasonable suspicion that a person is committing, has committed, or is about to commit a crime. A stop may continue for a reasonable period of time required to inquire into the person's identity and to ask for an explanation of the person's conduct. An officer conducting a stop may use only the amount of force reasonably necessary to detain the person while the inquiry into identity and conduct is made.

Or, if the evidence raises a question about the legality of an arrest, something like the following may be helpful:

> In this case, it is alleged that the officer was making a lawful arrest. An arrest is lawful when the officer has reasonable grounds to believe that the person has committed a crime. An officer making an arrest may use only the amount of force reasonably necessary to take the person into custody.

If the evidence raises a question about the "lawful authority" for an "exigent circumstances" entry, something like the following may be helpful:

> In this case, it is alleged that the officer was making a lawful entry under the "exigent circumstances" rule. That rule allows an officer to enter a dwelling without a warrant when the entry is necessary [to prevent the imminent destruction of evidence] [in hot pursuit of a criminal suspect] [to prevent injury to the suspect or another person] [to prevent the likelihood that the suspect will escape.]

The four bracketed examples of exigent circumstances are based on those set forth in State v. Ferguson, supra, 2009 WI 50, ¶20, citing State v. Richter, 2000 WI 58, 235 Wis.2d 524, ¶29, 612 N.W.2d 29 and State v. Smith, 131 Wis.2d 220, 229, 388 N.W.2d 601 (1986).

9. That the interpretation of the knowledge element reflected in Wis JI-Criminal 1765 is correct was confirmed in State v. Lossman, 118 Wis.2d 526, 536, 348 N.W.2d 159 (1984):

> The accused must believe or know he (1) resisted the officer, while the officer was (2) acting in an official capacity and (3) with lawful authority.

Also see State v. Elbaum, 54 Wis.2d 213, 194 N.W.2d 1660 (1972), and State v. Zdiarstek, 53 Wis.2d 776, 193 N.W.2d 833 (1972).

10. As amended by 2011 Wisconsin Act 74, § 946.41(2r) provides:

"Whoever violates sub. (1) and causes substantial bodily harm or a soft tissue injury to an officer is guilty of a Class H felony."

Where the felony offense is charged, the Committee recommends that a separate question be submitted to the jury if the jury finds the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Did the defendant cause (substantial bodily harm) (soft tissue injury) to an officer?

11. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of (substantial bodily harm) (soft tissue injury). The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

12. This is the definition of "substantial bodily harm" provided in § 939.22(38). Note that the definition provides only a list of harms that constitute "substantial bodily harm." Compare this with the definitions of "bodily harm" [§ 939.22(4)] and "great bodily harm" [§ 939.22(14)] which contain a general category in addition to a list of specific harms: in § 939.22(4) – "any impairment of physical condition," in § 939.22(14) – "other serious bodily injury."

13. 2011 Wisconsin Act 74 amended § 946.41(2r) to add as an alternative harm the causing of "a soft tissue injury." The definition in the instruction is the one provided in § 946.41(2)(c).

14. 2011 Wisconsin Act 74 created subsec. (2t) of § 946.41 to read:

"Whoever violates sub. (1) and causes great bodily harm to an officer is guilty of a Class G felony."

Where the felony offense is charged, the Committee recommends that a separate question be submitted to the jury if the jury finds the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Did the defendant cause great bodily harm to an officer?

15. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of great bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

16. See § 939.22(14) and Wis JI-Criminal 914.

1766 OBSTRUCTING AN OFFICER — § 946.41(1)

Statutory Definition of the Crime

Obstructing an officer, as defined in § 946.41 of the Criminal Code of Wisconsin, is committed by one who knowingly obstructs an officer while the officer is doing any act in an official capacity and with lawful authority.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obstructed an officer.

   A (title – e.g., sheriff) is an officer.[1]

   To obstruct an officer means that the conduct of the defendant prevents or makes more difficult the performance of the officer's duties.[2]

   (The refusal to answer an officer's questions, by itself, is not obstructing an officer.)[3]

2. The officer was doing an act in an official capacity.[4]

   _____[5] act in an official capacity when they perform duties that they are employed to perform.[6] [The duties of a _____ include: _____.][7]

3. The officer was acting with lawful authority.

   _____[8] act with lawful authority if their acts are conducted in accordance with the law. In this case, it is alleged that the officer was _____.[9]

4. The defendant knew that (officer) was an officer acting in an official capacity and with lawful authority and that the defendant knew (his) (her) conduct would obstruct the officer.[10]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1766 was originally published in 1990 and revised in 1992, 1999, 2003, 2005, and 2008. This revision was approved by the Committee in October 2009; it added to the Comment and to footnote 9.

The 1990 revision split former Wis JI Criminal 1765 into three instructions. Wis JI Criminal 1765 is limited to offenses involving "resisting" an officer, which is interpreted to require physical interference. Wis JI Criminal 1766 is limited to offenses involving "obstructing," interpreted to involve nonphysical interference. Wis JI Criminal 1766A is limited to offenses involving the giving of false information.

In State v. Ferguson, 2009 WI 50, 317 Wis.2d 587, 767 N.W.2d 187, the court concluded that a jury instruction for a charge of obstructing an officer should include a definition of "lawful authority" and that the definition should include description of "exigent circumstances" when the obstructing occurs directly after a warrantless entry of a dwelling. However, the failure to so instruct in this case was not error, or, if error, was harmless, because the evidence supported conviction for obstructing after the defendant was arrested and had been removed from the dwelling.

Four justices also concluded that the decision of the court of appeals in State v. Mikkelson, 2002 WI App 152, 256 Wis.2d 132, 647 N.W.2d 421, is overruled. Mikkelson was characterized as holding that exigent circumstances could not justify a warrantless entry to arrest for a misdemeanor. Ferguson holds that a warrantless entry, based on probable cause and exigent circumstances, may be made for any jailable offense.

The general definition of "lawful authority" provided in Wis JI Criminal 1766 was used in the Ferguson case, though the standard instruction was not cited. A model description of what "lawful authority" involves where there is an "exigent circumstances" entry has been added to footnote 9.

1. The Committee believes that it is clearer to the members of the jury if they are simply instructed that, for example, a sheriff is an officer. "Officer" is defined as follows in sec. 946.41(2)(b):

> "Officer" means a peace officer or other public officer or public employee having the authority by nature of his office or employment to take another into custody.

2. This part of the definition of "obstruct" was adapted from the one found in the 1966 version of Wis JI-Criminal 1765 which referred to "hinder, delay, impede, frustrate or prevent" an officer from performing his duties. No change of meaning is intended.

"Obstructing" was added to the statute in the 1955 version of the Criminal Code. Earlier definitions of this offense had prohibited only "resisting." See discussion in State v. Welch, 37 Wis. 196 (1875). The addition of "obstructing" was intended to cover the type of conduct (e.g., "impeding," "hindering," "frustrating") that Welch said was not covered by "resisting" standing alone.

The instruction's definition of "obstruct" was referred to with apparent approval [but without citing the instruction] in State v. Grobstick, 200 Wis.2d 242, 249, 546 N.W.2d 187 (Ct. App. 1996), where the court found that the defendant's jumping out a window and then returning to hide in a closet "made more difficult" the execution of a bench warrant.

3. An important question that has not been completely answered is whether failure to cooperate with police can be "obstructing" if no physical resistance is offered. For example, is it "obstructing an officer" for a person to refuse to identify himself and answer questions during a lawful "stop and question" situation? The Wisconsin Supreme Court recognized this question but found it unnecessary to answer definitively in State v. Hamilton, 120 Wis.2d 532, 356 N.W.2d 169 (1984). In Hamilton, the court assumed for the purposes of the case that the definition of "obstruct" in Wis JI-Criminal 1765 (© 1966) was correct and found that the facts of the case did not show a hindering, delaying, impeding, etc. Hamilton involved a person suspected of knowing about or being involved in the breaking of windows with a pellet gun. When confronted in a friend's house, Hamilton refused to identify himself or answer questions. The court held this refusal could not constitute "obstructing," primarily because the officers could easily have identified Hamilton by asking the other person who was present.

Some states have tried to address this problem by enacting statutes making it a crime to refuse to answer questions posed by police during a lawful stop. The constitutionality of such statutes has been raised in at least three cases before the United States Supreme Court. On each occasion, the Court has avoided giving a complete answer to the constitutional questions. (See Michigan v. DeFillipo, 443 U.S. 31 (1979); Texas v. Brown, 443 U.S. 47 (1979); and Kolender v. Lawson, 461 U.S. 352 (1983).)

In the Committee's judgment, a refusal to answer questions, by itself, should not be considered "obstructing an officer" in violation of § 946.41. The history of Wisconsin's statute shows that the type of conduct covered has been broadened substantially over the years to extend well beyond the "direct, forcible resistance" required by previous versions of the statute. (See note 2, supra.) Further expansion to cover simple refusal to answer questions should be done, if done at all, only by direct and carefully focused legislative action. (See, for example, sec. 946.40, Refusing To Aid Officer, which identifies a situation where persons do have an affirmative duty to assist a peace officer.)

The conclusion of the Committee in the paragraph above was approved in Henes v. Morrissey, 194 Wis.2d 339, 533 N.W.2d 802 (1995). Henes was a civil case against police officers who arrested Henes when he refused to identify himself during a Terry stop. The court held that

> mere silence, standing alone, is insufficient to constitute obstruction under the statute. Here, all Henes did was remain silent. He did not affirmatively act to obstruct the deputies' investigation: he did not give them false information, he did not flee from the deputies, nor did he act in any violent manner towards them. Without more than mere silence, there is no obstruction.
>
> Further, the deputies have not shown how Henes' refusal to identify himself "obstructed" their investigation. . . .
> 194 Wis.2d 339, 355.

In State v. Espinosa, 2002 WI App 51, 250 Wis.2d 804, 641 N.W.2d 484, the court court of appeals recognized an "exculpatory denial" exception to § 946.41(2)(a). This was overruled by State v. Reed, 2005 WI 53, ¶48, 280 Wis.2d 68, 695 N.W.2d 315:

> In sum, we conclude that there is no exculpatory denial exception in the obstructing statute. The statute criminalizes all false statements knowingly made and with intent to mislead the police. Although the State should have sound reasons for believing that a defendant knowingly made false statements with intent to mislead the police and were not made out of a good-faith attempt to defend against accusations of a crime, we conclude that the latter can never include the former; knowingly providing false information with intent to mislead the police is the antithesis of a good-faith attempt to defend against accusations of criminal wrongdoing. Accordingly, we overrule Espinoza.

4. Acting "in an official capacity" and acting "with lawful authority" are two separate questions. State v. Barrett, 96 Wis.2d 174, 180-81, 291 N.W.2d 498 (1980). For the purposes of sec. 940.20(2), Battery To A Law Enforcement Officer, the court in Barrett adopted the following test for "in his official capacity": "whether the official is acting in the scope of his employment as opposed to being engaged in a personal act of his own." Barrett, supra. "Lawful authority" goes to whether the officer's actions "are conducted in accordance with the law." Barrett, 96 Wis.2d at 181. See note 9, below.

5. Use the plural form in the blank, e.g., "sheriffs," "police officers," etc.

6. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

7. The duties, powers, or responsibilities of some peace officers are set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

8. Use the plural form in the blank, e.g., "sheriffs," "police officers," etc.

9. The Committee suggests specifying the lawful function being performed and, if raised by the evidence, instructing the jury on the applicable legal standard. For example, if a "stop and question" situation is involved, something like the following may be helpful:

> In this case, it is alleged that the officer was conducting a lawful stop to investigate a suspected crime. A stop is lawful when the officer has reasonable suspicion that a person is committing, has committed, or is about to commit a crime. A stop may continue for a reasonable period of time required to inquire into the person's identity and to ask for an explanation of the person's conduct. An officer conducting a stop may use only the amount of force reasonably necessary to detain the person while the inquiry into identity and conduct is made.

Or, if the evidence raises a question about the legality of an arrest, something like the following may be helpful:

> In this case, it is alleged that the officer was making a lawful arrest. An arrest is lawful when the officer has reasonable grounds to believe that the person has committed a crime. An officer making an arrest may use only the amount of force reasonably necessary to take the person into custody.

If the evidence raises a question about the "lawful authority" for an "exigent circumstances" entry, something like the following may be helpful:

> In this case, it is alleged that the officer was making a lawful entry under the "exigent circumstances" rule. That rule allows an officer to enter a dwelling without a warrant when the entry is necessary [to prevent the imminent destruction of evidence] [in hot pursuit of a criminal suspect] [to prevent injury to the suspect or another person] [to prevent the likelihood that the suspect will escape.]

The four bracketed examples of exigent circumstances are based on those set forth in the Ferguson decision, 2009 WI 50, ¶20, citing State v. Richter, 2000 WI 58, 235 Wis.2d 524, ¶29, 612 N.W.2d 29 and State v. Smith, 131 Wis.2d 220, 229, 388 N.W.2d 601 (1986).

10. That the interpretation of the knowledge element reflected in Wis JI-Criminal 1765 and 1766 is correct was confirmed in State v. Lossman, 118 Wis.2d 526, 536, 348 N.W.2d 159 (1984):

> The accused must believe or know he (1) resisted the officer, while the officer was (2) acting in an official capacity and (3) with lawful authority.

Also see State v. Elbaum, 54 Wis.2d 213, 194 N.W.2d 1660 (1972), and State v. Zdiarstek, 53 Wis.2d 776, 193 N.W.2d 833 (1972).

1766A OBSTRUCTING AN OFFICER: GIVING FALSE INFORMATION — § 946.41(2)(a)

Statutory Definition of the Crime

Obstructing an officer, as defined in § 946.41 of the Criminal Code of Wisconsin, is committed by one who knowingly gives false information to an officer with intent to mislead the officer in the performance of his or her duty while the officer is doing any act in an official capacity and with lawful authority.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly gave false information to an officer.

   A (title – e.g., sheriff) is an officer.[2]

2. The officer was doing an act in an official capacity.[3]

   _____[4] act in an official capacity when they perform duties that they are employed to perform.[5] [The duties of a _____ include: _____.][6]

3. The officer was acting with lawful authority.

_____[7] act with lawful authority if their acts are conducted in accordance with the law. In this case, it is alleged that the officer was _____.[8]

4. The defendant intended to mislead the officer.

This requires that the defendant knew that (officer) was an officer acting in an official capacity and with lawful authority[9] and that the defendant had the purpose to mislead the officer in the performance of his or her duties.[10] It is not required that the officer was misled.[11]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1766A was originally published in 1990 and revised in 1992, 2003, 2005, 2008, and 2009. This revision added to the Comment and to footnote 8.

The 1990 revision split former Wis JI Criminal 1765 into three instructions. Wis JI Criminal 1765 is limited to offenses involving "resisting" an officer, which is interpreted to require physical interference.

Wis JI Criminal 1766 is limited to offenses involving "obstructing," interpreted to involve nonphysical interference. Wis JI Criminal 1766A is limited to offenses involving the giving of false information.

Section 946.41 was amended by 1989 Wisconsin Act 121 (effective date: January 31, 1990) to add "or knowingly place physical evidence" to the definition of "obstruct" in subsec. (2)(a). A separate instruction has not been prepared for the "placing physical evidence" offense. Wis JI Criminal 1766A should be usable as a model with relatively little change.

1989 Wisconsin Act 121 also created sub. (2m), which provides that it is a Class H felony if § 946.41(1) is violated under all the following circumstances: the person gives false information or places physical evidence with intent to mislead the officer; and, the trier of fact at a criminal trial considers the false information or physical evidence; and, the trial results in the conviction of an innocent person. A uniform instruction has not been drafted for the felony offense.

In State v. Ferguson, 2009 WI 50, 317 Wis.2d 587, 767 N.W.2d 187, the court concluded that a jury instruction for a charge of obstructing an officer should include a definition of "lawful authority" and that the definition should include description of "exigent circumstances" when the obstructing occurs directly after a warrantless entry of a dwelling. However, the failure to so instruct in this case was not error, or, if error, was harmless, because the evidence supported conviction for obstructing after the defendant was arrested and had been removed from the dwelling.

Four justices also concluded that the decision of the court of appeals in State v. Mikkelson, 2002 WI App 152, 256 Wis.2d 132, 647 N.W.2d 421, is overruled. Mikkelson was characterized as holding that exigent circumstances could not justify a warrantless entry to arrest for a misdemeanor. Ferguson holds that a warrantless entry, based on probable cause and exigent circumstances, may be made for any jailable offense.

The general definition of "lawful authority" provided in Wis JI Criminal 1766 was used in the Ferguson case, though the standard instruction was not cited. A model description of what "lawful authority" involves where there is an "exigent circumstances" entry has been added to footnote 8.

1. This instruction is for a charge of obstructing an officer based on the giving of false information with intent to mislead the officer in the performance of his or her duties. Section 946.41(2)(a) provides as follows:

> "Obstructs" includes without limitation knowingly giving false information to the officer or knowingly placing physical evidence with intent to mislead the officer in the performance of his or her duty including the service of any summons or civil process.

In State v. Caldwell, 154 Wis.2d 683, 454 N.W.2d 13 (Ct. App. 1990), the court held that giving false information with intent to mislead constitutes "obstructing" as a matter of law. There is no need for further proof that the defendant's conduct made the officer's performance of duties more difficult.

In State v. Espinoza, 2002 WI App 51, 250 Wis.2d 804, 641 N.W.2d 484, the court of appeals recognized an "exculpatory denial" exception to § 946.41(2)(a). This was overruled by State v. Reed, 2005 WI 53, ¶48, 280 Wis.2d 68, 695 N.W.2d 315:

> In sum, we conclude that there is no exculpatory denial exception in the obstructing statute. The statute criminalizes all false statements knowingly made and with intent to mislead the police. Although the State should have sound reasons for believing that a defendant knowingly made false statements with intent to mislead the police and were not made out of a good-faith attempt to defend against accusations of a crime, we conclude that the latter can never include the former; knowingly providing false information with intent to mislead the police is the antithesis of a good-faith attempt to defend against accusations of criminal wrongdoing. Accordingly, we overrule Espinoza.

2. The Committee believes that it is clearer to the members of the jury if they are simply instructed that, for example, a sheriff is an officer. "Officer" is defined as follows in sec. 946.41(2)(b):

> "Officer" means a peace officer or other public officer or public employee having the authority by nature of his office or employment to take another into custody.

3. Acting "in an official capacity" and acting "with lawful authority" are two separate questions. State v. Barrett, 96 Wis.2d 174, 180-81, 291 N.W.2d 498 (1980). For the purposes of sec. 940.20(2), Battery To A Law Enforcement Officer, the court in Barrett adopted the following test for "in his official capacity": "whether the official is acting in the scope of his employment as opposed to being engaged in a personal act of his own." Barrett, supra. "Lawful authority" goes to whether the officer's actions "are conducted in accordance with the law." Barrett, 96 Wis.2d at 181. See note 8, below.

4. Use the plural form in the blank, e.g., "sheriffs," "police officers," etc.

5. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

6. The duties, powers, or responsibilities of some peace officers are set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

7. Use the plural form in the blank, e.g., "sheriffs," "police officers," etc.

8. The Committee suggests specifying the lawful function being performed and, if raised by the evidence, instructing the jury on the applicable legal standard. For example, if a "stop and question" situation is involved, something like the following may be helpful:

> In this case, it is alleged that the officer was conducting a lawful stop to investigate a suspected crime. A stop is lawful when the officer has reasonable suspicion that a person is committing, has committed, or is about to commit a crime. A stop may continue for a reasonable period of time required to inquire into the person's identity and to ask for an explanation of the person's conduct. An officer conducting a stop may use only the amount of force reasonably necessary to detain the person while the inquiry into identity and conduct is made.

Or, if the evidence raises a question about the legality of an arrest, something like the following may be helpful:

> In this case, it is alleged that the officer was making a lawful arrest. An arrest is lawful when the officer has reasonable grounds to believe that the person has committed a crime. An officer making an arrest may use only the amount of force reasonably necessary to take the person into custody.

If the evidence raises a question about the "lawful authority" for an "exigent circumstances" entry, something like the following may be helpful:

> In this case, it is alleged that the officer was making a lawful entry under the "exigent circumstances" rule. That rule allows an officer to enter a dwelling without a warrant when the entry is necessary [to prevent the imminent destruction of evidence] [in hot pursuit of a criminal suspect] [to prevent injury to the suspect or another person] [to prevent the likelihood that the suspect will escape.]

The four bracketed examples of exigent circumstances are based on those set forth in the Ferguson decision, 2009 WI 50, ¶20, citing State v. Richter, 2000 WI 58, 235 Wis.2d 524, ¶29, 612 N.W.2d 29 and State v. Smith, 131 Wis.2d 220, 229, 388 N.W.2d 601 (1986).

9. This interpretation of the knowledge element is based on the one found in Wis JI-Criminal 1765 and 1766, which was confirmed as correct in State v. Lossman, 118 Wis.2d 526, 536, 348 N.W.2d 159 (1984):

> The accused must believe or know he (1) resisted the officer, while the officer was (2) acting in an official capacity and (3) with lawful authority.

Also see State v. Elbaum, 54 Wis.2d 213, 194 N.W.2d 1660 (1972), and State v. Zdiarstek, 53 Wis.2d 776, 193 N.W.2d 833 (1972).

10. "With intent to" is defined in § 939.23(4). The definition changed, effective January 1, 1989, though both the old and new versions have "mental purpose" as one part of the definition. It is the other alternative that changed from "believes his act, if successful, will cause that result" to "is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

11. State v. Caldwell, 154 Wis.2d 683, 454 N.W.2d 13 (Ct. App. 1990), discussed in note 1, supra.

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1768 FAILURE TO COMPLY WITH AN OFFICER'S ATTEMPT TO TAKE A PERSON INTO CUSTODY — § 946.415

Statutory Definition of the Crime

Section 946.415 of the Criminal Code of Wisconsin is violated by a person who intentionally does all of the following:

- refuses to comply with an officer's lawful attempt to take the person into custody;
- retreats or remains in a building or place and, through action or threat, attempts to prevent the officer from taking the person into custody; and,
- remains or becomes armed with a dangerous weapon or threatens to use a dangerous weapon, regardless of whether the person has a dangerous weapon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally refused to comply with an officer's[1] lawful attempt to take the defendant into custody.

   "Intentionally" requires that the defendant knew that an officer was lawfully attempting to take the defendant into custody.[2]

2. The defendant intentionally retreated or remained in a building or place and, through action or threat, intentionally attempted to prevent the officer from taking the defendant into custody.

3. While committing elements 1. and 2.,[3] the defendant intentionally [(remained) (became) armed with a dangerous weapon] [threatened to use a dangerous weapon regardless of whether the defendant had a dangerous weapon].[4]

IF DEFINITION OF "ARMED" IS NEEDED, ADD THE FOLLOWING:

["Armed" means that a dangerous weapon must have been either on the defendant's person or within the defendant's reach.][5]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1768 was originally published in 1997. This revision was approved by the Committee in October 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for violations of § 946.415, which was created by 1995 Wisconsin Act 93, effective date: December 16, 1995.

In State v. Koeppen, 2000 WI App 121, 237 Wis. 2d 418k, 614 N.W.2d 530, the court held that § 946.415 "delineates one crime that can be committed in several ways. . . . [T]he offense has a refusal component, a physical manifestation of the refusal with threat component and a dangerous weapon component." ¶21. The jury is required to agree that each component was committed but not as to the way the component is committed. 2000 WI App 121, ¶24.

1. The definition of "officer" provided in § 946.41(2)(b) is adopted by § 946.415(1) and reads as follows:

> "Officer" means a peace officer or other public officer or public employee having the authority by virtue of the officer's or employee's office or employment to take another into custody.

2. Section 939.23(3) provides that when the word "intentionally" is used in a statute it requires that the defendant have knowledge of those facts set forth after the word and which are necessary to make the conduct criminal. The Committee concluded that with this offense, this rule means that the defendant must know that the officer was lawfully attempting to take the defendant into custody.

3. The phrase "while committing elements 1. and 2." was added to the instruction to track the statute as closely as possible. Subsection (2)(c) requires that "[w]hile acting under pars. (a) and (b)," the actor must remain or become armed, etc. Elements 1. and 2. address the requirements of "pars. (a) and (b)"; element 3. addresses subsection (2)(c).

4. If definition of "dangerous weapon" is needed, see Wis JI-Criminal 910.

5. This is based on the definition of "went armed" used in the uniform instruction for carrying a concealed weapon. See Wis JI-Criminal 1335; cases discussing the phrase are collected in footnote 3 of that instruction.

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1770 ESCAPE FROM THE CUSTODY OF A PEACE OFFICER AFTER LEGAL ARREST FOR A FORFEITURE OFFENSE[1] — § 946.42(2)(a)and (3)(e)

Statutory Definition of the Crime

Escape from custody, as defined in § 946.42(2) of the Criminal Code of Wisconsin, is committed by a person who intentionally escapes from custody when that custody resulted from legal arrest for a forfeiture offense.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was in custody.[2]

   "Custody" means that a person's freedom of movement is restricted either by the use of physical force by a peace officer or by the assertion of authority by a peace officer to which the person has submitted.[3]

2. The custody resulted from legal arrest for a forfeiture offense.

   An arrest for a forfeiture offense is legal when the officer making the arrest[4]

   (CHOOSE THE FOLLOWING WHICH APPLIES)

   (has reasonable grounds to believe that the person is committing or has committed a forfeiture offense).

(has a warrant commanding that the person be arrested, where that warrant is fair on its face, notwithstanding unsubstantial irregularities).

(believes on reasonable grounds that a warrant for the person's arrest has been issued in this state).

AT THE REQUEST OF THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:

[Evidence that the defendant was in custody as the result of being arrested is an essential element of this offense. However, the fact that the defendant was suspected of illegal activity must not be considered proof that the defendant is likely to have committed the offense of escape as charged in this case.][5]

3. The defendant escaped from custody.

Escape means to leave in any manner without lawful permission or authority.[6]

4. The escape from custody was intentional.

This requires that the defendant intentionally escaped from custody, that is, that the defendant had the mental purpose to escape.[7]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING[8] IF DEFENDANT HAS BEEN CHARGED UNDER § 946.42(3)(e): LEAVING THE STATE TO AVOID APPREHENSION.

If you find the defendant guilty of escape, you must consider the following question:

"Did the defendant leave the state to avoid apprehension?"

If you are satisfied beyond a reasonable doubt that the defendant left the state to avoid apprehension you should answer this question "yes."

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 1770 was originally published in 1980 and revised in 1988, 1993, and 1997. This revision combined JI 1770 and 1771. It also involved adoption of a new format and nonsubstantive editorial changes and was approved by the Committee in October 2007.

The Wisconsin escape statute, § 946.42, divides escape offenses into two classifications: offenses under § 946.42(2) are punished as Class A misdemeanors; offenses under § 946.42(3) are Class H felonies. The severity of the penalty is dependent upon the seriousness of the underlying reason for the accused being in custody.

This instruction is drafted for those violations of subsection (2)(a) involving escape from the custody of a police officer. These basic offenses are punished as Class A misdemeanors. The penalty is increased to that for a Class H felony if the defendant leaves the state to avoid apprehension. See § 946.42(3)(e). This instruction includes a special question to be used when the felony offense is submitted to the jury.

Escape charges under § 946.42(2) apply to persons who were jailed for nonpayment of a municipal forfeiture and failed to return to jail from work release. State v. Smith, 214 Wis.2d 541, 571 N.W.2d 472 (Ct. App. 1997).

Former § 946.42(4), which required that sentences imposed for escape be consecutive to any sentence previously imposed or which may be imposed for any crime or offense for which the person was in custody when he escaped, was repealed by 2001 Wisconsin Act 109.

1. Section 946.42(2) deals with escape from custody resulting from arrest for, charge of, or conviction of a statutory traffic regulation, statutory forfeiture or municipal ordinance violation, from civil arrest or body execution, or from custody under § 938.19 resulting from a traffic regulation, etc. This instruction is drafted for only one of the types of custody possible under § 946.42(2) – custody resulting from legal arrest for a forfeiture offense. For cases involving the other types of custody, the second element will have to be modified throughout the instruction.

2. This instruction is drafted for cases involving escape from the actual custody of a police officer after arrest. The definition of "custody" is based on recent decisions of the Wisconsin appellate courts. See note 3, below.

For cases involving escape from an institutional setting after arrest for or conviction of a forfeiture offense, defining "custody" in the following manner may be helpful:

> Custody means physical control of a person by (an institution) (a peace officer) (an institution guard). (A person is also in custody when temporarily outside an institution for the purpose of working or receiving medical care or other authorized purpose.)

The sentence in parentheses should be read to the jury only when the accused was lawfully outside the institution when the alleged escape took place. Prisoners may be taken from jails or other institutions for "rehabilitative and educational activities. . . . While away from the institution grounds, an inmate is deemed to be under the care and control of the institution in which he is an inmate and subject to its rules and discipline." Wis. Stat. § 302.15.

3. The definition of "custody" is adapted from decisions of the Wisconsin Supreme Court and Court of Appeals. These decisions held that the proper definition of custody was broader than being in the "physical control" of a police officer or institution guard, which had been the definition in the previous versions of this instruction. Rather, it is enough if freedom of movement has been restricted. State v. Adams, 152 Wis.2d 68, 447 N.W.2d 90 (Ct. App. 1989); State v. Hoffman, 163 Wis.2d 752, 472 N.W.2d 558 (Ct. App. 1991); State v. Swanson, 164 Wis.2d 437, 475 N.W.2d 437 (1991). See footnote 4, Wis JI-Criminal 1772 for complete discussion of these cases.

4. What constitutes a legal arrest is defined in subsection (1)(c) of § 946.42 as follows: "'Legal arrest' includes without limitation an arrest pursuant to process fair on its face notwithstanding insubstantial irregularities and also includes taking a juvenile into custody under s. 938.19." The question of an arrest's legality can become complicated; the instruction has not attempted to deal with each of the individual problems that can arise. The material in parentheses is based on the description of arrest authority provided in s. 968.07.

As far as the "privilege" to escape from an unlawful arrest is concerned, the comment to the Judiciary Committee's 1953 Report on the Criminal Code states at page 191:

> A prisoner in custody pursuant to an illegal arrest has a privilege to escape without the use of deadly or excessive force and so has a defense to a prosecution under this section. See § 339.48 Self-defense and defense of others. (Note, now § 939.48.) What is a legal arrest is partially set out in subsection (5) of this section. See also, Restatement, Torts § 124 (1934). If the illegality

of the original arrest has been overcome by subsequent events making the custody lawful, the privilege to escape no longer exists. The actor's innocence of the crime for which he is in custody is, of course, no defense to the crime of escape.

5. This cautionary instruction is intended to advise the jury that the fact of arrest is a necessary element of the escape offense but must not be used to find that the defendant is probably guilty of the escape charge simply because the defendant has been arrested. It should be given only at the request of the defendant, since it may serve to highlight the arrest.

6. This is the definition of "escape" found in § 946.42(1)(b).

7. The crime of escape is considered to be a continuing offense. Thus, a person who claims he was unable to form the intent to escape because of drunkenness or epileptic seizure may still be convicted since the person could have formed the required intent when he sobered up or when the disability ceased. See Parent v. State, 31 Wis.2d 106, 141 N.W.2d 878 (1966) (drunkenness), and Ray v. State, 33 Wis.2d 685, 148 N.W.2d 31 (1967) (psychomotor or epileptic seizure).

See Wis JI-Criminal 923A and 923B regarding instructing the jury on "intentionally."

8. Section 946.42(3)(e) provides for an increased penalty (from a Class A misdemeanor to a Class H felony) if the defendant leaves the state to avoid apprehension. Where the aggravated offense is charged, the Committee recommends that a separate question be submitted to the jury if they find the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Did the defendant leave the state to avoid apprehension?

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1771 ESCAPE FROM CUSTODY RESULTING FROM VIOLATION OF PROBATION, PAROLE, OR EXTENDED SUPERVISION — § 946.42(2m)

Statutory Definition of the Crime

Escape from custody, as defined in § 946.42(2m) of the Criminal Code of Wisconsin, is committed by a person who intentionally escapes from the custody of a probation, parole, or extended supervision agent, or a correctional officer, when that custody resulted from an allegation or finding of a violation of the rules or conditions of probation, parole, or extended supervision.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was in the custody of a (probation agent) (parole agent) (extended supervision agent) (correctional officer).

   "Custody" means the physical custody or authorized physical control of a person by a (probation agent) (parole agent) (extended supervision agent) (correctional officer).[1]

2. The custody resulted from (an allegation) (a finding) that the defendant violated the rules or conditions of (probation) (parole) (extended supervision).[2]

3. The defendant escaped from custody.

"Escape" means to leave in any manner without lawful permission or authority.[3]

4. The escape from custody was intentional.

This requires that the defendant intentionally escaped from custody, that is, that the defendant had the mental purpose to escape.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1771 was approved by the Committee in December 2008.

This instruction is drafted for violations of subsection (2m) of § 946.42, which reads as follows:

> (2m) A person who is in the custody of a probation, parole, or extended supervision agent, or a correctional officer, based on an allegation or a finding that the person violated the rules or conditions of probation, parole, or extended supervision and who intentionally escapes from custody is guilty of a Class H felony.

This subsection was created by 2007 Wisconsin Act 226 [effective date: May 31, 2008]. It was apparently intended to address a gap in the former statute identified in State v. Zimmerman, 2001 WI App 238, 248 Wis.2d 370, 635 N.W.2d 864, which held that a probationer or parolee, taken into custody for

violating terms of release by a probation or parole agent, was not "in custody" for purposes of § 946.42 when being transported to jail.

1. The definition of "custody" is based on § 946.42(1)(a)1.c.: "Actual custody or authorized physical control of a probationer, parolee, or person on extended supervision by the department of corrections." The instruction uses "physical custody" in place of "actual custody"; no change in meaning is intended. In the Committee's judgment, the custody requirement and its definition are intended to make the distinction between "legal custody" – all persons under supervision are in the legal custody of the department – and the "actual" or "physical" custody required as the predicate for an escape charge. For court decisions discussing "custody" in other contexts, see Wis JI-Criminal 1772, footnote 2.

Section 302.113 provides authority for the department to take physical custody of persons released on extended supervision. Section 304.06 does the same regarding persons released on parole. DOC 328.22, Wis. Admin. Code, promulgated under the authority of § 973.01(1), authorizes custody of probationers.

2. If a cautionary instruction is requested regarding the evidence that the defendant was alleged or found to have violated conditions of supervision, see Wis JI-Criminal 275 Cautionary Instruction: Evidence Of Other Conduct and Wis JI-Criminal 312 Prisoner As Witness Or Defendant: Prisoner Status An Issue.

3. This is the definition of escape found in § 946.42(1)(b).

4. The crime of escape is considered to be a continuing offense. Thus, a person who claims he was unable to form the intent to escape because of drunkenness or epileptic seizure may still be convicted since the person could have formed the required intent when he sobered up or when the disability ceased. See Parent v. State, 31 Wis.2d 106, 141 N.W.2d 878 (1966) (drunkenness), and Ray v. State, 33 Wis.2d 685, 148 N.W.2d 31 (1967) (psychomotor or epileptic seizure).

See Wis JI-Criminal 923A and 923B regarding instructing the jury on "intentionally."

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1772 ESCAPE FROM CUSTODY RESULTING FROM LEGAL ARREST FOR A CRIME — § 946.42(3)(a)

Statutory Definition of the Crime

Escape from custody, as defined in § 946.42(3) of the Criminal Code of Wisconsin, is committed by a person who intentionally escapes from custody when that custody resulted from legal arrest for a crime.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was in custody.

   SELECT THE APPLICABLE DEFINITION OF "CUSTODY."[1]

   [Custody means the physical control of a person by (an institution) (a peace officer) (an institution guard).[2] (A person is also in custody when temporarily outside an institution for the purpose of working or receiving medical care or other authorized purpose.)[3]]

   ["Custody" means that a person's freedom of movement is restricted either by the use of physical force by a peace officer or by the assertion of authority by a peace officer to which the person has submitted.[4]]

2. The custody resulted from legal arrest for a crime.

An arrest for a crime is legal when the officer making the arrest[5]

CHOOSE THE FOLLOWING WHICH APPLIES

(has reasonable grounds to believe that the person is committing or has committed a crime. _____ is a crime.)[6]

(has a warrant commanding that the person be arrested, where that warrant is fair on its face, notwithstanding unsubstantial irregularities).

(believes on reasonable grounds that a warrant for the person's arrest has been issued in this state).

(believes on reasonable grounds that a felony warrant for the person's arrest has been issued in another state).

AT THE REQUEST OF THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:

[Evidence that the defendant was in custody as the result of being arrested is an essential element of this offense. However, the fact that the defendant was suspected of illegal activity must not be considered proof that the defendant is likely to have committed the offense of escape as charged in this case.][7]

3. The defendant escaped from custody.

Escape means to leave in any manner without lawful permission or authority.[8]

ADD THE FOLLOWING IF THE CASE INVOLVES FAILURE TO REMAIN WITHIN THE LIMITS OF A HOME DETENTION PROGRAM UNDER § 302.425.

[Escape includes the intentional failure to remain within the limits of a home detention program.][9]

4. The escape from custody was intentional.

This requires that the defendant intentionally escaped from custody, that is, that the defendant had the mental purpose to escape.[10]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1772 was originally published in 1980 and revised in 1988, 1993, and 1997. This revision combined JI 1772 and 1773. It also involved adoption of a new format and nonsubstantive editorial changes and was approved by the Committee in October 2007.

The Wisconsin escape statute, § 946.42, divides escape offenses into two classifications: offenses under § 946.42(2) are punished as Class A misdemeanors; offenses under § 946.42(3) are Class H felonies. The severity of the penalty is dependent upon the seriousness of the underlying reason for the accused being in custody.

Section 946.42(3) deals with escapes from custody that result from the following circumstances:

(a) Pursuant to a legal arrest for, lawfully charged with or convicted of or sentenced for a crime.

(b) Lawfully taken into custody under s. 938.19 for or lawfully alleged or adjudged under ch. 938 to be delinquent on the basis of a violation of a criminal law.

(c) Subject to a disposition under s. 938.34(4d), (4h), or (4m), to a placement under s. 938.357(4) or to aftercare revocation under s. 938.357(5)(e).

(d) Subject to an order under s. 48.366.

(e) In custody under the circumstances described in sub. (2) and leaves the state to avoid apprehension. Leaving the state and failing to return is prima facie evidence of intent to avoid apprehension.

(f) Pursuant to a legal arrest as a fugitive from justice in another state.

(g) Committed to the department of health and family services under ch. 971 or 975.

This instruction is drafted for violations of subsection (3)(a) involving escape from the custody of a police officer or from the actual physical control of an institution or officer. [Escape from an officer at the time of arrest was formerly addressed in Wis JI Criminal 1773; that instruction has been combined in this version of Wis JI Criminal 1772.] The first element provides alternative definitions of "custody" for the two types of cases.

Wis JI Criminal 1774 is drafted for violations of subsection (3)(a) involving escapes following conviction or sentence. Wis JI Criminal 1770 is drafted for violations of subsection (3)(e) involving escapes under sub. (2) where the defendant leaves the state to avoid apprehension. For any of the other alternatives in § 946.42(3)(b) through (g), the second element of the instruction would need to be modified (along with corresponding changes in the opening and concluding paragraphs).

Note that the statute does not distinguish between arrests for felonies and misdemeanors or between custody resulting from arrest or conviction or sentence.

A note on the defense of necessity or coercion follows the Comment to Wis JI Criminal 1774.

A probationer or parolee, taken into custody for violating terms of release by a probation or parole agent, is not "in custody" for purposes of § 946.42 when being transported to jail. State v. Zimmerman, 2001 WI App 238, 248 Wis.2d 370, 635 N.W.2d 864.

1. This instruction is drafted for those violations of subsection (3) involving escape from the actual physical control of an institution or officer or from the custody of a police officer at the time of arrest. The applicable definition should be selected.

2. The definition of "custody" is based on the one provided in § 946.42(1)(a).

"Custody" was discussed at length in State v. Schaller, 70 Wis.2d 107, 233 N.W.2d 416 (1974), where it was held that it was not escape when a person committed to the county jail during nonworking hours as a condition of probation failed to return at the close of the working day. The court discussed "actual" and "constructive" custody and determined that a probationer was not in the constructive custody

of the sheriff during the periods of release and therefore his elopement did not constitute escape under § 946.42.

In State v. Rosenberg, 208 Wis.2d 191, 560 N.W.2d 266 (1997), the Wisconsin Supreme Court reaffirmed the holding in Schaller, at least as it applied to offenses charged under the 1994 version of § 946.42. The statute was again amended in 1996; the court "decline[d] to rule on the impact the 1996 amendments have on Schaller." Wis.2d 191, 193n.1. The Committee concluded that the plain language of the statute after the 1996 amendments covers a probationer who does not return to jail as required. The relevant portion is the last sentence of § 946.42(1)(a) which provides that custody does not include a probationer "unless the person is in actual custody or is subject to a confinement order under s. 973.09(4)." The underlined portion was added by 1995 Wisconsin Act 154. Rosenberg noted that the Legislative Reference Bureau analysis of the bill that was enacted as 1995 Wisconsin Act 154 stated: "This bill makes a probationer subject to the escape law at all times when he or she is subject to an order of confinement as a condition of probation."

A probationer or parolee, taken into custody for violating terms of release by a probation or parole agent, is not "in custody" for purposes of § 946.42 when being transported to jail. State v. Zimmerman, 2001 WI App 238, 248 Wis.2d 370, 635 N.W.2d 864.

3. The sentence in parentheses should be read to the jury only when the accused was lawfully outside the institution when the alleged escape took place. Prisoners may be taken from jails or other institutions for "rehabilitative and educational activities. . . . While away from the institution grounds, an inmate is deemed to be under the care and control of the institution in which he is an inmate and subject to its rules and discipline." Wis. Stat. § 302.15. Also, see note 2, above, regarding the custody status of prisoners confined to the county jail as a condition of probation.

4. The definition of "custody" is adapted from decisions of the Wisconsin Supreme Court and Court of Appeals. These decisions held that the proper definition of custody was broader than being in the "physical control" of a police officer or institution guard, which had been the definition in the previous versions of this instruction. Rather, it is enough if freedom of movement has been restricted. The Committee modified this definition in light of recent decisions dealing with "seizures" under the 4th Amendment to develop the definition used here.

In State v. Adams, 152 Wis.2d 68, 447 N.W.2d 90 (Ct. App. 1989), police stopped the suspect on suspicion of drunk driving and he failed the field sobriety tests. While the officer was running a license check, the suspect ran away but was chased down by the officer. The suspect and his companion then overwhelmed the officer, locked him up in his own handcuffs, and got away. They later turned themselves in. The defendant challenged his escape conviction on the ground that he was never in "custody." He argued that "custody" should be defined (as in Wis JI-Criminal 1772) as "in physical control" of the officer. Since they successfully resisted the arrest, so the argument goes, the defendants were never in the officer's control. The court of appeals rejected the argument, holding that "custody" means "ability or freedom of movement had been restricted."

In State v. Hoffman, 163 Wis.2d 752, 472 N.W.2d 558 (Ct. App. 1991), an officer went to Hoffman's house with a warrant for his arrest. He found Hoffman in his driveway and told him he had a warrant and was placing him under arrest. Hoffman moved toward the house but the officer positioned himself in his way. The officer refused Hoffman permission to go to the house to get clothing. While discussing this,

Hoffman's brother executed a "basketball pick" type of maneuver, blocking the officer while Hoffman ran away through the garage. The trial court modified the escape instruction to use the Adams definition of custody instead of the "physical control" definition from the standard instruction. Hoffman argued that Adams was wrong and the standard instruction was right. He conceded he may have been under legal arrest, but said he was never in the officer's control. The court rejected the argument, holding that "custody" is broader than the "physical control" definition used in the former instruction. It is satisfied by the restraint on freedom of movement that is required as the first element of the "three elements of arrest" test that has traditionally been used in Wisconsin. Everyone who is under legal arrest is in custody. A footnote establishes that there was enough restraint to satisfy what is required for an arrest: a reasonable jury could find that Hoffman submitted to the officer's assertion of authority. [This relates to the definition of "seizure" adopted by the U.S. Supreme Court for 4th Amendment purposes, see Hodari D., discussed below.]

In State v. Swanson, 164 Wis.2d 437, 475 N.W.2d 437 (1991), officers observed an automobile drive onto the sidewalk in the city of Prescott at 2:00 a.m. They made contact with Swanson, the driver, who could not produce a driver's license and smelled of intoxicants. The officers began to conduct field sobriety tests and did not detect slurred speech or difficulty in standing. Before completing the field sobriety test, the officers conducted a patdown and discovered a bag of marijuana. At that point the officers received a call for backup assistance at a domestic disturbance. They put Swanson in the police car and drove to the site of the disturbance. When they got there, Swanson was left alone and he escaped. The Wisconsin Supreme Court reversed Swanson's escape conviction because he was not "in custody." The court focused on the 4th Amendment test for arrest, holding that the suspect was not under arrest on the street because field sobriety tests are not "custody." Probable cause did not exist until after the marijuana bag was discovered, and it was discovered by an unlawful search - one that exceeded the scope of a lawful frisk. Thus, Swanson was not lawfully arrested and not covered by the escape statute. In the course of its decision, the court overruled the "three elements of arrest" test previously used in Wisconsin and relied on in Adams and Hoffman. In its place, the court adopted the "objective" test, under which the question is: would a reasonable person in the suspect's position have considered himself to be under arrest? The court mentioned neither Adams nor Hoffman and referred to escape only at the very end of the opinion:

> As Swanson was not "in custody" at the time he eluded police he cannot be considered as to have escaped from custody under sec. 946.42(3)(a), Stats.

164 Wis.2d 437, 455

The Committee concluded that the result of these three decisions is that "custody" for the purposes of the escape statute is to be defined in a manner consistent with the definition of "seizure" employed for 4th Amendment purposes. The United States Supreme Court addressed the issue in California v. Hodari D., 499 U.S. 621 (1991). Hodari D. involved police pursuit of a young man who ran away when he saw police approaching. Just before the officers caught him, he threw away a bag that turned out to have cocaine in it. The question was whether the man had been "seized" before he tossed the bag aside. For the purpose of determining when there is a 4th Amendment "seizure," the U.S. Supreme Court equated "seizure" with "arrest" and defined it as follows:

> An arrest requires either physical force (laying on of hands or application of physical force to restrain movement) or, where that is absent, submission to the assertion of authority.

499 U.S. 621, 626

The definition of "custody" used in the instruction is based on this formulation.

5. What constitutes a legal arrest is defined in subsection (1)(c) of § 946.42 as follows: "'Legal arrest' includes without limitation an arrest pursuant to process fair on its face notwithstanding insubstantial irregularities and also includes taking a juvenile into custody under s. 938.19." The question of an arrest's legality can become complicated; the instruction has not attempted to deal with each of the individual problems that can arise. The material in parentheses is based on the description of arrest authority provided in s. 968.07.

As far as the "privilege" to escape from an unlawful arrest is concerned, the comment to the Judiciary Committee's 1953 Report on the Criminal Code states at page 191:

> A prisoner in custody pursuant to an illegal arrest has a privilege to escape without the use of deadly or excessive force and so has a defense to a prosecution under this section. See § 339.48 Self-defense and defense of others. (Note, now § 939.48.) What is a legal arrest is partially set out in subsection (5) of this section. See also, Restatement, Torts § 124 (1934). If the illegality of the original arrest has been overcome by subsequent events making the custody lawful, the privilege to escape no longer exists. The actor's innocence of the crime for which he is in custody is, of course, no defense to the crime of escape.

6. Misdemeanor traffic violations are punishable by imprisonment and therefore are "crimes" under § 946.42. State v. Beasley, 165 Wis.2d 97, 477 N.W.2d 57 (Ct. App. 1991).

7. This cautionary instruction is intended to advise the jury that the fact of arrest is a necessary element of the escape offense but should not be used to find that the defendant is probably guilty of the escape charge simply because the defendant has been arrested. It should be given only at the request of the defendant, since it may serve to highlight the arrest.

8. This is the definition of "escape" found in § 946.42(1)(b).

9. Section 302.425 provides that the sheriff or superintendent of a house of correction may place a prisoner in a home detention programs to be monitored by an electronic monitoring system. Subsection (6) of the statute provides:

> Any intentional failure of a prisoner to remain within the limits of his or her detention or to return to his or her place of detention, as specified in the terms of detention under sub. (3), is considered an escape under s. 946.42(3)(a).

The Committee concluded that offenses involving electronic monitoring under sec. 302.045 are best handled by adding the recommended statement to the regular escape instruction. Electronic monitoring is also authorized by sec. 973.03(4)(a), which provides that "in lieu of a sentence of imprisonment to the county jail, a court may impose a sentence of detention at the defendant's place of residence . . ." Subsection (4)(c) provides that if the defendant fails to comply with the terms of the detention, the court may order that the remainder of the sentence be served in the county jail. Subsection (4)(d) provides that

a sentence under sec. 973.04 is not a sentence of imprisonment, and lists exceptions that do not include the escape statute. Because sec. 973.04 apparently provides a specific remedy for failure to abide by the terms of the detention and because it does not reference the escape statute as sec. 302.045 does, the Committee concluded that violations of detention conditions under sec. 973.04 are not punishable as escape.

10. The crime of escape is considered to be a continuing offense. Thus, a person who claims he was unable to form the intent to escape because of drunkenness or epileptic seizure may still be convicted since the person could have formed the required intent when he sobered up or when the disability ceased. See Parent v. State, 31 Wis.2d 106, 141 N.W.2d 878 (1966) (drunkenness), and Ray v. State, 33 Wis.2d 685, 148 N.W.2d 31 (1967) (psychomotor or epileptic seizure).

See Wis JI-Criminal 923A and 923B regarding instructing the jury on "intentionally."

1773 ESCAPE FROM THE CUSTODY OF A PEACE OFFICER AFTER LEGAL ARREST FOR A CRIME — § 946.42(3)(a)

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 1773 was originally published in 1993 and revised in 1997. It was withdrawn in 2007 when its substance was included in a revised Wis JI Criminal 1772.

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1774 ESCAPE FROM CUSTODY: JAIL OR PRISON ESCAPE — § 946.42(3)(a)

Statutory Definition of the Crime

Escape from custody, as defined in § 946.42(3)(a) of the Criminal Code of Wisconsin, is committed by a person who intentionally escapes from custody when that custody resulted from being sentenced for a crime.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was in custody.

   "Custody" means the physical control of a person by (an institution) (a peace officer) (an institution guard).[1] (A person is also in custody when temporarily outside an institution for the purpose of working or receiving medical care or other authorized purpose.)[2]

   ADD THE FOLLOWING IF THE CASE INVOLVES FAILURE TO REMAIN WITHIN THE LIMITS OF A HOME DETENTION PROGRAM UNDER § 302.425.

   [Escape includes the intentional failure to remain within the limits of a home detention program.][3]

2. The custody was the result of being sentenced[4] for a crime.[5]

AT THE REQUEST OF THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:

[While evidence that the defendant was in custody as the result of a prior criminal conviction is an essential element of this offense, it must not be used for any other purpose (than determining the weight and credit to be given to testimony).[6] Particularly, you should bear in mind that conviction of the defendant of a crime at some previous time is not proof that the defendant is guilty of the offense which is now charged.][7]

3. The defendant escaped from custody.

   Escape means to leave in any manner without lawful permission or authority.[8]

4. The escape from custody was intentional.

   This requires that the defendant intentionally escaped from custody, that is, that the defendant had the mental purpose to escape.[9]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1774 was originally published in 1980 and revised in 1988, 1993, and 1997. This revision involved adoption of a new format and nonsubstantive editorial changes and was approved by the Committee in October 2007.

The Wisconsin escape statute, § 946.42, divides escape offenses into two classifications: offenses under § 946.42(2) are punished as Class A misdemeanors; offenses under § 946.42(3) are Class H felonies. The severity of the penalty is dependent upon the seriousness of the underlying reason for the accused being in custody.

Section 946.42(3) deals with escapes from custody that result from the following circumstances:

(a) Pursuant to a legal arrest for, lawfully charged with or convicted of or sentenced for a crime.

(b) Lawfully taken into custody under s. 938.19 for or lawfully alleged or adjudged under ch. 938 to be delinquent on the basis of a violation of a criminal law.

(c) Subject to a disposition under s. 938.34(4d), (4h), or (4m), to a placement under s. 938.357(4) or to aftercare revocation under s. 938.357(5)(e).

(d) Subject to an order under s. 48.366.

(e) In custody under the circumstances described in sub. (2) and leaves the state to avoid apprehension. Leaving the state and failing to return is prima facie evidence of intent to avoid apprehension.

(f) Pursuant to a legal arrest as a fugitive from justice in another state.

(g) Committed to the department of health and family services under ch. 971 or 975.

Subsection (3)(a) of § 946.42 prohibits escape from custody "pursuant to a legal arrest for, lawfully charged with or convicted of or sentence for a crime." This instruction is drafted for violations of subsection (3)(a) involving escapes following conviction or sentence. There is a technical distinction in Wisconsin to the effect that one placed on probation is not serving a sentence. If that distinction is implicated in a case for which this instruction might be used, the text should be changed to refer to custody that "resulted from being convicted of a crime." Also see note 1, below.

The penalties provided in the escape statute do not distinguish between escapes from county jail and escapes from prison. All escapes from custody resulting from conviction for a crime are treated the same. They are also treated the same as escapes following arrest for a crime but before conviction. Wis JI Criminal 1774 is drafted for escapes following conviction and can be used if escape is from a jail or a prison. The place of imprisonment is no longer significant. What is significant is the cause of the custody – conviction of a crime.

For violations of subsection (3)(a) involving escapes after lawful arrest, see Wis JI Criminal 1772. Wis JI Criminal 1770 is drafted for violations of subsection (3)(e) involving escapes under sub. (2) where the defendant leaves the state to avoid apprehension. For any of the other alternatives in § 946.42(3)(b) through (g), the second element of the instruction would need to be modified (along with corresponding changes in the opening and concluding paragraphs).

Former § 946.42(4), which required that sentences imposed for escape be consecutive to any sentence previously imposed or which may be imposed for any crime or offense for which the person was in custody when he escaped, was repealed by 2001 Wisconsin Act 109.

A note discussing the defense of duress, necessity, or coercion follows these footnotes.

1. The definition of "custody" is based on the one provided in § 946.42(1)(a).

"Custody" was discussed at length in State v. Schaller, 70 Wis.2d 107, 233 N.W.2d 416 (1974), where it was held that it was not escape when a person committed to the county jail during nonworking hours as a condition of probation failed to return at the close of the working day. The court discussed "actual" and "constructive" custody and determined that a probationer was not in the constructive custody of the sheriff during the periods of release and therefore his elopement did not constitute escape under § 946.42.

In State v. Rosenberg, 208 Wis.2d 191, 560 N.W.2d 266 (1997), the Wisconsin Supreme Court reaffirmed the holding in Schaller, at least as it applied to offenses charged under the 1994 version of § 946.42. The statute was again amended in 1996; the court "decline[d] to rule on the impact the 1996 amendments have on Schaller." Wis.2d 191, 193n.1. The Committee concluded that the plain language of the statute after the 1996 amendments covers a probationer who does not return to jail as required. The relevant portion is the last sentence of § 946.42(1)(a) which provides that custody does not include a probationer "unless the person is in actual custody or is subject to a confinement order under s. 973.09(4)." The underlined portion was added by 1995 Wisconsin Act 154. Rosenberg noted that the Legislative Reference Bureau analysis of the bill that was enacted as 1995 Wisconsin Act 154 stated: "This bill makes a probationer subject to the escape law at all times when he or she is subject to an order of confinement as a condition of probation."

In State v. Sugden, 143 Wis.2d 728, 422 N.W.2d 624 (1988), the Wisconsin Supreme Court held that "custody" refers to secure custodial facilities within the general geographical boundary of a particular penal institution. Thus, Sugden's conviction for escape was affirmed where he left the locked cottage in which he was confined but was apprehended before he progressed beyond the outer fence defining the outer boundaries of the institution.

A probationer or parolee, taken into custody for violating terms of release by a probation or parole agent, is not "in custody" for purposes of § 946.42 when being transported to jail. State v. Zimmerman, 2001 WI App 238, 248 Wis.2d 370, 635 N.W.2d 864.

2. The sentence in parentheses should be read to the jury only when the accused was lawfully outside the institution when the alleged escape took place. Prisoners may be taken from jails or other institutions for "rehabilitative and educational activities. . . . While away from the institution grounds, an inmate is deemed to be under the care and control of the institution in which he is an inmate and subject

to its rules and discipline." Wis. Stat. § 302.15. Also, see note 2, above, regarding the custody status of prisoners confined to the county jail as a condition of probation.

3. Section 302.425 provides that the sheriff or superintendent of a house of correction may place a prisoner in a home detention programs to be monitored by an electronic monitoring system. Subsection (6) of the statute provides:

> Any intentional failure of a prisoner to remain within the limits of his or her detention or to return to his or her place of detention, as specified in the terms of detention under sub. (3), is considered an escape under s. 946.42(3)(a).

The Committee concluded that offenses involving electronic monitoring under sec. 302.045 are best handled by adding the recommended statement to the regular escape instruction. Electronic monitoring is also authorized by sec. 973.03(4)(a), which provides that "in lieu of a sentence of imprisonment to the county jail, a court may impose a sentence of detention at the defendant's place of residence . . ." Subsection (4)(c) provides that if the defendant fails to comply with the terms of the detention, the court may order that the remainder of the sentence be served in the county jail. Subsection (4)(d) provides that a sentence under sec. 973.04 is not a sentence of imprisonment, and lists exceptions that do not include the escape statute. Because sec. 973.04 apparently provides a specific remedy for failure to abide by the terms of the detention and because it does not reference the escape statute as sec. 302.045 does, the Committee concluded that violations of detention conditions under sec. 973.04 are not punishable as escape.

4. Although there apparently is no Wisconsin law on the subject, the Committee is of the opinion that the legality of the underlying conviction and sentence is not an issue where the charge is escape after conviction or sentence. Thus, it should be no defense that the defendant's underlying conviction is subject to challenge. See cases cited in 27 Am.Jur.2d Escape, Prison Breaking, and Rescue, §§ 1, 7, 14, and 16, for the general rule that where imprisonment is under color of law, the prisoner is not entitled to resort to self-help but must challenge the validity of the conviction through legal channels.

5. Misdemeanor traffic violations are punishable by imprisonment and therefore are "crimes" under § 946.42. State v. Beasley, 165 Wis.2d 97, 477 N.W.2d 57 (Ct. App. 1991).

6. Include the phrase in parentheses when the evidence of a prior conviction has been admitted as relevant to credibility under § 906.09. Subsection (2) of § 906.09 provides for the exclusion of such evidence if its probative value is outweighed by the danger of unfair prejudice. The trial judge must make a prior determination that such evidence is admissible (see §§ 906.09(3) and 901.04).

7. This cautionary instruction is suggested to deal with the fact that evidence of a prior conviction will be before the jury in most escape cases. It is intended to advise the jury that the prior conviction is a necessary element of the escape offense but must not be used to find that the defendant is probably guilty of the escape charge simply because he has been convicted before. It should be given only at the request of the defendant, since it may serve to highlight the prior conviction.

8. This is the definition of "escape" found in § 946.42(1)(b).

9. The crime of escape is considered to be a continuing offense. Thus, a person who claims he was unable to form the intent to escape because of drunkenness or epileptic seizure may still be convicted

since the person could have formed the required intent when he sobered up or when the disability ceased. See Parent v. State, 31 Wis.2d 106, 141 N.W.2d 878 (1966) (drunkenness), and Ray v. State, 33 Wis.2d 685, 148 N.W.2d 31 (1967) (psychomotor or epileptic seizure).

See Wis JI-Criminal 923A and 923B regarding instructing the jury on "intentionally."

NOTE ON DURESS, COERCION, OR NECESSITY DEFENSE

A commonly raised defense in escape cases is that the prisoner had no choice but to escape because of threats of violence or homosexual attacks by other inmates, unbearable conditions of confinement, or mistreatment by prison authorities. The Wisconsin Supreme Court has not specifically rejected or recognized such a defense to a charge of escape, although the court has recognized the defense of coercion for other criminal offenses, see Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979). Wis. Stat. § 939.47 defines the defense of coercion and § 939.46 defines the related defense of necessity. See Wis JI-Criminal 790 and 792.

Several states have recognized that coercion, necessity, or duress may be a defense to an escape charge, although relatively strict limits are usually placed on its availability. See, for example: People v. Lovercamp, 118 Cal. Rptr. 110, 43 Cal.App.3d 823 (1974); People v. Harmon, 220 N.W.2d 212 (Mich. 1974); People v. Unger, 362 N.E.2d 319 (Ill. 1977). Also see, 69 A.L.R.3d, "Duress, Necessity or Conditions of Confinement as Justifications for Escape from Prison."

Often the cases are not clear in distinguishing between coercion and necessity as the basis for the defense. In Wisconsin the two are theoretically distinct in the sense that coercion refers to threats or force from a third person and necessity refers to threats from natural physical forces. See §§ 939.46 and 939.47. (Also see Gardner, "The Defense of Necessity and the Right to Escape from Prison," 49 S. Cal. L. Rev. 110, 115 (1975); and Note, Duress – Defense to Escape, 3 Am. J. Crim. L. 331, 332 (1975).)

Some of the uncertainty regarding the scope and viability of the defense has been resolved by the decision of the United States Supreme Court in United States v. Bailey, 444 U.S. 394, (1980). In Bailey, the Court analyzed the applicability of the duress or necessity defense to a charge of escape under 18 U.S.C. § 751(a), a federal statute that is similar to Wis. Stat. § 946.42. The Court recognized that this type of defense could be available to one charged with escape but restricts its availability to cases where the defendant "demonstrates that, given the imminence of the threat, violation of [the escape statute] was his only reasonable alternative." Further, "in order to be entitled to an instruction on duress or necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure and that an indispensable element of such an offer is testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force."

The Committee recommends that Bailey's reasoning be applied in Wisconsin. Before an instruction on coercion (or necessity) is given, there must be evidence, either offered by the defendant or presented as part of the state's case, that shows a justification for the defendant's initial departure from custody and an effort to surrender or return when the alleged coercive force ceased to exist.

1775 ESCAPE FROM CUSTODY: CHAPTER 980 CUSTODY ORDER — § 946.42(3m)

Statutory Definition of the Crime

Escape from custody, as defined in § 946.42(3m) of the Criminal Code of Wisconsin, is committed by a person who intentionally escapes from custody while subject to a [detention order under § 980.04(1)] [custody order under § 980.04(3)] [a commitment order under § 980.06].[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was in custody.

   "Custody" means the physical control of a person by (an institution) (a peace officer) (an institution guard).[2] (A person is also in custody when temporarily outside an institution for the purpose of working or receiving medical care or other authorized purpose.)[3] (A person is also in custody when on supervised release under Chapter 980.)[4]

2. The custody was the result of a [detention order under § 980.04(1)] [custody order under § 980.04(3)] [commitment order under § 980.06].

AT THE REQUEST OF THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:

[While evidence that the defendant was in custody as the result of a (detention order) (custody order) (commitment order) is an essential element of this offense, it must not be used for any other purpose. Particularly, you should bear in mind that evidence of conviction of the defendant of a crime at some previous time is not proof that the defendant is guilty of the offense which is now charged.][5]

3. The defendant escaped from custody.

   Escape means to leave in any manner without lawful permission or authority.[6]

4. The escape from custody was intentional.

   This requires that the defendant intentionally escaped from custody, that is, that the defendant had the mental purpose to escape.[7]

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1775 was approved by the Committee in October 2007.

This instruction is drafted for violations of subsection (3m) of § 946.42, which was created by 2005 Wisconsin Act 434 – effective date: August 1, 2006. It reads as follows:

(3m) A person who intentionally escapes from custody under any of the following circumstances is guilty of a Class F felony:

(a) While subject to a detention order under s. 980.04(1) or a custody order under s. 980.04(3).
(b) While subject to an order issued under s. 980.06 committing the person to custody of the department of health and family services, regardless of whether the person is placed in institutional care or on supervised release.

1. Subsection (3m) of § 946.42 was created by 2005 Wisconsin Act 434. The text of the statute is provided in the Comment preceding this footnote. It applies to escape from custody imposed as a result of any of three orders issued under Chapter 980: a detention order issued after the petition is filed under § 980.04(1); a detention order issued after a finding of probable cause under § 980.04(1); and, a commitment order issued after a finding that the person is a sexually violent person under § 980.06.

2. The definition of "custody" is based on the one provided in § 946.42(1)(a).

"Custody" was discussed at length in State v. Schaller, 70 Wis.2d 107, 233 N.W.2d 416 (1974), where it was held that it was not escape when a person committed to the county jail during nonworking hours as a condition of probation failed to return at the close of the working day. The court discussed "actual" and "constructive" custody and determined that a probationer was not in the constructive custody of the sheriff during the periods of release and therefore his elopement did not constitute escape under § 946.42.

In State v. Rosenberg, 208 Wis.2d 191, 560 N.W.2d 266 (1997), the Wisconsin Supreme Court reaffirmed the holding in Schaller, at least as it applied to offenses charged under the 1994 version of § 946.42. The statute was again amended in 1996; the court "decline[d] to rule on the impact the 1996 amendments have on Schaller." Wis.2d 191, 193n.1. The Committee concluded that the plain language of the statute after the 1996 amendments covers a probationer who does not return to jail as required. The relevant portion is the last sentence of § 946.42(1)(a) which provides that custody does not include a probationer "unless the person is in actual custody or is subject to a confinement order under s. 973.09(4)." The underlined portion was added by 1995 Wisconsin Act 154. Rosenberg noted that the Legislative Reference Bureau analysis of the bill that was enacted as 1995 Wisconsin Act 154 stated: "This bill makes a probationer subject to the escape law at all times when he or she is subject to an order of confinement as a condition of probation."

In State v. Sugden, 143 Wis.2d 728, 422 N.W.2d 624 (1988), the Wisconsin Supreme Court held that "custody" refers to secure custodial facilities within the general geographical boundary of a particular

penal institution. Thus, Sugden's conviction for escape was affirmed where he left the locked cottage in which he was confined but was apprehended before he progressed beyond the outer fence defining the outer boundaries of the institution.

3. The sentence in parentheses should be read to the jury only when the accused was lawfully outside the institution when the alleged escape took place. Prisoners may be taken from jails or other institutions for "rehabilitative and educational activities. . . . While away from the institution grounds, an inmate is deemed to be under the care and control of the institution in which he is an inmate and subject to its rules and discipline." Wis. Stat. § 302.15.

4. This statement is part of the definition of "custody" in sec. 946.42.

5. This cautionary instruction is suggested to deal with the fact that evidence of the Chapter 980 order, which is based on a prior conviction, will be before the jury in most cases. It is intended to advise the jury that the existence of the order is a necessary element of the escape offense but must not be used to find that the defendant is probably guilty of the escape charge simply because he has been convicted before. It should be given only at the request of the defendant, since it may serve to highlight the prior conviction.

6. This is the definition of "escape" found in § 946.42(1)(b).

7. The crime of escape is considered to be a continuing offense. Thus, a person who claims he was unable to form the intent to escape because of drunkenness or epileptic seizure may still be convicted since the person could have formed the required intent when he sobered up or when the disability ceased. See Parent v. State, 31 Wis.2d 106, 141 N.W.2d 878 (1966) (drunkenness), and Ray v. State, 33 Wis.2d 685, 148 N.W.2d 31 (1967) (psychomotor or epileptic seizure).

See Wis JI-Criminal 923A and 923B regarding instructing the jury on "intentionally."

1775A ESCAPE: INDIVIDUAL WITH CUSTODY INJURED — § 946.42(4)

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE ESCAPE OFFENSE CHARGED.

If you find the defendant guilty, you must answer the following question:

"Was an individual who had custody of the defendant injured during the course of the escape?"

Before you may answer this question "yes," you must be satisfied beyond reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1775A was approved by the Committee in July 2008.

This instruction provides a special question to be added to instructions for escape offenses where a violation of subsection (4) of § 946.42 is alleged. This subsection was created by 2007 Wisconsin Act 226 [effective date: May 31, 2008] and reads as follows:

> (4) If a person is convicted of an escape under this section, the maximum term of imprisonment for the escape may be increased by not more than 5 years if an individual who had custody of the person who escaped is injured during the course of the escape.

Because the facts identified in this subsection increase the maximum penalty for the crime, they must be submitted to the jury. Apprendi v. New Jersey, 530 U.S. 466 (2000).

The Committee recommends that this penalty-enhancing fact be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of escape, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).
>
> We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Was an individual who had custody of the defendant injured during the course of the escape?"

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1776 FAILURE TO REPORT TO JAIL: PERIODS OF IMPRISONMENT — § 946.425(1)

Statutory Definition of the Crime

Section 946.425 of the Wisconsin Statutes is violated by a person who is subject to a series of periods of imprisonment and who intentionally fails to report to the county jail as required under the sentence.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was subject to a series of periods of imprisonment[1] which required that the defendant report to the county jail on (specify date).

2. The defendant intentionally failed to report as required.

   "Intentionally," as used here, means that the defendant knew (he) (she) had to report to jail on (specify date), had the ability to report as required, and purposely failed to do so.[2]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and

knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1776 was originally published in 1990 and revised in 1994 and 2008. This revision was approved by the Committee in August 2022; its added to the comment.

This instruction is for a violation of § 946.425(1), created by 1989 Wisconsin Act 85 (effective date: December 19, 1989). Subsection (1) applies only to persons sentenced to a series of periods of imprisonment under § 973.03(5)(b), see note 1, below. Persons who fail to report after receiving a stay of execution of sentence are covered by sub. (1m); see Wis JI-Criminal 1777A. Persons who fail to report who are subject to a confinement order under s. 973.09(4) as a result of a conviction for a misdemeanor or felony are covered by sub. (1r); see Wis JI-Criminal 1777B.

Subsection (2) of § 946.425 formerly provided that a court "shall impose a sentence under this section consecutive to any sentence previously imposed or that may be imposed for any crime or offense for which the person was sentenced under § 973.03(5)(b) (or 973.15(8)(a))." This provision was repealed by 2001 Wisconsin Act 109.

1. Subsection (1) of 946.425 applies only to periods of imprisonment "under s. 973.03(5)(b)." That sentencing alternative was created by 1989 Wisconsin Act 85 and provides as follows:

> In lieu of a continuous sentence, a court may sentence a person to serve a series of periods, not less than 48 hours nor more than 3 days for each period, of imprisonment in a county jail. The person is not subject to confinement between periods of imprisonment.

Subsection (5)(c) of § 973.03 provides this sentencing option does not apply to violations of Chapter 161 (where offenses involving controlled substances are defined) or to a "serious crime." "Serious crime" has the meaning given in § 969.08(10)(b).

Because § 946.425 is limited to persons sentenced under § 973.03(5)(b), it does not apply, for example, to persons who fail to report on time to begin serving a stayed sentence or prisoners who fail to report back to jail after being released for work or school. Persons who fail to report after receiving a stay

of execution of sentence are covered by sub. (1m); see Wis JI-Criminal 1777.

2. The word "intentionally" is defined to include two aspects: knowledge and purpose. The knowledge requirement is based on § 939.23(3) which provides that when the word "intentionally" is used, it requires that "the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" The purpose requirement is based on one of the two definitions of intent provided in § 939.23(3). The other, being aware that one's conduct is practically certain to cause the result, is not likely to apply to this offense. For a discussion of that alternative, see Wis JI-Criminal 923A.

The second element also provides that the defendant must have the ability to report to jail as required. This is based on the general principles for criminal omissions, which include the ability to do the act that is required. See State v. Williquette, 129 Wis.2d 239, 385 N.W.2d 145 (1986).

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1777A FAILURE TO REPORT TO JAIL: AFTER STAY OF SENTENCE — § 946.425(1m)

Statutory Definition of the Crime

Section 946.425 of the Wisconsin Statutes is violated by a person who receives a stay of execution of a sentence of imprisonment [of 10 days or more][1] and who intentionally fails to report to the county jail as required under the sentence.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was sentenced to imprisonment [of 10 days or more][2] and received a stay of execution which required that the defendant report to the county jail on (specify date).
2. The defendant intentionally failed to report as required.

   "Intentionally," as used here, means that the defendant knew (he) (she) had to report to jail on (specify date), had the ability to report as required, and purposely failed to do so.[3]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements,

if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1777 in 1994 and revised in 2008. It was revised as Wis JI-Criminal 1777A in 2022. This revision was approved by the Committee in August 2022; it added to the comment.

This instruction is for a violation of § 946.425(1m), created by 1993 Wisconsin Act 273 (effective date: April 27, 1994). Subsection (1) of § 946.425 applies to a person sentenced to a series of periods of imprisonment under § 973.03(5)(b) and who fails to report to jail as required. See Wis JI-Criminal 1776. Persons who fail to report who are subject to a confinement order under s. 973.09(4) as a result of a conviction for a misdemeanor or felony are covered by sub. (1r); see Wis JI-Criminal 1777B.

Subsection (2) of § 946.425 formerly provided that a court "shall impose a sentence under this section consecutive to any sentence previously imposed or that may be imposed for any crime or offense for which the person was sentenced under § 973.03(5)(b) (or 973.15(8)(a))." This provision was repealed by 2001 Wisconsin Act 109.

The offense is a Class A misdemeanor, unless the stayed sentence is of 10 days or more, which increases the penalty to a Class H felony.

1. The offense is a Class H felony if the stayed sentence was for "10 or more days." If the felony is charged, the bracketed material should be included.

2. See note 1, supra.

3. The word "intentionally" is defined to include two aspects: knowledge and purpose. The knowledge requirement is based on § 939.23(3) which provides that when the word "intentionally" is used, it requires that "the actor must have knowledge of those facts which are necessary to make

his or her conduct criminal and which are set forth after the word 'intentionally.'" The purpose requirement is based on one of the two definitions of intent provided in § 939.23(3). The other, being aware that one's conduct is practically certain to cause the result, is not likely to apply to this offense. For a discussion of that alternative, see Wis JI-Criminal 923A

The second element also provides that the defendant must have the ability to report to jail as required. This is based on the general principles for criminal omissions, which include the ability to do the act that is required. See State v. Williquette, 129 Wis.2d 239, 385 N.W.2d 145 (1986).

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1777B FAILURE TO REPORT TO JAIL: CONFINEMENT ORDER — § 946.425(1r)(a) and (b)

Statutory Definition of the Crime

Section 946.425(1r) of the Wisconsin Statutes is violated by a person who, as a condition of probation, is subject to a confinement order as the result of a conviction for a (misdemeanor) (felony) and who intentionally fails to report to the (county jail) (house of correction) as required under the order.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was subject to a confinement order under s. 973.09(4) as a result of a conviction for a (misdemeanor) (felony).[1]
2. The confinement order required that the defendant report to the (county jail) (house of corrections[2]) as a condition of probation on (specify date).
3. The defendant intentionally failed to report as required.

   "Intentionally," as used here, means that the defendant knew (he) (she) had to report to the (county jail) (house of corrections) on (specify date), had the ability to report as required, and purposely failed to do so.[3]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1777B was approved by the Committee in August 2022.

This instruction is for a violation of § 946.425(1r)(a) and (b), created by 1995 Wisconsin Act 154 [effective date: April 4, 1996]. Subsection (1r)(a) applies to persons subject to a confinement order under s. 973.09(4) as a result of a conviction for a misdemeanor. Subsection (1r)(b) applies to persons subject to a confinement order under s. 973.09(4) as a result of a conviction for a felony. For person sentenced to a series of periods of imprisonment under § 973.03(5)(b) and who fails to report to jail as required; see Wis JI-Criminal 1776. For persons who fail to report after receiving a stay of execution of sentence are covered by sub. (1m); see Wis JI-Criminal 1777A.

The offense is a Class A misdemeanor if the confinement order is the result of a conviction for a misdemeanor. If the confinement order is the result of a conviction for a felony, the offense is a Class H felony.

1. § 973.09(4)(a) – provides:

> The court may also require as a condition of probation that the probationer be confined during such period of the term of probation as the court prescribes, but not to exceed one year. The court may grant the privilege of leaving the county jail, Huber facility,

> work camp, or tribal jail during the hours or periods of employment or other activity under s. 303.08 (1) while confined under this subsection. The court may specify the necessary and reasonable hours or periods during which the probationer may leave the jail, Huber facility, work camp, or tribal jail or the court may delegate that authority to the sheriff. In those counties without a Huber facility under s. 303.09, a work camp under s. 303.10, or an agreement under s. 302.445, the probationer shall be confined in the county jail. In those counties with a Huber facility under s. 303.09, the sheriff shall determine whether confinement under this subsection is to be in that facility or in the county jail. In those counties with a work camp under s. 303.10, the sheriff shall determine whether confinement is to be in the work camp or the county jail. The sheriff may transfer persons confined under this subsection between a Huber facility or a work camp and the county jail. In those counties with an agreement under s. 302.445, the sheriff shall determine whether a person who is confined under this subsection but who is not subject to an order under par. (b) is to be confined in the tribal jail or the county jail, unless otherwise provided under the agreement. In those counties, the sheriff may transfer persons confined under this subsection between a tribal jail and a county jail, unless otherwise provided under the agreement.

2. § 973.09 (4)(b) provides:

> With the consent of the department and when recommended in the presentence investigation, the court may order that a felony offender subject to this subsection be confined in a facility located in the city of Milwaukee under s. 301.13 or 301.16 (1q), for the purpose of allowing the offender to complete an alcohol and other drug abuse treatment program.

3. The word "intentionally" is defined to include two aspects: knowledge and purpose. The knowledge requirement is based on § 939.23(3) which provides that when the word "intentionally" is used, it requires that "the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" The purpose requirement is based on one of the two definitions of intent provided in § 939.23(3). The other, being aware that one's conduct is practically certain to cause the result, is not likely to apply to this offense. For a discussion of that alternative, see Wis JI-Criminal 923A.

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1778 ASSAULT BY A PRISONER: PLACING AN OFFICER, EMPLOYEE, VISITOR, OR INMATE IN APPREHENSION OF AN IMMEDIATE BATTERY LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 946.43(1)

Statutory Definition of the Crime

Assault by a prisoner, as defined in § 946.43(1) of the Criminal Code of Wisconsin, is committed by one who is a prisoner confined to a [state prison] [(state) (county) (municipal) detention facility] who intentionally places (an officer) (an employee) (a visitor) (an inmate) of the institution in apprehension of an immediate battery likely to cause death or great bodily harm.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a prisoner confined to a [state prison] [(state) (county) (municipal) detention facility].

   This requires that the defendant was confined in a (prison) (detention facility) as a result of a violation of law.[1]

   (Name of institution) is a [state prison] [(state) (county) (municipal) detention facility].[2]

2. (Name of victim) was (an officer) (an employee) (a visitor) (an inmate) of (name of institution) .

3. The defendant placed (name of victim) in apprehension of an immediate battery likely to cause death or great bodily harm.[3]

"Apprehension" refers to being fearful of what is about to occur.

"Immediate," as used here, means near at hand, on the point of happening and capable of happening right away.

"Battery" means intentionally causing injury to another without consent.[4]

"Great bodily harm" means serious bodily injury.[5] [Injury which creates a serious risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury, is great bodily harm.]

4. The defendant intended to place (name of victim) in apprehension of an immediate battery likely to cause death or great bodily harm.

This requires that the defendant had the purpose to place (name of victim) in apprehension of an immediate battery likely to cause death or great bodily harm.[6]

5. The defendant knew (name of victim) was (an employee) (an officer) (a visitor) (an inmate) of (name prison or institution) .[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1778 was originally published in 1979 and revised in 1982, 1984, and 1990. This revision was approved by the Committee in August 2000 and involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment.

1. The defendant's status as a "prisoner" should rarely be in question, but the Committee concluded there should be some definition of the term in the instruction. The definition in the instruction was adapted from that found in Wis. Stat. § 46.011 and from the decision in State v. Brill, 1 Wis.2d 288, 83 N.W.2d 721 (1957), where the court made the following observations:

> So far as we know, the word "prisoner" has not been defined by this court. Black's Law Dictionary (4th ed.), p. 1358, defines the word as follows:
>
> "One who is deprived of his liberty; one who is against his will kept in confinement or custody."
>
> Webster's New International Dictionary (2d ed.) gives the following definition:
>
> "A person under arrest, in custody or in prison; one involuntarily restrained; a captive; as a prisoner of justice, or war or at the bar; to take one prisoner."

State v. Brill, 1 Wis.2d 288, 291.

The Brill definition has been cited with approval in several cases involving § 940.20(1), Battery by prisoner. Because that statute and § 946.43 are worded similarly, the Committee concluded that "prisoner" should have the same definition under each statute. In C.D.M. v. State, 125 Wis.2d 170, 370 N.W.2d 287 (Ct. App. 1985), the court held that a juvenile confined as a delinquent at the Lincoln Hills School was a "prisoner" under § 940.20(1) because he had violated a criminal law and was confined for a correctional objective. 125 Wis.2d 170, 173.

The Committee concluded that "prisoner" includes all persons who are confined to one of the identified institutions as a result of a violation of the law. "Prisoner" is also defined in § 46.011(2) (for purposes of Chapter 46 to 51, 55, and 58) and in § 301.01(2) (for purposes of chapters 301 to 304). But the Committee concluded that these definitions are not directly applicable here because they are concerned primarily with defining the authority of state agencies.

A person committed to a state mental health facility (in this case, the Mendota Mental Health Institute) after being found not guilty by reason of mental disease or defect is a "prisoner" for purposes of § 940.20(1), Battery by prisoner. State v. Skampfer, 176 Wis.2d 304, 500 N.W.2d 369 (Ct. App. 1993). The important fact is that the person's liberty was restrained premised on a finding that the person had violated the criminal law.

A probationer who violates a condition of probation and as a result is taken into custody is a prisoner "confined as a result of a violation of the law" as provided in C.D.M., supra, and this instruction. State v. Fitzgerald, 2000 WI App 55, ¶12, 233 Wis.2d 584, 608 N.W.2d 391 [also involving a charge under § 940.20(1).]

2. The institution's status as one of the designated facilities should not be a contested issue in most cases, and the Committee concluded that it is appropriate for the trial court to so instruct the jury.

Before being amended by Chapter 173, Laws of 1977, § 946.43 applied to "any prisoner confined to a state prison or to any other institution by virtue of a transfer from a state prison. . . ." (Wis. Stat. § 946.43 (1975).) As amended, the statute applies to "any prisoner confined to a state prison or other state, county or municipal detention facility. . . ." The Wisconsin Legislative Council staff note to 1977 Senate Bill 14, which was enacted as Chapter 173, Laws of 1977, stated: "This bill expands the application of § 946.43 to cover assaults by prisoners in all detention facilities in the state."

The question of what institutions are covered by the statute is arguably difficult only with regard to "state detention facilities." "County detention facility" most likely refers to a county jail (and possibly to the House of Correction in Milwaukee County); "municipal detention facility" most likely refers to city jails. But it is not clear what institutions are included in the term "state detention facility." The term "state prison" in the former statute included all correctional institutions (§ 53.01), so it could be argued that the revision was intended to include state mental health institutes. The Committee concluded that the statute may be applied to persons confined in mental health institutes provided their confinement is a result of criminal charges. This interpretation would include those committed for determination of competency to stand trial, those committed as not competent to stand trial, and those committed as not guilty by reason of mental disease or defect. This conclusion is consistent with the decision in State v. Skampfer, see note 1, supra.

Section 302.01 identifies the institutions which are "state prisons." Also see § 302.02 which defines the "precincts" of the state prisons, that is, those locations that are considered part of the prisons for legal purposes. See note 2, Wis JI-Criminal 1228.

3. For a case finding evidence to be sufficient on the "apprehension of an immediate battery" element, see State v. Block, 222 Wis.2d 586, 587 N.W.2d 914 (Ct. App. 1998), also holding that "the onset of apprehension of a battery may occur while the battery is in progress." 222 Wis.2d 586, 589.

4. The Committee concluded that "battery" in the context of this offense refers to the general meaning of the term as reflected in the definition used in the instruction, not to any of the many, specifically-defined, types of battery currently included in the Wisconsin Statutes.

5. The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. Also see Wis JI-Criminal 914 for further discussion of "great bodily harm."

6. Under § 939.23(3), "intentionally" is defined to mean "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." The Committee concluded that the "purpose" alternative is most likely to apply to the typical offense under § 946.43. See Wis JI-Criminal 923A and 923B for further discussion.

7. The question of the defendant's knowledge of the victim's status is usually not contested, but because of the way the statute is drafted, knowledge is an element of the offense. See § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'"

The alternative types of victims have been placed in parentheses so that in the usual case, where the victim's status and the defendant's knowledge are not disputed, the applicable type of victim may be selected to simplify the instruction for the jury. However, the Committee concluded that it should not be an obstacle to conviction if, for example, some jurors are convinced that the defendant thought the victim was an officer while other jurors are convinced that the defendant thought the victim was a visitor. In other words, it would be permissible to instruct the jury that the defendant must have known the victim was "an officer, or an employee, or a visitor, or another inmate."

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1779 ASSAULT BY A PRISONER: RESTRAINING OR CONFINING AN OFFICER, EMPLOYEE, VISITOR, OR INMATE — § 946.43(2)

Statutory Definition of the Crime

Assault by a prisoner, as defined in § 946.43(1) of the Criminal Code of Wisconsin, is committed by one who is a prisoner confined to a [state prison] [(state) (county) (municipal) detention facility] who intentionally confines or restrains (an officer) (an employee) (a visitor) (an inmate) of the institution without the consent of that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a prisoner confined to a [state prison] [(state) (county) (municipal) detention facility].

   This requires that the defendant was confined in a (prison) (detention facility) as a result of a violation of law.[1]

   (Name of institution) is a [state prison] [(state) (county) (municipal) detention facility].[2]

2. (Name of victim) was (an officer) (an employee) (a visitor) (an inmate) of (name of institution).

3. The defendant intentionally confined or restrained (name of victim).

If the defendant deprived (name of victim) of freedom of movement or compelled (him) (her) to remain where (he) (she) did not wish to remain, then (name of victim) was confined or restrained. The use of physical force is not required. One may be confined or restrained by acts or words or both.[3]

"Intentionally confined or restrained" means that the defendant had the purpose to confine or restrain (name of victim).[4]

4. The defendant confined or restrained (name of victim) without consent.[5]

5. The defendant knew (name of victim) was (an employee) (an officer) (a visitor) (an inmate) of (name prison or institution) and knew that (name of victim) did not consent to the confining or restraining.[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1779 was originally published in 1979 and revised in 1982, 1984, and 1990. This revision was approved by the Committee in August 2000 and involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment.

1. The defendant's status as a "prisoner" should rarely be in question, but the Committee concluded there should be some definition of the term in the instruction. The definition in the instruction was adapted from that found in Wis. Stat. § 46.011 and from the decision in State v. Brill, 1 Wis.2d 288, 83 N.W.2d 721 (1957), where the court made the following observations:

> So far as we know, the word "prisoner" has not been defined by this court. Black's Law Dictionary (4th ed.), p. 1358, defines the word as follows:
>
> "One who is deprived of his liberty; one who is against his will kept in confinement or custody."
>
> Webster's New International Dictionary (2d ed.) gives the following definition:
>
> "A person under arrest, in custody or in prison; one involuntarily restrained; a captive; as a prisoner of justice, or war or at the bar; to take one prisoner."

State v. Brill, 1 Wis.2d 288, 291.

The Brill definition has been cited with approval in several cases involving § 940.20(1), Battery by prisoner. Because that statute and § 946.43 are worded similarly, the Committee concluded that "prisoner" should have the same definition under each statute. In C.D.M. v. State, 125 Wis.2d 170, 370 N.W.2d 287 (Ct. App. 1985), the court held that a juvenile confined as a delinquent at the Lincoln Hills School was a "prisoner" under § 940.20(1) because he had violated a criminal law and was confined for a correctional objective. 125 Wis.2d 170, 173.

The Committee concluded that "prisoner" includes all persons who are confined to one of the identified institutions as a result of a violation of the law. "Prisoner" is also defined in § 46.011(2) (for purposes of chapters 46 to 51, 55, and 58) and in § 301.01(2) (for purposes of chapters 301 to 304). But the Committee concluded that these definitions are not directly applicable here because they are concerned primarily with defining the authority of state agencies.

A person committed to a state mental health facility (in this case, the Mendota Mental Health Institute) after being found not guilty by reason of mental disease or defect is a "prisoner" for purposes of § 940.20(1), Battery by prisoner. State v. Skampfer, 176 Wis.2d 304, 500 N.W.2d 369 (Ct. App. 1993). The important fact is that the person's liberty was restrained premised on a finding that the person had violated the criminal law.

A probationer who violates a condition of probation and as a result is taken into custody is a prisoner "confined as a result of a violation of the law" as provided in C.D.M., supra, and this instruction. State v. Fitzgerald, 2000 WI App 55, ¶12, 233 Wis.2d 584, 608 N.W.2d 391 [also involving a charge under § 940.20(1)].

2. The institution's status as one of the designated facilities should not be a contested issue in most cases, and the Committee concluded that it is appropriate for the trial court to so instruct the jury.

Before being amended by Chapter 173, Laws of 1977, § 946.43 applied to "any prisoner confined to a state prison or to any other institution by virtue of a transfer from a state prison. . . ." (Wis. Stat. § 946.43 (1975).) As amended, the statute applies to "any prisoner confined to a state prison or other state, county or municipal detention facility. . . ." The Wisconsin Legislative Council staff note to 1977 Senate Bill 14, which was enacted as Chapter 173, Laws of 1977, stated: "This bill expands the application of § 946.43 to cover assaults by prisoners in all detention facilities in the state."

The question of what institutions are covered by the statute is arguably difficult only with regard to "state detention facilities." "County detention facility" most likely refers to a county jail (and possibly to the House of Correction in Milwaukee County); "municipal detention facility" most likely refers to city jails. But it is not clear what institutions are included in the term "state detention facility." The term "state prison" in the former statute included all correctional institutions (§ 53.01), so it could be argued that the revision was intended to include state mental health institutes. The Committee concluded that the statute may be applied to persons confined in mental health institutes provided their confinement is a result of criminal charges. This interpretation would include those committed for determination of competency to stand trial, those committed as not competent to stand trial, and those committed as not guilty by reason of mental disease or defect. This conclusion is consistent with the decision in State v. Skampfer, see note 1, supra.

Section 302.01 identifies the institutions which are "state prisons." Also see § 302.02 which defines the "precincts" of the state prisons, that is, those locations that are considered part of the prisons for legal purposes. See note 2, Wis JI-Criminal 1228.

3. For further instruction on this element, see Wis JI-Criminal 1275, False Imprisonment, especially at notes 1-3.

4. Under § 939.23(3), "intentionally" is defined to mean "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." The Committee concluded that the "purpose" alternative is most likely to apply to the typical offense under § 946.43. See Wis JI-Criminal 923A and 923B for further discussion.

5. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

6. The question of the defendant's knowledge of the victim's status is usually not contested, but because of the way the statute is drafted, knowledge is an element of the offense. See § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'"

The alternative types of victims have been placed in parentheses so that in the usual case, where the victim's status and the defendant's knowledge are not disputed, the applicable type of victim may be selected to simplify the instruction for the jury. However, the Committee concluded that it should not be an obstacle to conviction if, for example, some jurors are convinced that the defendant thought the victim was an officer while other jurors are convinced that the defendant thought the victim was a visitor. In

other words, it would be permissible to instruct the jury that the defendant must have known the victim was "an officer, or an employee, or a visitor, or another inmate."

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1779A ASSAULT BY A PRISONER: THROWING OR EXPELLING A BODILY SUBSTANCE AT AN OFFICER, EMPLOYEE, VISITOR, OR INMATE — § 946.43(2m)

Statutory Definition of the Crime

Assault by a prisoner, as defined in § 946.43(2m) of the Criminal Code of Wisconsin, is committed by one who is a prisoner confined to a [state prison] [(state) (county) (municipal) detention facility] and who throws or expels a bodily substance[1] at or toward [(an officer) (an employee) (a visitor) (another prisoner) of the prison or facility] under the following circumstances: the prisoner intends that the bodily substance come into contact with the other person; the prisoner intends to cause bodily harm to or to abuse, harass, offend, intimidate, or frighten the other person; and the other person does not consent to the substance being thrown or expelled.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a prisoner confined to a [state prison] [(state) (county) (municipal) detention facility].

   This requires that the defendant was confined in a (prison) (detention facility) as a result of a violation of law.[2]

(Name of institution) is a [state prison] [(state) (county) (municipal) detention facility].[3]

2. (Name of victim) was (an officer) (an employee) (a visitor) (another prisoner) of (name of institution).

3. The defendant threw or expelled a bodily substance at or toward (name of victim) with intent that the bodily substance come into contact with (name of victim).[4]

(Identify substance) is a bodily substance.[5]

4. The defendant intended [to cause bodily harm to] [to abuse, harass, offend, intimidate or frighten][6] (name of victim).

5. (Name of victim) did not consent to the substance being thrown or expelled at or toward (him) (her).[7]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1779A was approved by the Committee in August 2000.

Subsection (2m) of § 946.43 was created by 1999 Wisconsin Act 188 [effective date: June 2, 2000]. The penalty is expressed as follows: ". . . may be fined not more than $10,000 or imprisoned for not more than 2 years or both." Note that the penalty is not designated as one of the standard penalty classes for felony offenses. Section 973.01(2)(b) defines the imprisonment portion of bifurcated sentences under "Truth In Sentencing" for Class B, BC, C, D, and E felonies. § 973.01(2)(b)1.-5. That section also provides that "[f]or any felony other than a felony specified in subds. 1. to 5., the term of confinement in prison may not exceed 75% of the total length of the bifurcated sentence." Thus, the maximum term of confinement for a violation of § 946.43(2m) appears to be 18 months – 75% of the two year maximum. The sentence must be imposed "consecutive to any sentence previously imposed or which may be imposed for any crime or offense for which the person was in custody when he or she committed the violation of par. (a)." § 946.43(2m)(b).

1. "Bodily substance" is used in place of the following phrase in the statute: ". . . blood, semen, vomit, saliva, urine, feces or other bodily substance . . ."

2. The defendant's status as a "prisoner" should rarely be in question, but the Committee concluded there should be some definition of the term in the instruction. The definition in the instruction was adapted from that found in Wis. Stat. § 46.011 and from the decision in State v. Brill, 1 Wis.2d 288, 83 N.W.2d 721 (1957), where the court made the following observations:

> So far as we know, the word "prisoner" has not been defined by this court. Black's Law Dictionary (4th ed.), p. 1358, defines the word as follows:
>
> "One who is deprived of his liberty; one who is against his will kept in confinement or custody."
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> Webster's New International Dictionary (2d ed.) gives the following definition:
>
> "A person under arrest, in custody or in prison; one involuntarily restrained; a captive; as a prisoner of justice, or war or at the bar; to take one prisoner."

State v. Brill, 1 Wis.2d 288, 291.

The Brill definition has been cited with approval in several cases involving § 940.20(1), Battery by prisoner. Because that statute and § 946.43 are worded similarly, the Committee concluded that "prisoner" should have the same definition under each statute. In C.D.M. v. State, 125 Wis.2d 170, 370 N.W.2d 287 (Ct. App. 1985), the court held that a juvenile confined as a delinquent at the Lincoln Hills School was a "prisoner" under § 940.20(1) because he had violated a criminal law and was confined for a correctional objective. 125 Wis.2d 170, 173.

The Committee concluded that "prisoner" includes all persons who are confined to one of the identified institutions as a result of a violation of the law. "Prisoner" is also defined in § 46.011(2) (for purposes of chapters 46 to 51, 55, and 58) and in § 301.01(2) (for purposes of chapters 301 to 304). But

the Committee concluded that these definitions are not directly applicable here because they are concerned primarily with defining the authority of state agencies.

A person committed to a state mental health facility (in this case, the Mendota Mental Health Institute) after being found not guilty by reason of mental disease or defect is a "prisoner" for purposes of § 940.20(1), Battery by prisoner. State v. Skampfer, 176 Wis.2d 304, 500 N.W.2d 369 (Ct. App. 1993). The important fact is that the person's liberty was restrained premised on a finding that the person had violated the criminal law.

A probationer who violates a condition of probation and as a result is taken into custody is a prisoner "confined as a result of a violation of the law" as provided in C.D.M., supra, and this instruction. State v. Fitzgerald, 2000 WI App 55, 12, 233 Wis.2d 584, 608 N.W.2d 391 [also involving a charge under § 940.20(1)].

3. The institution's status as one of the designated facilities should not be a contested issue in most cases, and the Committee concluded that it is appropriate for the trial court to so instruct the jury.

Before being amended by Chapter 173, Laws of 1977, § 946.43 applied to "any prisoner confined to a state prison or to any other institution by virtue of a transfer from a state prison. . . ." (Wis. Stat. § 946.43 (1975).) As amended, the statute applies to "any prisoner confined to a state prison or other state, county or municipal detention facility. . . ." The Wisconsin Legislative Council staff note to 1977 Senate Bill 14, which was enacted as Chapter 173, Laws of 1977, stated: "This bill expands the application of § 946.43 to cover assaults by prisoners in all detention facilities in the state."

The question of what institutions are covered by the statute is arguably difficult only with regard to "state detention facilities." "County detention facility" most likely refers to a county jail (and possibly to the House of Correction in Milwaukee County); "municipal detention facility" most likely refers to city jails. But it is not clear what institutions are included in the term "state detention facility." The term "state prison" in the former statute included all correctional institutions (§ 53.01), so it could be argued that the revision was intended to include state mental health institutes. The Committee concluded that the statute may be applied to persons confined in mental health institutes provided their confinement is a result of criminal charges. This interpretation would include those committed for determination of competency to stand trial, those committed as not competent to stand trial, and those committed as not guilty by reason of mental disease or defect. This conclusion is consistent with the decision in State v. Skampfer, see note 2, supra.

Section 302.01 identifies the institutions which are "state prisons." Also see § 302.02 which defines the "precincts" of the state prisons, that is, those locations that are considered part of the prisons for legal purposes. See note 2, Wis JI-Criminal 1228.

4. The statute requires two intents. The instruction places the first one in this element and treats the second one as a separate element 5.

5. Subsection 946.43(2m) applies to the following: "blood, semen, vomit, saliva, urine, feces or other bodily substance." Because the statute specifies certain substances as "bodily substances," the Committee concluded that the jury may be told, for example, that "blood is a bodily substance."

6. The offense is defined as engaging in one of the prohibited acts "with the intent either to cause bodily harm . . . or to abuse, harass, offend, intimidate or frighten . . ." The instruction puts the alternative intents in parentheses on the assumption that one or the other is likely to apply. However, the Committee concluded that it would be permissible to instruct on more than one type of intent and that jury agreement on the intent involved would not be required. The Wisconsin Supreme Court has reached that conclusion with offenses under § 948.07, Child enticement. State v. Derango, 2000 WI 89, 236 Wis.2d 721, 613 N.W.2d 833.

7. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

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1780 PERMITTING ESCAPE — § 946.44(1)(a) and (1g)

Statutory Definition of the Crime

Permitting escape, as defined in § 946.44(1)(a) of the Criminal Code of Wisconsin, is committed by an officer or an employee of an institution where prisoners are detained who intentionally permits a prisoner in his custody to escape.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following (three) (four)[1] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was an (officer) (employee) of an institution where prisoners[2] are detained.

   (Name of institution) is an institution where prisoners are detained.[3]

2. The defendant permitted a prisoner[4] in his custody to escape.

   "Escape" means to leave custody in any manner without lawful permission or authority.[5]

3. The defendant intentionally permitted a prisoner in his custody[6] to escape.

   "Intentionally" means that the defendant acted with the mental purpose of permitting a prisoner to escape.[7] It also requires that the defendant knew that

(name of prisoner) was a prisoner and knew that (name of prisoner) was leaving custody without lawful permission or authority.[8]

ADD THE FOLLOWING IF THE CLASS F FELONY UNDER SUBSEC. (1g) IS CHARGED:

[4. The defendant is a public (officer) (employee).[9]]

[A "public officer" is any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.]

[A "public employee" is any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all (three) (four) elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1780 was originally published in 1989 and revised in 1991. This revision was approved by the Committee in October 2007 and involved adoption of a new format and nonsubstantive changes to the text.

The basic offense is defined by § 946.44(1)(a) and is punished as a Class H felony. The penalty is increased to a Class F felony if "any public officer or public employee" violates the statute – see § 946.44(1g). It appears that any "officer or employee of an institution where prisoners are detained" under subsec. (1)(a) would also be a "public officer or employee" under subsec. (1g) (but see note 9, below). But since the statutes call for the different penalties, the instruction is drafted with an optional fourth element, for use when the Class F felony is charged.

1. Use four elements if the Class F felony offense is charged. See Comment.

2. "Prisoner" is defined in Wis JI-Criminal 1778 as "one who is confined in a prison or detention facility as a result of a violation of law." It was adapted from the definition in § 46.011 and from the discussion in State v. Brill, 1 Wis.2d 288, 83 N.W.2d 721 (1957).

3. The Committee has concluded that the jury may be told that, for example, "The _____ county jail is an institution where prisoners are detained." The jury must be satisfied that the defendant was an officer or employee of that type of institution.

4. See note 2, supra.

5. This is the definition of "escape" provided in § 946.42(1)(b), which applies to violations of § 946.44. See § 946.44(2)(b).

6. "Custody" is defined in § 946.42(1)(a) and that definition applies to § 946.44. See § 946.44(2)(a).

7. "Intentionally" is defined in § 939.23(3). The definition changed effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B.

8. "Intentionally," as defined in § 939.23(3), also requires knowledge of those facts necessary to make the conduct criminal and which appear after the word "intentionally" in the statute. See Wis JI-Criminal 923A and 923B.

9. See Comment preceding note 1. The definitions of "public officer" and "public employee" are those provided in § 939.22(30).

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1781 ASSISTING ESCAPE — § 946.44(1)(b)

Statutory Definition of the Crime

Assisting escape, as defined in § 946.44(1)(b) of the Criminal Code of Wisconsin, is committed by one who, with intent to aid any prisoner to escape from custody, introduces into the institution[1] where the prisoner is detained anything adapted for or useful in making an escape.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant introduced into the institution, where (name of prisoner) was detained, something adapted for or useful in making an escape.
2. The defendant acted with the intent to aid a prisoner[2] to escape from custody.

   This requires that the defendant had the mental purpose to help (name of prisoner) escape from custody.[3] "Escape" means to leave custody without lawful permission or authority.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1781 was originally published in 1989 and revised in 1991. This revision was approved by the Committee in October 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is drafted for violations of § 946.44(1)(b). For violations of § 946.44(1)(a), see Wis JI Criminal 1780.

The offense defined in § 946.44(1)(b) is punished as a Class H felony. The penalty increases to that of a Class F felony if the defendant is a public officer or employee. See Wis JI Criminal 1782 for an instruction for the Class F felony.

1. This instruction does not address the other type of conduct prohibited by § 946.44(1)(b): "transfer to the prisoner" anything adapted or useful in making an escape. In a case involving a "transfer to a prisoner," those words must be substituted for "introduce into the institution where the person is detained" throughout the instruction.

2. "Prisoner" is defined in Wis JI-Criminal 1778 as "one who is confined in a prison or detention facility as a result of a violation of law." It was adapted from the definition in § 46.011 and from the discussion in State v. Brill, 1 Wis.2d 288, 83 N.W.2d 721 (1957).

3. "With intent to" is defined in § 939.23(3). The definition changed effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "with intent to." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B.

4. This is the definition of "escape" provided in § 946.42(1)(b), which applies to violations of § 946.44. See § 946.44(2)(b).

1782 ASSISTING ESCAPE: PUBLIC OFFICER OR EMPLOYEE — § 946.44(1)(b) and (1g)

Statutory Definition of the Crime

Assisting escape, as defined in § 946.44(1)(b) of the Criminal Code of Wisconsin, is committed by a public (officer) (employee) who, with intent to aid any prisoner to escape from custody, introduces into the institution[1] where the prisoner is detained anything adapted for or useful in making an escape.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a public (officer) (employee).[2]

   [A "public officer" is any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.]

   [A "public employee" is any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.]

2. The defendant introduced into the institution, where (name of prisoner) was detained, something adapted for or useful in making an escape.

3. The defendant acted with the intent to aid a prisoner[3] to escape from custody.

This requires that the defendant had the mental purpose to help (name of prisoner) escape from custody.[4] "Escape" means to leave custody without lawful permission or authority.[5]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1782 was originally published in 1989 and revised in 1991. This revision was approved by the Committee in October 2007 and involved adoption of a new format and nonsubstantive changes to the text.

1. This instruction does not address the other type of conduct prohibited by § 946.44(1)(b): "transfer to the prisoner" anything adapted or useful in making an escape. In a case involving a "transfer to a prisoner," those words must be substituted for "introduce into the institution where the person is detained" throughout the instruction.

2. The definitions of "public officer" and "public employee" are those provided in § 939.22(30).

3. "Prisoner" is defined in Wis JI-Criminal 1778 as "one who is confined in a prison or detention facility as a result of a violation of law." It was adapted from the definition in § 46.011 and from the discussion in State v. Brill, 1 Wis.2d 288, 83 N.W.2d 721 (1957).

4. "With intent to" is defined in § 939.23(3). The definition changed effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "with intent to." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B.

5. This is the definition of "escape" provided in § 946.42(1)(b), which applies to violations of § 946.44. See § 946.44(2)(b).

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1783 INTRODUCING A FIREARM INTO AN INSTITUTION — § 946.44(1m)

Statutory Definition of the Crime

Assisting escape, as defined in § 946.44(1m) of the Criminal Code of Wisconsin, is committed by a person who intentionally introduces a firearm,[1] loaded or unloaded, into an institution where prisoners are detained.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant introduced a firearm into an institution where prisoners[2] are detained. A firearm is a weapon that acts by force of gunpowder.[3]
2. The defendant acted intentionally. This requires that the defendant knew the item was a firearm.[4]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1783 was originally published in 1989 and revised in 1991. This revision was approved by the Committee in October 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 946.44(1m). For violations of § 946.44(1)(a) and (b), see Wis JI Criminal 1780 1782.

1. The statute applies not only to firearms but also to "any article used or fashioned in a manner to lead another person to believe it is a firearm." The instruction refers to "firearm" throughout and would have to be changed if the "any article" alternative is used. Similar language is used in § 940.225(1)(b), see Wis JI-Criminal 1202, and § 943.32(2), see Wis JI-Criminal 1480A. (Note that both those statutes refer to leading a person "reasonably to believe"; "reasonably" is missing from § 946.44(1m).)

2. "Prisoner" is defined in Wis JI-Criminal 1778 as "one who is confined in a prison or detention facility as a result of a violation of law." It was adapted from the definition in § 46.011 and from the discussion in State v. Brill, 1 Wis.2d 288, 83 N.W.2d 721 (1957).

3. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes air guns. The statute applies to "any firearm, whether loaded or unloaded." Sec. 946.44(1m). Also see note 1, supra.

4. "Intentionally," as defined in § 939.23(3), requires knowledge of those facts necessary to make the conduct criminal and which appear after the word "intentionally" in the statute. Also see Wis JI-Criminal 923A and 923B regarding definition of the word "intentionally." In the context of this offense, the essence of the intent element appeared to the Committee to be knowledge that the item introduced was a firearm.

1784 INMATE POSSESSING AN ARTICLE WITH INTENT TO RETAIN—§ 302.095(2)(b)

Statutory Definition of the Crime

Section 302.095(2)(b) of the Wisconsin Statutes is violated by a person who has in (his) (her) possession any (article) (thing whatever) with intent to retain for (himself) (herself), contrary to the rules or regulations and without the knowledge or permission of the (sheriff or other keeper of the jail) (warden or superintendent of the prison).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed an article.
2. The defendant intended to retain the article for (himself) (herself).
3. The possession of the article was contrary to the rules or regulations and without the knowledge or permission of the (sheriff or other keeper of the jail[1]) (warden or superintendent of the prison).

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 1784 was approved by the Committee in October, 2020.

Section 302.095(2)(b) was created by 2019 Wisconsin Act 111 [effective date: March 1, 2019] for violations concerning an inmate possessing an article with intent to retain. The offense is a Class I felony. For violations of § 302.095(2)(a)1 concerning delivery of an article to an inmate, see Wis JI-Criminal 1785. For violations of § 302.095(2)(a)1 concerning possession of an article with intent to deliver it to an inmate, see Wis JI-Criminal 1786. For violations of § 302.095(2)(a)3 concerning receiving an article from an inmate to convey out of jail or prison, see Wis JI-Criminal 1787.

§ 302.095(2)(a)2 prohibits depositing or concealing an article in or about a jail or prison or in a vehicle going into jail or prison premises. There is not a uniform instruction for violation of sub (2)(a)2.

1. Section 302.095(1) provides that "'jail' means any of the following:

   (a) A jail, as defined in s. 302.30.
   (b) A house of correction.
   (c) A Huber facility under s. 303.09.
   (d) A lockup facility, as defined in s. 302.30."

1785 DELIVERING AN ARTICLE TO AN INMATE — § 302.095(2)(a)1

Statutory Definition of the Crime

Section 302.095(2)(a)1 of the Wisconsin Statutes is violated by a person who (delivers) (procures to be delivered) any article to an inmate confined in a (jail) (prison) with intent that any inmate confined in the jail or prison shall obtain or receive the same, contrary to the rules or regulations and without the knowledge or permission of the (sheriff or keeper of the jail) (warden or superintendent of the prison).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (delivered) (procured to be delivered) an article to an inmate confined in a (jail)[1] (prison).
2. The defendant intended that an inmate receive or obtain the article.
3. The (delivery) (procuring to be delivered) of the article was contrary to the rules or regulations and without the knowledge or permission of the (sheriff or other keeper of the jail) (warden or superintendent of the prison).[2]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 1785 was originally published in 1996 and revised in 2007. This revision was approved by the committee in October 2020; it reflects changes made by 2019 Wisconsin Act 111[effective date: March 1, 2020].

This instruction is for the type of violation of § 302.095(2)(a)1 concerning delivery of an article to an inmate. The offense is a Class I felony. For violations of § 302.095(2)(a)1 concerning possession of an article with intent to deliver it to an inmate, see Wis JI Criminal 1786. For violations of § 302.095(2)(a)3 concerning the receipt of an article from an inmate for conveyance out of the jail, see Wis JI-Criminal 1787. For violations concerning an inmate possessing an article with intent to retain, see Wis JI-Criminal 1784. The statute was amended by 1995 Wisconsin Act 437 to apply to jails as well as to prisons.

§ 302.095(2)(a)2 prohibits depositing or concealing an article in or about a jail or prison or in a vehicle going into jail or prison premises. There is not a uniform instruction for violation of sub (2)(a)2.

1. Section 302.095(1) provides that "'jail'' means any of the following:

   (a) A jail, as defined in s. 302.30.
   (b) A house of correction.
   (c) A Huber facility under s. 303.09.
   (d) A lockup facility, as defined in s. 302.30."

2. Previous versions of this instruction required that the defendant have knowledge that the delivery of an article to an inmate was contrary to the rules or regulations and without the knowledge or permission of the sheriff or other keeper of the jail. The Committee concluded 2019 Wisconsin Act 111 amended § 302.095(2)(a)(1) so that the statute no longer includes the knowledge requirement for this element.

1786 POSSESSING AN ARTICLE WITH INTENT TO DELIVER IT TO AN INMATE — § 302.095(2)(a)(1)

Statutory Definition of the Crime

Section 302.095(2)(a)(1) of the Wisconsin Statutes is violated by a person who possesses any article[1] with intent to deliver it to an inmate confined in a [jail] [prison] contrary to the rules or regulations and without the knowledge or permission of the [sheriff or keeper of the jail] [warden or superintendent of the prison].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed an article.

   ["Possessed" means that the defendant knowingly[2] had actual physical control of an article.][3]

2. The defendant intended to deliver the article to an inmate confined in a [jail][4] [prison].

3. The (delivery) of the article was contrary to the rules or regulations and without the knowledge or permission of the (sheriff or other keeper of the jail) (warden or superintendent of the prison).[5]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 1786 was originally published in 1996 and revised in 2007. This revision was approved by the committee in October 2021; it reflects changes made by 2019 Wisconsin Act 111 [effective date: March 1, 2020].

This instruction is for the type of violation of § 302.095(2) (a)(1) concerning possessing and article with intent to deliver to an inmate. The offense is a Class I felony. For violations of § 302.095(2)(a)(1) concerning delivery of an article to an inmate, see Wis JI-Criminal 1785. For violations of § 302.095(2)(a)(3) concerning the receipt of an article from an inmate for conveyance out of the jail, see Wis JI-Criminal 1787. For violations concerning an inmate possessing an article with intent to retain, see Wis JI-Criminal 1784. The statute was amended by 1995 Wisconsin Act 437 to apply to jails as well as to prisons.

§ 302.095(2)(a)2 prohibits depositing or concealing an article in or about a jail or prison or in a vehicle going into jail or prison premises. There is not a uniform instruction for violation of sub (2)(a)2.

1. The statement of the offense omits the following language from the statute: "with intent that any inmate confined in the jail or prison shall obtain or receive the same. . ." The Committee concluded that it is redundant to say "possess an article with intent to deliver it and with intent that an inmate receive it." The intent to deliver covers both concepts.

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

3. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not

in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so called constructive possession.

4. Section 302.095(1) provides that "'jail' means any of the following:

(a) A jail, as defined in s. 302.30.
(b) A house of correction.
(c) A Huber facility under s. 303.09.
(d) A lockup facility, as defined in s. 302.30."

5. Previous versions of this instruction required that the defendant have knowledge that the delivery of an article to an inmate was contrary to the rules or regulations and without the knowledge or permission of the sheriff or other keeper of the jail. The Committee concluded 2019 Wisconsin Act 111 amended § 302.095(2)(a)(1) so that the statute no longer includes the knowledge requirement for this element.

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1787 RECEIVING AN ARTICLE FROM AN INMATE TO CONVEY OUT OF JAIL OR PRISON — § 302.095(2)(a)3

Statutory Definition of the Crime

Section 302.095(2)(a)3 of the Wisconsin Statutes is violated by a person who receives from an inmate any article with intent to convey the same out of (jail) (prison), contrary to the rules or regulations and without the knowledge or permission of the (sheriff or keeper of the jail) (warden or superintendent of the prison).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant received an article from an inmate.
2. The defendant intended to convey the article out of the (jail)[1] (prison).
3. The conveyance of the article out of the (jail) (prison) was contrary to the rules or regulations and without the knowledge or permission of the (sheriff or other keeper of the jail) (warden or superintendent of the prison).[2]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 1787 was approved by the committee in October 2020.

This instruction is for violations of § 302.095(2)(a)3, as amended by 2019 Wisconsin Act 111 [effective date: March 1, 2020], concerning the receipt of an article from an inmate for conveyance out of the jail. The offense is a Class I felony. For violations of § 302.095(2)(a)1 concerning delivery of an article to an inmate, see Wis JI-Criminal 1785. For violations of § 302.095(2)(a)1 concerning possession of an article with intent to deliver it to an inmate, see Wis JI Criminal 1786. For violations of § 302.095(2)(b) concerning an inmate possessing an article with intent to retain, see Wis JI-Criminal 1784.

§ 302.095(2)(a)2 prohibits depositing or concealing an article in or about a jail or prison or in a vehicle going into jail or prison premises. There is not a uniform instruction for violation of sub (2)(a)2.

1. Section 302.095(1) provides that "'jail' means any of the following:

   (a) A jail, as defined in s. 302.30.
   (b) A house of correction.
   (c) A Huber facility under s. 303.09.
   (d) A lockup facility, as defined in s. 302.30."

1788 ENCOURAGING A VIOLATION OF PROBATION, EXTENDED SUPERVISION OR PAROLE — § 946.46

Statutory Definition of the Crime

Encouraging a violation of (probation) (extended supervision) (parole) as defined in Section 946.46 of the Wisconsin Statutes is committed by one who intentionally aids or encourages a person on (probation) (extended supervision) (parole)[1] to abscond or to violate a term or condition of (probation) (extended supervision) (parole).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of person) was on (probation supervision) (extended supervision) (parole supervision).
2. The defendant intentionally aided or encouraged (name of person) [to abscond.] [to violate a term or condition of supervision.]

   ["To abscond" means to fail to make oneself available as directed by the person supervising (name of person).][2]

   This element requires that the defendant acted with the purpose to aid or encourage the violation or was aware that (his) (her) conduct was practically certain to cause that result.

3. The defendant knew[3] that (name of person) was on supervision and knew [that (name of person) was required to make (himself) (herself) available as directed] [that _____ was a condition of supervision].

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1788 was approved by the Committee in July 2010.

This instruction is drafted for violations of § 946.46.

1. Section 946.46 also applies to aiding or encouraging "any person committed to the custody or supervision of the department of corrections or a county department under s. 46.215, 46.22 or 46.23 by reason of crime or delinquency." [Section 46.215 addresses the Milwaukee County social services department; § 46.22 addresses all other county departments; § 46.23 addresses county social services departments generally.] The phrase in quotes above apparently creates two additional options not addressed by the instruction: (1) a person committed to the custody or supervision of the department of corrections but not on probation, parole, or extended supervision; and, (2) a person committed to the custody or supervision of a county social services department.

2. The definition of "abscond" is based on the definition of "absconding" provided in DOC 328.03(1), Wisconsin Administrative Code: "Absconding means the failure of a client to make himself or herself available as directed by the agent."

3. Including the separate knowledge requirement is based on the conclusion that the use of "intentionally" in the statute requires "knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3).

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1790 AIDING A FELON — § 946.47(1)(a)

Statutory Definition of the Crime

Aiding a felon, as defined in § 946.47(1)(a) of the Criminal Code of Wisconsin, is committed by one who, with intent to prevent the apprehension of a felon, harbors or aids the felon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant aided (name of person aided).

   To aid means to help or assist.[1]

2. (Name of person aided) [was a felon] [had engaged in the prohibited felonious conduct of (name of crime)[2]].

   [A felon is a person who has committed a crime punishable by imprisonment in the Wisconsin state prisons.[3] (Name of crime) is such a crime,[4] and the State must prove by evidence which satisfies you beyond a reasonable doubt that (name of person aided) committed that crime. (Name of crime) is committed by one who

   LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS

NECESSARY.[5]]

[(Name of crime) is prohibited felonious conduct in Wisconsin,[6] and the State must prove by evidence which satisfies you beyond a reasonable doubt that (name of person aided) engaged in this prohibited felonious conduct. (Name of crime) is committed by one who

LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[7]]

3. The defendant knew that (name of person aided) had engaged in the conduct which constitutes (name of crime).[8]

4. The defendant aided (name of person aided) with the intent to prevent the apprehension of (name of person aided).[9]

This element requires that the defendant had the purpose of preventing (name of person aided) from being taken into custody by law enforcement officers or was aware that (his) (her) conduct was practically certain to cause that result.[10]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1790 was originally published in 1981 and revised in 1991, 2007, and 2009, and 2014. The 2014 revision added to the text at element 2 and revised the Comment and footnotes to reflect changes made by 2013 Wisconsin Act 254. This revision was approved by the Committee in December 2023. It modified element 2 by providing an option for individuals who have engaged in the prohibited felonious conduct.

This instruction is for an offense under § 946.47(1)(a). It covers conduct which at common law made the accused an "accessory after the fact." Conduct relating to the destruction of evidence is prohibited by § 946.47(1)(b). See Wis JI Criminal 1791.

Section 946.47(3) formerly provided an exclusion for persons related to the felon. That provision was repealed by 2013 Wisconsin Act 254 [effective date: April 10, 2014].

2013 Wisconsin Act 254 also changed the penalty structure for this offense. See subsection (2m) of § 946.47. It is a Class G felony if the defendant aided a felon who committed a Class A, B, C, or D felony; it is a Class I felony if the defendant aided a felon who committed a Class E, F, G, H, or I felony. Because the crime committed by the felon will be specified in the second element, there is no need for any additional fact-finding as to the classification of that crime.

Section 946.47 applies to aiding felons who committed a crime outside of Wisconsin that was a felony in that jurisdiction and would also be a felony if committed in Wisconsin. See § 946.47(2). The Committee concluded that the jury must find that the facts constituting the out-of-state crime occurred, but that it is for the judge to determine that those facts constituted a felony in the other state and would constitute a felony in Wisconsin.

In State v. Schmidt, 221 Wis.2d 189, 198, 585 N.W.2d 16 (Ct. App. 1998), the court held that § 946.47 could be applied to a person who aided a convicted felon who was wanted for a parole violation:

. . . The plain language of § 946.67(1)(a) and (2)(a) suggests no distinction between a person who has already been convicted of a felony and is now wanted for a parole violation following that conviction, and a person who is now wanted for, but has not yet been convicted of, a felony. Each is a "felon" within the definition of § 946.47(2)(a) because each "commits an act . . . which constitutes a felony under the laws of this state."

Note that § 946.46 makes it a Class A misdemeanor to aid or encourage a person under supervision to abscond or violate a condition of supervision.

1. "'Harbor or aid' includes giving the person food, shelter, medical treatment or money or performing an operation to change his fingerprints or his appearance." 1953 Judiciary Committee Report on the Criminal Code, p. 195 (Wis. Legislative Council). (1953 Report.) "Harbor" means to give shelter or refuge to. Webster's Third International Dictionary.

2. "Felon," as used in § 946.47, refers to a person who has engaged in prohibited felonious conduct, whether convicted or not. State v. Jones, 98 Wis.2d 679, 681, 298 N.W.2d 100 (Ct. App. 1988).

3. Wis. Stat. § 939.60.

4. Here use the short title for the felony, for example: "Burglary is such a crime." The Committee concludes that the jury may be told that a certain crime constitutes a felony under the laws of Wisconsin. However, the jury must find that the person aided committed the crime. In the usual case, the person aided will have been convicted and proof will not be difficult.

In State v. Schmidt, 221 Wis.2d 189, 198, 585 N.W.2d 16 (Ct. App. 1980), the court held that § 946.47 could be applied to a person who aided a convicted felon who was wanted for a parole violation. See Comment preceding note 1.

5. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

6. Here use the short title for the felony, for example: "Burglary is such a crime." The Committee concludes that the jury may be told that a certain crime is prohibited felonious conduct in Wisconsin. However, the jury must find that the person aided engaged in this prohibited felonious conduct. It is not necessary that the person aided have been convicted of, or even charged with, the felony. State v. Jones, 98 Wis.2d 679, 298 N.W.2d 100 (Ct. App. 1980).

7. See footnote 5, supra.

8. In State v. Jones, 98 Wis.2d 679, 681, 298 N.W.2d 100 (Ct. App. 1988), the court held that a required element of this offense is that "the accused had actual knowledge" of the offense committed by the person aided.

The third element of the instruction does not require that the defendant know the precise name of the felony committed or know that the conduct engaged in by the person aided is a felony. It does require that the defendant know what conduct was engaged in by the person aided. That conduct must constitute a felony under the law of Wisconsin.

"This section requires that the actor (1) intend to prevent the apprehension of a person he knows has committed a crime which in fact constitutes a felony. . . ." 1953 Judiciary Committee Report on the Criminal

Code, p. 195 (Wis. Legislative Council).

In a case where further definition of the defendant's knowledge is desired, and additional sentence connecting the knowledge requirement with the elements of the crime may be helpful. For example, where the felony is burglary: "This requires that the defendant knew that (name person aided) intentionally entered a building without the consent of the person in lawful possession and with intent to steal."

In State v. Schmidt, 221 Wis.2d 189, 198, 585 N.W.2d 16 (Ct. App. 1998), the court held that § 946.47 could be applied to a person who aided a convicted felon who was wanted for a parole violation. See Comment preceding note 1. For a case like Schmidt, the elements of the crime need not be summarized, since it is likely the state will simply introduce documentary proof that the person had been convicted of a felony and was on parole on a sentence for the conviction.

9. "Whether the actor has an intent to prevent the apprehension of the felon is a question of fact depending on the circumstances of each case. For example, a person who has committed a felony might go to the home of a friend who, having never been faced with such a situation before, might allow him to remain there for an hour or might give him food or medical treatment without having formed an intent to prevent his apprehension by the police." 1953 Judiciary Committee Report on the Criminal Code, p. 195 (Wis. Legislative Council).

10. Section 939.23(4). See Wis JI-Criminal 923A and 923B.

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1791 AIDING A FELON BY DESTROYING, ETC., PHYSICAL EVIDENCE — § 946.47(1)(b)

Statutory Definition of the Crime

Aiding a felon, as defined in § 946.47(1)(b) of the Criminal Code of Wisconsin, is committed by one who with intent to prevent the apprehension, prosecution, or conviction of a felon, destroys, alters, hides, or disguises physical evidence.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name of person aided) was a felon.

   A felon is a person who has committed a crime punishable by imprisonment in the Wisconsin state prisons.[2] (Name of crime) is such a crime[3] and the State must prove by evidence which satisfies you beyond a reasonable doubt that (name of person aided) committed that crime. (Name of crime) is committed by one who

   > LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[4]

2. The defendant knew that (name of person aided) had engaged in conduct which constitutes (name of crime).[5]

3. The defendant (destroyed) (altered) (hid) (disguised) physical evidence.

4. The defendant (destroyed) (altered) (hid) (disguised) physical evidence with the intent to prevent the (apprehension) (prosecution) (conviction) of (name of person aided).[6]

This element requires that the defendant had the purpose of preventing (name of person aided) from being (taken into custody) (prosecuted) (convicted) or was aware that his conduct was practically certain to cause that result.[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1791 was originally published in 1991 and revised in 2008. This revision was approved by the Committee in October 2014; it added text at element 2. and revised the Comment and footnotes to reflect changes made by 2013 Wisconsin Act 254.

This instruction is for an offense under § 946.47(1)(b). Aiding a felon by harboring is covered by § 946.47(1)(a). See Wis JI Criminal 1790.

Section 946.47(3) formerly provided an exclusion for persons related to the felon. That provision was repealed by 2013 Wisconsin Act 254 [effective date: April 10, 2014].

2013 Wisconsin Act 254 also changed the penalty structure for this offense. See subsection (2m) of § 946.47. It is a Class G felony if the defendant aided a felon who committed a Class A, B, C, or D felony; it is a Class I felony if the defendant aided a felon who committed a Class E, F, G, H, or I felony. Because the crime committed by the felon will be specified in the second element, there is no need for any additional fact-finding as to the classification of that crime.

Section 946.47 applies to aiding felons who committed a crime outside of Wisconsin that was a felony in that jurisdiction and would also be a felony if committed in Wisconsin. See § 946.47(2). The Committee concluded that the jury must find that the facts constituting the out-of-state crime occurred, but that it is for the judge to determine that those facts constituted a felony in the other state and would constitute a felony in Wisconsin.

"Felon," as used in § 946.47, refers to a person who has engaged in prohibited felonious conduct, whether convicted or not. State v. Jones, 98 Wis.2d 679, 681, 298 N.W.2d 100 (Ct. App. 1988).

In State v. Schmidt, 221 Wis.2d 189, 198, 585 N.W.2d 100 (Ct. App. 1998), the court held that § 946.47 could be applied to a person who aided a convicted felon who was wanted for a parole violation:

> . . . The plain language of § 946.67(1)(a) and (2)(a) suggests no distinction between a person who has already been convicted of a felony and is now wanted for a parole violation following that conviction, and a person who is now wanted for, but has not yet been convicted of, a felony. Each is a "felon" within the definition of § 946.47(2)(a) because each "commits an act . . . which constitutes a felony under the laws of this state."

Though Schmidt was concerned with a crime charged under sub. (1)(a), the same conclusion should apply to violations of sub. (1)(b).

Note that § 946.46 makes it a Class A misdemeanor to aid or encourage a person under supervision to abscond or violate a condition of supervision.

1. The statute also covers placing false evidence. Section 946.47(1)(b).

2. Wis. Stat. § 939.60.

3. Here use the short title for the felony, for example: "Burglary is such a crime." The Committee concludes that the jury may be told that a certain crime constitutes a felony under the laws of Wisconsin. However, the jury must find that the person aided committed the crime. In the usual case, the person aided will have been convicted and proof will not be difficult. However, it is not necessary that the

person aided have been convicted of, or even charged with, the felony. State v. Jones, 98 Wis.2d 679, 298 N.W.2d 100 (Ct. App. 1980). The Committee recommends advising the jury of the elements of the underlying crime allegedly committed by the person aided, requiring them to find each element before finding the defendant guilty of aiding a felon.

4. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

5. In State v. Jones, cited in note 3 above, the court held that a required element of this offense is that "the accused had actual knowledge" of the offense committed by the person aided. 98 Wis.2d at 681.

The third element of the instruction does not require that the defendant know the precise name of the felony committed or know that the conduct engaged in by the person aided is a felony. It does require that the defendant know what conduct was engaged in by the person aided. That conduct must constitute a felony under the law of Wisconsin.

"This section requires that the actor (1) intend to prevent the apprehension of a person he knows has committed a crime which in fact constitutes a felony. . . ." 1953 Judiciary Committee Report on the Criminal Code, p. 195 (Wis. Legislative Council).

In a case where further definition of the defendant's knowledge is desired, the sentence in brackets may be helpful. For example: "This requires that the defendant knew that (name persons aided) intentionally entered a building without the consent of the person in lawful possession and with intent to steal."

In State v. Schmidt, 221 Wis.2d 189, 198, 585 N.W.2d 100 (Ct. App. 1980), the court held that § 946.47 could be applied to a person who aided a convicted felon who was wanted for a parole violation. See Comment preceding note 1. For a case like Schmidt, the elements of the crime need not be summarized, since it is likely the state will simply introduce documentary proof that the person had been convicted of a felony and was on parole on a sentence for that conviction.

6. "Whether the actor has an intent to prevent the apprehension of the felon is a question of fact depending on the circumstances of each case. For example, a person who has committed a felony might go to the home of a friend who, having never been faced with such a situation before, might allow him to remain there for an hour or might give him food or medical treatment without having formed an intent to prevent his apprehension by the police." 1953 Judiciary Committee Report on the Criminal Code, p. 195 (Wisconsin Legislative Council).

7. Section 939.23(4). See Wis JI-Criminal 923A and 923B.

1795 BAIL JUMPING — § 946.49(1)

Statutory Definition of the Crime

Bail jumping, as defined in § 946.49(1) of the Criminal Code of Wisconsin, is committed by one who has been released from custody on bond[1] and intentionally fails to comply with the terms of that bond.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was (arrested for) (charged with)[2] (a felony) (a misdemeanor).[3]

   (A felony is a crime punishable by imprisonment in the Wisconsin state prisons.[4] _____ is a felony.)[5]

   (A misdemeanor is a crime punishable by imprisonment in the county jail.[6] _____ is a misdemeanor.)[7]

2. The defendant was released from custody on bond.

   This requires that after (arrest) (being charged),[8] the defendant was released from custody on bond under conditions established by a (judge) (court commissioner)[9] (bail schedule).[10]

3. The defendant intentionally failed to comply with the terms of the bond.

This requires that the defendant had the mental purpose to fail to comply with the terms of the bond. This also requires that the defendant knew of the terms of the bond and knew that (his) (her) actions did not comply with those terms.[11]

ADD THE FOLLOWING IF THE VIOLATION OF BOND IS ALLEGED TO INVOLVE THE COMMISSION OF A CRIMINAL OFFENSE[12]

[The defendant is charged with violating a condition of bond that required that (he) (she) not commit any crime. The State alleges that the defendant committed the crime of _____. The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant committed the crime of _____.[13]

The crime of _____ is committed by one who

LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1795 was originally published in 1981 and revised in 1987, 1988, 1990, 1994, 1999, 2003, 2005, 2010, and 2015. This revision was approved by the Committee in December 2017; it made an addition to element 3.

This instruction is for an offense under § 946.49(1). The penalty is a Class A misdemeanor if the defendant was released from custody on a misdemeanor charge; the penalty is a Class H felony if the defendant was released from custody on a felony charge.

Subsection (2) of § 946.49 applies to witnesses who fail to comply with conditions of bail after release under § 969.01(3). There is no uniform instruction for that offense.

The three elements set forth in this instruction were cited with approval in State v. Dawson, 195 Wis.2d 161, 170-71, 536 N.W.2d 119 (Ct. App. 1995).

In State ex rel. Jacobus v. Wisconsin, 208 Wis.2d 39, 559 N.W.2d 900 (1997), the court affirmed a conviction for bail jumping based on violation of a condition forbidding the consumption of alcohol. The court concluded that "§ 51.45(1) does not prohibit the criminal prosecution of an individual for bail jumping under these circumstances." 208 Wis.2d 39, 44. This reversed the contrary decision of the court of appeals in this case, see 198 Wis.2d 783, 544 N.W.2d 234 (Ct. App. 1995).

The Wisconsin Court of Appeals has held that where a bail jumping charge is based on the commission of a new crime, that new crime is not a lesser included offense and conviction of both bail jumping and the new crime is not barred by double jeopardy principles. See State v. Nelson, 146 Wis.2d 442, 432 N.W.2d 115 (Ct. App. 1988). In State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698, reversed on other grounds, 2004 WI 89, 273 Wis.2d 352, 681 N.W.2d 871, the court of appeals held that when a bail jumping charge is based on the commission of a new crime, the jury must be instructed on the elements of that crime. See the text of the instruction at footnote 12.

The statute is also violated by one who has been released from custody under Chapter 969 and commits a crime in another jurisdiction. State v. West, 181 Wis.2d 792, 512 N.W.2d 207 (Ct. App. 1994).

A defendant may be charged with multiple counts of bail jumping for violating separate terms of the same bond. State v. Anderson, 219 Wis.2d 740, 580 N.W.2d 329 (1998), reversing 214 Wis.2d 126, 570 N.W.2d 872 (Ct. App. 1997).

In State v. Schaab, 2000 WI App 204, 238 Wis.2d 598, 617 N.W.2d 872, the court held that the evidence was insufficient to support a bindover on a charge of bail jumping based on the alleged violation of a "no contact" condition of bond.

In State v. Bowen, 2015 WI App 12, 359 Wis.2d 650, 859 N.W.2d 166, the court of appeals affirmed Bowen's conviction for bail jumping based on a violation of a "no contact" provision of his bond. He challenged his conviction on the ground that the evidence was not sufficient if judged by the jury instruction given in the case, which required that he "had contact with [F.B.]." The word "contact" is not defined in the statutes or in the jury instruction, so the court gave it its common and ordinary meaning, which "can include touching and face-to-face interactions, as Bowen argues, but it can also include auditory observations and indirect contact of the type F.B. testified occurred here." ¶21.

> ¶30 In sum, the jury instruction requiring the State to prove that Bowen made "contact with [F.B.]" did not require the State to show that F.B. saw Bowen or that Bowen directly communicated with F.B. F.B.'s testimony that she saw Bowen's truck in the driveway, heard glass breaking, and heard someone walking up and down her stairs, combined with police officer testimony that Bowen was found intoxicated in F.B.'s basement, was sufficient to demonstrate that Bowen made "contact with F.B."

A positive urine test is sufficient to establish a bail jumping charge based on the violation of a "no drug" condition of bond. State v. Taylor, 226 Wis.2d 490, 595 N.W.2d 56 (Ct. App. 1999).

Two counts of bail jumping are permissible under the following circumstances: the defendant was released on one bond covering 2 cases; the preliminary hearing was set for the same date and time for each case; and, the defendant failed to appear. While the bail jumping offenses are "identical in law," each requires "an individual factual inquiry" so multiple charges are lawful. State v. Eaglefeathers, 2009 WI App 2, 316 Wis.2d 152, 762 N.W.2d 690.

In State v. Dewitt, 2008 WI App 134, 313 Wis.2d 794, 758 N.W.2d 201, the defendant was charged with nine counts of bail jumping based on nine phone calls he made from jail in violation of a no contact order. He was entitled to release on his signature on one misdemeanor charge but could not post bail on two other charges. So, while he was in jail, he was "released" on the one charge and was properly charged with violating conditions of that release.

A conviction for bail jumping can stand despite the same jury finding "not guilty" on the felony that was the basis for the bail jumping charge. State v. Rice, 2008 WI App 10, 307 Wis.2d 335, 743 N.W.2d 517.

1. The 1994 revision changed the wording from "released from custody under conditions" to "released from custody on bond." The statute refers to "released from custody under Chapter 969." The Committee concluded that the offense is committed only by someone who violates a "term of his bond." Persons may be released under Chapter 969 without a bond being required. Thus, it is logical to limit the instruction to situations where release is "on bond." This interpretation was approved in State v. Dawson, 195 Wis.2d 161, 171, n.1, 536 N.W.2d 119 (Ct. App. 1995). The court held that Dawson could not be charged with bail jumping where he had been released from custody without bail and where there was no evidence that a bond had been executed before his release. "[T]he express language of the statute requires that defendants must be under a bond before they can 'fail to comply' with the terms of that bond." 195 Wis.2d 161, 168.

"Bond" is defined as follows in § 967.02(4):

> 'Bond' means an undertaking either secured or unsecured entered into by a person in custody by which the person binds himself or herself to comply with such conditions as are set forth therein.

2. The appropriate alternative should be selected. It appears that the alternatives are required because the statute could apply in two different situations. The "arrested for" alternative would be used where the defendant is arrested, released on bail under a bail schedule, and is alleged to have violated a condition of that release before being officially "charged with" a crime. See note 8, below. The "charged with" alternative would be used where a defendant appears in court in response to a summons, receives a copy of the criminal complaint, and is released on bond without an official arrest having taken place.

3. The nature of the underlying crime for which the defendant was in custody determines the penalty range, see § 946.49(1)(a) and (b), and must be established at trial.

4. See § 939.60.

5. In the Committee's judgment, the jury may be told that a certain crime is in fact a felony or a misdemeanor. The jury must find that the defendant was actually arrested for or charged with that crime.

6. See §§ 939.60 and 939.12. "County jail" includes the Milwaukee County House of Correction.

7. See note 5, supra.

8. Chapter 969 governs release on bail and applies to any "defendant arrested for a criminal offense." (§ 969.01(1).) In the Committee's judgment, § 946.49 applies to any person released under Chapter 969, whether or not the person has been officially charged with a crime in a criminal complaint. Thus, the statute applies to persons released by reference to a misdemeanor bail schedule (§ 969.06) or by a duty judge or court commissioner prior to being charged.

For a similar interpretation of the word "charged" in connection with Wis. Stat. Ch. 969, see 65 Opinions of the Attorney General 102 (1976).

9. A court commissioner's power to set bail is governed by §§ 967.07 and 757.69(1)(b).

10. The Committee concluded that release on a uniform bail schedule is, in effect, release on conditions set by a judge because the schedule has been approved by the court. When a court continues a bond, it adopts and approves all conditions of that bond and it becomes an act of the court.

11. Section 939.23(3) provides that the word "intentionally" means that the actor must have had the purpose to cause the result specified or be aware that his or her act is practically certain to have that result and that the actor have knowledge of those facts necessary to make his or her conduct criminal and which are set forth after the word "intentionally." See § 939.23(3) and Wis JI-Criminal 923A and 923B.

In some cases, defendants may wish to challenge the legality of the condition they are charged with violating. In the Committee's judgment, this should be done prior to trial upon proper motion and not at trial by interpreting the statute to require failure to comply with a "legal" or "valid" condition. See the discussion at note 1, Wis JI-Criminal 2031.

12. In State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698, the court of appeals held that when a bail jumping charge is based on the commission of a new crime, the jury must be instructed on the elements of that crime:

> We think it self-evident that when a bail jumping charge is premised upon the commission of a further crime, the jury must be properly instructed regarding the elements of that further crime. We think it equally self-evident that when a bail jumping charge is premised upon the commission of a lesser-included offense of such further crime, the jury must be properly instructed under the law of lesser-included offenses.
>
> NOTE: Henning was reversed as to the remedy ordered by the Court of Appeals. See State v. Henning, 2004 WI 89, 273 Wis.2d 352, 681 N.W.2d 871. The part of the decision relating to defining the new crime was not affected.

In the Committee's judgment, a full instruction on the "further crime" is not necessary if that crime was also charged separately and the jury was instructed on it. Stating to the jury that "the crime of _____ has already been defined for you and you should apply the same definition here" should be sufficient. As specified in Henning, it can be necessary to include instructions on a lesser included offense if appropriate. The instruction provided here does not address that issue. See SM-6 on lesser included offenses, generally. See Wis JI-Criminal 112 for an instruction providing the transition between a charged crime and a lesser included offense.

13. This sentence was added in the 2005 revision to make it clear to the jury that the State must prove, beyond a reasonable doubt, that the defendant committed the new crime on which the bail jumping charge is based.

OFFICE OF JUDICIAL EDUCATION
1/2024

WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME III

Wisconsin Criminal Jury Instructions Committee

[Cite as Wis JI-Criminal]

- Includes 1/2024 Supplement (Release No. 63)

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1805 CONCEALING IDENTITY

[INSTRUCTION RENUMBERED — SEE WIS JI CRIMINAL 994]

COMMENT

Wis JI-Criminal 1805 was originally published in 1974 and revised in 1979 and 1981. It was renumbered Wis JI Criminal 994 in 1986. This note was republished without change in 1995.

1985 Wisconsin Act 104 (effective date: November 28, 1985) renumbered the statute that penalizes committing a crime while identity is concealed. Former § 946.62 was renumbered § 939.641. The revision also clarified the point over which there had been some confusion: that "concealing identity" is not a separate criminal offense but is a fact that increases the penalty for the underlying crime.

The suggested uniform instruction was renumbered to correspond to the legislative change.

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1808A BRIBERY OF WITNESSES: TRANSFERRING PROPERTY — § 946.61(1)(a)

Statutory Definition of the Crime

Section 946.61(1)(a) of the Criminal Code of Wisconsin is violated by one who, with the intent to induce another to refrain from (giving evidence) (testifying) in any civil or criminal matter before any court, judge, grand jury, magistrate, court commissioner, referee or administrative agency authorized by statute to determine issues of fact, transfers (to him or her) (on his or her behalf), any property or any pecuniary advantage.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant transferred [(property) (money)[1]] [(to) (on behalf of)] (name of witness).[2]
2. The defendant did so with intent to induce (name of witness) to refrain[3] from (giving evidence) (testifying) in [specify proceeding, e.g., a criminal trial before a judge][4].

   "With intent to" means that the defendant had the mental purpose to influence (name of witness) .[5]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all two elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1808A was approved in 2021.

This instruction is for violations of § 946.61(1)(a), Bribery of Witness. The offense is a Class H felony. The offense was created as part of the 1956 revision of the Criminal Code. See L.1955, c. 696, § 1.

There are two instructions for violations of § 946.61: Wis JI-Criminal 1808A concerns subsec. (1)(a) and is for offering a bribe with intent to "induce another to refrain from giving evidence or testifying in any civil or criminal matter"; Wis JI-Criminal 1808B concerns subsec. (1)(b) and is for accepting a bribe "knowing that such property or pecuniary advantage was transferred to him or her or on his or her behalf with intent to induce him or her to refrain from giving evidence or testifying in any civil or criminal matter."

1. The instruction refers to "money," deleting the statute's "pecuniary advantage" and would need to be modified if money was not involved. Although "pecuniary" has apparently not been defined in Wisconsin case law, Webster's Third New International Dictionary (Unabridged) defines "pecuniary" as follows: "taking the form of or consisting of money; of or relating to money." Black's Law Dictionary (Fourth Edition) adds: "consisting of money or that which can be valued in money." The Committee believes the meaning should include not only actual money but also "that which can be valued in money" per the Black's Law definition.

2. This section does not apply to a person who is charged with a crime, or any person acting on his or her behalf, who transfers property to which he or she believes the other is legally entitled. § 946.61(2). The Committee concluded that a "does not apply" provision should be handled in the same manner as affirmative defenses under Wisconsin law. The burden of production is on the defendant to introduce or point to "some evidence," tending to show that he or she believed that the witness was legally entitled to

the transfer of property. If that showing is made, the burden is on the State to prove beyond a reasonable doubt that the defendant did not believe that the witness was legally entitled to the transfer of property. As to the general rules in Wisconsin relating to "affirmative defenses," see Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979) and State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983). See also, Wis JI-Criminal 700.

3. This section only prohibits transferring property or money to a person to "refrain" from testifying and does not include influencing testimony. As noted in State v. Manthey, 169 Wis.2d 673, 487 N.W. 2d 44 (1992), "The plain language of the statute makes it a crime to pay or accept inducement to *refrain* from testifying or giving evidence." Id. at 685. See also, State v. Duda, 60 Wis.2d 431, 210 N.W. 2d 763 (1973).

For matters involving the making of a false material statement under oath, see Wis JI-Criminal 1750 Perjury. § 946.31.

4. § 946.61(1)(b) provides the complete list of proceedings as meaning any civil or criminal matter before any:

- court,
- judge,
- grand jury,
- magistrate,
- court commissioner,
- referee, or
- administrative agency authorized by statute to determine issues of fact.

5. Under the Criminal Code, the phrase "with intent to" means that the defendant either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result. See § 939.23(4) and Wis JI-Criminal 923A and 923B. For a discussion of the sufficiency of the evidence on the "intent to influence" element, see State v. Rosenfeld, 93 Wis.2d 325, 286 N.W.2d 596 (1980).

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1808B BRIBERY OF WITNESS: ACCEPTING A BRIBE — § 946.61(1)(b)

Statutory Definition of the Crime

Section 946.61(1)(b) of the Criminal Code of Wisconsin is violated by one who accepts any property or any pecuniary advantage, knowing that such property or pecuniary advantage was transferred (to him or her) (on his or her behalf) with intent to induce him or her to refrain from (giving evidence) (testifying) in any civil or criminal matter before any court, judge, grand jury, magistrate, court commissioner, referee, or administrative agency authorized by statute to determine issues of fact.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant accepted (property) (money)[1].
2. The defendant knew the transfer of [(property) (money)] [(to him or her) (on his or her behalf)] was intended to induce him or her to refrain[2] from (giving evidence) (testifying) in [specify proceeding, e.g., a criminal trial before a judge][3].

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and

knowledge.[4]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all two elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1808B was approved in 2021.

This instruction is for violations of § 946.61(1)(b), Bribery of Witness. The offense is a Class H felony. The offense was created as part of the 1956 revision of the Criminal Code. See L.1955, c. 696, § 1.

There are two instructions for violations of § 946.61: Wis JI-Criminal 1808B concerns subsec. (1)(b) and is for accepting a bribe "knowing that such property or pecuniary advantage was transferred to him or her or on his or her behalf with intent to induce him or her to refrain from giving evidence or testifying in any civil or criminal matter"; Wis JI-Criminal 1808A concerns subsec. (1)(a) and is for offering a bribe with intent to "induce another to refrain from giving evidence or testifying in any civil or criminal matter."

1. The instruction refers to "money," deleting the statute's "pecuniary advantage" and would need to be modified if money was not involved. Although "pecuniary" has apparently not been defined in Wisconsin case law, Webster's Third New International Dictionary (Unabridged) defines "pecuniary" as follows: "taking the form of or consisting of money; of or relating to money." Black's Law Dictionary (Fourth Edition) adds: "consisting of money or that which can be valued in money." The Committee believes the meaning should include not only actual money but also "that which can be valued in money" per the Black's Law definition.

2. This section only prohibits transferring property or money to a person to "refrain" from testifying and does not include influencing testimony. As noted in State v. Manthey, 169 Wis.2d 673, 487 N.W. 2d 44 (1992), "The plain language of the statute makes it a crime to pay or accept inducement to *refrain* from testifying or giving evidence." Id. at 685. See also, State v. Duda, 60 Wis.2d 431, 210 N.W. 2d 763 (1973).

For matters involving the making of a false material statement under oath, see Wis JI-Criminal 1750 Perjury.

3. § 946.61(1)(b) provides the complete list of proceedings as meaning any civil or criminal matter before any:
    - court,
    - judge,
    - grand jury,
    - magistrate,
    - court commissioner,

- referee, or
- administrative agency authorized by statute to determine issues of fact.

4. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

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1810 CONCEALING DEATH OF CHILD — § 946.63

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1810 was originally published in 1974. It was withdrawn in 1989.

This instruction was withdrawn because the statute with which it deals was repealed by 1987 Wisconsin Act 332, effective July 1, 1989. The offense was recreated, with minor substantive change, as § 948.23. See Wis JI Criminal 2154.

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1812 COMMUNICATING WITH A JUROR — § 946.64)

Statutory Definition of the Crime

Section 946.64 of the Criminal Code of Wisconsin is violated by one who, with intent to influence a person summoned or serving as juror, in relation to any matter which is before or which may be brought before that person, communicates with that person otherwise than in the regular course of proceedings in the trial or hearing of that matter.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of juror) was (summoned) (serving) as a juror.
2. The defendant communicated with (name of juror) other than in the regular course of proceedings in a trial or hearing.
3. The defendant communicated with (name of juror) with intent to influence (name of juror) in relation to any matter which (was before) (might have come before) (name of juror).

   "With intent to" means that the defendant had the mental purpose to influence (name of juror).[1]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1812 was originally published in 1995. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for violations of § 946.64, Communicating with Jurors. There are no reported decisions interpreting the statute, which was created as part of the 1956 revision of the Criminal Code. Often referred to as "jury tampering," the offense was known at common law as "embracery." See Platz, "The Criminal Code," 1956 Wis. L. Rev. 350, 380.

1. Under the Criminal Code, the phrase "with intent to" means that the defendant either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

1815 OBSTRUCTING JUSTICE — § 946.65

Statutory Definition of the Crime

Obstructing justice, as defined in § 946.65 of the Criminal Code of Wisconsin, is committed by one who, for a consideration, knowingly gives false information to any officer of any court with intent to influence the officer in the performance of official functions.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant gave false information to (name of officer).
2. (Name of officer) was an officer of a court.[1]
3. The defendant knowingly gave false information to an officer of the court.

   This requires that the defendant knew the information was false and knew that (name of officer) was an officer of a court.[2]
4. The defendant gave false information with intent to influence (name of officer) in the performance of official functions.

   "With intent to influence" means that the defendant had the mental purpose to influence the officer.[3]

"Official functions" are duties that an officer of a court is employed to perform.[4]

5. The defendant gave false information for a consideration.

"For a consideration" means that another person provided or agreed to provide some benefit to the defendant for giving false information.[5]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1815 was originally published in 1988 and revised in 1995. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

1. Section 946.65(2) provides: "Officer of any court includes the judge, reporter, bailiff, and district attorney." This provides authority for advising the jury that, for example, a judge is an officer of a court.

2. Section 939.23(2) provides that "'know' requires only that the actor believes that the specified facts exist."

3. Section 939.23(4) provides that "with intent to" means that the actor has the purpose to cause the result specified or is aware that his or her conduct is practically certain to cause that result. See Wis JI-Criminal 923A and 923B.

4. The definition of "official functions" is adapted from the one provided for "acting in official capacity" in Wis JI-Criminal 915.

5. The definition of consideration is adapted from the decision in State v. Howell, 141 Wis.2d 58, 414 N.W.2d 54 (Ct. App. 1987), where the court concluded that "only conduct which involves a third party contracting with another to give false information to a court officer . . . is proscribed by the statute." 141 Wis.2d 58, 62. Howell's conduct was not covered, therefore, since he had provided false information to the court during a hearing on his bail reduction request. The court found there was no consideration because, "in a contractual sense, the false information did not induce the court to carry out its statutory function to litigate a bail reduction request. Regardless of the quality of the information given, the trial court would have made a bail determination." 141 Wis.2d 58, 62. Further, the court held that some concerted activity between two or more persons is required; a person providing false information to advance his own interests is not covered by the statute.

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1825 SIMULATING LEGAL PROCESS — § 946.68

Statutory Definition of the Crime

Simulating legal process, as defined in § 946.68 of the Criminal Code of Wisconsin, is committed by one who sends or delivers to another person any document which simulates legal process.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant sent or delivered a document to another person.
2. The document simulated legal process.

"Simulate" means to imitate or have the appearance of without being genuine.[1]

"Legal process" includes a subpoena, summons, complaint, warrant, injunction, writ, notice, pleading, order, or other document that directs a person to perform or refrain from performing a specified act and compliance with which is enforceable by a court or governmental agency.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE CLASS D FELONY DEFINED IN SUB. (1r)(b) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE DOCUMENT WAS SENT OR DELIVERED WITH INTENT TO INDUCE PAYMENT OF A CLAIM:[3]

[If you find the defendant guilty, you must answer the following question "yes" or "no":

Did the defendant send or deliver the document with intent to induce payment of a claim?

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant sent or delivered the document with intent to induce payment of a claim.]

ADD THE FOLLOWING IF THE CLASS D FELONY DEFINED IN SUB. (1r)(c) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE DOCUMENT SIMULATED CRIMINAL PROCESS:[4]

[If you find the defendant guilty, you must answer the following question "yes" or "no":

Did the document simulate criminal process?

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the document simulated criminal process.]

COMMENT

Wis JI-Criminal 1825was originally published in 1997. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for violations of § 946.68. The basic offense is a Class I felony. It increases to a Class H felony in two situations: where the document is sent or delivered with intent to induce payment of a claim [see sub. (1r)(b)]; and where the document simulates any criminal process [see sub. (1r)(c)]. The Committee recommends handling the Class H felonies by adding a special question to the instruction for the basic offense that asks the jury to determine if the aggravating factor is established.

1. The definition of "simulate" is based on the one provided in The American Heritage Dictionary of the English Language, with the addition of "without being genuine."

2. This is the definition provided in sub. (1g) of § 946.68.

3. As with similar provisions that increase the maximum penalty for a criminal offense, the Committee concluded that the facts that increase the penalty for this offense to a Class H felony should be submitted to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of simulating legal process under § 946.68 of the Wisconsin Statutes at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> "Did the defendant send or deliver the document with intent to induce payment of a claim?"

4. As with similar provisions that increase the maximum penalty for a criminal offense, the Committee concluded that the facts that increase the penalty for this offense to a Class H felony should be submitted to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of simulating legal process under § 946.68 of the Wisconsin Statutes at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> "Did the document simulate criminal process?"

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1830 IMPERSONATING A PEACE OFFICER, FIRE FIGHTER, OR OTHER EMERGENCY PERSONNEL — § 946.70(1)

Statutory Definition of the Crime

Impersonating a (peace officer) (fire fighter) (emergency medical technician) (first responder), as defined in § 946.70(1) of the Criminal Code of Wisconsin, is committed by one who impersonates a (peace officer) (fire fighter) (emergency medical technician) (first responder) with intent to mislead others into believing that the person is actually a (peace officer) (fire fighter) (emergency medical technician) (first responder).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant impersonated a (peace officer) (fire fighter) (emergency medical technician)[1] (first responder).[2]

   To "impersonate" means to (assume the identity or characteristics of) (represent oneself to be) (pretend to be) another person without authority to do so.[3] (One may impersonate another by verbal declarations as well as by obvious physical impersonations as in wearing a badge or a uniform.)[4]

[A "peace officer" is a person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.][5]

2. The defendant impersonated a (peace officer) (fire fighter) (emergency medical technician) (first responder) with intent to mislead[6] (another person) (other persons) into believing the defendant was actually a (peace officer) (fire fighter) (emergency medical technician) (first responder).

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1830 was originally published in 1980 and revised in 1986, 1995, and 2009. This revision was approved by the Committee in July 2012; it reflects changes made in § 946.70 by 2011 Wisconsin Act 276.

This instruction is drafted for a violation of subsec. (1) of § 946.70 which is a Class A misdemeanor. The maximum penalty for the basic offense is increases to a Class H felony if the person acts "with the intent to commit or aid and abet the commission of a crime. . . ." § 946.70(2). Wis JI-Criminal 1831 is the suggested uniform instruction for the felony offense.

1985 Wisconsin Act 97 amended § 946.70 by substituting the word "impersonate" for "personate." Since the two words have essentially the same meaning, it is assumed that no change in meaning was intended.

2011 Wisconsin Act 276 amended § 946.70 by creating subs. (1)(b), (c), and (d), extending the coverage to include impersonating a fire fighter, an emergency medical technician, and a first responder. [Effective date: April 24, 2012.]

1. Section 946.70(1)(c) refers to "an emergency medical technician as defined in s. 256.01(5)."

2. Section 946.70(1)(d) refers to "a first responder as defined in s. 256.01(9)."

3. Webster's Third New International Dictionary.

4. This definition was adopted when the instruction was first published in 1980. It was based on one found in 35 C.J.S. False Personation § 3 (1960).

5. This is the definition provided in Wis. Stat. § 939.22(22).

6. The phrase "with intent to" means that the actor either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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1831 IMPERSONATING A PEACE OFFICER, FIRE FIGHTER, OR OTHER EMERGENCY PERSONNEL WITH INTENT TO COMMIT A CRIME — § 946.70(2)

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 1831 was originally published in 1986 and revised in 1995, 2009 and 2013. Its withdrawal was approved by the Committee in October 2017.

Wis JI-Criminal 1831 provided a separate instruction for a violation of subsec. (2) of § 946.70 which is a Class H felony and requires that a person violating § 946.70(1) act "with the intent to commit or aid and abet the commission of a crime. . . ." The additional facts necessary for the Class H felony have been added to Wis JI-Criminal 1830 as a special question.

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1832 INTERFERENCE WITH CUSTODY OF A CHILD — § 946.71(1)

1833 INTERFERENCE WITH CUSTODY OF A CHILD — § 946.71(2)

1834 INTERFERENCE WITH CUSTODY OF A CHILD — § 946.71(3)

1835 INTERFERENCE WITH CUSTODY OF A CHILD — § 946.71(4)

1835A INTERFERENCE WITH CUSTODY OF A NONMARITAL CHILD — § 946.71(4)

1838 INTERFERENCE WITH THE PARENTAL RIGHTS OF THE OTHER PARENT: CONCEALING A CHILD — § 946.715(1)(a)

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1832, 1833, 1834, 1835, and 1835A were originally published in 1985.

Wis JI Criminal 1838 was originally published in 1987 and was revised in 1988.

All the instructions were withdrawn in 1989 because the statutes with which they deal, §§ 946.71 and 946.715, were repealed by 1987 Wisconsin Act 332, effective July 1, 1989. Section 948.31, Interference With Custody By Parent Or Others, was created in place of the repealed provisions. See Wis JI Criminal 2166 through 2169.

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1848 UNEMPLOYEMENT INSURANCE FRAUD: MAKING A FALSE STATEMENT TO OBTAIN A BENEFIT PAYMENT — § 108.24(1)(a)

Statutory Definition of the Crime

Unemployment insurance fraud, as defined in § 108.24(1)(a) of the Wisconsin Statutes, is committed by any person who knowingly makes a false statement or representation to obtain any benefit payment under Chapter 108, either for himself or herself or for any other person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained a benefit under Chapter 108 for (himself) (herself) (another person), by making a (statement) (representation).

2. The (statement) (representation) to obtain a benefit under Chapter 108 was false when made.

3. The defendant knew the (statement) (representation) to obtain a benefit under Chapter 108 was false when made.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE DEFENDANT IS CHARGED WITH FRAUDULENTLY SECURING MORE THAN $2,500 AND THE EVIDENCE WOULD SUPPORT THAT FINDING.[1]

If you find the defendant guilty, you must also determine beyond a reasonable doubt the value of any unemployment insurance benefits for which the defendant was not eligible and insert that amount in the verdict.[2]

Determining Value

("Was the value of any benefit obtained more than $10,000?"

Answer: "yes" or "no.")

("Was the value of any benefit obtained more than $5,000?"

Answer "yes" or "no.")

("Was the value of any benefit obtained more than $2,500?"

Answer "yes" or "no.")

Before you answer "yes," you must be satisfied beyond a reasonable doubt that the value of any benefit obtained was more than the amount stated in the question.

COMMENT

Wis JI-Criminal 1848 was approved by the Committee in July 2018.

This instruction is for criminal violations of § 108.24(1)(a), making a false statement to obtain unemployment insurance benefit payments. The penalty structure was modified by 2017 Wisconsin Act 147 [effective date: April 1, 2018]. Fraudulently obtaining unemployment benefits not exceeding $2,500 is a Class A misdemeanor. The penalty increases to a felony if the value of the benefit received exceeds specified amounts. There are four ranges of criminal penalties, depending on the value of the benefits or payments obtained. See sub. (2) of § 108.24. The penalty issue is addressed by adding a special question at the end of the instruction. See footnote 1, below.

1. The jury must make a finding of the value of the unemployment insurance benefit payment if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt."

2. The penalties for violations of § 108.24(1)(a) depend on the value of the payment or benefit. The jury should be asked to determine that value. (See, by analogy, Wis JI-Criminal 1441 Theft, footnote 8.) The applicable penalty is capped by the crime charged in the complaint or information. The penalties are specified in sub. (1)(b) as follows:

Value of benefit	Penalty
less than $2,500	Class A misdemeanor
more than $2,500 but does not exceed $5,000	Class I felony
more than $5,000 but does not exceed $10,000	Class H felony
more than $10,000	Class G felony

The Committee concluded that if the securing of less than $2,500 is charged, the jury need not make a finding of value.

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1850 PUBLIC ASSISTANCE FRAUD: MAKING A FALSE STATEMENT IN AN APPLICATION FOR PUBLIC ASSISTANCE — § 946.93(2)

Statutory Definition of the Crime

Public assistance fraud, as defined in § 946.93(2) of the Wisconsin Statutes, is committed by a person who intentionally makes or causes to be made any false statement or representation of material fact in any application for or receipt of public assistance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (made) (caused to be made) a (statement) (representation) of material fact in an application for or receipt of public assistance.

   The [statement] [representation] claimed to have been made in this case is: (specify the alleged statement or representation) .

   A material fact is one that affects eligibility for or the amount of public assistance.[1]

   "Public assistance" means any aid, benefit, or services provided under Chapter 49 of the Wisconsin Statutes.[2]

2. The (statement) (representation) of material fact was false when made.

3. The defendant knew the (statement) (representation) of material fact was false when made.[3]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1850 was originally published in 1980 and revised in 1988 and 1995. This revision was approved by the Committee in October 2014; it reflects the repeal and recreation of former § 49.95 as § 946.93.

This offense was originally defined in § 49.12; that statute was renumbered § 49.95 by 1995 Wisconsin Act 27. 2013 Wisconsin Act 226 [effective date: April 10, 2014] repealed § 49.95 and recreated it as § 946.93. The offense definition in current § 946.93(2) is the rough equivalent of the one provided in former § 49.95(1).

This instruction is for criminal violations of § 946.93(2), which are Class A misdemeanors. The penalty for this offense no longer depends on the value of the assistance received.

1. The definition of "material" is consistent with the discussion of that term in State v. Williams, 179 Wis.2d 80, 87-88, 505 N.W.2d 468 (Ct. App. 1993), a case dealing with the related offense of medical assistance fraud:

> If the false statements did not affect the amount of benefits or payments made, an issue of materiality is raised. If the statements had no legal effect, the court could determine as a matter of law that the false statements were not material. At the very least, the jury should be given the opportunity to determine whether the false statements were material based upon the evidence concerning the legal effect of the statements.

2. Section 946.93(1).

3. The recreation of former § 49.95 as § 946.93 substituted "intentionally" for "willfully," clarifying the mental element required. When used in the Criminal Code, "intentionally" requires that the actor have the purpose to cause the result specified and "have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" Section 939.23(3). As applied to this offense, that requires that the defendant knew the statement or representation in the application was false.

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1851 PUBLIC ASSISTANCE FRAUD: CONCEALING OR FAILING TO DISCLOSE AN EVENT AFFECTING ELIGIBILITY — § 946.93(3)(a)

Statutory Definition of the Crime

Public assistance fraud, as defined in § 946.93(3)(a) of the Wisconsin Statutes, is committed by a person who, having knowledge of an event affecting the initial or continued eligibility for public assistance, conceals or fails to disclose that event with an intent to fraudulently secure public assistance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had knowledge of an event affecting the initial or continued eligibility for public assistance.

   The event alleged to have occurred in this case is: (specify the alleged event) .

   "Public assistance" means any aid, benefit, or services provided under Chapter 49 of the Wisconsin Statutes.[1]

2. The defendant (concealed) (failed to disclose) that event.

3. The defendant (concealed) (failed to disclose) that event with an intent to fraudulently secure public assistance.

This requires that the defendant acted with the purpose to obtain public assistance to which (he) (she) was not entitled.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

If you find the defendant guilty, you must also determine beyond a reasonable doubt the value of the public assistance for which the defendant was not eligible and insert that amount in the verdict.[2]

COMMENT

Wis JI-Criminal 1851 was approved by the Committee in February 2015.

This instruction is for criminal violations of § 946.93(3)(a), as created by 2013 Wisconsin Act 226 [effective date: April 10, 2014]. Offenses now defined in § 946.93 were formerly found in § 49.95; there does not appear to be an equivalent of sub. (3)(a) in former § 49.95.

This instruction is for criminal violations of § 946.93(3), which involve payments or benefits of more than $300. There are five ranges of criminal penalties, depending on the value of the payments or benefits. This is addressed by adding a special question at the end of the instruction. See footnote 2, below.

1. Section 946.93(1).

2. The penalties for violations of § 946.93(3) depend on the value of the payment or benefit. The jury should be asked to determine that value. (See, by analogy, Wis JI-Criminal 1441 Theft, footnote 8.) The applicable penalty is capped by the crime charged in the complaint or information. The penalties are specified in sub. (3)(e) as follows:

Value of payment or benefit	Penalty
less than $300	Class B forfeiture
more than $300 but does not exceed $1000	Class B misdemeanor
more than $1000 but does not exceed $2000	Class A misdemeanor
more than $2000 but does not exceed $5000	Class I felony
more than $5000 but does not exceed $10,000	Class H felony
more than $10,000	Class G felony

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1852 PUBLIC ASSISTANCE FRAUD: FAILURE TO REPORT RECEIPT OF INCOME OR ASSETS — § 946.93(3)(b)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1852 was originally published in 1980 and revised in 1988, 1995, and 2003. It was withdrawn by the Committee in December 2014.

Wis JI Criminal 1852 addressed violations of former § 49.95(6). 2013 Wisconsin Act 226 [effective date: April 10, 2014] repealed § 49.95 and replaced it with § 946.93. The offense definition in current § 946.93(3)(b) is the rough equivalent of the one provided in former § 49.95(6) – it addresses the failure to report receipt of income or assets.

The Committee decided to withdraw Wis JI Criminal 1852 because the conduct it addressed now appears to be covered by § 946.93(3)(a), a section created by 2013 Wisconsin Act 226 and for which there was no substantial equivalent under prior law. Section 946.93(3)(a) prohibits concealing or failing to disclose "an event affecting the initial or continued eligibility for public assistance" with an intent to fraudulently secure public assistance. The Committee concluded that sub. (3)(a)'s reference to "an event affecting initial or continued eligibility for public assistance" is broad enough to include the receipt of income or assets and that therefore Wis JI Criminal 1852 could be withdrawn. See Wis JI Criminal 1851 for violations of § 946.93(3)(a).

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1854 PUBLIC ASSISTANCE FRAUD: FAILURE TO NOTIFY AUTHORITIES OF CHANGE OF FACTS — § 946.93(3)(c)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1854 was originally published in 1980 and revised in 1988, 1995, and 2003. It was withdrawn by the Committee in December 2014.

Wis JI-Criminal 1854 addressed violations of former § 49.95(9). 2013 Wisconsin Act 226 [effective date: April 10, 2014] repealed § 49.95 and replaced it with § 946.93. The offense definition in current § 946.93(3)(c) is the rough equivalent of the one provided in former § 49.95(9) – it addresses the failure to notify the public assistance agency "of any change in circumstances for which notification by the recipient must be provided under law."

The Committee decided to withdraw Wis JI-Criminal 1854 because the conduct it addressed now appears to be covered by § 946.93(3)(a), a section created by 2013 Wisconsin Act 226 and for which there was no substantial equivalent under prior law. Section 946.93(3)(a) prohibits concealing or failing to disclose "an event affecting the initial or continued eligibility for public assistance" with an intent to fraudulently secure public assistance. The Committee concluded that sub. (3)(a)'s reference to "an event affecting initial or continued eligibility for public assistance" is broad enough to include the failure to notify "of any change in circumstances" and that therefore Wis JI-Criminal 1854 could be withdrawn. See Wis JI-Criminal 1851 for violations of § 946.93(3)(a).

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1862 FOOD STAMP FRAUD: MISSTATING FACTS ON AN APPLICATION — § 946.92(2)(a)

Statutory Definition of the Crime

Food stamp fraud, as defined in § 946.92(2)(a) of the Wisconsin Statutes, is committed by a person who misstates or conceals facts in a food stamp program application or report of income, assets, or household circumstances with the intent to secure or continue to receive food stamp program benefits.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (misstated) (concealed) facts in a food stamp program [application] [report of income, assets, or household circumstances].

   The facts claimed to have been (misstated) (concealed) in this case are: (specify the alleged facts) .

2. The defendant (misstated) (concealed) facts with the intent to [secure] [continue to receive] food stamp program benefits.

   "With intent to"[1] requires that the defendant had the mental purpose to obtain food stamp program benefits by (misstating) (concealing) facts in the application.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE DEFENDANT IS CHARGED WITH FRAUDULENTLY SECURING MORE THAN $100 AND THE EVIDENCE WOULD SUPPORT THAT FINDING[2]

If you find the defendant guilty, you must also determine beyond a reasonable doubt the value of the food stamp program benefits for which the defendant was not eligible and insert that amount in the verdict.

COMMENT

Wis JI-Criminal 1862 was originally published in 1988 and revised in 1995, 2003, and 2007. This revision was approved by the Committee in December 2014; it reflects the renumbering of § 49.795 as § 946.92.

This instruction is for violations of subsection (2) of § 946.92, Food Stamp Offenses. The statute prohibits two different kinds of conduct: misstating or concealing facts in an application with intent to secure food stamp program benefits; and, misstating or concealing facts in a report of income, assets, or household circumstances with intent to continue to receive benefits.

This offense was previously defined in § 49.127; that statute was renumbered § 49.795 by 2001 Wisconsin Act 16. That statute was renumbered 946.92 by 2013 Wisconsin Act 226, effective date: April 10, 2014. The offense definition in current § 946.92(2)(a) is the same as that formerly found in § 49.795(2).

There are three ranges of criminal penalties, depending on the value of the benefits obtained. This is addressed by adding a special question at the end of the instruction. See footnote 2, below.

1. "With intent to" requires either the mental purpose to cause the result specified or being aware that conduct is practically certain to cause the result. See § 939.22(24) and Wis JI-Criminal 923B. The Committee concluded that the "mental purpose" alternative is most likely to apply to this offense.

2. The penalties for violations of § 946.92(2)(a) are determined by reference to "the value of the food stamp program benefits." The jury should be asked to determine that value. (See, by analogy, Wis JI-Criminal 1441 Theft, footnote 8.) The applicable penalty is capped by the crime charged in the complaint or information.

The penalties for this offense are specified in § 946.92(3)(a) as follows:

Value of benefits secured	Penalty
less than $100	Class B misdemeanor
more than $100 but less than $5000	Class I felony Class H felony if the defendant has a prior conviction under this section
more than $5000	Class G felony

The Committee concluded that if the securing of less than $100 is charged, the jury need not make a finding as to value.

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1870 MEDICAL ASSISTANCE FRAUD: MAKING A FALSE STATEMENT IN AN APPLICATION FOR A BENEFIT OR PAYMENT — § 946.91(2)(a)

Statutory Definition of the Crime

Medical assistance fraud, as defined in § 946.91(2)(a) of the Wisconsin Statutes, is committed by a person who intentionally makes or causes to be made any false statement or representation of a material fact in any application for any medical assistance payment or benefit.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally made or caused to be made a (statement) (representation) of a material fact in an application for (payment) (a benefit) in connection with a medical assistance program.

   The (statement) (representation) claimed to have been made is that: (specify the alleged statement or representation) .

   A material fact is one that affects eligibility for or the amount of a (payment) (benefit).[2]

"Medical assistance program" means a program providing services and items relating to health care to persons who apply for that assistance.[3]

2. The (statement) (representation) was false when made.

3. The defendant knew that the (statement) (representation) was false.[4]

4. The application for (payment) (benefit) was submitted.

The defendant does not have to receive the (payment) (benefit) sought. All that is required is that the application be submitted for payment.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1870 was originally published in 1992 and revised in 1993 and 2003. This revision was approved by the Committee in October 2014; it reflects the renumbering of § 49.795 as § 946.92.

The offense was formerly defined in § 49.49; that statute was renumbered § 946.91 by 2013 Wisconsin Act 226 [effective date: April 10, 2014]. The offense definition in § 946.91(2)(a) is the rough equivalent of the one provided in former § 49.49(a) ¶1.

1. This instruction is for violations of § 946.91(2)(a), which can be committed either by the person who provides services as part of the medical assistance program or by the person who receives the services. The provider of services may commit the offense by submitting a fraudulent "application for payment." The recipient may commit the offense by submitting fraudulent "application for benefits." The offense is a Class H felony with a maximum fine of $25,000.

2. This definition of "material" is consistent with the discussion of the term in State v. Williams, 179 Wis.2d 80, 505 N.W.2d 468 (Ct. App. 1993):

> If the false statements did not affect the amount of benefits or payments made, an issue of materiality is raised. If the statements had no legal effect, the court could determine as a matter of law that the false statements were not material. At the very least, the jury should be given the opportunity to determine whether the false statements were material based upon the evidence concerning the legal effect of the statements.

179 Wis.2d 80, 87-88.

3. The definition of "medical assistance program" was devised by the Committee. "Medical assistance" is defined in § 946.91(1)(b) as: "the program providing aid under subch. IV of Ch. 49, except ss. 49.468 and 49.471." The statutes referred to in the definition are extremely long and complex and do not lend themselves to convenient use as a definition of the term "medical assistance."

4. The recodification of former § 49.49 as § 946.91 substituted "intentionally" for "willfully," clarifying the mental element required. When used in the Criminal Code, "intentionally" requires that the actor have the purpose to cause the result specified and "have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" Section 939.23(3). As applied to this offense, that requires that the defendant knew the statement or representation in the application was false.

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1881 RACKETEERING ACTIVITY — USING PROCEEDS OF A PATTERN OF RACKETEERING ACTIVITY TO ESTABLISH OR OPERATE AN ENTERPRISE — § 946.83(1)

Statutory Definition of the Crime

Engaging in racketeering activity, as defined by § 946.83(1) of the Criminal Code of Wisconsin, is committed by one who has received any proceeds with knowledge that they were derived, directly or indirectly, from a pattern of racketeering activity and uses or invests them directly or indirectly, to establish or operate an enterprise.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant received proceeds that were derived from a pattern of racketeering activity.

   "Pattern of racketeering activity" means that at least three interrelated felonies occurred within a seven-year period and that these felonies amounted to, or posed a threat of, continued criminal activity.[2]

   Felonies are "interrelated" if they have the same or similar intents, results, accomplices, victims or methods of commission, or share other distinguishing characteristics.[3]

Felonies amount to or show a threat of continued criminal activity if they have been or will be a part of a regular way of doing business.[4]

In this case, it is alleged that the proceeds were derived, directly or indirectly, from the following felonies: (name the felonies - at least three - they must be listed in sec. 946.82(4)) . Each of the felonies will be defined at the end of this instruction.

2. The defendant knew that the proceeds were derived from a pattern of racketeering activity.

3. The defendant used any of the proceeds to (establish) (operate) (name of alleged enterprise) .[5]

4. (Name of alleged enterprise) was an enterprise.

Meaning of "Enterprise"

"Enterprise" means any [(sole proprietorship) (partnership) (corporation) (business trust) (union) organized under the laws of this state] [(legal entity) (union) not organized under the laws of this state] [association or group of individuals associated in fact although not a legal entity].[6]

In this case, it is alleged that the proceeds were derived, directly or indirectly, from the following felonies: (name the felonies - at least three - they must be listed in sec. 946.82(4)) .

[DEFINE THE ELEMENTS OF EACH OF THE CRIMES.][7]

Before you may return a verdict of guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed at least three predicate felonies as charged in the information. All 12 jurors must also be satisfied beyond a reasonable doubt that the defendant committed the same three predicate felonies.[8]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1881 was originally published in 1990. This revision was approved by the Committee in October 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a charge under § 946.83(1). Subsections (2) and (3) are addressed by Wis JI-Criminal 1882 and 1883, respectively. These are the primary criminal provisions of the Wisconsin Organized Crime Control Act, which is modeled after the federal Racketeer Influenced and Corrupt Organizations Act. The latter is commonly referred to as "RICO" and is found at 18 U.S.C. §§ 1961-1968. The federal RICO statute has both criminal and civil provisions, as does the Wisconsin counterpart. There has been extensive litigation under the federal statute, some of which is relevant to interpreting the Wisconsin statute. The Wisconsin Court of Appeals has recognized that "the voluminous federal law concerning RICO may be persuasive authority as to the interpretation of" the Wisconsin Act. State v. Judd, 147 Wis.2d 398, 401, 433 N.W.2d 260 (Ct. App. 1988).

1. This instruction addresses one type of violation of subsection (1) of § 946.83(1) – investing the proceeds of racketeering activity in an enterprise. Another type of violation is also prohibited but is not

addressed by the instruction – using proceeds "in the acquisition of any title to, or any right, interest, or equity in, real property."

2. The requirement of three interrelated felonies in a seven-year period is based on the statutory definition of "pattern of racketeering activity" in § 946.82(3):

> "Pattern of racketeering activity" means engaging in at least three incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, provided at least one of the incidents occurred after April 27, 1982 and that the last of the incidents occurred within 7 years after the first incident of racketeering activity. Acts occurring at the same time and place which may form the basis for crimes punishable under more than one statutory provision may count for only one incident of racketeering activity.

The requirement that the felonies amount to or pose a threat of continued criminal activity is based on the decision in H. J., Inc. v. Northwestern Bell, 492 U.S. 229 (1989), where the United States Supreme Court interpreted the "pattern" requirement under the federal RICO statute. The Court held that Congress had a "natural and commonsense approach to RICO's pattern element in mind, intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related to and that amounted to, or threatened the likelihood of, continued criminal activity." 492 U.S. 229, 237.

The Court relied on the plain meaning of the word "pattern" to conclude that more than "just a multiplicity of racketeering predicates" is required:

> A "pattern" is an "arrangement or order of things or activity," 11 Oxford English Dictionary 357 (2d ed. 1989), and the mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order. It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them "ordered" or "arranged."

492 U.S. 229, 238.

The court noted that the text of the statute fails to identify any "forms of relationship or external principles" to be used to determine whether a "pattern" exists. Given the legislative purpose of the RICO statutes, however, the Court concludes that a flexible approach is to be used: ". . . a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates." This relationship between predicates requires that the predicates be related and that they amount to or pose a threat of continued criminal activity. "'It is this factor of continuity plus relationship which combines to produce a pattern.'" 492 U.S. 229, 239, citing S. Rep. No. 91-617 at 158. The Court elaborated on the "continuity" requirement:

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. See Barticheck v. Fidelity Union Bank/First National State, 832 F.2d 36, 39 (CA3 1987). It is, in either case, centrally a temporal concept – and particularly so in the RICO context, where what must be continuous, RICO's predicate acts or offenses,

> and the relationship these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated. See S.Rep. No. 91-617, at 158.
>
> Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case. Without making any claim to cover the field of possibilities – preferring to deal with this issue in the context of concrete factual situations presented for decision – we offer some examples of how this element might be satisfied. A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes. Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime." The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."
>
> The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists. The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope.

492 U.S. 229, 241-243.

In justifying its conclusion about the "continuity" requirement, the Court relied on the text of the federal statute which, in defining the pattern requirement, states that a pattern "requires" at least two predicate acts. The Court emphasized the significance of the use of "requires" rather than "means" in concluding that the presence of the two predicate acts is the minimal requirement: "it assumes that there is something to a RICO pattern beyond simply the number of predicate acts involved." 492 U.S. 229, 238. The Wisconsin definition of "pattern," however, does use the word "means" where the federal statute uses "requires." This may offer a basis for interpreting the Wisconsin pattern requirement

differently than the United States Supreme Court interpreted the federal definition in Northwestern Bell. But in the absence of direct authority for doing so, the Committee decided that the Northwestern Bell definition should be used as a guide for this instruction.

The definition of "pattern of racketeering activity" in § 948.82(3) is not unconstitutionally vague. State v. O'Connell, 179 Wis.2d 598, 615, 508 N.W.2d 23 (Ct. App. 1993).

3. This is based on § 946.82(3), see note 2, supra.

4. This is based on H. J., Inc. v. Northwestern Bell, cited in note 2, supra.

5. The instruction is drafted on the assumption that the "enterprise" will be a legitimate or regular business and therefore will have a name that can be used to identify it. If that is not the case, substitute a description of the enterprise for the name.

6. The definition of "enterprise" is taken from the statutory definition found in § 946.82(2). Parentheses are added on the assumption that only the alternatives supported by the evidence will be presented to the jury. In State v. Judd, 147 Wis.2d 398, 433 N.W.2d 260 (Ct. App. 1988), the court of appeals held that a one-man corporation could be an "enterprise," at least for purposes of a charge under subsec. (3) of § 946.83. While the "person" who conducts the pattern of racketeering activity through the enterprise must be separate from the enterprise, that test is met where the "one-man band" has incorporated. The act of incorporation forms the enterprise. Also see, State v. O'Connell, 179 Wis.2d 598, 508 N.W.2d 23 (Ct. App. 1993).

7. The Committee assumes that all the elements of the crimes alleged to be the three interrelated felonies must be proved. There are suggested uniform instructions for most of the felonies listed in § 946.82(4).

8. This addition is based on Richardson v. United States, 526 U.S. 813 (1999). Richardson held that unanimous agreement on the predicate acts was required in prosecutions under a "continuing criminal enterprise" statute which is separate from, but similar to, the RICO statute. Adding it here is by analogy to that situation. The 7th Circuit uniform jury instructions require unanimity under the federal RICO statute. See, http://www.ca7.uscourts.gov/Rules/pjury.pdf.

1882 RACKETEERING ACTIVITY — ACQUIRING OR MAINTAINING AN INTEREST IN OR CONTROL OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY — § 946.83(2)

Statutory Definition of the Crime

Engaging in racketeering activity, as defined by § 946.83(2) of the Criminal Code of Wisconsin, is committed by one who, directly or indirectly, acquires or maintains any interest in or control of any enterprise through a pattern of racketeering activity.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of the alleged enterprise) [2] was an enterprise.

   "Enterprise" means any [(sole proprietorship) (partnership) (corporation) (business trust) (union) organized under the laws of this state] [(legal entity) (union) not organized under the laws of this state] [association or group of individuals associated in fact although not a legal entity].[3]

2. The defendant (acquired) (maintained), directly or indirectly, an interest[4] in (name of the alleged enterprise) .

3. The defendant (acquired) (maintained) an interest in (name of the alleged enterprise) through a pattern of racketeering activity.

"Pattern of racketeering activity" means that at least three interrelated felonies occurred within a seven-year period and that these felonies amounted to, or posed a threat of, continued criminal activity.[5]

Felonies are "interrelated" if they have the same or similar intents, results, accomplices, victims or methods of commission, or share other distinguishing characteristics.[6]

Felonies amount to or show a threat of continued criminal activity if they have been or will be a part of a regular way of doing business.[7]

In this case, it is alleged that the defendant (acquired) (maintained) an interest in an enterprise through the following three felonies: (name the felonies - at least three - they must be listed in sec. 946.82(4)) .

[DEFINE THE ELEMENTS OF EACH CRIME.][8]

Before you may return a verdict of guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed at least three predicate felonies as charged in the information. All 12 jurors must also be satisfied beyond a reasonable doubt that the defendant committed the same three predicate felonies.[9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1882 was originally published in 1990. This revision was approved by the Committee in October 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a charge under § 946.83(2). Subsections (1) and (3) are addressed by Wis JI Criminal 1881 and 1883, respectively. These are the primary criminal provisions of the Wisconsin Organized Crime Control Act, which is modeled after the federal Racketeer Influenced and Corrupt Organizations Act. See the Comment to Wis JI Criminal 1881 for discussion of these provisions.

1. This instruction is drafted for one type of violation of subsection (2) of § 946.83 – acquiring an interest in an enterprise through a pattern of racketeering activity. The statute also applies to maintaining an interest and to acquiring or maintaining control of an enterprise. If any of those alternatives are involved, the second element would need to be modified and similar changes made in the concluding paragraphs.

2. The instruction is drafted on the assumption that the "enterprise" will be a legitimate or regular business and therefore will have a name that can be used to identify it. If that is not the case, substitute a description of the enterprise for the name.

3. The definition of "enterprise" is taken from the statutory definition found in § 946.82(2). Parentheses are added on the assumption that only the alternatives supported by the evidence will be presented to the jury. In State v. Judd, 147 Wis.2d 398, 433 N.W.2d 260 (Ct. App. 1988), the court of appeals held that a one-man corporation could be an "enterprise," at least for purposes of a charge under subsec. (3) of § 946.83. While the "person" who conducts the pattern of racketeering activity through the enterprise must be separate from the enterprise, that test is met where the "one-man band" has incorporated. The act of incorporation forms the enterprise. Also see, State v. O'Connell, 179 Wis.2d 598, 508 N.W.2d 23 (Ct. App. 1993).

4. This element would need to be modified if an alternative other than "acquiring an interest" is involved, see note 1, supra.

5. The approach to defining the "pattern" requirement is described in detail in note 2, Wis JI-Criminal 1881.

6. This is based on § 946.82(3), see note 2, Wis JI-Criminal 1881.

7. This is based on the decision in H. J., Inc. v. Northwestern Bell, 492 U.S. 229 (1989), discussed at length in note 2, Wis JI-Criminal 1881.

8. The Committee assumes that all the elements of the crimes alleged to be the three interrelated felonies must be proved. There are suggested uniform instructions for most of the felonies listed in § 946.82(4).

9. This addition is based on Richardson v. United States, 526 U.S. 813 (1999). Richardson held that unanimous agreement on the predicate acts was required in prosecutions under a "continuing criminal enterprise" statute which is separate from, but similar to, the RICO statute. Adding it here is by analogy

to that situation. The 7th Circuit uniform jury instructions require unanimity under the federal RICO statute. See, http://www.ca7.uscourts.gov/Rules/pjury.pdf.

1883 RACKETEERING ACTIVITY — CONDUCTING OR PARTICIPATING IN AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY — § 946.83(3)

Statutory Definition of the Crime

Engaging in racketeering activity, as defined by § 946.83(3) of the Criminal Code of Wisconsin, is committed by one who is employed by or associated with an enterprise and who, directly or indirectly, conducts or participates in the enterprise through a pattern of racketeering activity.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of the alleged enterprise) [1] was an enterprise.

   "Enterprise" means any [(sole proprietorship) (partnership) (corporation) (business trust) (union) organized under the laws of this state] [(legal entity) (union) not organized under the laws of this state] [association or group of individuals associated in fact although not a legal entity].[2]

2. The defendant was (employed by) (associated with)[3] (name of the alleged enterprise) .

3. The defendant, directly or indirectly, (conducted) (participated in) (name of the alleged enterprise) through a pattern of racketeering activity.

"Pattern of racketeering activity" means that at least three interrelated felonies occurred within a seven-year period and that these felonies amounted to, or posed a threat of, continued criminal activity.[4]

Felonies are "interrelated" if they have the same or similar intents, results, accomplices, victims or methods of commission, or share other distinguishing characteristics.[5]

Felonies amount to or show a threat of continued criminal activity if they have been or will be part of a regular way of doing business.[6]

In this case, it is alleged that the defendant (conducted) (participated in) an enterprise through the following three felonies: (name the felonies - at least three - they must be listed in sec. 946.82(4)) .

[DEFINE THE ELEMENTS OF EACH CRIME.][7]

Before you may return a verdict of guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed at least three predicate felonies as charged in the information. All 12 jurors must also be satisfied beyond a reasonable doubt that the defendant committed the same three predicate felonies.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1883 was originally published in 1990. This revision was approved by the Committee in October 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a charge under § 946.83(3). Subsections (1) and (2) are addressed by Wis JI Criminal 1881 and 1882, respectively. These are the primary criminal provisions of the Wisconsin Organized Crime Control Act, which is modeled after the federal Racketeer Influenced and Corrupt Organizations Act. See the Comment to Wis JI Criminal 1881 for discussion of these provisions.

Violations of § 946.83 do not involve a mental element beyond any that may be required for the underlying predicate offenses. State v. Mueller, 201 Wis.2d 121, 145 (Ct. App. 1996). The court found that the absence of a separate intent element in this instruction "buttressed" that conclusion.

1. The instruction is drafted on the assumption that the "enterprise" will be a legitimate or regular business and therefore will have a name that can be used to identify it. If that is not the case, substitute a description of the enterprise for the name.

2. The definition of "enterprise" is taken from the statutory definition found in § 946.82(2). Parentheses are added on the assumption that only the alternatives supported by the evidence will be presented to the jury. In State v. Judd, 147 Wis.2d 398, 433 N.W.2d 260 (Ct. App. 1988), the court of appeals held that a one-man corporation could be an "enterprise," at least for purposes of a charge under subsec. (3) of § 946.83. While the "person" who conducts the pattern of racketeering activity through the enterprise must be separate from the enterprise, that test is met where the "one-man band" has incorporated. The act of incorporation forms the enterprise. Also see, State v. O'Connell, 179 Wis.2d 598, 508 N.W.2d 23 (Ct. App. 1993).

3. Choose the alternative supported by the evidence.

4. The approach to defining the "pattern" requirement is described in detail in note 2, Wis JI-Criminal 1881.

5. This is based on § 946.82(3), see note 2, Wis JI-Criminal 1881.

6. This is based on the decision in H. J., Inc. v. Northwestern Bell, 492 U.S. 229 (1989), discussed at length in note 2, Wis JI-Criminal 1881.

7. The Committee assumes that all the elements of the crimes alleged to be the three interrelated felonies must be proved. There are suggested uniform instructions for most of the felonies listed in § 946.82(4).

8. This addition is based on Richardson v. United States, 526 U.S. 813 (1999). Richardson held that unanimous agreement on the predicate acts was required in prosecutions under a "continuing criminal enterprise" statute which is separate from, but similar to, the RICO statute. Adding it here is by analogy to that situation. The 7th Circuit uniform jury instructions require unanimity under the federal RICO statute. See, http://www.ca7.uscourts.gov/Rules/pjury.pdf.

1900 DISORDERLY CONDUCT — § 947.01

Statutory Definition of the Crime

Disorderly conduct, as defined in § 947.01 of the Criminal Code of Wisconsin, is committed by a person who, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct.[1]
2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

Meaning of "Disorderly Conduct"

"Disorderly conduct" may include physical acts, or language, or both.[2]

[The general phrase "otherwise disorderly conduct" means conduct having a tendency to disrupt good order and provoke a disturbance.[3] It includes all acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether

committed by words or acts. Conduct is disorderly although it may not be violent, abusive, indecent, profane, boisterous, or unreasonably loud if it is of a type which tends to disrupt good order and provoke a disturbance.][4]

The principle upon which this offense is based is that in an organized society a person should not unreasonably offend others in the community.[5] This does not mean that all conduct that tends to disturb another is disorderly conduct. Only conduct that unreasonably offends the sense of decency or propriety of the community is included. It does not include conduct that is generally tolerated by the community at large, but that might disturb an oversensitive person.

Meaning of "Tend to Cause or Provoke a Disturbance"

It is not necessary that an actual disturbance must have resulted from the defendant's conduct. The law requires only that the conduct be of a type that tends to cause or provoke a disturbance under the circumstances as they then existed.[6] You must consider not only the nature of the conduct but also the circumstances surrounding that conduct. What is proper under one set of circumstances may be improper under other circumstances. This element requires that the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

WHERE THE STATE'S CASE RELIES IN PART ON EVIDENCE THAT THE DEFENDANT WAS CARRYING A FIREARM AT THE TIME OF THE ALLEGED OFFENSE, ADD THE FOLLOWING:[7]

[Loading, carrying, or going armed with a firearm does not, by itself, constitute disorderly conduct unless other facts and circumstances indicate a criminal or malicious intent.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1900 was originally published in 1966. Non-substantive revisions and additions to the comment were made in 1989, 1991, 1998, 1999, 2001, 2002, 2004, 2009 and 2022. In 2012, revisions were made that involved the addition of the bracketed material preceding the "Jury's Decision" paragraph to reflect 2011 Wisconsin Act 35. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" provided in the comment.

In State v. Givens, 28 Wis.2d 109, 135 N.W.2d 780 (1965), the court affirmed the convictions of several civil rights demonstrators on the grounds that the defendant's conduct met the requirements of the disorderly conduct statute as to being disruptive of good order and tending to provoke a disturbance and on the additional grounds that each defendant deliberately and knowingly violated commands of persons in authority. In so ruling, the court held that persons in authority over public buildings must be accorded discretion to regulate conduct therein. In appropriate cases, the jury should be instructed on failure to obey lawful commands of persons in authority as constituting disorderly conduct. See note 4, below.

The application of disorderly conduct and related statutes often involves claims that the exercise of constitutional rights prevents such application or excuses what would otherwise be a criminal violation. For recent discussions, see the following: City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989) (disorderly conduct ordinance); State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989) (criminal trespass to medical facility statute); Milwaukee v. K.F., 145 Wis.2d 24, 426 N.W.2d 329 (1988) (juvenile loitering ordinance); Milwaukee v. Nelson, 149 Wis.2d 434, 439 N.W.2d 562 (1989) (adult

loitering ordinance); State v. Dronso, 90 Wis.2d 110, 279 N.W.2d 710 (Ct. App. 1979) (§ 947.01). Also see Texas v. Johnson, 109 S. Ct. 2533 (1989), dealing with the federal flag desecration statute.

In State v. Olsen, 99 Wis.2d 572, 299 N.W.2d 632 (Ct. App. 1980), the defendants were charged with disorderly conduct as a result of demonstrations against a shipment of spent fuel from a nuclear power plant. The court of appeals held that the trial court acted properly in excluding evidence offered by the defendant to show that his conduct was privileged under the defense of necessity as set forth in § 939.47. The court held that necessity is limited to the pressure of natural physical forces such as "storms, fires and privations" and, therefore, is not available in the context of a protest against the transportation of spent nuclear fuel. 99 Wis.2d 572, 576.

1. The Committee recommends selecting one of the terms in parentheses where possible but believes it is proper to instruct on all alternatives that are supported by the evidence. The Wisconsin Supreme Court affirmed this position in Doubek v. Kaul, 2022 WI 31, ¶14, --N.W.2d--, stating that "[T]he language of Wis. Stat. § 947.01(1) is most naturally read as creating a single crime of disorderly conduct, while listing alternative means to satisfy its first element. The focus of the list is any type of conduct that is disorderly." Based on this finding, the court concluded that "Wisconsin's disorderly conduct statute is indivisible, and enumerates different means of committing the same crime." Id.

Speech alone in certain contexts can constitute disorderly conduct. State v. A.S., 2001 WI 48, ¶1, 243 Wis.2d 173, 626 N.W.2d 712. Also see State v. Douglas D., 2001 WI 47, ¶3, 243 Wis.2d 204, 626 N.W.2d 725. Verbal or written statements may constitute "abusive conduct" if they "tended to provoke retaliatory conduct on the part of the person or persons to whom the statements were addressed." A.S., ¶29. Also see Douglas D., ¶32. Speech can be considered "otherwise disorderly" if it is of a type that tends to disrupt good order. A.S., ¶33. If the statements constitute threats, they must be "true threats." Douglas D., ¶32; A.S., ¶22. Both A.S. and Douglas D. applied a definition of "true threat" announced in State v. Perkins, 2001 WI 46, ¶29, 243 Wis.2d 141, 626 N.W.2d 762. Perkins involved a charge under § 940.203, which prohibits threats to a judge. Wis JI-Criminal 1240B, Threat To A Judge, offers the following definition of "true threat," based on Perkins:

> A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.

2. Teske v. State, 256 Wis. 440, 444, 41 N.W.2d 642 (1950).

A common disorderly conduct situation involves directing abusive language to police officers. The Wisconsin Supreme Court has discussed the general principles applicable to this situation in a civil case where a person arrested for disorderly conduct sued the arresting officer for false imprisonment:

> The fact that the abusive language is directed to a policeman or other law enforcement officer and is not overheard by others does not prevent it from being a violation . . . [of a disorderly conduct statute or ordinance].

> However, a police officer cannot provoke a person into a breach of the peace, such as directing abusive language to the police officer, and then arrest him without a warrant. Lane v. Collins, 29 Wis.2d 66, 72, 138 N.W.2d 264 (1965) (footnote omitted).

3. In State v. Givens, 28 Wis.2d 109, 115, 135 N.W.2d 780 (1965), the court held that the phrase "otherwise disorderly conduct" which tends to provoke a disturbance means conduct of a type not previously enumerated in the statute but similar thereto in having a tendency to disrupt good order and to provoke a disturbance. This interpretation rests upon the rule of ejusdem generis. The statute is not unconstitutionally vague.

In State v. Schwebke, 2002 WI 55, 253 Wis.2d 1, 644 N.W.2d 666, the court upheld the application of the disorderly conduct statute to mailings sent by the defendant to three different victims. The conduct can be considered "otherwise disorderly conduct" under § 947.01:

> . . . [T]he disorderly conduct statute does not necessarily require disruptions or disturbances that implicate the public directly. The statute encompasses conduct that tends to cause a disturbance or disruption that is personal or private in nature, as long as there exists the real possibility that this disturbance or disruption will spill over and disrupt the peace, order or safety of the surrounding community as well. Conduct is not punishable under the statute when it tends to cause only personal annoyance to a person. See Douglas D., 2001 WI 47, ¶27. An examination of the circumstances in which the conduct occurred must take place, considering such factors as the location of the conduct, the parties involved, and the manner of the conduct. 2002 WI 55, ¶30.
>
> . . . [T]he disorderly conduct statute requires, at a minimum, that, when the conduct tends to cause or provoke a disturbance that is private or personal in nature, there must exist the real possibility that this disturbance will spill over and cause a threat to the surrounding community as well. 2002 WI 55, ¶31.
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> . . . [W]e conclude that the disorderly conduct statute was appropriately applied to Schwebke's conduct in this case. In each instance, the conduct at issue, in light of the circumstances, went beyond conduct that merely tended to annoy or cause personal discomfort in another person. In each instance, the mailings constituted conduct that not only caused disturbances to the lives of the recipients, but the conduct was of the type that would be disruptive to peace and good order in the community. 2002 WI 55, ¶32.

4. The paragraph in brackets is intended for use primarily where the "otherwise disorderly conduct" alternative is used. In Teske v. State, supra, the court quotes this definition from 17 Am. Jur. Disorderly Conduct § 1 (1957), which is also adopted by the court in State v. Givens, supra.

In City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989), the Wisconsin Supreme Court reviewed the application of a disorderly conduct ordinance (modeled after § 947.01) to a television reporter who refused to obey police orders to leave the scene of the 1985 Midwest Express airplane crash. The court held that the defendant's conduct violated the statute under the "otherwise disorderly" provision. There was a legitimate need to maintain control at the crash site, which was threatened by the defendant's refusal to obey the police order to stay out of the restricted area. The conduct tended to cause a disturbance because others may have followed the defendant if he had been allowed to disobey the officer.

5. This statement is based on the decision in State v. Givens, supra, where the court quoted from the comment to a proposed disorderly conduct section contained in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The 1999 revision made minor changes in this statement in the interest of clarity; no change in meaning was intended.

Deciding whether conduct "unreasonably" offends the sense of decency or propriety of the community may be aided by comparing the harm to the public and the social value of the defendant's conduct.

An instruction attempting to explain this comparison might read as follows:

> In determining whether the conduct "unreasonably" offends the public sense of decency and propriety, you should weigh the degree to which decency and propriety were offended by the conduct against any contribution to the public interest made by the conduct. In this case, (here specify the reason the conduct was engaged in). [EXAMPLE: In this case the defendant has testified that he engaged in the conduct in order to protest the Viet Nam War.] Conduct unreasonably offends the public sense of decency and propriety if, but only if, the harm to the public outweighs the social value achieved by the defendant's conduct.

6. This statement is found in the comment to proposed § 347.01 in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The phrase "tending to create or provoke a breach of the peace," as found in § 943.145, Criminal Trespass To A Medical Facility, was discussed in State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989).

7. Section 947.01 was amended by 2011 Wisconsin Act 35, the "licensed carry" law. The current statute was renumbered § 947.01(1) and a new subsection (2) was created to read:

> (2) Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section for loading, carrying, or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried.

The Committee concluded that the new provision is best addressed by adding a statement for cases where there is evidence that the defendant was carrying a firearm at the time of the alleged disorderly conduct.

The phrase "criminal or malicious intent" is used in new sub. (2) of § 947.01. The Committee concluded that "criminal intent" means "intent to commit a crime." "Malicious" does not have an established meaning in the current Wisconsin Criminal Code [with one exception: see § 940.41(1r), that is not applicable here].

1901 DISRUPTING A FUNERAL OR MEMORIAL SERVICE — § 947.011(2)(a)1.

Statutory Definition of the Crime

Disrupting a funeral or memorial service, as defined in § 947.011(2)(a)1. of the Criminal Code of Wisconsin, is committed by a person who engages in disorderly conduct (during a funeral or memorial service) (during the 60 minutes immediately preceding the scheduled starting time of a funeral or memorial service) (during the 60 minutes immediately following a funeral or memorial service),[1] within 500 feet of any entrance to a facility being used for the service, and with intent to disrupt the service.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct.[2]
2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.
3. The conduct of the defendant occurred (during a funeral or memorial service) (during the 60 minutes immediately preceding the scheduled starting time of a

funeral or memorial service) (during the 60 minutes immediately following a funeral or memorial service).[3]

4. The conduct of the defendant occurred within 500 feet of any entrance to a facility being used for the service.

5. The defendant engaged in the conduct with intent to disrupt the service.

Meaning of "Disorderly Conduct"

"Disorderly conduct" may include physical acts, language, or both.[4]

[The general phrase "otherwise disorderly conduct" means conduct having a tendency to disrupt good order and provoke a disturbance.[5] It includes all acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts. Conduct is disorderly, although it may not be violent, abusive, indecent, profane, boisterous, or unreasonably loud if it is of a type that tends to disrupt good order and provoke a disturbance.][6]

The principle upon which this offense is based is that in an organized society, a person should not unreasonably offend others in the community.[7] This does not mean that all conduct that tends to disturb another is disorderly conduct. Only conduct that unreasonably offends the sense of decency or propriety of the community is included. It does not include conduct that is generally tolerated by the community at large, but that might disturb an oversensitive person.

Meaning of "Tend to Cause or Provoke a Disturbance"

It is not necessary that an actual disturbance must have resulted from the defendant's conduct. The law requires only that the conduct be of a type that tends to cause or provoke a disturbance under the circumstances as they then existed.[8] You must consider not only the nature of the conduct but also the circumstances surrounding that conduct. What is proper under one set of circumstances may be improper under other circumstances. This element requires that the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

Deciding About Intent To Disrupt

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1901 was approved by the Committee in June 2006. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" provided in the comment.

This instruction is drafted for violations of § 947.011(2)(a)1. Section 947.011 was created by 2005 Wisconsin Act 114; effective date: March 1, 2006.

Act 114 created six offenses. Subsection (2)(a) defines two offenses: subd. 1. prohibits engaging in disorderly conduct within 500 feet and 60 minutes of a funeral service with intent to disrupt the service. This is the offense addressed by this instruction. Subsection (2)(a)2. prohibits intentionally blocking access to a facility being used for a service; an instruction has not been drafted for this violation. Subsection (2)(b) prohibits impeding vehicles with intent to disrupt a funeral process; see Wis JI Criminal 1901A. Subsections (2)(c) and (d) define offenses that are the same as subs. (2)(a) and (b), respectively, except that they do not include an intent element. Wis JI Criminal 1901 or 1901A could be adapted for use for those offenses by deleting the intent elements.

Violations of § 947.011 are Class A misdemeanors except that: "Any person who violates sub. (2)(a) or (b) after having been convicted of a violation of this section is guilty of a Class I felony." See sub. (3). Thus, only second offenses charged under sub. (2)(a) or (b) become felonies if the defendant has a prior conviction under any subsection of § 947.011.

1. The Committee recommends selecting the alternative supported by the evidence.

2. Speech alone in certain contexts can constitute disorderly conduct. State v. A.S., 2001 WI 48, ¶1, 243 Wis.2d 173, 626 N.W.2d 712. Also see State v. Douglas D., 2001 WI 47, ¶3, 243 Wis.2d 204, 626 N.W.2d 725. Verbal or written statements may constitute "abusive conduct" if they "tended to provoke retaliatory conduct on the part of the person or persons to whom the statements were addressed." A.S., ¶29. Also see Douglas D., ¶32. Speech can be considered "otherwise disorderly" if it is of a type that tends to disrupt good order. A.S., ¶33. If the statements constitute threats, they must be "true threats." Douglas D., ¶32; A.S., ¶22. Both A.S. and Douglas D. applied a definition of "true threat" announced in State v. Perkins, 2001 WI 46, ¶29, 243 Wis.2d 141, 626 N.W.2d 762. Perkins involved a charge under § 940.203, which prohibits threats to a judge. Wis JI-Criminal 1240B, Threat To A Judge, offers the following definition of "true threat," based on Perkins:

> A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.

3. The Committee recommends selecting the alternative supported by the evidence.

4. Teske v. State, 256 Wis. 440, 444, 41 N.W.2d 642 (1950).

A common disorderly conduct situation involves directing abusive language to police officers. The Wisconsin Supreme Court has discussed the general principles applicable to this situation in a civil case where a person arrested for disorderly conduct sued the arresting officer for false imprisonment:

> The fact that the abusive language is directed to a policeman or other law enforcement officer and is not overheard by others does not prevent it from being a violation . . . [of a disorderly conduct statute or ordinance].

> However, a police officer cannot provoke a person into a breach of the peace, such as directing abusive language to the police officer and then arrest him without a warrant. Lane v. Collins, 29 Wis.2d 66, 72, 138 N.W.2d 264 (1965) (footnote omitted).

5. In State v. Givens, 28 Wis.2d 109, 115, 135 N.W.2d 780 (1965), the court held that the phrase "otherwise disorderly conduct," which tends to provoke a disturbance, means conduct of a type not previously enumerated in the statute but similar thereto in having a tendency to disrupt good order and to provoke a disturbance. Such interpretation rests upon the rule of ejusdem generis. The statute is not unconstitutionally vague.

In State v. Schwebke, 2002 WI 55, 253 Wis.2d 1, 644 N.W.2d 666, the court upheld the application of the disorderly conduct statute to mailings sent by the defendant to three different victims. The conduct can be considered "otherwise disorderly conduct" under § 947.01:

> . . . [T]he disorderly conduct statute does not necessarily require disruptions or disturbances that implicate the public directly. The statute encompasses conduct that tends to cause a disturbance or disruption that is personal or private in nature as long as there exists the real possibility that this disturbance or disruption will spill over and disrupt the peace, order, or safety of the surrounding community as well.
> Conduct is not punishable under the statute when it tends to cause only personal annoyance to a person. See Douglas D., 2001 WI 47, ¶27. An examination of the circumstances in which the conduct occurred must take place, considering such factors as the location of the conduct, the parties involved, and the manner of the conduct. 2002 WI 55, ¶30.
>
> . . . [T]he disorderly conduct statute requires, at a minimum, that, when the conduct tends to cause or provoke a disturbance that is private or personal in nature, there must exist the real possibility that this disturbance will spill over and cause a threat to the surrounding community as well. 2002 WI 55, ¶31.
>
> . . . [W]e conclude that the disorderly conduct statute was appropriately applied to Schwebke's conduct in this case. In each instance, the conduct at issue, in light of the circumstances, went beyond conduct that merely tended to annoy or cause personal discomfort in another person. In each instance, the mailings constituted conduct that not only caused disturbances to the lives of the recipients but the conduct was of the type that would be disruptive to peace and good order in the community. 2002 WI 55, ¶32.

6. The paragraph in brackets is intended for use primarily where the "otherwise disorderly conduct" alternative is used. In Teske v. State, supra, the court quotes this definition from 17 Am. Jur. Disorderly Conduct § 1 (1957), which is also adopted by the court in State v. Givens, supra.

In City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989), the Wisconsin Supreme Court reviewed the application of a disorderly conduct ordinance (modeled after § 947.01) to a television reporter who refused to obey police orders to leave the scene of the 1985 Midwest Express airplane crash. The court held that the defendant's conduct violated the statute under the "otherwise disorderly" provision. There was a legitimate need to maintain control at the crash site, which was threatened by the defendant's refusal to obey the police order to stay out of the restricted area. The conduct tended to cause a disturbance because others may have followed the defendant if he had been allowed to disobey the officer.

7. This statement is based on the decision in State v. Givens, supra, where the court quoted from the comment to a proposed disorderly conduct section contained in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The 1999 revision made minor changes in this statement in the interest of clarity; no change in meaning was intended.

Deciding whether conduct "unreasonably" offends the sense of decency or propriety of the community may be aided by comparing the harm to the public and the social value of the defendant's conduct.

An instruction attempting to explain this comparison might read as follows:

> In determining whether the conduct "unreasonably" offends the public sense of decency and propriety, you should weigh the degree to which decency and propriety were offended by the conduct against any contribution to the public interest made by the conduct. In this case, (here specify the reason the conduct was engaged in). [EXAMPLE: In this case, the defendant has testified that he engaged in the conduct in order to protest the Vietnam War.] Conduct unreasonably offends the public sense of decency and propriety if, but only if, the harm to the public outweighs the social value achieved by the defendant's conduct.

8. This statement is found in the comment to proposed § 347.01 in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The phrase "tending to create or provoke a breach of the peace," as found in § 943.145, Criminal Trespass To A Medical Facility, was discussed in State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989).

1901A DISRUPTING A FUNERAL OR MEMORIAL SERVICE: IMPEDING VEHICLES — § 947.011(2)(b)

Statutory Definition of the Crime

Disrupting a funeral or memorial service, as defined in § 947.011(2)(b) of the Criminal Code of Wisconsin, is committed by a person who, with intent to disrupt a funeral procession, impedes vehicles that he or she knows are part of the procession.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant impeded vehicles that he or she knew were part of a funeral procession.
2. The defendant impeded vehicles with intent to disrupt a funeral procession.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1901A was approved by the Committee in June 2006.

This instruction is drafted for violations of § 947.011(2)(b). Section 947.01 was created by 2005 Wisconsin Act 114; effective date: March 1, 2006.

Act 114 created six offenses. Subsection (2)(b) prohibits impeding vehicles with intent to disrupt a funeral process. This is the offense addressed by this instruction. Subsection (2)(a) defines two offenses: subd. 1. prohibits engaging in disorderly conduct within 500 feet and 60 minutes of a funeral service with intent to disrupt the service. See Wis JI-Criminal 1901. Subsection (2)(a)2. prohibits intentionally blocking access to a facility being used for a service; an instruction has not been drafted for this violation. Subsections (2)(c) and (d) define offenses that are the same as subs. (2)(a) and (b), respectively, except that they do not include an intent element. Wis JI Criminal 1901 or 1901A could be adapted for use for those offenses by deleting the intent elements.

Violations of § 947.011 are Class A misdemeanors except that: "Any person who violates sub. (2)(a) or (b) after having been convicted of a violation of this section is guilty of a Class I felony." See sub. (3). Thus, only second offenses charged under sub. (2)(a) or (b) become felonies if the defendant has a prior conviction under any subsection of § 947.011.

1902 UNLAWFUL USE OF TELEPHONE — § 947.012(1)(a)

Statutory Definition of the Crime

Unlawful use of telephone, as defined in § 947.012(1)(a) of the Criminal Code of Wisconsin, is committed by one who, with intent to frighten, intimidate, threaten, abuse or harass, makes a telephone call and threatens to inflict injury or physical harm to any person or the property of any person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant made a telephone call to (name of victim).
2. In making the telephone call to (name of victim), the defendant intended to[1] (frighten) (intimidate) (threaten) (abuse) (harass)[2] (name of victim).

   "With intent to (frighten) (intimidate) (threaten) (abuse) (harass)" means that the defendant acted with the mental purpose to (frighten) (intimidate) (threaten) (abuse) (harass) another person or was aware that his or her conduct was practically certain to cause that result.[3]
3. In the course of that telephone call, the defendant threatened[4] to inflict (physical harm to) (damage to the property of) any person.

It is not necessary that the person making the threat have the ability to carry out the threat.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1902 was originally published in 1981 and revised in 1992, 1996, and 2008. This revision was approved by the Committee in October 2023; it updated case law citations in the comment.

Section 947.012, Unlawful Use Of Telephone, was created by Chapter 131, Laws of 1979. The original statute contained six subsections and was apparently modeled after a federal statute, 47 U.S.C. § 223. The statute was revised by 1991 Wisconsin Act 39, effective August 15, 1991. This instruction is for an offense under subsection (1)(a) of the revised statute; the offense was previously defined in § 947.012(1), 1989 90 Wis. Stats. 1991 Wisconsin Act 39 changed some violations of § 947.012 from crimes to forfeitures. The penalty for this offense was not affected; it is a Class B misdemeanor.

1. The Committee recommends that one of the alternatives in parentheses should be elected if possible because it clarifies the issue for the jury. The Committee does not conclude that an instruction joining one or more alternatives in the disjunctive would be error. See Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979); and United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

2. "Harassment" is referred to in § 947.013(1m)(b), which identifies one type of harassment penalized by that statute:

> (b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

The § 947.013(1m)(b) reference is the same as the one used in the harassment restraining order statute, § 813.125(1)(b). The restraining order statute and its definition of harassment were found to be constitutional by the Wisconsin Supreme Court in Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), where the court found the meaning of harassment readily ascertainable by reference to a dictionary: "'Harass' means to worry or impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil, or badger." 139 Wis.2d 397, 407, citing Webster's Third New International Dictionary 1031 (1961).

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary.

3. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

4. Wisconsin appellate courts have held that some criminal statutes prohibiting threats must be read to apply only to "true threats." For example, in State v. Robert T., 2008 WI App 22, 307 Wis.2d 488, 746 N.W.2d 564, the court of appeals held that "§ 947.015 must be read with the limitation that only a false bomb scare that constitutes a 'true threat' can be charged." ¶12. State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762, reached the same conclusion for violations of § 940.203, Threat to a judge. Also see State v. A.S., 2001 WI 48, 243 Wis.2d 173, 626 N.W.2d 712, holding that a "true threat" is required for disorderly conduct charges based on threats.

The Committee concluded that a separate definition of "true threat" is not necessary in this instruction because its substance is covered by the second element, which requires that the defendant "intended to frighten, intimidate, threaten, abuse, or harass" the victim.

The following is the most complete definition of "true threat" offered by the court in State v. Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

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1903 UNLAWFUL USE OF TELEPHONE — § 947.012(1)(b)

Statutory Definition of the Crime

Unlawful use of telephone, as defined in § 947.012(1)(b) of the Criminal Code of Wisconsin, is committed by one who telephones another and uses any obscene, lewd, or profane language[1] with intent to frighten, intimidate, threaten, or abuse or suggests any lewd or lascivious act.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant made a telephone call to _____.
2. In making the telephone call to _____, the defendant [used obscene, lewd, or profane language] [suggested any lewd or lascivious act].
3. The defendant made the telephone call to _____ with intent to[3] (frighten) (intimidate) (threaten) (abuse) any person at the called number.

   "With intent to (frighten) (intimidate) (threaten) (abuse)" means that the defendant acted with the mental purpose to (frighten) (intimidate) (threaten) (abuse) another person or was aware that his or her conduct was practically certain to cause that result.[4]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1903 was originally published in 1987 and revised in 1992. This revision was approved by the Committee in February 2008 and involved adoption of a new format.

Section 947.012, Unlawful Use Of Telephone, was created by Chapter 131, Laws of 1979. The original statute contained six subsections and was apparently modeled after a federal statute, 47 U.S.C. § 223. The statute was revised by 1991 Wisconsin Act 39, effective August 15, 1991. This instruction is for an offense under subsection (1)(a) of the revised statute; the offense was previously defined in § 947.012(1), 1989 90 Wis. Stats. 1991 Wisconsin Act 39 changed some violations of § 947.012 from crimes to forfeitures. The penalty for this offense was not affected; it is a Class B misdemeanor.

1. The statute also applies to one who "suggests any lewd or lascivious act." That alternative is not included in this instruction.

2. 1991Wisconsin Act 39 revised the statute to eliminate two alternatives from this subsection ("harass" and "offend") and created new § 947.012(2) which punishes that conduct as a Class B forfeiture.

3. The Committee recommends that one of the alternatives in parentheses should be elected if possible because it clarifies the issue for the jury. The Committee does not conclude that an instruction joining one or more alternatives in the disjunctive would be error. See Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979); and United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

1904 UNLAWFUL USE OF TELEPHONE — § 947.012(1)(c)

Statutory Definition of the Crime

Unlawful use of telephone, as defined in § 947.012(1)(c) of the Criminal Code of Wisconsin, is committed by one who makes a telephone call, whether or not conversation ensues, without disclosing his or her identity and with intent to abuse[1] or threaten any person at the called number.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant made a telephone call.

   This does not require that any conversation took place.

2. In making the telephone call the defendant did not disclose (his) (her) identity.

3. The defendant made the telephone call to with intent to[2] (abuse) (threaten) any person at the called number.

   "With intent to (abuse) (threaten)" means that the defendant acted with the mental purpose to (abuse) (threaten) another person or was aware that his or her conduct was practically certain to cause that result.[3]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1904 was originally published in 1992. This revision was approved by the Committee in February 2008 and involved adoption of a new format.

Section 947.012, Unlawful Use Of Telephone, was created by Chapter 131, Laws of 1979. The original statute contained six subsections and was apparently modeled after a federal statute, 47 U.S.C. § 223. This instruction was for an offense under subsection (5) of the original statute. The section was renumbered subsec. (1)(c) by 1991 Wisconsin Act 39, effective date August 15, 1991. 1991 Wisconsin Act 39 changed some violations of § 947.012 from crimes to forfeitures. The penalty for this offense was not affected; it is a Class B misdemeanor. But see note 1, below.

1. The former statute also prohibited calls made with intent to "harass." The 1991 revision recreated the "harass" version of the offense in subsec. (2)(d) where it is punished as a Class B forfeiture.

2. The Committee recommends that one of the alternatives in parentheses should be elected if possible because it clarifies the issue for the jury. The Committee does not conclude that an instruction joining one or more alternatives in the disjunctive would be error. See Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979); and United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

3. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

1905 UNLAWFUL USE OF TELEPHONE — § 947.012(4)

[INSTRUCTION RENUMBERED – SEE WIS JI CRIMINAL 1907]

COMMENT

Wis JI-Criminal 1905 was originally published in 1987. It was renumbered Wis JI Criminal 1907 in 1993.

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1906 UNLAWFUL USE OF TELEPHONE — § 947.012(2)(b)

Statutory Definition of the Crime

Unlawful use of telephone, as defined in § 947.012(2)(b) of the Criminal Code of Wisconsin, is committed by one who causes the telephone of another repeatedly to ring with intent to harass any person at the called number.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you to a reasonable certainty by evidence that is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant caused the telephone of _____ repeatedly to ring.

   This does not require that any conversation took place.

2. The defendant caused the telephone of _____ repeatedly to ring with intent to harass[1] any person at the called number.

   "With intent to harass" means that the defendant acted with the mental purpose to harass another person or was aware that his or her conduct was practically certain to cause that result.[2]

Jury's Decision

If you are satisfied by evidence which satisfies you to a reasonable certainty by evidence that is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1906 was originally published in 1992. This revision was approved by the Committee in February 2008 and involved adoption of a new format.

Section 947.012, Unlawful Use Of Telephone, was created by Chapter 131, Laws of 1979. The original statute contained six subsections and was apparently modeled after a federal statute, 47 U.S.C. § 223. The statute was revised by 1991 Wisconsin Act 39, effective August 15, 1991. This instruction is for an offense under subsection (2)(b), punished as a Class B forfeiture. The conduct was formerly punished as a Class B misdemeanor under § 947.012(3) 1989 90 Wis. Stats.

1. "Harassment" is referred to in § 947.013(1m)(b), which identifies one type of harassment penalized by that statute:

> (b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

The § 947.013(1m)(b) reference is the same as the one used in the harassment restraining order statute, § 813.125(1)(b). The restraining order statute, and its definition of harassment, were found to be constitutional by the Wisconsin Supreme Court in Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), where the court found the meaning of harassment readily ascertainable by reference to a dictionary: "'Harass' means to worry or impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil, or badger." 139 Wis.2d 397, 407, citing Webster's Third New International Dictionary 1031 (1961).

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary.

2. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

1907 UNLAWFUL USE OF TELEPHONE — § 947.012(2)(c)

Statutory Definition of the Crime

Unlawful use of telephone, as defined in § 947.012(2)(c) of the Criminal Code of Wisconsin, is committed by one who makes repeated telephone calls, whether or not conversation ensues, with intent solely to harass any person at the called number.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you to a reasonable certainty by evidence that is clear, satisfactory and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant made repeated telephone calls.

   This does not require that any conversation took place.

2. The defendant made repeated telephone calls with intent solely to harass[1] any person at the called number.

   "With intent solely to harass" means that the defendant acted with the mental purpose to harass another person or was aware that his or her conduct was practically certain to cause that result.[2]

Jury's Decision

If you are satisfied by evidence that is clear, satisfactory and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1907 was originally published in 1992. This revision was approved by the Committee in February 2008 and involved adoption of a new format.

Section 947.012, Unlawful Use Of Telephone, was created by Chapter 131, Laws of 1979. The original statute contained six subsections and was apparently modeled after a federal statute, 47 U.S.C. § 223. The statute was revised by 1991 Wisconsin Act 39, effective August 15, 1991. This instruction is for an offense under subsection (2)(c), punished as a Class B forfeiture. The conduct was formerly punished as a Class B misdemeanor under § 947.012(4) 1989 90 Wis. Stats.

1. "Harassment" is referred to in § 947.013(1m)(b), which identifies one type of harassment penalized by that statute:

> (b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

The § 947.013(1m)(b) reference is the same as the one used in the harassment restraining order statute, § 813.125(1)(b). The restraining order statute, and its definition of harassment, were found to be constitutional by the Wisconsin Supreme Court in Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), where the court found the meaning of harassment readily ascertainable by reference to a dictionary: "'Harass' means to worry or impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil, or badger." 139 Wis.2d 397, 407, citing Webster's Third New International Dictionary 1031 (1961).

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary.

2. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

1908 UNLAWFUL USE OF A COMPUTERIZED COMMUNICATION SYSTEM — § 947.0125(2)(a)

Statutory Definition of the Crime

Unlawful use of [an electronic mail] [a computerized communication] system, as defined in § 947.0125(2)(a) of the Criminal Code of Wisconsin, is committed by one who with intent to frighten, intimidate, threaten, abuse or harass another person, sends a message to the person on [an electronic mail] [a computerized communication] system, and threatens to inflict injury or physical harm to any person or the property of any person

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant sent a message[1] to (name of victim) on [an electronic mail] [a computerized communication] system.
2. The defendant sent the message to (name of victim) with intent to[2] (frighten) (intimidate) (threaten) (abuse) (harass)[3] (name of victim).

   "With intent to (frighten) (intimidate) (threaten) (abuse) (harass)" means that the defendant acted with the mental purpose to (frighten) (intimidate) (threaten) (abuse) (harass) another person or was aware that the conduct was practically

certain to cause that result.[4]

3. In the message, the defendant threatened[5] to inflict [physical harm to] [damage to the property of] any person.

It is not necessary that the person making the threat have the ability to carry out the threat.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1908 was originally published in 1996 and revised in 2008. This revision was approved by the Committee in October 2023; it updated case law citations in the comment.

Section 947.0125, Unlawful Use Of Computerized Communication Systems, was created by 1995 Wisconsin Act 353. Effective date: June 7, 1996. Violations of subsec. (2) are Class B misdemeanors.

1. "Message" is defined as follows in § 947.0125(1): "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, or any transfer of a computer program." The definition also provides that "computer program" is as defined in § 943.70.

2. The Committee recommends that one of the alternatives in parentheses should be elected if possible because it clarifies the issue for the jury. The Committee does not conclude that an instruction joining one or more alternatives in the disjunctive would be error. See Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979); and United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

3. "Harassment" is referred to in § 947.013(1m)(b), which identifies one type of harassment penalized by that statute:

(b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

The § 947.013(1m)(b) reference is the same as the one used in the harassment restraining order statute, § 813.125(1)(b). The restraining order statute and its definition of harassment were found to be constitutional by the Wisconsin Supreme Court in Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), where the court found the meaning of harassment readily ascertainable by reference to a dictionary: "'Harass' means to worry or impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil, or badger." 139 Wis.2d 397, 407, citing Webster's Third New International Dictionary 1031 (1961).

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

5. Wisconsin appellate courts have held that some criminal statutes prohibiting threats must be read to apply only to "true threats." For example, in State v. Robert T., 2008 WI App 22, 307 Wis.2d 488, 746 N.W.2d 564, the court of appeals held that "§ 947.015 must be read with the limitation that only a false bomb scare that constitutes a 'true threat' can be charged." ¶12. State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762, reached the same conclusion for violations of § 940.203, Threat to a judge. Also see State v. A.S., 2001 WI 48, 243 Wis.2d 173, 626 N.W.2d 712, holding that a "true threat" is required for disorderly conduct charges based on threats.

The Committee concluded that a separate definition of "true threat" is not necessary in this instruction because its substance is covered by the second element, which requires that the defendant "intended to frighten, intimidate, threaten, abuse, or harass" the victim.

The following is the most complete definition of "true threat" offered by the court in State v. Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

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1909 UNLAWFUL USE OF A COMPUTERIZED COMMUNICATION SYSTEM: USE OF OBSCENE LANGUAGE — § 947.0125(2)(c)

Statutory Definition of the Crime

Unlawful use of [an electronic mail] [a computerized communication] system, as defined in § 947.0125(2)(c) of the Criminal Code of Wisconsin, is committed by one who with intent to frighten, intimidate, threaten, or abuse another person, sends a message to the person on [an electronic mail] [a computerized communication] system, and uses any obscene, lewd, or profane language or suggests any lewd or lascivious act.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant sent a message[1] to (name of victim) on [an electronic mail] [a computerized communication] system.
2. The defendant sent the message to (name of victim) with intent to[2] (frighten) (intimidate) (threaten) (abuse) (name of victim).

   "With intent to (frighten) (intimidate) (threaten) (abuse)" means that the defendant acted with the mental purpose to (frighten) (intimidate) (threaten) (abuse) (harass) another person or was aware that the conduct was practically certain to cause that result.[3]

3. In sending the message, the defendant used any obscene, lewd, or profane language or suggested any lewd or lascivious act.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1909 was originally published in 1996. This revision was approved by the Committee in February 2008 and involved adoption of a new format.

Section 947.0125, Unlawful Use Of Computerized Communication Systems, was created by 1995 Wisconsin Act 353. Effective date: June 7, 1996. Violations of subsec. (2) are Class B misdemeanors.

1. "Message" is defined as follows in § 947.0125(1): "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, or any transfer of a computer program." The definition also provides that "computer program" is as defined in § 943.70.

2. The Committee recommends that one of the alternatives in parentheses should be elected if possible because it clarifies the issue for the jury. The Committee does not conclude that an instruction joining one or more alternatives in the disjunctive would be error. See Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979); and United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

3. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

1910 HARASSMENT: SUBJECTING ANOTHER TO PHYSICAL CONTACT — § 947.013(1r) and (1m)(a)

Statutory Definition of the Crime

Harassment, as defined in § 947.013 of the Criminal Code of Wisconsin, is committed by one who is subject to an order under § _____[1] that prohibits or limits contact with another person and who, with intent to harass or intimidate that person, strikes, shoves, kicks, or otherwise subjects the person to physical contact or attempts to do the same, and accompanies the conduct with a credible threat that places the person in reasonable fear of death or great bodily harm.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. An order under § _____ prohibited or limited the defendant's contact with (name of victim) .
2. The defendant [subjected] [attempted to subject][3] (name of victim) to physical contact.[4]
3. The defendant engaged in the conduct with intent to harass or intimidate (name of victim) .

"With intent to harass or intimidate" means that the defendant acted with the mental purpose to harass or intimidate another person or was aware that (his) (her) conduct was practically certain to harass or intimidate another.[5]

4. The defendant's conduct was accompanied by a credible threat that placed (name of victim) in reasonable fear of death or great bodily harm.

"Credible threat" means a threat made with the intent and apparent ability to carry out the threat.[6]

"Great bodily harm" means serious bodily injury.[7]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF ONE THE PENALTY FACTORS SET FORTH IN SUBS. (1t), (1v), OR (1x) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACTOR IS ESTABLISHED[8]

If you find the defendant guilty, you must answer the following question(s):

FOR CHARGES UNDER SUB. (1t)[9]

[Did the defendant have a previous conviction for (identify the crime) ?[10]

Was the victim of that crime the victim of the crime in this case?

Did the crime in this case occur within 7 years after the previous conviction?]

FOR CHARGES UNDER SUB. (1v)

[Did the defendant intentionally gain access to a record in electronic format that contained personally identifiable information regarding the victim in order the facilitate the crime in this case?][11]

FOR CHARGES UNDER SUB. (1x)

[Did the defendant have a previous conviction for (identify the crime) ?[12]

Did the defendant intentionally gain access to a record in order the facilitate the crime in this case?][13]

CONTINUE WITH THE FOLLOWING IN ALL CASES

Before you may answer "yes", you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1910 was originally published in 1993 and revised in 1994. This revision was approved by the Committee in December 2002 and involved adoption of a new format.

This instruction is for one type of offense defined in subsec. (1m)(a) of § 947.013 – subjecting another to physical contact. For threats to engage in physical contact, see Wis JI-Criminal 1911.

Prior to the revision of the statute in 1992, there had been no instruction for violations of § 947.013, Harassment, because violations were Class B forfeitures, not crimes. When the statute was amended in 1992 to punish some offenses as misdemeanors and others as felonies, instructions were drafted. The penalties were revised by 2001 Wisconsin Act 109, effective date: February 1, 2003.

Closely related offenses are covered by other statutes. Section 940.32 prohibits "stalking." See Wis JI-Criminal 1248, 1248A, and 1248B. Violations of restraining orders are already made criminal by §§ 813.12, 813.122, and 813.125. See Wis JI-Criminal 2040, which offers a suggested instruction for the three different restraining order offenses recognized by Wisconsin law. In State v. Sveum, 2002 WI App 105, 254 Wis.2d 868, 648 N.W.2d 496, the court held that violations of restraining orders are not lesser included offenses of charges under § 947.013(1r).

A violation of § 943.017(1r) is a Class A misdemeanor. The facts identified in sub. (1t) increase the penalty to a Class I felony. The facts identified in subs. (1v) and (1x) increase the penalty to a Class H felony. These penalty classifications take effect February 1, 2003.

The facts specified in subs. (1t), (1v), and (1x) must be submitted to the jury because they increase the statutorily-authorized penalty range. The following form is suggested for the verdict:

"We, the jury, find the defendant guilty of harassment under Wis. Stat. § 947.013, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

[State the applicable question.]"

1. Here insert the number of the statute under which the order was entered: § 813.12, § 813.122, or § 813.125. See § 947.013(1r)(b). The validity of the underlying order may not be collaterally attacked in the criminal prosecution for violating the order, absent a showing of fraud in the obtaining of the order. State v. Bouzek, 168 Wis.2d 642, 484 N.W.2d 362 (Ct. App. 1992).

2. Identifying the elements of this offense requires combining facts found in several subsections of § 947.013. Subsection (1r) states that it is a Class A misdemeanor if a person "violates subsection (1m) under all the following circumstances":

(a) The act is accompanied by a credible threat that places the victim in reasonable fear of death or great bodily harm.

(b) The act occurs while the actor is subject to an order or injunction under s. 813.12, 813.122 or 813.125 that prohibits or limits his or her contact with the victim.

So two of the elements of the offense are those specified above. The other two are provided in subsection (1m). Subsection (1m)(a) refers to: "Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same." This was adapted for the second element. The introductory clause of subsection (1m) refers to engaging in conduct "with intent to harass or intimidate another person." This is used as the third element in the instruction.

3. If a case is based on the claim that the defendant attempted to subject the victim to physical contact, definition of "attempt" should be included. See Wis JI-Criminal 580.

4. The full description of the offense used in the statute provides: "strikes, shoves, kicks, or otherwise subjects the person to physical contact or attempts . . . to do the same." The instruction uses only "physical contact" because that term includes the other, more specific, alternatives.

5. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary. Also see footnote 3, Wis JI-Criminal 1912.

"Intimidate" is defined as "to make timid or fearful" in Webster's New Collegiate Dictionary.

6. Section 947.013(1)(b). The Wisconsin statutes uses the same definition of "credible threat" that is found in § 646.9 of the California Penal Code, which defines the crime of "stalking."

7. See Wis JI-Criminal 914 for a more complete definition of "great bodily harm."

8. The questions address the penalty-increasing facts set forth is subs. (1t), (1v), and (1x) of § 943.017.

9. The following three questions address the penalty-increasing provision set forth in sub. (1t) of § 943.017: "Whoever violates sub. (1r) is guilty of a Class I felony if the person has a prior conviction under this subsection or (sub. (1r), (1v), or (1x) or s. 940.32 (2), (2e), (2m), or (3) involving the same victim and the present violation occurs within 7 years of the prior conviction."

10. The applicable crimes are: a violent crime as defined in § 939.632(1)(e)1.; stalking under § 940.32; or, harassment under § 947.013(1r), (1t), (1v), or (1x).

11. The factor specified in § 947.013(1v) increases the penalty to that for a Class H felony.

Sub. (1)(c) of § 943.017 provides: "'Personally identifiable information' has the meaning given in s. 19.62(5)."

Sub. (1)(d) of § 943.017 provides: "'Record' has the meaning given in s. 19.32(2)."

12. The facts set forth in sub. (1x) increase the penalty to that for a Class H felony.

The applicable crimes are: violations § 947.013(1r), (1t), or (1v); or, violations of § 940.32(2), (2e), (2m), or (3).

13. Note that this fact is not worded in the same manner as the similar fact in sub. (1v). This statement requires only access to a "record," not a "record in electronic format that contains personally identifiable information regarding the victim."

Sub. (1)(d) of § 943.017 provides: "'Record' has the meaning given in s. 19.32(2)."

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1911 HARASSMENT: THREATENING PHYSICAL CONTACT WITH ANOTHER — § 947.013(1r) and (1m)(a)

Statutory Definition of the Crime

Harassment, as defined in § 947.013 of the Criminal Code of Wisconsin, is committed by one who is subject to an order under § _____[1] that prohibits or limits contact with another person and who, with intent to harass or intimidate that person, makes a credible threat of physical contact that places the person in reasonable fear of death or great bodily harm.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. An order under § _____ prohibited or limited the defendant's contact with (name of victim).
2. The defendant made a credible threat of physical contact[3] that placed (name of victim) in reasonable fear of death or great bodily harm.

   "Credible threat" means a threat made with the intent to carry out the threat and with the apparent ability to do so.[4]

   "Great bodily harm" means serious bodily injury.[5]

3. The defendant made the threat with intent to harass or intimidate (name of victim) .

"With intent to harass or intimidate" means that the defendant acted with the mental purpose to harass or intimidate another person or was aware that (his) (her) conduct was practically certain to harass or intimidate another.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF ONE THE PENALTY FACTORS SET FORTH IN SUBS. (1t), (1v), OR (1x) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACTOR IS ESTABLISHED[7]

If you find the defendant guilty, you must answer the following question(s):

FOR CHARGES UNDER SUB. (1t)[8]

[Did the defendant have a previous conviction for (identify the crime) ?[9]

Was the victim of that crime the victim of the crime in this case?

Did the crime in this case occur within 7 years after the previous conviction?]

FOR CHARGES UNDER SUB. (1v)

[Did the defendant intentionally gain access to a record in electronic format that contained personally identifiable information regarding the victim in order the facilitate the crime in this case?][10]

FOR CHARGES UNDER SUB. (1x)

[Did the defendant have a previous conviction for (identify the crime) ?[11]

Did the defendant intentionally gain access to a record in order the facilitate the crime in this case?][12]

CONTINUE WITH THE FOLLOWING IN ALL CASES

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

This instruction was originally published as Wis JI-Criminal 1910.1 in 1993 and republished without change in 1994. This revision was approved by the Committee in December 2002; it renumbered the instruction, adopted a new format and made nonsubstantive changes in the text.

This instruction is for one type of offense defined in subsec. (1m)(a) of § 947.013 – threats to engage in physical contact. For subjecting another to physical contact, see Wis JI-Criminal 1910.

See the Comment to Wis JI-Criminal 1910 for general information about § 947.013.

The facts specified in subs. (1t), (1v), and (1x) must be submitted to the jury because they increase the statutorily-authorized penalty range. The following form is suggested for the verdict:

"We, the jury, find the defendant guilty of harassment under Wis. Stat. § 947.013, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

[State the applicable question.]"

1. Here insert the number of the statute under which the order was entered: § 813.12, § 813.122, or § 813.125. See § 947.013(1r)(b). The validity of the underlying order may not be collaterally attacked in the criminal prosecution for violating the order, absent a showing of fraud in the obtaining of the order. State v. Bouzek, 168 Wis.2d 642, 484 N.W.2d 362 (Ct. App. 1992).

2. Identifying the elements of this offense requires combining facts found in several subsections of § 947.013. Subsection (1r) states that it is a Class A misdemeanor if a person "violates subsection (1m) under all the following circumstances":

(a) The act is accompanied by a credible threat that places the victim in reasonable fear of death or great bodily harm.

(b) The act occurs while the actor is subject to an order or injunction under s. 813.12, 813.122 or 813.125 that prohibits or limits his or her contact with the victim.

So two of the elements of the offense are those specified above. The other two are provided in subsection (1m). Subsection (1m)(a) refers to: "Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same." This was adapted for the second element. The introductory clause of subsection (1m) refers to engaging in conduct "with intent to harass or intimidate another person." This is used as the third element in the instruction.

3. The full description of the offense used in the statute provides: "strikes, shoves, kicks, or otherwise subjects the person to physical contact or attempts or threatens to do the same." The instruction uses only "physical contact" because that term includes the other, more specific, alternatives.

4. This is the definition provided in § 947.013(1)(b). It is modeled after § 646.9 of the California Penal Code.

As described in the comment preceding note 1, supra, the instruction collapses into one element two statements that result from a literal reading of the statute. Subsection (1m)(a) refers to a threat of physical contact; subsection (1r)(a) refers to accompanying a violation of sub. (1m) with a "credible threat." Thus, a literal reading would require a "threat accompanied by a credible threat." The Committee concluded that the statute does not require proof of two separate threats. Rather, reading the subsections together indicates that what is required is a threat made under such circumstances that it is a "credible threat," as defined in § 947.013(1)(b).

5. See Wis JI-Criminal 914 for a more complete definition of "great bodily harm."

6. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary. Also see footnote 3, Wis JI-Criminal 1912.

"Intimidate" is defined as "to make timid or fearful" in Webster's New Collegiate Dictionary.

7. The questions address the penalty-increasing facts set forth in subs. (1t), (1v), and (1x) of § 943.017.

8. The following three questions address the penalty-increasing provision set forth in sub. (1t) of § 943.017: "Whoever violates sub. (1r) is guilty of a Class I felony if the person has a prior conviction under this subsection or (sub. (1r), (1v), or (1x) or s. 940.32 (2), (2e), (2m), or (3) involving the same victim and the present violation occurs within 7 years of the prior conviction."

9. The applicable crimes are: a violent crime as defined in § 939.632(1)(e)1.; stalking under § 940.32; or, harassment under § 947.013(1r), (1t), (1v), or (1x).

10. The factor specified in § 947.013(1v) increases the penalty to that for a Class H felony.

Sub. (1)(c) of § 943.017 provides: "'Personally identifiable information' has the meaning given in s. 19.62(5)."

Sub. (1)(d) of § 943.017 provides: "'Record' has the meaning given in s. 19.32(2)."

11. The facts set forth in sub. (1x) increase the penalty to that for a Class H felony.

The applicable crimes are: violations § 947.013(1r), (1t), or (1v); or, violations of § 940.32(2), (2e), (2m), or (3).

12. Note that this fact is not worded in the same manner as the similar fact in sub. (1v). This statement requires only access to a "record," not a "record in electronic format that contains personally identifiable information regarding the victim."

Sub. (1)(d) of § 943.017 provides: "'Record' has the meaning given in s. 19.32(2)."

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1912 HARASSMENT: ENGAGING IN A COURSE OF CONDUCT WHICH HARASSES OR INTIMIDATES ANOTHER — § 947.013(1r) and (1m)(b)

Statutory Definition of the Crime

Harassment, as defined in § 947.013 of the Criminal Code of Wisconsin, is committed by one who is subject to an order under § _____[1] that prohibits or limits contact with another person and who, with intent to harass or intimidate that person, engages in a course of conduct which harasses or intimidates the person, serves no legitimate purpose, and is accompanied by a credible threat that places the person in reasonable fear of death or great bodily harm.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. An order under § _____ prohibited or limited the defendant's contact with (name of victim) .
2. The defendant engaged in a course of conduct which harassed[3] or intimidated[4] (name of victim) and which served no legitimate purpose.

   A course of conduct is a series of acts over a period of time, however short, showing a continuity of purpose.[5]

3. The defendant engaged in the conduct with intent to harass or intimidate (name of victim) .

"With intent to harass or intimidate" means that the defendant acted with the mental purpose to harass or intimidate another person or was aware that (his) (her) conduct was practically certain to harass or intimidate another.[6]

4. The defendant's conduct was accompanied by a credible threat that placed (name of victim) in reasonable fear of death or great bodily harm.

"Credible threat" means a threat made with the intent to carry out the threat and with the apparent ability to do so.[7]

"Great bodily harm" means serious bodily injury.[8]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF ONE THE PENALTY FACTORS SET FORTH IN SUB. (1t) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACTOR IS ESTABLISHED[9]

If you find the defendant guilty, you must answer the following question(s):

FOR CHARGES UNDER SUB. (1t)[10]

[Did the defendant have a previous conviction for (identify the crime) ?[11]

Was the victim of that crime the victim of the crime in this case?

Did the crime in this case occur within 7 years after the previous conviction?]

FOR CHARGES UNDER SUB. (1v)

[Did the defendant intentionally gain access to a record in electronic format that contained personally identifiable information regarding the victim in order the facilitate the crime in this case?][12]

FOR CHARGES UNDER SUB. (1x)

[Did the defendant have a previous conviction for (identify the crime) ?[13]

Did the defendant intentionally gain access to a record in order the facilitate the crime in this case?][14]

CONTINUE WITH THE FOLLOWING IN ALL CASES

Before you may answer "yes", you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1912 was originally published in 1993 and revised in 1994. This revision was approved by the Committee in December 2002 and involved adoption of a new format.

See the Comment to Wis JI Criminal 1910 for general information about § 947.013.

A violation of § 943.017 is a Class A misdemeanor. The facts identified in subs. (1t) increase the penalty to a Class I felony. The facts identified in sub. (1v) and (1x) increase the penalty to a Class H felony. These penalty classifications take effect February 1, 2003.

The facts must be submitted to the jury because they increase the statutorily-authorized penalty range. The following form is suggested for the verdict:

"We, the jury, find the defendant guilty of harassment under Wis. Stat. § 947.013, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

[State the applicable question.]"

1. Here insert the number of the statute under which the order was entered: § 813.12, § 813.122, or § 813.125. See § 947.013(1r)(b). The validity of the underlying order may not be collaterally attacked in the criminal prosecution for violating the order, absent a showing of fraud in the obtaining of the order. State v. Bouzek, 168 Wis.2d 642, 484 N.W.2d 362 (Ct. App. 1992).

2. Identifying the elements of this offense requires combining facts found in several subsections of § 947.013. Subsection (1r) states that it is a Class A misdemeanor if a person violates subsection (1m) under "all the following circumstances":

(a) The act is accompanied by a credible threat that places the victim in reasonable fear of death or great bodily harm.

(b) The act occurs while the actor is subject to an order or injunction under s. 813.12, 813.122 or 813.125 that prohibits or limits his or her contact with the victim.

So two of the elements of the offense are those specified above. The other two are provided in subsection (1m). Subsection (1m)(a) states: "Engages in a course of conduct which harasses or intimidates the person and serves no legitimate purpose." This is used in the second element. [An alternative is provided in (1m)(a): "Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same." See Wis JI-Criminal 1910.] The introductory clause of subsection (1m) refers to engaging in conduct "with intent to harass or intimidate another person." This is used as the third element in the instruction.

3. The way "harass" is used in § 947.013(1m)(b) is the same as that used in the harassment restraining order statute, § 813.125(1)(b). The restraining order statute was found to be constitutional by the Wisconsin Supreme Court in Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), where the court found the meaning of harassment readily ascertainable by reference to a dictionary: "'Harass' means to worry and impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil, or badger." 139 Wis.2d 397, 407 citing Webster's Third New International Dictionary 1031 (1961).

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary.

4. "Intimidate" is defined as "to make timid or fearful" in Webster's New Collegiate Dictionary.

5. This definition is based on the one provided in § 947.013(1)(a), which reads as follows:

"Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.

6. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

For a discussion of the meaning of "harass" and "intimidate," see notes 3 and 4, Wis JI-Criminal 1912.

7. This definition is based on the one provided in § 947.013(1)(b), which reads as follows:

"Credible threat" means a threat made with the intent and apparent ability to carry out the threat.

8. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a more complete discussion of the definition of "great bodily harm."

9. The questions address the penalty-increasing facts set forth is subs. (1t), (1v), and (1x) of § 943.017.

10. The following three questions address the penalty-increasing provision set forth in sub. (1t) of § 943.017: "Whoever violates sub. (1r) is guilty of a Class I felony if the person has a prior conviction under this subsection or (sub. (1r), (1v), or (1x) or s. 940.32 (2), (2e), (2m), or (3) involving the same victim and the present violation occurs within 7 years of the prior conviction."

11. The applicable crimes are: a violent crime as defined in § 939.632(1)(e)1.; stalking under § 940.32; or, harassment under § 947.013(1r), (1t), (1v), or (1x).

12. The factor specified in § 947.013(1v) increases the penalty to that for a Class H felony.

Sub. (1)(c) of § 943.017 provides: "'Personally identifiable information' has the meaning given in s. 19.62(5)."

Sub. (1)(d) of § 943.017 provides: "'Record' has the meaning given in s. 19.32(2)."

13. The facts set forth in sub. (1x) increase the penalty to that for a Class H felony.

The applicable crimes are: violations § 947.013(1r), (1t), or (1v); or, violations of § 940.32(2), (2e), (2m), or (3).

14. Note that this fact is not worded in the same manner as the similar fact in sub. (1v). This statement requires only access to a "record," not a "record in electronic format that contains personally identifiable information regarding the victim."

Sub. (1)(d) of § 943.017 provides: "'Record' has the meaning given in s. 19.32(2)."

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1919 SWATTING — § 947.014

Statutory Definition of the Crime

Swatting, as defined in section 947.014 of the Criminal Code of Wisconsin, is committed by one who intentionally conveys or causes to be conveyed any false information that an emergency exists, which elicited, or could elicit a response from a specialized tactical team, knowing such information to be false.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (conveyed) (caused to be conveyed) information concerning the existence of an emergency.

   "Emergency" means [Specify type of emergency as provided in 947.014(1)(b)].[1]

   "Intentionally" means that the defendant must have had the mental purpose to (convey) or (cause to be conveyed) information that an emergency exists.[2]

2. The information was false.

3. The defendant knew that the information was false. This requires only that the defendant believed that the information was false.[3]

4. The information (elicited) (could have elicited) a response from a specialized tactical team.

A "specialized tactical team" means a special weapons and tactics team or tactical response team that is designated by a law enforcement agency and whose members are recruited, selected, trained, equipped, and assigned to resolve critical incidents that involve a threat to public safety.[4]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS H OR E FELONY AND THERE IS EVIDENCE THAT THE PENALTY-INCREASING FACT IS PRESENT[5]

[If you find the defendant guilty, you must answer the following question:

(Did the violation result in bodily harm to any person?)

(Did the violation result in great bodily harm to any person?)

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."]

COMMENT

Wis JI-Criminal 1919 approved by the Committee in June 2020.

This instruction is drafted for violations of § 947.014, created by 2019 Wisconsin Act 132 [effective date: March 5, 2020].

The offense is a Class I felony, unless the violation "resulted in bodily harm to any person," in which case the penalty increases to a Class H felony. If the violation "resulted great bodily harm to any person," the penalty increases to a Class E felony. § 947.014(3).

1. Section 947.014(1)(b) provides: "Emergency" means any of the following:
    1. A condition that results in or could result in the response of a law enforcement officer, tribal law enforcement officer, state-certified commission warden, fire fighter, emergency medical responder, or emergency medical services practitioner in an authorized emergency vehicle, aircraft, or vessel.
    2. A condition that jeopardizes or could jeopardize public safety and results in or could result in the evacuation of any area, building, structure, or vehicle.

2. "Intentionally" means that the actor has the mental purpose to cause the result specified or "is aware that his or her conduct is practically certain to cause that result." § 939.23(3) The "mental purpose" alternative is most likely to apply to this offense. For discussion of the "practically certain" alternative, see Wis JI-Criminal 923B.

3. Section 939.23(3) provides that when the word "intentionally" is used in a criminal statute, it requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally.'"

4. Section 947.014(1)(h).

5. The special question addresses the penalty-increasing facts that are provided in § 947.014(3). A violation resulting in bodily harm to any person is a Class H felony. An offense resulting in great bodily harm to any person is a Class E felony.

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1920 BOMB SCARES — § 947.015

Statutory Definition of the Crime

Bomb scare, as defined in section 947.015 of the Criminal Code of Wisconsin, is committed by one who intentionally conveys or causes to be conveyed any threat or false information, knowing such to be false, concerning an attempt or alleged attempt being made or to be made to destroy any property by means of explosives.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (conveyed) (caused to be conveyed) (a threat) (information) concerning an attempt or alleged attempt (being made) (to be made) to destroy any property by means of explosives.

   "Intentionally" means that the defendant must have had the mental purpose to convey or cause to be conveyed (a threat) (information) concerning an attempt or alleged attempt (being made) (to be made) to destroy property by means of explosives.[1]

   FOR CASES INVOLVING A THREAT ADD THE FOLLOWING.[2]

   [A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires

that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in making this determination.]

2. The (threat) (information) was false.[3]

3. The defendant knew that the (threat) (information) was false. This requires only that the defendant believed that the (threat) (information) was false.[4]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1920 was originally published as Wis JI-Criminal 1905 in 1971. It was renumbered and republished without change in 1987 and revised in April 1993. The instruction was revised in 2008. This revision was approved in 2020; it added to the comment.

In State v. Van Ark, 62 Wis.2d 155, 215 N.W.2d 41 (1974), the Wisconsin Supreme Court held that a violation of § 947.015 was not a lesser included offense of what was then endangering safety by

conduct regardless of life. The current counterpart to that offense is Recklessly Endangering Safety under § 941.30.

1. "Intentionally" means that the actor has the mental purpose to cause the result specified or "is aware that his or her conduct is practically certain to cause that result." § 939.23(3) The "mental purpose" alternative is most likely to apply to this offense. For discussion of the "practically certain" alternative, see Wis JI-Criminal 923B.

2. In State v. Robert T., 307 Wis.2d 488, 746 N.W.2d 564 (2008), the court of appeals held that "§ 947.015 must be read with the limitation that only a false bomb scare that constitutes a 'true threat' can be charged." ¶12. The definition of "threat" in the instruction is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. State v. Robert T. cited Perkins with approval. The Committee concluded that the term "true threat" is a constitutional term of art that need not be communicated to the jury in a situation like the one covered by this instruction where it could be especially confusing given the requirement that the threat be false.

Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

3. Although the statute does not specify that the threat be "false," the Committee is satisfied this is implied by the next clause referring to the actor to "knowing such to be false."

This conclusion is bolstered by the decision in State v. Van Ark, supra. In concluding that a violation of § 947.015 was not a lesser included offense of what was then called endangering safety by conduct regardless of life, the court identified the elements of § 947.015 as follows:

> It is apparent from a comparison of the two statutes that sec. 947.015, Stats., is not an included crime in sec. 941.30 because it does require proof of additional facts, namely, the conveyance of a false bomb threat and knowledge that it is false. The state would be required to prove under sec. 941.30 that the "bomb" was imminently dangerous and under sec. 947.015 that the "bomb" was false or inoperable.

62 Wis.2d 155, 164

4. Section 939.23(3) provides that when the word "intentionally" is used in a criminal statute, it requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally.'"

1925A INTENTIONAL TERRORIST THREATS — § 947.019(1)(a) - (d)

Statutory Definition of the Crime

Making a terrorist threat, as defined in § 947.019 of the Criminal Code of Wisconsin, is committed by any person who threatens to cause the death of or bodily harm to any person or to damage any person's property and who intends to (prevent the occupation of or cause the evacuation of a building)[1] (cause public inconvenience) (cause public panic or fear) (cause an interruption or impairment of governmental operations).[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause the death of or bodily harm to any person or to damage any person's property.

   A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the

circumstances in determining whether a threat is a true threat.[3]

2. The defendant intended to (prevent the occupation of or cause the evacuation of a building) (cause public inconvenience) (cause public panic or fear) (cause an interruption or impairment of governmental operations).

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1925A was approved by the Committee in December 2016. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

This instruction is drafted for violations of sec. 947.019(1)(a) - (d), created by 2015 Wisconsin Act 311 [effective date: April 1, 2016]. Each subsection requires intent to cause the specified result. Violations of sub. (1)(e), which involve recklessness instead of intent, are addressed by Wis JI Criminal 1925B.

The offense is a Class I felony unless the violation "contributes to any individual's death," in which case the penalty increases to a Class G felony. Sec. 947.019(2).

1. In addition to applying to a "building," the statute also applies to "dwelling, school premises, vehicle, facility of public transportation, or place of public assembly or any room within a building, dwelling, or school." The instruction is drafted for "building" because that appears to be the most comprehensive term. If one of the more specific terms applies, it should be substituted here and in the second element.

2. The statute also applies to causing an interruption or impairment of "public communication, of transportation, or of a supply of water, gas, or other public service." The instruction is drafted for

impairment of "governmental operations" because that appears to be the most comprehensive term. If one of the more specific terms applies, it should be substituted here and in the second element.

3. Other Wisconsin statutes prohibiting a "threat" have been interpreted to require a "true threat." The definition of "true threat" is based on the one used for the other criminal offenses involving threats and is derived from State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. For a complete explanation of the definition, see footnote 3, Wis JI-Criminal 1240B Threat To A Judge.

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1925B RECKLESS TERRORIST THREATS — § 947.019(1)(e)

Statutory Definition of the Crime

The making of terrorist threats, as defined in § 947.019 of the Criminal Code of Wisconsin, is committed by any person who threatens to cause the death of or bodily harm to any person or to damage any person's property and creates an unreasonable and substantial risk of (preventing the occupation of or causing the evacuation of a building)[1] (causing public inconvenience) (causing public panic or fear) (causing an interruption or impairment of governmental operations)[2] and is aware of that risk.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause the death of or bodily harm to any person or to damage any person's property.

   A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person

making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.[3]

2. The defendant created an unreasonable and substantial risk of (preventing the occupation of or causing the evacuation of a building) (causing public inconvenience) (causing public panic or fear) (causing an interruption or impairment of governmental operations).

3. The defendant was aware of that risk.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1925B was approved by the Committee in December 2016. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

This instruction is drafted for violations of sec. 947.019(1)(e), created by 2015 Wisconsin Act 311 [effective date: April 1, 2016]. Subsection (1)(e) requires creating "an unreasonable and substantial risk" that one of the specified harms will occur and being "aware of that risk," a standard equivalent to criminal recklessness under § 939.25. Violations of sub. (1)(a) - (d), which involve intent instead of recklessness, are addressed by Wis JI-Criminal 1925A.

The offense is a Class I felony unless the violation "contributes to any individual's death," in which case the penalty increases to a Class G felony. Sec. 947.019(2).

1. In addition to applying to a "building," the statute also applies to "dwelling, school premises, vehicle, facility of public transportation, or place of public assembly or any room within a building, dwelling, or school." The instruction is drafted for "building" because that appears to be the most comprehensive term. If one of the more specific terms applies, it should be substituted here and in the second element.

2. The statute also applies to causing an interruption or impairment of "public communication, of transportation, or of a supply of water, gas, or other public service." The instruction is drafted for impairment of "governmental operations" because that appears to be the most comprehensive term. If one of the more specific terms applies, it should be substituted here and in the second element.

3. Other Wisconsin statutes prohibiting a "threat" have been interpreted to require a "true threat." The definition of "true threat" is based on the one used for the other criminal offenses involving threats and is derived from State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. For a complete explanation of the definition, see footnote 3, Wis JI-Criminal 1240B Threat To A Judge.

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1930 FAILURE TO WITHDRAW FROM AN UNLAWFUL ASSEMBLY — § 947.06(3)

Statutory Definition of the Crime

Section 947.06(3) of the Criminal Code of Wisconsin is violated by any person who intentionally fails or refuses to withdraw from an unlawful assembly which the person knows has been ordered to disperse.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. An unlawful assembly existed.

CHOOSE THE ALTERNATIVE SUPPORTED BY THE EVIDENCE.[1]

[An assembly consists of three or more persons. An assembly is unlawful when it causes a disturbance of public order such that it is reasonable to believe[2] that the assembly will cause injury to persons or damage to property unless it is immediately dispersed.][3]

[An assembly consists of three or more[4] persons. An assembly is unlawful when those persons assemble for the purpose of blocking or obstructing the lawful use by any other person of any property and the assembly does in fact block or obstruct the lawful use of such property.][5]

2. The defendant was part of that assembly.[6]

3. The assembly was ordered to disperse by a police officer.[7]

4. The defendant knew that the assembly had been ordered to disperse.[8]

5. The defendant intentionally failed or refused to withdraw from the unlawful assembly.[9]

"Intentionally" means that the defendant must have had the mental purpose to fail or refuse to withdraw.[10]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1930 was originally published in 1992. This revision was approved by the Committee in February 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This offense was described as follows in the 1953 Legislative Council Report on the Criminal Code:

> Making assemblies which are likely to result in disorder unlawful is essentially a crime prevention device. An unlawful assembly is basically an assembly which is so dominated by mob psychology that its members are very likely to do acts of violence which as individuals they would not do. One type of unlawful assembly is bent on doing some particular unlawful act. The lynch mob is an example. Another type is best illustrated by the college homecoming riot type of situation. There, the assembly is not bent on any particular unlawful act, but in the process of "letting off steam," the loss of a sense of individual responsibility which results from large numbers acting together is apt to culminate in injury to person or property. The crux of the matter is that most of the people in an unlawful assembly are peaceful citizens who would never commit a violent crime if it were not for the fact that mob psychology dominates their thinking. Therefore, it follows that if the assembly can be dispersed and mob spirit dissipated before violence results, a real step toward preventing crime has been taken.

(Report, p. 215)

The constitutionality of § 947.06 was upheld by a three-judge district court panel in Cassidy v. Ceci, 320 F. Supp. 223 (E.D. Wis. 1970). The court held that the statute is not "vague or indefinite, but fairly apprises those required to comply with what 'it commands or forbids.' Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)." 320 F. Supp. 223, 226. The court also rejected the claim that the statute delegated too much discretion to police: ". . . the enactment with reasonable clarity delimits the officers' discretion in that it authorizes an arrest only where 'it is reasonable to believe' that the disturbance will cause injury. This is akin to the 'probable cause' standard. . . ." 320 F. Supp. 223, 226.

The court also held that the statute does not apply where the disturbance or damage is caused by hostile onlookers, not by the participants in the assembly: ". . . this statute adequately evidences a design to penalize the members of assemblies only when it is their own conduct which causes a disturbance or damage, as distinguished from a disturbance or damage that is caused by militant onlookers." 320 F. Supp. 223, 226. The court cited legislative history for the current version of the statute, indicating that the legislature intended to restate the rule found in Shields v. State, 187 Wis. 448, 204 N.W. 486 (1925).

The Shields decision affirmed the conviction of a man who assaulted a participant in a Ku Klux Klan parade in Boscobel in 1924. In reviewing the case, the court found it "appropriate to consider the legal status of the parade. . . ." The court found that as long as the people in the parade were conducting themselves peacefully, they were not engaged in an unlawful assembly, defined as assembling in such a manner "that the persons so assembled will disturb the peace tumultuously." The fact that the beliefs and tenets of those in the assembly might be expected to "excite resentment" in observers does not make the assembly unlawful. Thus, the defendant had no right to interfere with the parade and his conviction for assault was allowed to stand.

1. The two definitions of "unlawful assembly" deal with different kinds of conduct. The first involves an assembly that creates a risk of injury or damage. The second involves obstruction of the lawful use of property.

2. "Reasonable to believe" has been likened to the standard of probable cause. See Cassidy v. Ceci, 330 F. Supp. 223 (E.D. Wis. 1970).

3. This is adapted from the last sentence of § 947.06(1). Note that there are three parts to this definition of an unlawful assembly: (1) it must consist of three or more persons; (2) it must be causing a

disturbance of public order; and (3) it must be reasonable to believe that the assembly will cause personal injury or property damage unless it is immediately dispersed.

4. Including the requirement that there be three or more persons in this second definition is based on the reference in § 947.06(2) that an unlawful assembly "includes" an assembly as described in that subsection. The Committee interpreted this as a reference to incorporating the "three or more" requirement from the definition of unlawful assembly in subsection (1). While common law definitions of unlawful assembly vary, it was common that they required three or more persons. 1953 Report on the Criminal Code, p. 217. Also see Black's Law Dictionary (7th Edition), referring to unlawful assembly at common law as the meeting together of three or more persons.

5. This is adapted from the alternative definition of "unlawful assembly" provided in § 947.06(2).

6. This element is implicit in the definition of the crime, which penalizes refusal to withdraw from an unlawful assembly.

7. Section 947.06(1) provides that an order to disperse may be given by "sheriffs, their undersheriffs, and deputies, constables, marshals, and police officers." If other than a police officer is involved, the proper title should be substituted.

8. The definition of the crime refers to an assembly "which the person knows has been ordered to disperse." § 947.06(3). The knowledge requirement also results from the use of "intentionally" at the beginning of that section. See § 939.23(3).

9. The essence of this offense is the refusal to disperse when ordered to do so.

> While no crime has been committed under this section until there has been a refusal to comply with a lawful order to disperse, this section does not confer immunity on persons who commit some other crime while members of an unlawful assembly. Individual members of the assembly may be guilty of disorderly conduct, of conspiracies or attempts, or even of criminal damage to property or of homicide if the assembly has progressed to that stage. In this section, however, the emphasis is on the preventive police measures and obstruction to those measures.

1953 Report on the Criminal Code p. 216.

10. The Committee concluded that the "mental purpose" definition of intent is most likely to apply in the context of this offense. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

1960 CONTRIBUTING TO DELINQUENCY OR NEGLECT OF CHILDREN — § 947.15(1)(a)

1961 CONTRIBUTING TO DELINQUENCY OF CHILDREN BY PARENT, GUARDIAN, OR LEGAL CUSTODIAN — § 947.15(1)(b)

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1960 was originally published in 1967 and was revised in 1980.

Wis JI-Criminal 1961 was originally published in 1981.

Both instructions were withdrawn in 1989 because the statute with which they deal was repealed by 1987 Wisconsin Act 332, effective July 1, 1989. The conduct covered by the repealed statutes is prohibited by two new statutes. See § 948.21, Neglecting A Child (Wis JI-Criminal 2150) and § 948.40, Contributing To The Delinquency Of A Child (Wis JI-Criminal 2170, 2170A, and 2171).

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1980 MISTREATING AN ANIMAL — §§ 951.02 and 951.18(1)

Statutory Definition of the Crime

Mistreating an animal, as defined in §§ 951.02 and 951.18 of the Criminal Code of Wisconsin, is committed by one who (intentionally) (negligently)[1] treats any animal in a cruel manner.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant treated an animal[2] in a cruel manner.

   "Cruel" means causing (unnecessary and excessive pain or suffering) (unjustifiable injury or death).[3]

2. The defendant (intentionally) (negligently) treated an animal in a cruel manner.

   ["Intentionally" requires that the defendant acted with the mental purpose to treat the animal in a cruel manner or was aware that the conduct was practically certain to cause that result.][4]

   ["Negligently" requires that the defendant's conduct amounted to "criminal negligence."[5] "Criminal negligence" means:

   - the conduct created a risk of death or great bodily harm; and

- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED[6]

If you find the defendant intentionally treated an animal in a cruel manner, you must answer the following question:

["Did treating the animal in a cruel manner result in the (mutilation) (disfigurement) (death) of the animal?"][7]

["Did the defendant cause injury to the animal and know that the animal was used by a law enforcement agency to perform agency functions or duties?"][8]

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the answer to the question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1980 was originally published in 1984 and revised in 1986, 1989, 1995, and 2005. The 2005 revision adopted a new format and changed the definition of "negligently." The 2012 revision updated the Comment and footnote 2. This revision was approved by the Committee in December 2012; it added to the text for felony offenses and added to footnote 4.

1987 Wisconsin Act 332 renumbered the chapter containing crimes against animals from Chapter 948 to Chapter 951. The effective date of the change was July 1, 1989.

2011 Wisconsin Act 32 made changes in Chapter 951 relating to its application to scientific research. § 951.02 Mistreating Animals was amended to read as follows:

> No person may treat any animal, whether belonging to the person or another, in a cruel manner. This section does not prohibit ~~bona fide experiments carried on for scientific research or~~ normal and accepted veterinary practices.

And, § 951.015(3) was created to provide that the chapter does not apply to research pursuant to a procedure approved by an educational or research institution.

Simple violations of the statutes relating to cruelty to animals are Class C forfeitures. When a person "intentionally or negligently violates" the statutes, the offense is a Class A misdemeanor. See § 951.18(1). Section 951.18(1) further provides for a felony penalty in two circumstances: "Any person who intentionally violates s. 951.02, resulting in the mutilation, disfigurement, or death of an animal, is guilty of a Class I felony"; and, "Any person who intentionally violates § 951.02 or 951.06, knowing that the animal that is the victim is used by a law enforcement agency to perform agency functions or duties and causing injury to the animal, is guilty of a Class I felony."

If the felony offense is charged, the Committee suggests adding a special question to address the penalty-increasing fact.

Chapter 951 applies to individuals who used snowmobiles to run down and kill deer. Criminal charges are not superceded by regulations relating to hunting in Chapter 29, Wisconsin Statutes. State v. Kuenzi, 2011 WI App 30, ¶3, 332 Wis.2d 299, 796 N.W.2d 222.

1. "Intentionally" or "negligently" violating the statutes relating to cruelty to animals makes the conduct criminal (see Comment, supra). The instruction is drafted on the premise that one of the alternatives will be selected.

2. The following definition is provided in § 951.01(1):

(1) "Animal" includes every living:
(a) Warm-blooded creature, except a human being;
(b) Reptile; or
(c) Amphibian.

"The definition of 'animal' is based on § 346.20, Minn. Stats. Anno. (1971). The term includes not only animals strictly so-called but birds and other living warm-blooded creatures except people." Legislative Council Note to 1973 Senate Bill 16.

The definition of "animal" includes non-captive wild animals, such as deer. State v. Kuenzi, 2011 WI App 30, ¶17, 332 Wis.2d 299, 796 N.W.2d 222.

3. This definition is provided in § 951.01(2).

4. See § 939.23(3) and Wis JI-Criminal 923A and 923B. A charge of intentionally mistreating an animal, resulting in death, under §§ 951.02 and 951.18(1) requires proof of intent to treat the animal in a cruel manner; the state does not have to prove the defendant intended to cause the animal's death. State v. Klingelhoets, 2012 WI App 55, 341 Wis.2d 432, 814 N.W.2d 885.

5. The Committee concluded that "criminal negligence" applies to this offense because § 939.25(2) states: "If criminal negligence is an element of a crime in chs. 939 to 951 . . . the negligence is indicated by the term "negligent" or "negligently." This offense is defined in §§ 951.02 and 951.18 and the latter uses the term "negligently."

If reference to ordinary negligence is believed to be helpful in defining "criminal negligence," see Wis JI-Criminal 925.

6. Intentionally treating an animal in a cruel manner becomes a Class I felony in two situations. See footnotes 7 and 8, below. The Committee recommends that the penalty increasing fact be submitted to the jury in the form of a special question. The following form is suggested for the verdict; one of the bracketed questions should be included:

We, the jury, find the defendant guilty of mistreating an animal, under Wis. Stat. § 951.02, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

["Did treating the animal in a cruel manner result in the (mutilation) (disfigurement) (death) of the animal?"]

["Did the defendant cause injury to the animal and know that the animal was used by a law enforcement agency to perform agency functions or duties?"]

7. Section 951.18(1) provides: "Any person who intentionally violates s. 951.02, resulting the mutilation, disfigurement or death of an animal, is guilty of a Class I felony."

8. Section 951.18(1) provides: "Any person who intentionally violates s. 951.02 or 951.06, knowing that the animal that is the victim is used by a law enforcement agency to perform agency functions or duties and causing injury to the animal, is guilty of a Class I felony."

1981 HARASSMENT OF POLICE OR FIRE ANIMALS — §§ 951.095 and 951.18(2m)

Statutory Definition of the Crime

Sections 951.095 and 951.18(2m) of the Criminal Code of Wisconsin are violated by one who causes injury to an animal that is used by a law enforcement agency or fire department to perform agency or department functions by intentionally striking, shoving, kicking, or otherwise subjecting the animal to physical contact and knows that the animal is used by a law enforcement agency to perform agency functions.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name animal) was an animal used by a (law enforcement agency) (fire department) to perform (agency) (department) functions.
2. The defendant knew that the animal was used by a (law enforcement agency) (fire department) to perform (agency) (department) functions.
3. The defendant intentionally struck, shoved, kicked, or otherwise subjected the animal to physical contact.
4. Striking, shoving, kicking, or otherwise subjecting the animal to physical contact caused injury to the animal.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1981 was originally published in 1996 and revised in 1997. This revision was approved by the Committee in June 2004 and involved adoption of a new format.

1987 Wisconsin Act 332 renumbered the chapter containing crimes against animals from Chapter 948 to Chapter 951. The effective date of the change was July 1, 1989.

This instruction is drafted for a violation of § 951.095 that is punished as a Class I felony pursuant to § 951.18(2m): "Any person who intentionally violates s. 951.095, knowing that the animal that is the victim is used by a law enforcement agency or fire department to perform agency or department functions or duties and causing injury to the animal, is guilty of a Class I felony."

Simple violations of § 951.095 are punished as Class B forfeitures. When a person "intentionally or negligently violates" the statute, the punishment is that of a Class A misdemeanor. See § 951.18(2m). Section 951.18(2m) further provides for another felony penalty in addition to the offense addressed by this instruction: "Any person who intentionally violates s. 951.095, knowing that the animal that is the victim is used by a law enforcement agency or fire department to perform agency or department functions or duties and causing death to the animal, is guilty of a Class H felony."

1982 FAILING TO PROVIDE AN ANIMAL WITH SUFFICIENT FOOD AND WATER — §§ 951.13 and 951.18(1)

Statutory Definition of the Crime

Failing to provide an animal with sufficient food and water, as defined in §§ 951.13 and 951.18 of the Criminal Code of Wisconsin, is committed by one who owns or is responsible for confining or impounding an animal and (intentionally) (negligently)[1] fails to supply the animal with a sufficient supply of food and water.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (owned) (was responsible for confining) an animal.[2]
2. The defendant failed to supply the animal with a sufficient supply of food and water.
3. The defendant (intentionally) (negligently) failed to supply the animal with a sufficient supply of food and water.

   ["Intentionally" requires that the defendant acted with the mental purpose to fail to supply the animal with a sufficient supply of food and water or was aware that the conduct was practically certain to cause that result.][3]

["Negligently" requires that the defendant's conduct amounted to "criminal negligence."[4] "Criminal negligence" means:

- the conduct created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1982 was originally published in 1984 and revised in 1989 and 1995. This revision was approved by the Committee in June 2004 and involved adoption of a new format and a change in the definition of "negligently."

1987 Wisconsin Act 332 renumbered the chapter containing crimes against animals from Chapter 948 to Chapter 951. The effective date of the change was July 1, 1989.

Simple violations of the statutes relating to cruelty to animals are punished as Class C forfeitures. When a person "intentionally or negligently violates" the statutes, the punishment is that of a Class A misdemeanor. See § 951.18(1). Section 951.18(1) further provides for a felony penalty in certain circumstances that do not apply to violations of § 951.13, the statute addressed by this instruction.

1. "Intentionally" or "negligently" violating the statutes relating to cruelty to animals makes the conduct criminal (see Comment, supra). The instruction is drafted on the premise that one of the alternatives will be selected.

2. The following definition is provided in § 951.01(1):

(1) "Animal" includes every living:
(a) Warm-blooded creature, except a human being;
(b) Reptile; or

(c) Amphibian.

"The definition of 'animal' is based on § 346.20, Minn. Stats. Anno. (1971). The term includes not only animals strictly so-called but birds and other living warm-blooded creatures except people." Legislative Council Note to 1973 Senate Bill 16.

3. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

4. The Committee concluded that "criminal negligence" applies to this offense because § 939.25(2) states: "If criminal negligence is an element of a crime in chs. 939 to 951 . . . the negligence is indicated by the term "negligent" or "negligently." This offense is defined in §§ 951.02 and 951.18 and the latter uses the term "negligently."

If reference to ordinary negligence is believed to be helpful in defining "criminal negligence," see Wis JI-Criminal 925.

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1983 DOGNAPPING AND CATNAPPING — §§ 951.03 and 951.18(1)

Statutory Definition of the Crime

(Dognapping) (Catnapping) as defined in §§ 951.03 and 951.18 of the Criminal Code of Wisconsin, is committed by one who intentionally[1] takes the (dog) (cat) of another from one place to another without the owner's consent.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant took the (dog) (cat) of another from one place to another.
2. The owner of the (dog) (cat) did not consent to the taking.
3. The defendant acted intentionally.

   This requires that the defendant acted with the mental purpose to take the (dog) (cat) of another and knew that the (dog) (cat) belonged to another and knew that the owner did not consent to the taking.[3]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1983 was originally published in 1996. This revision was approved by the Committee in June 2004 and involved adoption of a new format.

This instruction is for one type of violation of § 951.03, Dognapping and Catnapping: taking a dog or cat from one place to another without the owner's consent. The violation is punished as a Class A misdemeanor if committed "negligently or intentionally." § 951.18(1).

The statute" does not apply to law enforcement officers or humane society agents engaged in the exercise of their official duties." The Committee concluded that exceptions like this are usually resolved at the pretrial motion stage. It does not become an issue at trial until there is some evidence that the exception may apply. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that "the defendant was not a (law enforcement officer) (humane society agent) engaged in the exercise of official duties." Appropriate additions should be made to the instruction.

1. Violations of § 951.03 become Class A misdemeanors if committed "intentionally or negligently." See § 951.18(1). The instruction uses the term "intentionally," the Committee having concluded that negligent dognappings or catnappings are unlikely to be criminally charged.

2. Section 951.03 also prohibits "caus[ing] such a dog or cat to be confined or carried out of this state or held for any purpose without the owner's consent." These options are not addressed in the instruction, which is drafted for violations involving a taking of the animal. For the other options,

reference to the uniform instructions for kidnapping offenses might be helpful. See Wis JI-Criminal 1280 - 1282.

3. The definition of "intentionally" uses the mental purpose alternative, which the Committee believes is most likely to apply to this offense. "Intentionally" also applies to one who is "aware that his or her conduct is practically certain to cause that result." See § 939.23(3) and Wis JI-Criminal 923A and 923B. Section 939.23(3) also provides that "intentionally" requires that the "actor have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'." With this offense, "intentionally" becomes applicable because it is set forth in the penalty section, § 951.18. See note 1, supra.

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1984 FAILING TO PROVIDE AN ANIMAL WITH PROPER SHELTER — §§ 951.14 and 951.18(1)

Statutory Definition of the Crime

Failing to provide an animal with proper shelter, as defined in §§ 951.14 and 951.18 of the Criminal Code of Wisconsin, is committed by one who owns or is responsible for confining or impounding an animal and (intentionally) (negligently)[1] fails to supply the animal with proper shelter.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (owned) (was responsible for confining) an animal.[2]
2. The defendant failed to proper shelter for the animal.

   Shelter is proper when it is sufficient to maintain the animal in good health.[3]
3. The defendant (intentionally) (negligently) failed to supply the animal with proper shelter.

   ["Intentionally" requires that the defendant acted with the mental purpose to fail to supply the animal with proper shelter or was aware that the conduct was practically certain to cause that result.][4]

["Negligently" requires that the defendant's conduct amounted to "criminal negligence."[5] "Criminal negligence" means:

- the conduct created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1984 was originally published in 1984 and revised in 1989 and 1995. This revision was approved by the Committee in June 2004 and involved adoption of a new format and a change in the definition of "negligently."

1987 Wisconsin Act 332 renumbered the chapter containing crimes against animals from Chapter 948 to Chapter 951. The effective date of the change was July 1, 1989.

Simple violations of the statutes relating to cruelty to animals are punished as Class D forfeitures. When a person "intentionally or negligently violates" the statutes, the punishment is that of a Class A misdemeanor. See § 951.18(1). Section 951.18(1) further provides for a felony penalty in certain circumstances that do not apply to § 951.14, the statute addressed by this instruction.

1. "Intentionally" or "negligently" violating the statutes relating to cruelty to animals makes the conduct criminal (see Comment, supra). The instruction is drafted on the premise that one of the alternatives will be selected.

2. The following definition is provided in § 951.01(1):

(1) "Animal" includes every living:

(a) Warm-blooded creature, except a human being;
(b) Reptile; or
(c) Amphibian.

"The definition of 'animal' is based on § 346.20, Minn. Stats. Anno. (1971). The term includes not only animals strictly so-called but birds and other living warm-blooded creatures except people." Legislative Council Note to 1973 Senate Bill 16.

3. If more detailed explanation of "proper shelter" is required, see subsecs. (1) through (4) of sec. 951.14 which address indoor standards, outdoor standards, space standards, and sanitation standards, respectively.

4. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

5. The Committee concluded that "criminal negligence" applies to this offense because § 939.25(2) states: "If criminal negligence is an element of a crime in chs. 939 to 951 . . . the negligence is indicated by the term "negligent" or "negligently." This offense is defined in §§ 951.02 and 951.18 and the latter uses the term "negligently."

If reference to ordinary negligence is believed to be helpful in defining "criminal negligence," see Wis JI-Criminal 925.

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1986 INSTIGATING FIGHTS BETWEEN ANIMALS — § 951.08(1)

Statutory Definition of the Crime

Section 951.08(1) of the Criminal Code of Wisconsin is violated by one who intentionally [(instigates) (promotes)] [participates in the earnings from] [maintains or allows any place to be used for] a (cockfight) (dogfight).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [(instigated) (promoted)] [participated in the earnings from] [maintained or allowed any place to be used for] a (cockfight) (dogfight).[1]
2. The defendant did so intentionally.

   This requires that the defendant acted with the mental purpose[2] to [(instigate) (promote)] [participate in the earnings from] [maintain or allow any place to be used for] a (cockfight) (dogfight).

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1986 was approved by the Committee in February 2009 and involved adoption of a new format and nonsubstantive changes to the text.

Penalties for violations of § 951.08(1) are set forth in § 951.18(2): a Class I felony for the first violation and a Class H felony for the second or subsequent violation. For a case charged as a Class H felony, the fact of the prior conviction would not be a fact that is submitted to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

1. The instruction provides for selecting "cockfight" or "dogfight," which the Committee believes are the most likely cases to be charged. The statute applies however, to additional conduct: ". . . bullfight or other fight between the same or different kinds of animals or between an animal and a person." § 951.08(1).

2. The Committee concluded that the "mental purpose" part of the definition of "intentionally" is most likely to apply to this offense. For a complete discussion of the meaning of "intentionally" see Wis JI-Criminal 923A and Wis JI-Criminal 923B.

1988 KEEPING AN ANIMAL WITH INTENT THAT IT ENGAGE IN FIGHTING — § 951.08(2)

Statutory Definition of the Crime

Section 951.08(2) of the Criminal Code of Wisconsin is violated by one who owns, possesses, keeps, or trains any animal with the intent that the animal be engaged in an exhibition of fighting.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (owned) (possessed) (kept) (trained) an animal.[1]
2. The defendant did so with the intent that the animal be engaged in an exhibition of fighting.

   This requires that the defendant acted with the mental purpose[2] that the animal be engaged in an exhibition of fighting.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1988 was approved by the Committee in February 2009 and involved adoption of a new format and nonsubstantive changes to the text.

Penalties for violations of § 951.08(2) are set forth in § 951.18(2): a Class I felony for the first violation and a Class H felony for the second or subsequent violation. For a case charged as a Class H felony, the fact of the prior conviction would not be a fact that is submitted to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

1. The Committee recommends selecting one of the terms in parentheses, but believes it is proper to submit all alternatives that are supported by the evidence.

2. The Committee concluded that the "mental purpose" part of the definition of "with intent that" is most likely to apply to this offense. For a complete discussion of the meaning of "intentionally" see Wis JI-Criminal 923A and Wis JI-Criminal 923B.

2000 ABANDONMENT BY HUSBAND OR FATHER

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 2000 was published in 1971. It applied to violations of Sec. 53.05(1) which defined a felony offense. That statute was repealed by 1985 Wisconsin Act 29 and replaced by § 940.27. An instruction for violations of § 940.27 is provided at Wis JI Criminal 1264. This note was republished without change in 1995.

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2010 PATERNITY

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 2010 dealt with the adjudication of paternity under § 52.21, et seq., 1963 Wis. Stats. Chapter 352, Laws of 1979, extensively changed paternity procedures, making Wis JI-Criminal 2010 obsolete. The instruction was withdrawn. Jury instructions for current paternity procedures will be published in Wis JI-Civil. This note was republished without change in 1995.

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2020 JUVENILE DELINQUENCY: COMPOSITE INSTRUCTION

2021 SAMPLE: DELINQUENCY UNDER CHAPTER 48: BURGLARY

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 2020 and 2021 were originally published in 1986 and revised in 1995. Their withdrawal was approved in February 2009.

1995 Wisconsin Act 77 changed the procedures for delinquency determinations – see Chapter 938, Juvenile Justice Code – that do not provide for a jury determination. See § 938.31(2). The provisions took effect on July 1, 1996.

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2031 CONTEMPT OF COURT: PUNITIVE SANCTION — § 785.01)

Statutory Definition of the Crime

Contempt of court, as defined in § 785.01(1)(b) of the Wisconsin Statutes, is committed by one who intentionally disobeys an order of a court.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. A court ordered the defendant to (describe terms of order).[2]
2. The defendant had the ability to comply with that order.[3]
3. The defendant intentionally disobeyed that court order.

   "Intentionally" means that the defendant knew the court order had been issued and acted with the purpose to disobey it.[4]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2031was originally published in 1990 and revised in 1995. This revision was approved by the Committee in February 2009 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for "criminal contempt," more precisely termed "punitive sanction for contempt of court." The "punitive sanction" is set forth in § 785.04(2)(a) which provides that a fine of not more than $5,000 or imprisonment in the county jail for not more than one year or both may be imposed "after a finding of contempt of court in a nonsummary procedure." Nonsummary procedures for punitive sanctions are described in § 785.03(1)(b) which provides, inter alia, that the "complaint shall be processed under chs. 967-973." The Committee has concluded that regular criminal procedure is to be followed, including the giving of regular criminal jury instructions.

The court of appeals has ruled that punitive contempt is not a crime, and thus its penalty cannot be enhanced by reference to the general repeater statute, § 939.62. State v. Carpenter, 179 Wis.2d 838, 842, 508 N.W.2d 69 (Ct. App. 1993), quoting from McGee v. Racine County Circuit Court, 150 Wis.2d 178, 441 N.W.2d 308 (Ct. App. 1989): "Contempt proceedings are sui generis and are neither civil actions nor criminal prosecutions within the ordinary meaning of those terms."

The dismissal of a criminal complaint charging punitive contempt was reversed in State v. Chinavare, 185 Wis.2d 528, 518 N.W.2d 772 (Ct. App. 1994), the court holding that it is proper to charge someone with violating a court order as a party to the crime: "One directly violates a court order by having others do the things prohibited by the order even if those others are not bound by the order." 185 Wis.2d 528, 535.

Section 785.01(1)(bm) provides that contempt includes intentional "Violation of any provision of s. 767.117(1)," which prohibit certain conduct during the pendency of an action affecting the family.

Procedures relating to the contempt power of the court are addressed in CR-29, Wisconsin Judicial Benchbooks, Volume I.

1. This instruction is for one type of offense defined in subsection (1)(b) of § 785.01: "Disobedience, resistance or obstruction of the authority, process, or order of a court." The instruction is drafted in terms of disobeying an order of the court because the Committee concluded that in most contempt cases, a court order is issued and the contempt charge is based on the defendant's disobeying that order.

It apparently is not appropriate to challenge the validity of the order in the context of the criminal prosecution based on failure to obey that order. In State v. Orethun, 84 Wis.2d 487, 267 N.W.2d 318 (1978), the Wisconsin Supreme Court affirmed a conviction for operating after revocation. The defendant had claimed that his revocation should have been deemed not to have occurred because a speeding conviction on which the revocation was based had been vacated. The court held that legal channels were available to challenge the speeding conviction and the revocation. Those are the remedies that must be pursued – a driver has to comply with the revocation until it is set aside through one of the proper channels.

The court in Orethun analogized the case to "that of the person who fails to comply with an injunction but then argues that he should not be held in contempt because the injunction was erroneously granted." 84 Wis.2d 487, 480. Getka v. Lader, 71 Wis.2d 237, 238 N.W.2d 87 (1976), was quoted:

> Setting aside the trial court injunction against the defendants does not, ipso facto, erase the contempt finding. . . . Where a court has jurisdiction over the subject matter and the parties, the fact that an order or judgment is erroneously or improvidently rendered does not justify a person in failing to abide by its terms. The subsequent appeal and reversal of the injunction here does not alter the obligation of the defendants in this case to initially comply with such injunction until it was stayed or set aside. [Footnote omitted.]

2. The Committee recommends describing the order that is the basis for the contempt charge.

3. The essence of this offense is an omission – the failure to obey a court order. Criminal liability for an omission generally requires the ability to perform the required acts. See State v. Williquette, 129 Wis.2d 239, 251, 385 N.W.2d 145 (1986), citing LaFave and Scott, Criminal Law, sec. 26 at 182. This general rule can be changed by the statutory definition of a particular offense. See, for example, § 948.22, Failure To Support, discussed in notes 5 and 10, Wis JI-Criminal 2152. The Wisconsin Supreme Court has held that ". . . it is essential in contempt cases that the thing ordered to be done be within the power of the person." In re Adam's Rib, Inc. (Kaminsky), 39 Wis.2d 741, 746, 159 N.W.2d 643 (1968).

4. "Intentionally" is defined in § 939.23(3) as either having the mental purpose to cause the result specified or being "aware that his conduct is practically certain to cause that result." Having the "mental purpose" is believed to be the most likely alternative for this offense. For definition of the other alternative, see Wis JI-Criminal 923B.

The meaning of "intentional" as used in § 785.01 was discussed in Shepard v. Outagamie County Circuit Court, 189 Wis.2d 279, 535 N.W.2d 764 (Ct. App. 1994). The court fell short of explicitly adopting the definition from § 939.23, but its decision is consistent with that definition of the term "intentionally."

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2040 VIOLATING A TEMPORARY RESTRAINING ORDER OR AN INJUNCTION — §§ 813.12, 813.122, 813.123, 813.125[1]

Statutory Definition of the Crime

Violating (an injunction) (a temporary restraining order), as defined in § _____[2] of the Wisconsin Statutes, is committed by one who knowingly violates (an injunction) (a temporary restraining order) issued under § _____[3] of the Wisconsin Statutes.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (An injunction) (A temporary restraining order) was issued against (name of defendant) under § _____ of the Wisconsin Statutes.

   (An injunction) (A temporary restraining order) is a court order prohibiting specified conduct.

   ADD THE FOLLOWING FOR VIOLATIONS OF § 813.12 WHEN SUPPORTED BY THE EVIDENCE

   [An injunction remains in effect even if the petitioner allows or initiates contact with the respondent or if the respondent is admitted into a dwelling that the injunction directs him or her to avoid.][4]

2. The defendant committed an act that violated the terms of the (injunction) (temporary restraining order).

3. The defendant knew that the (injunction) (temporary restraining order) had been issued and knew that (his) (her) acts violated its terms.[5]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2040 was originally published in 1987 and revised in 1988, 1995, 2001, 2010, and 2011. This revision was approved by the Committee in December 2018; it updated the Comment and made non-substantive changes in the text.

Wis JI-Criminal 2040 is drafted for use for any one of the four restraining order/injunction statutes in chapter 813. See note 1, below. The statutes are essentially the same, though variations in the text are present. Violations of restraining orders may also constitute the offense of "harassment" as defined in § 947.013. See Wis JI-Criminal 1910, 1911, and 1912.

The constitutionality of § 813.12 was upheld in Schramek v. Bohren, 145 Wis.2d 695, 429 N.W.2d 501 (Ct. App. 1988).

For a discussion of cases involving harassment restraining orders under § 813.125, see the material following note 5.

A defendant cannot collaterally attack the validity of a harassment injunction [issued under § 813.125] in a criminal prosecution for the violation of that injunction. State v. Bouzek, 168 Wis.2d 642, 484 N.W.2d 362 (Ct. App. 1992).

A judge's oral remarks relating to the scope of an injunction issued under § 813.125 modify the terms of the written order. State v. O'Dell, 193 Wis.2d 333, 532 N.W.2d 741 (1995). The court noted,

however, that trial courts are "strongly encouraged" to incorporate all oral modifications into the written injunction. 193 Wis.2d 333, 344.

The restraining order statutes were amended by 1995 Wisconsin Act 71, to prohibit possession of firearms by persons subject to the orders. All persons enjoined under §§ 813.12 and 813.122 are prohibited from possessing firearms. See §§ 813.12(4m) and 813.122(5m), created by 1995 Wisconsin Act 71. Persons enjoined under §§ 813.123 and 813.125 may be prohibited from possessing firearms if a specific finding is made. See § 813.123(5m) and 813.125(4m). Possession of a firearm by persons subject to these injunctions is punishable as a violation of § 941.29. See Wis JI-Criminal 1344.

1. The instruction has been drafted for use for any one of the four restraining order/injunction offenses now defined by the Wisconsin Statutes:

§ 813.12 - Domestic Abuse
§ 813.122 - Child Abuse
§ 813.123 - Individuals at Risk
§ 813.125 - Harassment.

Note: Domestic abuse injunctions and orders under § 813.12 include an injunction or order "issued by a tribal court under a tribal domestic abuse ordinance adopted in conformity with this section." § 813.12(1)(e).

2. In the blank provided, insert one of the following:

§ 813.12(8) - for a domestic abuse case
§ 813.122(11) - for a child abuse case
§ 813.123(10) - for an individual at risk case
§ 813.125(7) - for a harassment case.

3. In the blank provided, insert one of the following if the case involves violation of an injunction:

§ 813.12(4) - for a domestic abuse case
§ 813.122(5) - for a child abuse case
§ 813.123(5) - for an individual at risk case
§ 813.125(4) - for a harassment case.

If a temporary restraining order is involved, substitute § 813.12(3), § 813.122(4), § 813.123(4), or § 813.125(3), as appropriate.

4. This is a paraphrase of the rules stated in § 813.12(4)(c); no change in meaning is intended. Similar provisions are <u>not</u> found in the other injunction statutes to which this instruction applies.

5. That the defendant "knowingly" violated the order is explicitly required by §§ 813.12(8) and 813.122(11). Section 813.123(10) requires that the defendant "intentionally violates" the order. "Knowingly" is absent from § 813.125(7), which establishes the criminal penalty for violations of harassment orders. The Committee concluded that "knowingly" should be required in the latter situation as well.

Whether the order was properly served is relevant to the knowledge requirement since it is an effective way to prove that the defendant did have knowledge of the order. However, service of the injunction is not specifically dealt with in the instruction. In domestic abuse, child abuse and individual at risk cases, §§ 813.12(2), 813.122(2), and 813.123(2), respectively, provide that the "action commences with service of the petition." Thus, without service, there could be no action and no criminal charge for violating the injunction or temporary restraining order. There is no counterpart for this subsection in § 813.125 for harassment cases. However, in order to issue the harassment injunction, the court must have found that the temporary restraining order was served on the defendant, see § 813.125(4)(a)2. Therefore, the same result – no action without service – ought to follow in the harassment case, despite the difference between the statutes.

Statutes in each of the four types of cases require that notice of the injunction hearing be served. If the defendant did not appear at the hearing, proof of service would show that he has received notice that an injunction may be issued which will contain the same terms as the temporary restraining order. It is error to instruct the jury to "accept as conclusively proven" that the defendant was served with the order. State v. Gordon, 2002 WI App 53, ¶45, 250 Wis.2d 702, 641 N.W.2d 183.

Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), and State v. Sarlund, 139 Wis.2d 386, 407 N.W.2d 544 (1987), upheld the constitutionality of the harassment injunction statute, § 813.125. In the process, however, the court emphasized that to be valid, the injunctions had to be narrowly drawn: they "must be specific as to acts and conduct which are enjoined." The injunction in the Salamone case, restraining "any contact" with the petitioner, was held invalid because it described the prohibited conduct too broadly.

In the Committee's judgment, the injunction would be properly framed if it prohibited future "harassment." Section 813.125 allows the issuance of an injunction if the person has engaged in "harassment" under § 947.013. While a violation of § 947.013 is directly punishable as a Class B forfeiture, engaging in conduct prohibited by the criminal statute also justifies the issuance of an injunction. The injunction may order a person not to engage in any more "harassment," see § 813.125(4)(a). Violating the injunction is then punishable as a crime. That is, a person may not engage in another violation of § 947.013 without suffering criminal penalties under § 813.125. Such an injunction is valid because it only covers conduct prohibited by § 947.013. The definition of "harassment" found in that statute was upheld in the two cases cited above as providing sufficient notice of the prohibited conduct and not infringing on innocent or protected behavior.

Under this approach, a violation of § 947.013 supports the issuance of an injunction ordering the person not to violate § 947.013 again. A second violation of § 947.013 violates the injunction. This seems to avoid the overbreadth and vagueness problems of orders that prevent "all contact" or "any communication." And in the criminal action, the issues would be: (1) was there an order; and (2) did the defendant (knowingly) engage in "harassment" as defined in § 947.013 (which definition has been upheld as constitutional).

2042 VIOLATING A FOREIGN PROTECTION ORDER — § 813.128

Statutory Definition of the Crime

Violating a foreign protection order, as defined in § 813.128 of the Wisconsin Statutes, is committed by one who knowingly violates a condition of a foreign protection order that is entitled to full faith and credit under § 806.247.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. A foreign protection order was issued against (name of defendant) .
2. The foreign protection order was entitled to full faith and credit under § 806.247.
3. The defendant committed an act that violated a condition of the foreign protection order.[2]
4. The defendant knew that the foreign protection order had been issued and knew that (his) (her) acts violated its terms.

Definition of Foreign Protection Order

"Foreign protection order" means any temporary or permanent injunction or order of a civil or criminal court (of the United States) (of an Indian tribe) (of any other state) issued for preventing abuse, bodily harm, communication, contact, harassment, physical

proximity, threatening acts or violence by or to a person, other than support or custody orders.[3]

Determination of Full Faith and Credit

"Full faith and credit" means that an order from a court outside the state is enforced as if the order was an order of a court in this state. An order shall be accorded full faith and credit if all of the following conditions are met:[4]

- the person against whom the order was issued received reasonable notice; and,
- the person against whom the order was issued received an opportunity to be heard that was sufficient to protect (his) (her) right to due process; and,
- the court that issued the order had jurisdiction over the parties and over the subject matter.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2042 was approved by the Committee in December 2001.

Section 813.128(1) provides that a "foreign protection order or modification of a foreign protection order that meets the requirements under s. 806.247(2) has the same effect as an order issued under s. 813.12, 813.122, 813.123, or 813.125, except that the foreign protection order or modification shall be enforced according to its own terms." Subsection (2) provides a criminal penalty [a fine of not more than $1,000 or imprisonment for not more than 9 months or both] for "a person who knowingly violates a condition of a foreign protection order. . ."

This instruction follows the approach used for violations of the other restraining order/injunction statutes. See Wis JI-Criminal 2040.

1. The Committee concluded that the "full faith and credit" issue is a fact that the jury must find. This is based on the conclusion that it is part of the definition of the crime in § 813.128(2): "A person who knowingly violates a condition of a foreign protection order . . . that is entitled to full faith and credit . . ."

This conclusion is consistent with the decision of the U.S. Supreme Court in United States v. Gaudin, 515 U.S. 506 (1995). That decision resolved a split among the federal circuits regarding whether "materiality" under a federal false swearing statute was a fact that the jury must decide. The court rejected the Government's argument that "materiality" was a legal question to which the right to a jury determination does not attach. The court stated:

> . . . [T]he resolution of the question before us seems simple. The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.
> 515 U.S. 506, 511.

2. Section 813.128(2) applies to one who "knowingly violates a condition of a foreign protection order or modification of a foreign protection order ..." The instruction refers only to violating a condition of the order, the Committee having concluded that it should be sufficient to cover a violation of a modification to an original order.

3. This is the definition of "foreign protection order" provided in § 806.247(1)(b) without change.

4. The requirements for "full faith and credit" are based on the conditions set forth in § 806.247(2)(a). Expert testimony may be required to establish that the procedures in the foreign jurisdiction meet these requirements.

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2044 VIOLATING A DOMESTIC ABUSE CONTACT PROHIBITION — § 968.075(5)

Statutory Definition of the Crime

Section 968.075(5) of the Criminal Code of Wisconsin is violated by one who, within 72 hours of an arrest for a domestic abuse incident, intentionally does not avoid [the residence of the alleged victim of the domestic abuse incident] [any premises temporarily occupied by the alleged victim] [contacting or causing any person to contact the alleged victim].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was arrested for a domestic abuse incident.

   "Domestic abuse" means (identify the type of conduct specified in § 968.075(1)(a)) [1] engaged in by an adult person against [his or her (spouse) (former spouse)] [an adult with whom the person (resides) (formerly resided)] [an adult with whom the person has a child in common].

2. The defendant was advised orally and in writing[2] that (he) (she) avoid [the residence of the alleged victim of the domestic abuse incident] [any premises

temporarily occupied by the alleged victim] [contacting or causing any person to contact the alleged victim].

3. The defendant intentionally did not avoid [the residence of the alleged victim of the domestic abuse incident] [any premises temporarily occupied by the alleged victim] [contacting or causing any person to contact the alleged victim] within 72 hours of the arrest for a domestic abuse incident.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2044 was approved by the Committee in July 2012.

Violating the contact prohibition under § 968.075(5) was changed from a forfeiture to a crime punishable by a fine of not more than $10,000 or imprisonment for not more than 9 months or both by 2011 Wisconsin Act 267 [effective date: April 24, 2012].

The contact prohibition is set forth in § 968.075(5)(a). It applies "unless there is a waiver under par. (c)." The Committee concluded that the existence of a waiver should be treated as an affirmative defense: it is not an issue in the case until there is some evidence of its existence; then, the state must prove the absence of the waiver beyond a reasonable doubt to support a finding of guilt.

1. Section 968.075(1)(a)1. - 4. identify the following conduct that may constitute "domestic abuse":

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225 (1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

Violations of s. 940.225 (1), (2) or (3) refer to first, second, or third degree sexual assault. If that option is used, the crimes should be defined. See Wis JI-Criminal 1201 - 1218B.

2. Subsection (5)(b)1. of § 968.075 requires that a law enforcement officer "shall inform the arrested person orally and in writing" of the contact prohibition. Section § 968.075(b)3. provides that a failure to comply with the notice requirement "bars a prosecution under par. (a)."

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2050 BURDEN OF PROOF: FORFEITURE ACTIONS
2055 FIVE SIXTHS VERDICT: FORFEITURE ACTIONS

[INSTRUCTIONS RENUMBERED – SEE WIS JI CRIMINAL 140.1

AND 515.1]

COMMENT

Wis JI-Criminal 2050 and 2055 were originally published in 1962. They were renumbered Wis JI Criminal 140.1 and 515.1, respectively, in 1993.

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2101A SEXUAL CONTACT — § 948.01(5)

SELECT ONE OF THE FOLLOWING ALTERNATIVES RELATING TO THE TYPE OF SEXUAL CONTACT AND INSERT IT IN THE INSTRUCTION FOR THE SEXUAL ASSAULT OF A CHILD OFFENSE.[1]

Meaning of "Sexual Contact"

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF THE INTIMATE PARTS OF THE VICTIM:

[Sexual contact is an intentional touching of the (name intimate part)[2] of (name of victim) (by the defendant) (by another person upon the defendant's instruction)[3]. The touching may be of the (name intimate part) directly or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching.

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim) .)][4]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING BY THE VICTIM OF THE INTIMATE PARTS OF THE DEFENDANT OR OF ANOTHER PERSON:

[Sexual contact is a touching by (name of victim) of the (name intimate part)[5] (of the defendant) (of another person upon the defendant's instruction),[6] if the defendant intentionally caused or allowed[7] (name of victim) to do that touching. The touching may be of the (name intimate part) directly or it may be through the clothing.

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim) .)][8]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL EJACULATION OR INTENTIONAL EMISSION OF URINE OR FECES UPON THE COMPLAINANT:

[Sexual contact is intentional penile ejaculation of ejaculate or intentional emission of urine or feces (by the defendant) (by another person upon the defendant's instruction)[9] upon any part of the body clothed or unclothed of (name of victim) .[10]

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim) .)[11]]

FOR SEXUAL CONTACT INVOLVING INTENTIONALLY CAUSING THE VICTIM TO EJACULATE OR EMIT URINE OR FECES ON ANY PART OF THE DEFENDANT'S BODY:

[Sexual contact is ejaculation or emission of urine or feces by (name of victim) on any part of the defendant's body, clothed or unclothed, which the defendant intentionally causes.[12]

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim) .)[13]]

GIVE THE FOLLOWING IN ALL CASES.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent.

CONTINUE WITH THE INSTRUCTION FOR THE SEXUAL ASSAULT OF A CHILD OFFENSE.

COMMENT

Wis JI-Criminal 2101A was originally published in 1996 and revised in 1999, 2001, 2002, and 2003. This revision was approved by the Committee in October 2006; it reflected changes made by 2005 Wisconsin Acts 273 and 435.

This instruction provides definitions of "sexual contact" that are to be integrated into the instruction for sexual assault of a child offenses involving sexual contact as appropriate to the facts of the case. The material provided here was formerly included in the text of each offense instruction, dividing the sexual contact definition into two separate elements: one involving the type of touching; the other involving the purpose of the touching. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing this separate instruction with all the alternatives for both the type of touching and the purpose of the touching. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

A similar instruction is provided at Wis JI-Criminal 1200A for offenses in violation of § 940.225. This instruction differs in several ways, due to differences between the statutory definition of "sexual contact" provided in § 948.01(5), addressed in this instruction, and the definition of the same term provided in § 940.225(5)(b), addressed in Wis JI-Criminal 1200A. This instruction should be used only for violations of § 948.02.

The following definition of "sexual contact" is provided in § 948.01(5), as amended by 2005 Wisconsin Acts 273 and 435 (effective date: June 6, 2006):

(5) "Sexual contact" means any of the following:

(a) Any of the following types of intentional touching whether direct or through clothing if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant:

1. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.

2. Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person.

(b) Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

(c) For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

1. The definition of "sexual contact" in § 948.01(5) identifies two types of intentional touchings and two alternatives involving intentional emission of bodily substances. The instruction provides separate alternatives for each alternative, one of which should be selected and added to the instruction for the sexual assault of a child offense.

Each alternative includes the second part of the statutory sexual contact definition: that the contact was for a sexual purpose. See note 4, below.

2. Section 939.22(19) defines "intimate parts": "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved in the sexual contact.

In State v. Morse, 126 Wis.2d 1, 374 N.W.2d 388 (Ct, App. 1985), the court of appeals held that a trial court did not improperly broaden the scope of the sexual contact definition in § 939.22(19) by defining "intimate part" to include "the vaginal area."

A child's testimony referring to her "private," her "potty place," and "between her legs" was sufficient to support a jury finding that the defendant touched her "groin, vagina, or pubic mound." State v. Brunette, 220 Wis.2d 431, 453-54, 583 N.W.2d 174 (Ct. App. 1998).

"[T]he plain language of Wis. Stat. § 939.22(19) is meant to include a female and a male breast because each is 'the breast . . . of a human being' and thereby the touching of a [15 year old] boy's breast constitutes 'sexual contact' within the meaning of Wis. Stat. § 948.02(2)." State v. Forster, 2003 WI App 29, 260 Wis.2d149, 659 N.W.2d 144.

3. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

4. Each alternative definition includes the requirement that the contact be for one of two prohibited purposes. Earlier versions of the instructions included the purpose as a separate element, but the Committee concluded that it was preferable to deal with at as a second part of the sexual contact definition. The Committee also concluded that including purpose as part of each alternative will reduce the possibility that it would be inadvertently overlooked. Failure to include the purpose of the contact as a part of the jury instruction is reversible error. State v. Krueger, 2001 WI App 14, 240 Wis.2d 644, 623 N.W.2d 211. Likewise, failure to include reference to purpose when accepting a guilty plea may be grounds for withdrawal of the plea. State v. Bollig, 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199; State v. Jipson, 2003 WI App 222, 267 Wis.2d 467, 671 N.W.2d 18; and, State v. Nichelson, 220 Wis.2d 214, 582 N.W.2d 460 (1998).

The two purposes set forth as alternatives are the only two contained in the definition of "sexual contact" provided in § 948.01(5). The definition of "sexual contact" in § 940.225(5)(b) includes touching which "contains the elements of actual or attempted battery . . ." The Committee has interpreted this as a "purpose to cause bodily harm," but note that this purpose does not apply to offenses under § 948.02.

The instruction phrases the two alternatives as requiring that the defendant acted "with intent to" achieve one of the prohibited results. The statute refers to acting with "the purpose of . . ." No change in meaning is intended.

5. See note 2, supra.

6. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

7. The instruction refers to the touching of the defendant by the complainant as a touching which the defendant "caused or allowed" the complainant to do. The statute does not expressly provide for the "causing" alternative, but the Committee concluded that the requirement is implicit. The "or allowed" alternative was added after the Wisconsin Court of Appeals approved an instruction to which it had been added. State v. Traylor, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992). In Traylor, the court rejected the defendant's argument that sexual contact requires an affirmative act and that mere passivity is not "intentional touching" as contemplated by the statute:

> . . . the defendant does not have to initiate sexual contact with a child. If the defendant allows the contact, that is sufficient to constitute intentional touching because it indicates that the defendant had the requisite purpose of causing sexual arousal or gratification. 170 Wis.2d 393, 404.

In a footnote, the court emphasized that there must be evidence that a defendant allowed the touching:

> The mere fact of a child's touching an adult does not raise the inference [that the defendant sanctioned the touching for the purpose of sexual arousal or gratification]. There might indeed be evidence in a specific case that the adult called an immediate halt to this activity. Absent other evidence that the event was sanctioned by the adult, the mere fact that a touching took place is not the same as "allowing" it. 170 Wis.2d 393, 404, note 2.

Applied literally to a case where the victim is caused to touch the defendant, § 948.01(5)(a) requires an "intentional touching by the complainant . . . of the . . . defendants' intimate parts . . ." The Committee concluded that the Traylor decision interpreted this definition in a manner that focuses on the defendant's, rather than the victim's, intent. Thus, the instruction refers simply to "a touching" by the victim that the defendant "intentionally caused or allowed."

8. See note 4, supra.

9. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

10. This is the type of "sexual contact" defined in sub. (5)(b) of § 948.01. It was created by 1995 Wisconsin Act 69, which first applies to offenses committed on December 2, 1995.

11. See note 4, supra.

12. This is the type of "sexual contact" defined in sub. (5)(c) of § 948.01. It was created by 2005 Wisconsin Act 273, which first applies to offenses committed on April 20, 2006.

13. See notes 4 and 5, supra.

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2101B SEXUAL INTERCOURSE — § 948.01(6)

Meaning of "Sexual Intercourse"

INSERT THE ALTERNATIVE[S] SUPPORTED BY THE EVIDENCE INTO THE INSTRUCTION ON THE SEXUAL ASSAULT OFFENSE.

["Sexual intercourse" means any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required.][1]

["Sexual intercourse" includes (cunnilingus) (fellatio).

(Cunnilingus means oral contact with the clitoris or vulva.)[2]

(Fellatio means oral contact with the penis.)[3]]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[The act of sexual intercourse must be either by the defendant or upon the defendant's instruction.][4]

["Sexual intercourse" does not include an intrusion for a proper non-sexual purpose, such as a medical examination or appropriate child care or treatment.][5]

COMMENT

Wis JI-Criminal 2101B was originally published in 1996 and revised in 2001, 2006, and 2007. This revision added bracketed material to the text at footnote 5 and was approved by the Committee in February 2010.

The definitions provided here were formerly provided in each instruction for a sexual assault of a child offense involving sexual intercourse. The 1996 revision combined sexual contact and sexual intercourse offenses into one instruction, making it necessary to refer to this instruction for definition of "sexual intercourse" and to Wis JI-Criminal 2101A for definition of "sexual contact."

The 2006 revision changed the definitions of "cunnilingus" and "fellatio." See footnotes 2 and 3.

A similar instruction is provided in Wis JI Criminal 1200B for sexual assault offenses under § 940.225. Though there is one difference in the definitions of "sexual intercourse" found in § 948.01(6) and § 940.225(5)(c), the Committee concluded that no substantive difference is intended. Thus, the text of Wis JI Criminal 2101B and Wis JI Criminal 1200B is the same. Note that both the § 948.01(6) and § 940.225(5)(c) definitions are substantially broader than the one provided in § 939.22(36).

1. The definition of "sexual intercourse" is a paraphrase of the complete statutory definition found in § 948.01(6). NOTE: The definition in § 948.01(6) is substantially broader than the one provided in § 939.22(36) and is essentially the same as the one provided in § 940.225(5)(b).

2. This definition was revised in 2006 in light of the decision in State v. Harvey, 2006 WI App. 26, 289 Wis.2d 222, 710 N.W.2d 482, which held that defining cunnilingus as "oral stimulation . . ." is not required by the "statutory scheme of the sexual assault law" and "offends the principles underpinning the sexual assault law." Par. 14. The former definition was taken from Webster's New Collegiate Dictionary, but the court of appeals held that "a standard dictionary definition should not by default become the legal definition of a term if it unfairly or inaccurately states the law or misconveys the legislative intent." Par. 17. The court stated: "We think a better resource is BLACK'S LAW DICTIONARY 380 (6th ed. 1990) which more neutrally defines cunnilingus as '[a]n act of sex committed with the mouth and the female sexual organ.'" Par. 17. The Committee decided not to use that definition because it refers to a "sex act," which is inconsistent with the emphasis of Harvey that a purpose of the sexual assault law was to recognize that sexual assaults were crimes of violence, not of sexual passion. Par. 15. As noted in the Harvey decision, the current edition of Black's does not define the term. [See Par. 17, footnote 6.] The Committee believes the revised definition in the instruction is faithful to the substance of the Harvey decision.

3. This definition was revised in 2006 in light of the decision in State v. Harvey, 2006 WI App. 26, see note 2, supra. Harvey was concerned only with the definition of "cunnilingus," but the Committee concluded that the logic of the court's analysis would also apply to defining fellatio as "oral stimulation," which the instruction formerly did. The former definition had been approved in State v. Childs, 146 Wis.2d 116, 430 N.W.2d 353 (Ct. App. 1988).

4. This phrase appears in the definition of "sexual intercourse" in § 948.01(6) and in the similar definition found in § 940.225(5)(b).

In State v. Olson, 2000 WI App. 158, 238 Wis.2d 74, 616 N.W.2d 144, the court construed the definition provided in § 948.01(6) to require that "the defendant has to either affirmatively perform one of the actions on the victim, or instruct or direct the victim to perform one of them on him- or herself." Olson, ¶10. The Committee concluded that the bracketed sentence in the instruction adequately addresses the Olson requirement. The Olson decision also implies that "allowing" the sexual intercourse to take place may also satisfy the statute (see ¶12), but the holding is limited to the "upon the defendant's instruction" issue.

In State v. Lackershire, 2007 WI 74, 288 Wis.2d 609, 707 N.W.2d 891, the court held there was a defect in establishing a factual basis for a guilty plea to second degree sexual assault of a child, where the defendant claimed to be the victim of a sexual assault by the "child." The court held that being a victim constitutes a defense and that the trial court should have explored that issue as part of the factual basis inquiry: ". . . If the defendant was raped, the act of having sexual intercourse with a child does not

constitute a crime. § 948.01(6)." ¶29. The court relied on State v. Olson, supra, to conclude that the entire definition in § 948.01(6) is modified by the phrase "by the defendant or upon the defendant's instruction." Thus, sexual intercourse resulting from being forced to engage in it by the other party is not "by the defendant or upon the defendant's instruction."

5. This statement is based on State v. Lesik, 2010 WI App 12, ___ Wis.2d ___, ___ N.W.2d ___, [2008 AP 3072-CR]. The court of appeals construed the definition of "sexual intercourse" in § 948.01(6) narrowly and agreed with the trial court's conclusion that "it would be 'patently and obviously absurd' to make medical personnel and parents guilty of a Class B felony for performing 'certain appropriate conduct relative to proper treatment of children.'" Lesik, ¶10. The court of appeals held that the trial court was correct in giving the statute a limiting construction by adding the following to the jury instruction:

> "Sexual intercourse" does not, however include such an intrusion for a proper non-sexual purpose, such as a medical examination or appropriate child care or treatment.

Lesik, ¶5.

Also see, State v. Neumann, 179 Wis.2d 687, 712, n. 14, 508 N.W.2d 54 (Ct. App. 1993), reaching the same conclusion with respect to the definition of "sexual intercourse" applicable to prosecutions under § 940.225.

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2102 INTRODUCTORY COMMENT: § 948.02 SEXUAL ASSAULT OF A CHILD: AS AMENDED BY 2007 WISCONSIN ACT 80 [EFFECTIVE DATE: MARCH 27, 2008] AND 2013 WISCONSIN ACT 167 [EFFECTIVE DATE: MARCH 29, 2014]

Background

Section 948.02 was amended by both 2005 Wisconsin Act 430 and 2005 Wisconsin Act 437. The changes were inconsistent with one another, so the Revisor of Statutes published the statute as amended by Act 437. The statute as amended by Act 430 was printed immediately following that version in the 2005-06 Wisconsin Statutes – in boldface type. A study committee of the Wisconsin Legislative Council was convened to review the matter, and issued a report with recommendations for additional legislation. The Legislative Council draft was introduced in both houses: 2007 Assembly Bill 209 and 2007 Senate Bill 103. Senate Bill 103 was enacted as 2007 Wisconsin Act 80 [effective date: March 27, 2008.] Section 948.02(1)(e) was later amended by 2013 Wisconsin Act 167.

Summary: Offenses Defined in § 948.02

As amended by 2007 Wisconsin Act 80 and 2013 Wisconsin Act 167, § 948.02(1) defines 5 types of first degree sexual assault of a child. See Wis JI-Criminal 2102A-E. Section 948.02(2), which defines second degree sexual assault of a child, was not affected by Act 80. See Wis JI-Criminal 2104.

Because some of the offense definitions differ only slightly, the Committee concluded that a summary of the elements, penalties, and related issues might be helpful.

§ 948.02(1) 1st degree sexual assault of a child

(am) • sexual contact or sexual intercourse
• with a person who has not attained the age of 13
• causes great bodily harm
[Wis JI-Criminal 2102A]

Class A felony. Minimum of 25 years confinement before extended supervision eligibility – § 939.616(1g).

(b) • sexual intercourse
• with a person who has not attained the age of 12
[Wis JI-Criminal 2102B]

Class B felony. Mandatory minimum term of confinement of 25 years – § 939.616(1r).

(c) • sexual intercourse
• with a person who has not attained the age of 16
• by use or threat of force or violence
[Wis JI-Criminal 2102C]

Class B felony. Mandatory minimum term of confinement of 25 years – § 939.616(1r).

(d) • sexual contact
• with a person who has not attained the age of 16
• by use or threat of force or violence
• by a person who is at least 18 years of age
[Wis JI-Criminal 2102D]

Class B felony. Mandatory minimum term of confinement of 5 years – § 939.616(2).

(e) • sexual contact or sexual intercourse
• with a person who has not attained the age of 13
[Wis JI-Criminal 2102E]

Class B felony.
NOTE: 2013 Wisconsin Act 167 amended § 948.02(1)(e) by adding "sexual intercourse." [Effective date: March 29, 2014.]

§ 948.02(2) 2nd degree sexual assault of a child
[Not affected by 2007 Wisconsin Act 80]

• sexual contact or sexual intercourse
• with a person who has not attained the age of 16
[Wis JI-Criminal 2104]

Class C felony.

NOTE: Section 948.02(2) was amended by 2017 Wisconsin Act 174 [effective date: March 30, 2018] to add the following: "This section does not apply if s. 948.093 applies." Section 948.093, Underage sexual activity, applies to sexual activity by a defendant who has not attained the age of 19.

Mandatory Minimum Sentences – § 939.616

As noted above, § 939.616 provides for mandatory minimum sentences for violations of § 948.02(1)(am) through (d). In State v. Lalicata, 2012 WI App 138, 345 Wis.2d 342, 824 N.W.2d 921, the court of appeals held that the mandatory minimum sentence under § 939.616(1r) for convictions under § 948.02(1)(b) is "truly mandatory, with no probation option." ¶1.

Section 939.616(3) provides: ". . . The mandatory minimum sentences in this section do not apply to an offender who was under 18 years of age when the violation occurred."

Penalty Increase for Sexual Assault or Physical Abuse of a Child by a Child Care Provider – § 939.635

Section 939.635 was created by 2011 Wisconsin Act 82 [effective date: December 9, 2011]. It allows an increase of not more than 5 years for violations of §§ 948.02, 948.025, 948.03(2) and (3), and 948.03(5)(a)1., 2., 3., and 4. if the defendant committed the crime against a child for whom the defendant was providing child care for compensation. Wis JI-Criminal 2115 provides a special question to be added to the applicable offense instruction when the enhanced penalty authorized by § 939.635 is alleged in the charging document and the evidence would support a finding that the penalty-increasing facts are established.

Lesser Included Offenses

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a "crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged" is a lesser included crime.

COMMENT

Wis JI-Criminal 2102 Introductory Comment was originally published in 2008 and revised in 2013 and 2015. The 2013 revision added reference to State v. Lalicata. The 2015 revision reflected a change made in § 948.02(1)(e) by 2013 Wisconsin Act 167. The 2016 revision corrected editorial errors. This revision was approved by the Committee in December 2018; it added a section describing the penalty increase under § 939.635.

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2102A FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS: CAUSING GREAT BODILY HARM — § 948.02(1)(am)

Statutory Definition of the Crime

First degree sexual assault of a child, as defined in § 948.02(1)(am) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with a person who has not attained the age of 13 years and causes great bodily harm to that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).

2. (Name of victim) was under the age of 13 years at the time of the alleged sexual [contact] [intercourse].

   Knowledge of (name of victim)'s age is not required[1] and mistake regarding (name of victim)'s age is not a defense.[2]

   Consent to sexual [contact] [intercourse] is not a defense.[3]

3. The defendant caused great bodily harm to (name of victim).

"Great bodily harm" means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[4]

Meaning of [Sexual Contact] [Sexual Intercourse]

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2102A was approved by the Committee in April 2008. It reflects changes made in § 948.02 by 2007 Wisconsin Act 80.

This instruction is drafted for violations of § 948.02(1)(am) as created by 2008 Wisconsin Act 80 [effective date: March 27, 2008]. A violation of this subsection is a Class A felony.

As revised by Act 80, the statute defines the crime in the same manner as § 940.225(1)(a): "Has sexual contact or sexual intercourse . . . and causes . . . great bodily harm." Under § 940.225(1)(a), the act itself need not cause the great bodily harm. See Wis JI-Criminal 1201, footnote 1, and State v. Schambow, 176 Wis.2d 286, 298-99, 500 N.W.2d 362 (Ct. App. 1993). The Wisconsin Legislative Council Act Memo for 2007 Wisconsin Act 80 states that the revision "clarifies that harm to the victim caused by the offender at the time of a first-degree sexual of a child, and not necessarily caused by the sexual intercourse or contact, would satisfy the great bodily harm element . . ."

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing

separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a "crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged" is a lesser included crime.

1. See § 939.23(6).

2. See § 939.43(2).

3. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

4. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

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2102B FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 12 YEARS — § 948.02(1)(b)

Statutory Definition of the Crime

First degree sexual assault of a child, as defined in § 948.02(1)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with a person who has not attained the age of 12 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse with (name of victim) .
2. (Name of victim) was under the age of 12 years at the time of the alleged sexual intercourse.

Knowledge of (name of victim) 's age is not required[1] and mistake regarding (name of victim) 's age is not a defense.[2]

Consent to sexual intercourse is not a defense.[3]

Meaning of Sexual Intercourse

REFER TO WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2102B was approved by the Committee in April 2008; it reflects changes made by 2007 Wisconsin Act 80.

This instruction is drafted for violations of § 948.02(1)(b) as created by 2008 Wisconsin Act 80 [effective date: March 27, 2008.] The offense is a Class B felony.

NOTE: The age limit for this offense is that the victim "has not attained the age of 12 years." The similar offense involving sexual contact applies to a victim who "has not attained the age of 13 years." See § 948.02(1)(e).

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a "crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged" is a lesser included crime.

1. See § 939.23(6).

2. See § 939.43(2).

3. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

2102C FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS BY USE OR THREAT OF FORCE OR VIOLENCE — § 948.02(1)(c)

Statutory Definition of the Crime

First degree sexual assault of a child, as defined in § 948.02(1)(c) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with a person who has not attained the age of 16 years by the use or threat of force or violence.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse with (name of victim).

2. (Name of victim) was under the age of 16 years at the time of the alleged sexual intercourse.

   Knowledge of (name of victim)'s age is not required[1] and mistake regarding (name of victim)'s age is not a defense.[2]

3. The defendant had sexual intercourse with (name of victim) by the use or threat of force or violence.

   The use or threat of force of violence may occur at any time before or as part of the sexual intercourse.[3]

As a matter of law, a person who has not attained the age of 16 years cannot consent to sexual intercourse. Any consideration of the conduct of (name of victim) must be limited to determining whether the defendant had sexual intercourse by the use or threat of force or violence.[4]

Meaning of Sexual Intercourse

REFER TO WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2102C was approved by the Committee in April 2008. It reflects changes made in § 948.02 by 2007 Wisconsin Act 80.

This instruction is drafted for violations of § 948.02(1)(c) as created by 2008 Wisconsin Act 80 [effective date: March 27, 2008]. The offense is a Class B felony.

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a "crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged" is a lesser included crime.

1. See § 939.23(6).

2. See § 939.43(2).

3. This is based on State v. Hayes, 2003 WI App 99, 264 Wis.2d 377, 633 N.W.2d 351, discussed in footnote 2, Wis JI-Criminal 1208.

4. This material is used in place of the statement in other instructions for child sexual assault offenses that "consent is not a defense" because the latter could be interpreted as inconsistent with the

defendant's right to challenge proof of the "by the use or threat of force or violence" element by reference to conduct of the victim. For a similar situation, see Wis JI-Criminal 926, Contributory Negligence.

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2102D FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS BY USE OR THREAT OF FORCE OR VIOLENCE BY A PERSON WHO HAS ATTAINED THE AGE OF 18 YEARS — § 948.02(1)(d)

Statutory Definition of the Crime

First degree sexual assault of a child, as defined in § 948.02(1)(d) of the Criminal Code of Wisconsin, is committed by a person who has attained the age of 18 years who has sexual contact with a person who has not attained the age of 16 years by the use or threat of force or violence.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual contact with (name of victim) .
2. The defendant had attained the age of 18 years.
3. (Name of victim) was under the age of 16 years at the time of the alleged sexual contact.

Knowledge of (name of victim) 's age is not required[1] and mistake regarding (name of victim) 's age is not a defense.[2]

4. The defendant had sexual contact with (name of victim) by the use or threat of force or violence.

The use or threat of force of violence may occur at any time before or as part of the sexual contact.[3]

As a matter of law, a person who has not attained the age of 16 years cannot consent to sexual contact. Any consideration of the conduct of (name of victim) must be limited to determining whether the defendant had sexual contact by the use or threat of force or violence.[4]

[The phrase "use or threat of force or violence" includes forcible sexual contact or force used as the means of making sexual contact.][5]

Meaning of Sexual Contact

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2102D was approved by the Committee in April 2008. It reflects changes made in § 948.02 by 2007 Wisconsin Act 80.

Section 948.02(1)(d) was created by 2008 Wisconsin Act 80 [effective date: March 27, 2008]. The offense is a Class B felony.

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a "crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged" is a lesser included crime.

1. See § 939.23(6).

2. See § 939.43(2).

3. This is based on State v. Hayes, 2003 WI App 99, 264 Wis.2d 377, 633 N.W.2d 351, discussed in footnote 2, Wis JI-Criminal 1208.

4. This material is used in place of the statement in other instructions for child sexual assault offenses that "consent is not a defense" because the latter could be interpreted as inconsistent with the defendant's right to challenge proof of the "by the use or threat of force or violence" element by reference to conduct of the victim. For a similar situation, see Wis JI-Criminal 926, Contributory Negligence.

5. See State v.Bonds, 165 Wis.2d 27, 477 N.W.2d 265 (1991), discussed in footnote 5, Wis JI-Criminal 1208.

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2102E FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS — § 948.02(1)(e)

Statutory Definition of the Crime

First degree sexual assault of a child, as defined in § 948.02(1)(e) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with a person who has not attained the age of 13 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. (Name of victim) was under the age of 13 years at the time of the alleged sexual [contact] [intercourse].

Knowledge of (name of victim)'s age is not required[1] and mistake regarding (name of victim)'s age is not a defense.[2]

Consent to sexual [contact] [intercourse] is not a defense.[3]

Meaning of [Sexual Contact] [Sexual Intercourse]

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2102E was originally published in 2008. This revision was approved by the Committee in June 2014; it reflects changes made in § 948.02 by 2013 Wisconsin Act 167.

This instruction is drafted for violations of § 948.02(1)(e) as created by 2008 Wisconsin Act 80 [effective date: March 27, 2008] and as amended by 2013 Wisconsin Act 167 [effective date: March 29, 2013].

2013 Wisconsin Act 167 amended § 948.02(1)(e) to add "sexual intercourse." Before that amendment, sub. (1)(e) applied only to "sexual contact."

NOTE: The age limit for this offense is that the victim "has not attained the age of 13 years." Section 948.02(1)(b) prohibits "sexual intercourse with a person who has not attained the age of 12 years.".

1. See § 939.23(6).

2. See § 939.43(2).

3. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

2104 SECOND DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS — § 948.02(2)

Statutory Definition of the Crime

Second degree sexual assault of a child, as defined in § 948.02(2) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with a person who has not attained the age of 16 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).

2. (Name of victim) was under the age of 16 years at the time of the alleged sexual [contact] [intercourse].

Knowledge of (name of victim)'s age is not required[1] and mistake regarding (name of victim)'s age is not a defense.[2]

Consent to sexual [contact] [intercourse] is not a defense.[3]

Meaning of [Sexual Contact] [Sexual Intercourse]

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1989 as Wis JI-Criminal 2104 [for sexual intercourse offenses] and Wis JI-Criminal 2105 [for sexual contact offense]. It was revised in 1996 to combine the instructions as Wis JI-Criminal 2104. The 2001 revision adopted a new format, made nonsubstantive changes to the text, and updated the Comment. The 2008 revision added a reference to 2007 Wisconsin Act 80 to the Comment. The 2018 revision reflected a change made by 2017 Wisconsin Act 174. This revision was approved by the Committee in June 2020; it corrected an inadvertent error in the statutory citation.

Section 948.02(2) was amended by 2017 Wisconsin Act 174 [effective date: March 30, 2018] to add the following: "This section does not apply if s. 948.093 applies." Section 948.093, Underage sexual activity, applies to sexual activity by a defendant who has not attained the age of 19. The Committee concluded that any factual discrepancies regarding the applicability of § 948.093 would likely be resolved before trial and in any event should be treated in the same manner as statutory exceptions. The Committee's judgment has been that statutory exceptions are best addressed as follows. The question whether an exception applies is not an issue in the case until there is some evidence of that fact. Once there is evidence sufficient to raise that issue, the burden is on the state to prove beyond a reasonable doubt that the exception does not apply. See the Comment to Wis JI-Criminal 1335B explaining the application of this approach to exceptions to the prohibition on carrying a concealed weapon.

This instruction is for two of the types of second degree sexual assault of a child defined by § 948.02(2): sexual contact or sexual intercourse with a person who has not attained the age of 16 years.

2008 Wisconsin Act 80 made significant changes in subsection (1) of § 948.02(2). Subsection (2) was not affected.

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a "crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged" is a lesser included crime.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Second degree sexual assault of a child under § 948.02(2) is a lesser included offense of first degree sexual assault of a child under § 948.02(1) and is properly submitted when the evidence supports a reasonable doubt about the child's age. State v. Moua, 215 Wis.2d 511, 573 N.W.2d 2020 (Ct. App. 1997).

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant's alleged "constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation." State v. Fisher, 211 Wis.2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997).

1. See § 939.23(6).

2. See § 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis.2d 418, 680 N.W.2d 810, the court held that "no affirmative defense of the victim's intentional misrepresentation of his or her age exists in a prosecution under § 948.02(2). . . . If an accused's reasonable belief about the victim's age, based on the victim's intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant's belief about the victim's ages nor evidence regarding the cause for or reasonableness of that is relevant." ¶3.

3. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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2105A ATTEMPTED SECOND DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS: ACTUAL CHILD — §§ 948.02(2); 939.32

Statutory Definition of the Crime

Attempted second degree sexual assault of a child, as defined in § 939.32 and § 948.02(2) of the Criminal Code of Wisconsin, is committed by one who, with intent to have sexual (contact) (intercourse) with a person who has not attained the age of 16 years, does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intended[1] to have sexual [contact] [intercourse] with (name of victim) .

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

2. (Name of victim) was under the age of 16 years.

Knowledge of (name of victim) 's age is not required[2] and mistake regarding (name of victim) 's age is not a defense.[3]

3. The defendant did acts which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have had sexual [contact] [intercourse] with (name of victim) except for the intervention of another person or some other extraneous factor.[4]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2105A was approved by the Committee in August 2004.

This instruction provides a model for attempted second degree sexual assault of a child based on an attempt to assault an actual child. It combines Wis JI-Criminal 2104 and 580 but departs from the format recommended by the general instruction on attempt and involves three elements: the first two being the elements of the completed crime and the third being the definition of attempt.

A separate instruction is provided for cases based on attempts to assault what turns out to be a fictitious child, which result from "sting" operations based on electronic communications. See Wis JI-Criminal 2105B.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant's alleged "constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation." State v. Fisher, 211 Wis.2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997).

1. See State v. Weeks, 165 Wis.2d 200, 477 N.W.2d 642 (Ct. App. 1991), which discusses the meaning of the intent required for attempts.

2. Section 939.23(6).

3. Section 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis.2d 418, 680 N.W.2d 810, the court held that "no affirmative defense of the victim's intentional misrepresentation of his or her age exists in a prosecution under § 948.02(2). . . . If an accused's reasonable belief about the victim's age, based on the victim's intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant's belief about the victim's age nor evidence regarding the cause for or reasonableness of that belief is relevant." ¶3.

4. The definition of "attempt" is based on § 939.32 and Wis JI-Criminal 580. For explanation of the definitions of "unequivocally," "another person," and "extraneous factor," see the footnotes to Wis JI-Criminal 580.

2105B ATTEMPTED SECOND DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS: FICTITIOUS CHILD — §§ 948.02(2); 939.32)

Statutory Definition of the Crime

Attempted second degree sexual assault of a child, as defined in § 939.32 and § 948.02(2) of the Criminal Code of Wisconsin, is committed by one who, with intent to have sexual (contact) (intercourse) with a person who has not attained the age of 16 years, does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intended to have sexual [contact] [intercourse] with another person.

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

2. The defendant believed that the person was under the age of 16 years.[1]

3. The defendant did acts which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have had sexual [contact] [intercourse] with that person except for the intervention of another person or some other extraneous factor.[2]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

That the victim was fictitious can constitute an extraneous factor. What is required is that the defendant believed the person (he) (she) was dealing with was a child who was under the age of 16 years and that the defendant intended to have sexual (contact) (intercourse) with that person.[3]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2105B was approved by the Committee in August 2004.

This instruction provides a model for attempted second degree sexual assault of a child based on an attempt to assault what turns out to be a fictitious child, which result from "sting" operations based on electronic communications. It combines Wis JI-Criminal 2104 and 580. A separate instruction is provided for cases based on attempts to assault an actual child. See Wis JI-Criminal 2105A.

Prosecutions based on activities directed toward fictitious children have been upheld in connection with charges of enticing a child under § 948.07 and sexual assault of a child under § 948.02.

In State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287, the Wisconsin Supreme Court upheld the application of the child enticement statute to a defendant charged with arranging, over the internet, a meeting in a motel with a boy he believed to be 13 years old. In fact, the boy was the fictitious creation of a government agent. The court held:

> . . . attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the "child" is fictitious. 2002 WI 65, ¶34.

Robins upheld State v. Koenck, 2001 WI App 93, 242 Wis.2d 693,626 N.W.2d 359, where the court of appeals reached the same conclusion: "the fictitiousness of the girls constituted an extraneous factor beyond Koenck's control that prevented him from successfully enticing a child for the express purpose of sexual intercourse or contact." 2001 WI APP 93, ¶28.

State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284, and State v. Brienzo, 2003 WI App 203, 267 Wis.2d 349, 671 N.W.2d 700, held that prosecutions for attempted sexual assault of a child can also be maintained in "internet sting" situations. ". . . [T]he reasoning in Koenck and Robins is equally applicable to the charge of attempted second-degree sexual assault of a child." Grimm, 258

Wis.2d 166, ¶10. Brienzo held that "the crime of attempted sexual assault of a child by means of sexual intercourse is a crime known to law. A defendant may have the intent to engage in sexual intercourse and may engage in acts in furtherance of that intent. When he or she does, he or she is liable for that attempt." 267 Wis.2d 349, ¶21.

Also see § 948.075, which prohibits use of a computerized communication system to facilitate a child sex crime. Wis JI-Criminal 2135 provides a model for violations of that statute.

1. The Committee concluded that where the case involves a fictitious victim, that is, where a government agent poses as a child, the state must prove that the defendant believed that the person with whom he or she was dealing was a child. In a case involving intent to engage in sexual contact or intercourse with a child in violation of § 948.02(2), for which this instruction is drafted, the victim must be under the age of 16, so the defendant's belief must match that element of the crime.

The Committee concluded that requiring that the defendant believe the victim was a child is the equivalent of the requirement stated in State v. Robins, 2002 WI 65, 253 Wis.2d 298,646 N.W.2d 287: "attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the 'child' is fictitious." 253 Wis.2d 298, ¶34.

The two cases dealing with attempted sexual assault of a child also contain statements supporting this conclusion: "The facts alleged and their reasonable inferences permit the conclusion that [the defendant] intended to have sexual contact with a person he believed to be under the age of sixteen." State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284, ¶20; State v. Brienzo, 2003 WI App 203, 267 Wis.2d 349, 671 N.W.2d 700, ¶25.

2. The definition of "attempt" is based on § 939.32 and Wis JI-Criminal 580. For explanation of the definitions of "unequivocally," "another person," and "extraneous factor," see the footnotes to Wis JI-Criminal 580.

3. This is based on the statement in State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287, that "attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the 'child' is fictitious." 253 Wis.2d 298, ¶34.

2106 SEXUAL ASSAULT OF A CHILD: FAILURE TO ACT TO PREVENT SEXUAL INTERCOURSE OR SEXUAL CONTACT — § 948.02(3)

Statutory Definition of the Crime

Failure to act to prevent sexual assault of a child, as defined in § 948.02(3) of the Criminal Code of Wisconsin, is committed by a person responsible for the welfare of a child who has not attained the age of 16 years, if that person has knowledge that another person (intends to have) (is having) (has had) sexual (intercourse) (contact) with a child, is physically and emotionally capable of taking action which will prevent sexual (intercourse) (contact) from (taking place) (being repeated), fails to take that action, and whose failure to act [exposes the child to an unreasonable risk that (intercourse) (contact) may occur between the child and the other person] [facilitates the sexual (intercourse) (contact) that does occur between the child and the other person].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following seven elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a person responsible for the welfare of a child, (name of victim) .

A "person responsible for the welfare of a child" includes (use the appropriate term from § 948.01(3)) .[1]

2. (Name of victim) was under the age of 16 years[2] at the time of the alleged offense.

3. (Name of principal) [3] (intended to have) (was having) (had) sexual (intercourse) (contact) with (name of victim) .

4. The defendant had knowledge[4] that (name of principal) (intended to have) (was having) (had) sexual (intercourse) (contact) with (name of victim) .

5. The defendant was physically and emotionally capable of taking action which would have prevented the sexual (intercourse) (contact) from (taking place) (being repeated).

6. The defendant failed to take action that would have prevented the sexual (intercourse) (contact) from (taking place) (being repeated).

7. The defendant's alleged failure to act [exposed the child to an unreasonable risk that sexual (intercourse) (contact) may occur] [facilitated the sexual (intercourse) (contact) that occurred between (name of victim) and (name of principal)].

["Facilitate" means to make easier.][5]

Meaning of [Sexual Contact] [Sexual Intercourse]

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all seven elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2106 was originally published in 1996 and revised in 2002. This revision was approved by the Committee in December 2008. It involved updating footnote 1.

Section 948.02 defines crimes relating to the sexual assault of children. Subsection (1) defines first degree sexual assault – see Wis JI-Criminal 2102. Subsection (2) defines second degree sexual assault – see Wis JI-Criminal 2104. Subsection (3), addressed by this instruction, imposes liability for failing to act to prevent the sexual assault of a child who has not attained the age of 16 years.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B.

As revised in 2001, the instruction includes bracketed or parenthetical material that cover all the alternative ways of committing the offense defined by § 948.02(3), including exposing the child to an unreasonable risk that a sexual assault will occur or be repeated.

In State v. Carol M.D., 198 Wis.2d 162, 542 N.W.2d 476 (Ct. App. 1995), the court affirmed multiple charges of failing to act to prevent sexual assault. Carol was informed by her son that Carol's live-in boyfriend had sexually assaulted him on a number of occasions. Carol confronted the boyfriend and he denied the assaults. Carol did nothing further. The boyfriend allegedly assaulted the son nine more times during September 1994. The son did not inform Carol of any of those assaults. Carol was charged under § 948.02(3) for failing to act to prevent the September 1994 assaults. The court of appeals held that she can be charged with nine counts – one for each of the assaults allegedly committed by the boyfriend. "[A] defendant may be convicted of more than one count under this statute if knowledge of the prior sexual assault is accompanied by failure to take action on each separate occasion." 198 Wis.2d 162, 168.

A similar provision relating to physical abuse of a child is found in § 948.03(4). See Wis JI-Criminal 2108.1. The Wisconsin Supreme Court has stated that "[t]he legislature deliberately enacted sec. 948.03(4) to penalize the conduct described in the Williquette decision." State v. Rundle, 176 Wis.2d 985, 999, 500 N.W.2d 916 (1993). That reference is to State v. Williquette, 129 Wis.2d 239, 385 N.W.2d 145 (1986), where the Wisconsin Supreme Court held that a person could violate the prior child abuse statute (§ 940.201, 1985-86 Stats.) by failing to protect children from a risk of physical abuse by another. That statute required that the defendant "subject the child to cruel maltreatment," which the court found was established where the defendant mother was shown to have failed to act in the face of repeated abuse of her children by the children's father. The Williquette court also recognized that general omissions liability exists in Wisconsin, notwithstanding the fact that no specific statute exists. 129 Wis.2d 239, 251-55.

1. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

See Wis JI-Criminal 2106A for discussion of authorities relating to "person responsible for the child's welfare."

2. For purposes of offenses under Chapter 948, "child" is generally defined as "a person who has not attained the age of 18 years." § 948.01(1). However, § 948.02(3) applies only to a person responsible for the welfare of a child who has not attained the age of 16 years.

3. The "principal" is the person who intends to have, was having, or had sexual intercourse or contact with the child. The defendant accused of the crime addressed by this instruction is charged with failing to act to prevent that sexual intercourse or contact from taking place or being repeated.

4. This element was revised in 2001 to use the words of the statute: "has knowledge that." The previous version of the instruction substituted "knew or believed," based on the definition of "know" in § 939.23(2): "'Know' requires only that the actor believes that the specified fact exists." The Committee concluded that in the context of this offense, it may be confusing to introduce the concept of "believes." That is, a defendant may "have knowledge of" facts that indicate sexual activity but may not "believe" that the activity is taking place. Repeating the words of the statute was believed to be the better approach.

5. This is based on a typical dictionary definition of "facilitate." See The American Heritage Dictionary Of The English Language, Third Edition (1992).

2106A LAW NOTE: "PERSON RESPONSIBLE FOR THE CHILD'S WELFARE" — § 948.01(3)

Chapter 948 Offenses

The term "person responsible for the child's welfare" is currently used in five offense definitions in Chapter 948:

- 948.02(3) Sexual assault of a child; failure to act
- 948.03(4)(a) Physical abuse of a child; failing to act to prevent great bodily harm
- 948.03(4)(b) Physical abuse of a child; failing to act to prevent bodily harm
- 948.21(1) and (2) Neglecting a child
- 948.40(2) Contributing to the delinquency of a child; by a "person responsible . . ."

Chapter 948 Definition

Section 948.01(3) defines the term as follows:

> "Person responsible for the child's welfare" includes the child's parent; stepparent; guardian; foster parent; an employee of a public or private residential home, institution, or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

The Committee concluded that the § 948.01(3) definition applies to all Chapter 948 offenses even though there is a slight difference in the wording of the phrase in § 948.02(3), which refers to "a person responsible for the welfare of a child."

Compare Privilege of Parental Discipline

Note that the same phrase – "person responsible for the child's welfare" – is used in defining the class of persons who have the privilege to discipline a child under § 939.45(5). However, that statute provides its own definition, which differs slightly from the Chapter 948 definition. Compare § 939.45(5)(a)3. with § 948.01(3).

Penalty Enhancers Repealed

The term was formerly used in penalty enhancers that applied to violations of §§ 948.02, 948.025, and 948.03. Those provisions were repealed by 2001 Wisconsin Act 109 ["TIS II"]; effective date: February 1, 2003.

Case Law Interpreting the Term

In State v. Sostre, 198 Wis.2d 409, 542 N.W.2d 774 (1996), the Wisconsin Supreme Court held that a live-in boyfriend, who was a volunteer caretaker of a child, was a "person . . . responsible for the welfare of [a] child" under § 948.01(3). The defendant had lived with the mother of the victim for about three years. During this time the defendant did everything the mother did with regard to taking care of the children, including feeding and bathing them. The child considered the defendant his father or stepfather, called him "Poppy," and had a father-son relationship with the defendant. The definition of "person responsible . . ." includes those who are "employed by one legally responsible for the child's welfare to exercise temporary control or care for the child." The court held:

> One of the common meanings of the word "employed" is to "engage the service of" or "to make use of." Under these facts, it seems clear that the mother made use of the services of the defendant, or engaged the services of the defendant, in order to take care of her child when it was necessary for her to be away. In other words, the defendant was clearly "employed" by a person "legally responsible" for a child to "care for that child."
> 198 Wis.2d 409, 415

The fact that the word "employed" is usually equated with economic payment for services does not require a different result. Nor does the fact that a person in this defendant's position may not qualify as a "person responsible" for purposes of the privilege of parental discipline defined in § 939.45(5). That definition does not include the phrase "employed by one legally responsible . . ." that was at issue in this case. [State v. Dodd, 185 Wis.2d 560, 518 N.W.2d 300 (Ct. App. 1994), held that a live-in boyfriend was not covered by the privilege.] The court concluded the legislature specifically and deliberately defined the same term differently in the two statutes.

A biological father, who has admitted paternity in writing, is a "parent" and thus a "person responsible for the child's welfare" under § 948.21, Neglecting a Child. State v. Evans, 171 Wis.2d 471, 492 N.W.2d 141 (1992). The definition of "person responsible . . ." in § 948.01(3) applies to § 948.21.

In State v. Ward, 228 Wis.2d 301, 596 N.W.2d 301 (Ct. App. 1999), the court held that "person responsible . . ." under § 948.02(3) applied to an unpaid, volunteer babysitter whose husband sexually assaulted children of a neighbor. The evidence was sufficient to show that the defendant was employed by the parent in the sense that she was "used by

the child's legal guardian to act as a caretaker for the child." 228 Wis.2d 301, 307, citing Sostre, cited above.

"A seventeen-year-old employed by a parent to care for the parent's child can be a person responsible for the welfare of the child. . . . [She] became a voluntary caretaker of [the child] and, as such, she was a person responsible for his welfare." State v. Hughes, 2005 WI App 155, 285 Wis.2d 388, 702 N.W.2d 87.

COMMENT

Wis JI-Criminal A was originally published in 2009. This revision was approved by the Committee in July 2009.

This Law Note is intended to collect authority relating to the term "person responsible for the welfare of a child" as it is used in Chapter 948 and in § 939.45(5).

The 2010 revision deleted reference to "treatment foster parent," which was removed from the definition in § 948.01(3) by 2009 Wis Act 28 (Section 3352).

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2107 REPEATED ACTS OF SEXUAL ASSAULT OF A CHILD — § 948.025

Statutory Definition of the Crime

Section 948.025 of the Criminal Code of Wisconsin is violated by one who, within a specified period of time,[1] commits three or more sexual assaults of the same child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant committed at least three sexual assaults of (name of victim).

   In this case, the defendant is alleged to have committed sexual assault of a child by violating (identify the subsection of § 948.02 that defines the sexual assault alleged).[2]

   Section _____ requires the State to prove that:[3]

   LIST THE ELEMENTS OF THE INTENDED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[4]

2. At least three sexual assaults took place within a specified period of time. The specified period of time is from (beginning date of specified period) through (ending date of specified period).[5]

GIVE THE FOLLOWING ONLY IF MORE THAN THREE ACTS HAVE BEEN ALLEGED.

[More Than Three Acts Alleged]

[Before you may find the defendant guilty you must unanimously agree that at least three sexual assaults occurred between (beginning date of specified period) and (ending date of specified period), but you need not agree on which acts constitute the required three.][6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant committed three violations of (specify statute) within the specified period of time, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2107 was originally published in 1994 and revised in 1996, 2002, 2003, 2008, and 2018. This revision was approved by the Committee in February 2019; it updated the Comment.

This instruction is for a violation of § 948.025(1), which was created by 1993 Wisconsin Act 227 [effective date: April 23, 1994]. Act 227 provided that "[t]his act first applies to offenses committed on the effective date of this SECTION." 1993 Wisconsin Act 227, Section 44, Initial Applicability. Thus it appears that all of the acts must have occurred after April 23, 1994. The statute was amended by 2007 Wisconsin Act 80 [effective date: March 27, 2008].

NOTE: This instruction is drafted for a case where the predicate acts alleged are all violations of the same subsection of § 948.02. [See Wis JI-Criminal 2107 EXAMPLE for a case where all predicates are violations of § 948.02(1)(b).] If the charge alleges violations of different subsections of § 948.02, considerable complexity could result and great care should be taken in drafting the instruction. Issues of concern include:

- slight variations in the elements of the predicate crimes, as with, for example, the age limits;
- determining whether less serious violations of § 948.025 are lesser included offenses – there is no special rule for § 948.025 in § 939.66, so the strict compare-the-statutory elements test would apply;
- submitting individual predicate offenses as lesser included offenses;
- making a proper statement regarding jury agreement – see § 948.025(2); and,
- potential confusion if evidence of other similar acts are submitted under § 904.04(2).

The 2008 revision of Wis JI-Criminal 2107 reflected the penalty changes made by 2007 Wisconsin Act 80. There are five possible penalties for convictions under § 948.025:

- § 948.025(1)(a) requires at least three violations of § 948.02(1)(am) and is a Class A felony with a mandatory minimum of 25 years confinement before extended supervision eligibility – see § 939.616(1g).

- § 948.025(1)(b) requires at least three violations of § 948.02(1)(am), (b), or (c) and is a Class B felony with a mandatory minimum term of confinement of 25 years – see § 939.616(1r).

- § 948.025(1)(c) requires at least three violations of § 948.02(1)(am), (b), (c), or (d) and is a Class B felony with a mandatory minimum term of confinement of 5 years – see § 939.616(2).

- § 948.025(1)(d) requires at least three violations of § 948.02(1) and is a Class B felony with no mandatory minimum term of confinement.

- § 948.025(1)(e) requires at least three violations of § 948.02(1) or (2) and is a Class C felony with no mandatory minimum term of confinement.

Penalties and elements for offenses defined in § 948.02 are outlined in Wis JI-Criminal 2102 INTRODUCTORY COMMENT: § 948.02 SEXUAL ASSAULT OF A CHILD: AS AMENDED BY 2007 WISCONSIN ACT 80 AND 2013 WISCONSIN ACT 167.

Section 939.635 provides that the maximum penalty for violations of § 948.025 "may be increased by not more than 5 years" if the offense was "against a child for whom the person was providing child care for compensation." See Wis JI-Criminal 2115 for a special question that should be added to the instruction when that penalty-increasing fact is charged.

State v. Colton M., 2015 WI App 94, 366 Wis.2d 119, 875 N.W.2d 642, concerned a claim by the 15-year-old defendant that applying § 948.025(1)(e) to him violated his due process and equal protection rights because statutes defined him as both a victim and an offender. The court concluded that "§ 948.025(1)(e), as applied to Colton, is not unconstitutionally vague beyond a reasonable doubt and, therefore, his delinquency adjudication under that statute does not violate his due process rights. We also conclude the prosecutor's decision to charge Colton and not D. [the underage victim] was not made on a discriminatory basis and, therefore, did not violate Colton's right to equal protection." 2015 WI App 94, ¶6.

Section 948.025(3) prohibits separate charges for sexual assaults that are predicates for the repeated sexual assault charge. See State v. Cooper, 2003 WI App 227, 267 Wis.2d 886, 672 N.W.2d 118. Separate charges for offenses that are not predicates for the repeated sexual assault charge are permissible. State v. Nommensen, 2007 WI App 224, 305 Wis.2d 695, 741 N.W.2d 481.

1. The statute refers to 3 or more violations "within a specified period of time." The Committee concluded that the intent of the statute must be that the prosecutor will specify the applicable period in the charge. That "specified period" should be carried over to the jury instruction. See note 5, below.

2. This instruction is drafted for a case where the predicate acts alleged are all violations of the same subsection of § 948.02. Refer to the standard instruction for that subsection and insert it here, using the bullet points in place of numbers for each element. For an illustration, see Wis JI-Criminal 2107 EXAMPLE.

3. To avoid a second reference to "elements" in defining the predicate crimes, the Committee decided that a bulleted list should be used instead of a numerical one. The instruction introduces the list with ". . . requires the State to prove that: . ." to allow simply plugging in the regular statement of the element without change, using a bullet point instead of a number. See Wis JI-Criminal 2107 EXAMPLE.

4. The Committee recommends that a complete listing of the elements of the "predicate crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and the intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

5. Here identify the beginning and ending dates of the period specified by the prosecution. For example: "The specified period of time is from January 1, 2008 through June 16, 2008."

In State v. Schultz, 2019 WI App 3, 385 Wis.2d 494, 922 N.W.2d 866, the defendant was tried and acquitted on a charge of repeated sexual assault of child. The specified time period was identified as "late summer or early fall" of 2012. After the acquittal, he was charged with a single act of child sexual assault against the same victim alleged to have occurred on or about Oct. 19, 2012. This was based on a paternity test showing he was the father of a child conceived at that time. Schultz argued that principles of double jeopardy should bar the charge for child sexual assault. The issue for the court of appeals was whether Oct. 19 was included in the specified time period of "late summer or early fall."

The court concluded that "early fall" was ambiguous and that it was "appropriate to look at the entire record to clarify the meaning of the phrase ..." ¶25. The proper test "is to consider how a reasonable person familiar with the facts and circumstances of a particular case would understand that charging language." ¶30. The court concluded that the reasonable person "would not consider the phrase 'early fall of 2012' to include October 19." ¶34.

The court added:

> We thus emphasize an important point, lest our decision be read to encourage the use of ambiguous charging language to manipulate double jeopardy protections in future prosecutions: well-established law in Wisconsin already provides a remedy for a defendant facing an ambiguous charge. Specifically, a defendant may move for the dismissal – or, in the alternative, move to make more definite and certain the allegations against him or her – of charges based on allegedly overbroad or ambiguous timeframes in a charging document.
> ¶35.
> [The Wisconsin Supreme Court granted review in Schultz on April 2, 2019.]

6. This statement is based on § 948.025(2). It is sufficient for cases where all the alleged predicate violations are of the same subsection of § 948.02. If the alleged predicate violations are of different subsections of § 948.02, a more detailed statement is required. See subs. (b) and (c) of § 948.025.

The rules in subsec. (2) of § 948.025 do "not violate due process or the right to a unanimous verdict." State v. Johnson, 2001 WI 52, ¶28, 243 Wis.2d 365, 627 N.W.2d 455.

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2107 EXAMPLE REPEATED ACTS OF SEXUAL ASSAULT OF A CHILD — § 948.025(1)(b)

Statutory Definition of the Crime

Section 948.025(1)(b) of the Criminal Code of Wisconsin is violated by one who, within a specified period of time, commits three or more sexual assaults of the same child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant committed at least three sexual assaults of (name of victim).

In this case, the defendant is alleged to have committed sexual assault of a child by violating Section 948.02(1)(b).

Section 948.02(1)(b) requires the State to prove that:

$ The defendant had sexual intercourse with (name of victim).

$ (Name of victim) was under the age of 12 years at the time of the alleged sexual intercourse.

Knowledge of (name of victim)'s age is not required and mistake regarding (name of victim)'s age is not a defense.

Consent to sexual intercourse is not a defense.

Meaning of Sexual Intercourse

REFER TO WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

2. At least three sexual assaults took place within a specified period of time. The specified period of time is from (beginning date of specified period) through (ending date of specified period) .

GIVE THE FOLLOWING ONLY IF MORE THAN THREE ACTS HAVE BEEN ALLEGED.

[More Than Three Acts Alleged]

[Before you may find the defendant guilty you must unanimously agree that at least three sexual assaults occurred between (beginning date of specified period) and (ending date of specified period) , but you need not agree on which acts constitute the required three.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant committed three violations of § 948.02(1)(b) within the specified period of time, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2107 EXAMPLE was approved by the Committee in December 2008.

This instruction is drafted as an example of how Wis JI-Criminal 2107 would read when applied to a case where all the predicate offenses for a charge under § 948.025(1)(b) are violations of § 948.02(1)(b).

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2108 PHYSICAL ABUSE OF A CHILD: INTENTIONALLY CAUSING GREAT BODILY HARM — § 948.03(2)(a)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(2)(a) of the Criminal Code of Wisconsin, is committed by one who intentionally causes great bodily harm to a child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim) .

   "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[1]

2. The defendant intentionally[2] caused great bodily harm.

   This requires that the defendant had the mental purpose to cause great bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

3. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

Knowledge of (name of victim) 's age by the defendant is not required[3] and mistake regarding (name of victim) 's age is not a defense.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2108 was originally published in 1989. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse.

This instruction is for a violation of § 948.03(2)(a), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

The privilege of parental discipline as defined in § 939.45(5) is not available as a defense to a charge under § 948.03(2)(a). As amended by the same legislation that created § 948.03, § 939.45(5)(b) provides that "it is never reasonable discipline to use force which is intended to cause great bodily harm. . . ." Thus, by proving that the defendant intentionally caused great bodily harm, the state will also prove that the privilege does not apply. If evidence was received that might raise the issue of parental discipline, it might be helpful to the jury to instruct in the words quoted above that the privilege does not apply to the intentional causing of great bodily harm. If the lesser included offense of intentionally causing bodily harm is submitted, the privilege could apply to that offense. See Wis JI-Criminal 950.

1. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

2. "Intentionally" is defined in § 939.23(3). See Wis JI-Criminal 923A and 923B.

3. Section 939.23(6).

4. Section 939.43(2).

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2108A PHYSICAL ABUSE OF A CHILD: FAILING TO ACT TO PREVENT GREAT BODILY HARM — § 948.03(4)(a)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(4)(a) of the Criminal Code of Wisconsin, is committed by a person responsible for the welfare of a child who has knowledge that another person intends to cause great bodily harm to the child, is physically and emotionally capable of taking action which will prevent the great bodily harm from occurring, fails to take that action, and whose failure to act facilitates the great bodily harm to the child that is intentionally caused by the other person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following seven elements were present.

Elements of the Crime That the State Must Prove

1. First, that the defendant was a person responsible for the welfare of a child, (name of victim) .

   A "person responsible for the welfare of a child" includes (use the appropriate term from § 948.01(3)) .[1]

2. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

Knowledge of (name of victim)'s age by the defendant is not required[2] and mistake regarding (name of victim)'s age is not a defense.[3]

3. (Name of principal) intentionally[4] caused great bodily harm to (name of victim).

This requires that (name of principal) had the mental purpose to cause great bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[5]

4. The defendant knew or believed[6] that (name of principal) intended to cause[7] great bodily harm to (name of victim).

What the defendant knew or believed must be determined from the standpoint of the defendant at the time of the alleged offense and not from the viewpoint of the jury now.[8]

5. The defendant was physically and emotionally capable of taking action which would have prevented the great bodily harm from occurring.[9]

6. The defendant failed to take that action.

7. The defendant's alleged failure to act facilitated the great bodily harm to (name of victim) that was intentionally caused by (name of principal).[10]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all seven elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 2108.1 in 1993. This revision renumbered the instruction and was approved by the Committee in December 2008; it involved adoption of a new format and nonsubstantive changes to the text.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse. Subsection (4), addressed by this instruction, imposes liability for failing to act to prevent great bodily harm.

This instruction is drafted for one type of liability defined by § 948.03(4)(a) – that where a person's failure to act facilitates great bodily harm intentionally caused by another person. The statute also prohibits exposing a child to an unreasonable risk of great bodily harm. That alternative is not covered by this instruction.

The Wisconsin Supreme Court has stated that "[t]he legislature deliberately enacted sec. 948.03(4) to penalize the conduct described in the Williquette decision." State v. Rundle, 176 Wis.2d 985, 999, 500 N.W.2d 916 (1993). The reference is to State v. Williquette, 129 Wis.2d 239, 385 N.W.2d 145 (1986), where the Wisconsin Supreme Court held that a person could violate the prior child abuse statute (§ 940.201, 1985-86 Stats.) by failing to protect children from a risk of physical abuse by another. That statute required that the defendant "subject the child to cruel maltreatment," which the court found was established where the defendant mother was shown to have failed to act in the face of repeated abuse of

her children by the children's father. The Williquette court also recognized that general omissions liability exists in Wisconsin, notwithstanding the fact that no specific statute exists. 129 Wis.2d 239, 251-55.

Section 940.201 was repealed and replaced by § 948.03. 1987 Wisconsin Act 332. In Rundle, supra, the court held that the Williquette holding was codified in § 948.03(4). The court reversed Rundle's conviction for aiding and abetting a violation of § 948.03 because the evidence was not sufficient to prove "conduct, either verbal or overt, that as a matter of objective fact, aids another in the execution of a crime." 176 Wis.2d 985, 1004. The court held that omissions cannot be used to satisfy the "conduct" requirement of party to crime liability (at least for violations of § 948.03): "In sec. 948.03(4) the legislature has specified which omissions to act are unlawful." 176 Wis.2d 985, 1003.

1. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

NOTE: The same phrase is used in defining the class of persons who have the privilege to discipline a child under § 939.45(5), but a different definition applies. Compare § 939.45(5)(c)3 with § 948.01(3).

See Wis JI-Criminal 2106A for discussion of authority relating to "person responsible for the welfare of a child."

2. Section 939.23(6).

3. Section 939.43(2).

4. This instruction is drafted for cases where great bodily harm is intentionally caused by another person. Section 948.03(4)(a) applies where the other person "intends to cause, is causing or has intentionally or recklessly caused great bodily harm." The Committee concluded that for the variety of conduct addressed by this instruction, the other person must have intentionally caused great bodily harm and the defendant must have known that the person intended to cause such harm.

5. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

6. The instruction uses "knew or believed" in place of the phrase "has knowledge that" which is used in the statute. No change in meaning is intended. See § 939.23(2).

7. See note 4, above.

8. Section 939.23(2).

9. Section 948.03(4)(a) also applies to preventing the harm from "being repeated." The Committee concluded that the "being repeated" alternative fits better with exposing the child to a risk of

harm, which is not addressed by this instruction.

10. The instruction addresses the case where the defendant's failure to act is alleged to have facilitated great bodily harm caused by another. The statute also covers exposing the child to a risk of harm, which is not addressed by this instruction.

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2108B PHYSICAL ABUSE OF A CHILD: FAILING TO ACT TO PREVENT RECKLESS CAUSING OF GREAT BODILY HARM — § 948.03(4)(a)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(4)(a) of the Criminal Code of Wisconsin, is committed by a person responsible for the welfare of a child who has knowledge that another person has recklessly caused great bodily harm to the child, is physically and emotionally capable of taking action which will prevent the great bodily harm from occurring, fails to take that action, and whose failure to act facilitates the great bodily harm to the child that is recklessly caused by the other person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following seven elements were present.

Elements of the Crime That the State Must Prove

1. First, that the defendant was a person responsible for the welfare of a child, (name of victim) .

   A "person responsible for the welfare of a child" includes (use the appropriate term from § 948.01(3)) .[1]

2. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

Knowledge of (name of victim)'s age by the defendant is not required[2] and mistake regarding (name of victim)'s age is not a defense.[3]

3. (Name of principal) recklessly caused great bodily harm to (name of victim).

This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).[4]

In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim).[5]

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[6]

4. The defendant knew or believed[7] that (name of principal) recklessly caused great bodily harm to (name of victim).

What the defendant knew or believed must be determined from the standpoint of the defendant at the time of the alleged offense and not from the viewpoint of the jury now.[8]

5. The defendant was physically and emotionally capable of taking action which would have prevented the great bodily harm from occurring.[9]

6. The defendant failed to take that action.

7. The defendant's alleged failure to act facilitated the great bodily harm to (name of victim) that was recklessly caused by (name of principal) .[10]

Deciding About Knowledge and Belief

You cannot look into a person's mind to find knowledge and belief. Knowledge and belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all seven elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was approved by the Committee in March 2015.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse. Subsection (4), addressed by this instruction, imposes liability for failing to act to prevent great bodily harm.

This instruction is drafted for one type of liability defined by § 948.03(4)(a) – that where a person's failure to act facilitates great bodily harm recklessly caused by another person. See Wis JI-Criminal 2108A for offenses involving great bodily harm intentionally caused by another person. The statute also prohibits exposing a child to an unreasonable risk of great bodily harm. That alternative is not covered by this instruction.

The Wisconsin Supreme Court has stated that "[t]he legislature deliberately enacted sec. 948.03(4) to penalize the conduct described in the Williquette decision." State v. Rundle, 176 Wis.2d 985, 999, 500 N.W.2d 916 (1993). The reference is to State v. Williquette, 129 Wis.2d 239, 385 N.W.2d 145 (1986), where the Wisconsin Supreme Court held that a person could violate the prior child abuse statute (§ 940.201, 1985-86 Stats.) by failing to protect children from a risk of physical abuse by another. That statute required that the defendant "subject the child to cruel maltreatment," which the court found was established where the defendant mother was shown to have failed to act in the face of repeated abuse of her children by the children's father. The Williquette court also recognized that general omissions liability exists in Wisconsin, notwithstanding the fact that no specific statute exists. 129 Wis.2d 239, 251-55.

Section 940.201 was repealed and replaced by § 948.03. 1987 Wisconsin Act 332. In Rundle, supra, the court held that the Williquette holding was codified in § 948.03(4). The court reversed Rundle's conviction for aiding and abetting a violation of § 948.03 because the evidence was not sufficient to prove "conduct, either verbal or overt, that as a matter of objective fact, aids another in the execution of a crime." 176 Wis.2d 985, 1004. The court held that omissions cannot be used to satisfy the "conduct" requirement of party to crime liability (at least for violations of § 948.03): "In sec. 948.03(4) the legislature has specified which omissions to act are unlawful." 176 Wis.2d 985, 1003.

1. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

NOTE: The same phrase is used in defining the class of persons who have the privilege to discipline a child under § 939.45(5), but a different definition applies. Compare § 939.45(5)(c)3 with § 948.01(3).

See Wis JI-Criminal 2106A for discussion of authority relating to "person responsible for the welfare of a child."

2. Section 939.23(6).

3. Section 939.43(2).

4. The definition of "recklessly" is the one provided in § 948.03(1). Note that this definition is different from the definition of "criminal recklessness" in § 939.24. The Wisconsin Court of Appeals has discussed the difference in two cases.

In State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719, the court held that "'recklessly' causing harm to a child under § 948.03(3)(b) is distinguished from 'criminal recklessness,'

because only the latter includes a subjective component. We therefore conclude that recklessly causing harm to a child, unlike criminal recklessness, does not contain a subjective component." ¶23. Thus, reckless child abuse does not require that the defendant was subjectively aware of the risk to the child's safety.

In State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393, the issue was whether the defendant was entitled to an instruction on the mistake defense in his prosecution for physical abuse of a child by recklessly causing great bodily harm. The court of appeals concluded that the mistake defense did not apply because the crime charged does not require a mental element that the alleged mistake could negate. "Inasmuch as § 948.03 sets out its own unique definition of 'recklessly,' the general definition of criminal recklessness [in § 939.24] does not apply." 2006 WI App 185, ¶11.

5. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though"recklessly" is defined differently in § 948.03, the basic concept is the same – all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

In the Committee's judgment, the purpose of the conduct may also be considered in making this determination. This would include the purpose of parental discipline, even though it is not completely clear whether the privilege as defined in § 939.45(5) would apply. See Wis JI-Criminal 951.

6. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

7. The instruction uses "knew or believed" in place of the phrase "has knowledge that" which is used in the statute. No change in meaning is intended. See § 939.23(2).

8. Section 939.23(2).

9. Section 948.03(4)(a) also applies to preventing the harm from "being repeated." The Committee concluded that the "being repeated" alternative fits better with exposing the child to a risk of harm, which is not addressed by this instruction.

10. The instruction addresses the case where the defendant's failure to act is alleged to have facilitated great bodily harm caused by another. The statute also covers exposing the child to a risk of harm, which is not addressed by this instruction.

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2109 PHYSICAL ABUSE OF A CHILD: INTENTIONALLY CAUSING BODILY HARM — § 948.03(2)(b)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(2)(b) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to a child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   Bodily harm means physical pain or injury, illness, or any impairment of physical condition.[1]

2. The defendant intentionally[2] caused bodily harm.

   This requires that the defendant had the mental purpose to cause bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

3. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

   Knowledge of (name of victim)'s age by the defendant is not required[3] and mistake regarding (name of victim)'s age is not a defense.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2109 was originally published in 1989. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse.

This instruction is for a violation of § 948.03(2)(b), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

See Wis JI-Criminal 950 for an instruction on the privilege of parental discipline.

1. This is the definition of "bodily harm" provided in § 939.22(4).

2. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and B.

3. Section 939.23(6).

4. Section 939.43(2).

2110 PHYSICAL ABUSE OF A CHILD: INTENTIONALLY CAUSING BODILY HARM BY CONDUCT WHICH CREATES A HIGH PROBABILITY OF GREAT BODILY HARM — § 948.03(2)(c)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(2)(c) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to a child by conduct which creates a high probability of great bodily harm.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   Bodily harm means physical pain or injury, illness, or any impairment of physical condition.[1]

2. The defendant intentionally[2] caused bodily harm.

   This requires that the defendant had the mental purpose to cause bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

3. The defendant's conduct created a high probability of great bodily harm.

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[3]

4. The defendant knew that (his) (her) conduct created a high probability of great bodily harm.[4]

5. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

Knowledge of (name of victim)'s age by the defendant is not required[5] and mistake regarding (name of victim)'s age is not a defense.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2110 was originally published in 1989. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse.

This instruction is for a violation of § 948.03(2)(c), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

See Wis JI-Criminal 950 regarding the applicability of the privilege of parental discipline to this offense.

1. This is the definition of "bodily harm" provided in § 939.22(4).

2. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and B.

3. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

4. Section 948.03(2)(c) applies to those who "intentionally cause bodily harm by conduct which creates a high probability of great bodily harm." Section 939.23(3) provides that when "intentionally" is used in a criminal statute, it requires that the actor "have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally'." The Committee concluded that this requires that the defendant charged under § 948.03(2)(c) must have known that his conduct created a high probability of great bodily harm.

5. Section 939.23(6).

6. Section 939.43(2).

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2111 PHYSICAL ABUSE OF A CHILD: RECKLESSLY CAUSING GREAT BODILY HARM — § 948.03(3)(a)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(3)(a) of the Criminal Code of Wisconsin, is committed by one who recklessly causes great bodily harm to a child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim).

   "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[1]

2. The defendant recklessly caused great bodily harm.

   This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).[2]

   In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should

consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim) .[3]

3. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

Knowledge of (name of victim) 's age by the defendant is not required[4] and mistake regarding (name of victim) 's age is not a defense.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2111 was originally published in 1989. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse.

This instruction is for a violation of § 948.03(3)(a), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

1. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

2. The definition of "recklessly" is the one provided in § 948.03(1). Note that this definition is different from the definition of "criminal recklessness" in § 939.24. The Wisconsin Court of Appeals has discussed the difference in two cases.

In State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719, the court held that "'recklessly' causing harm to a child under § 948.03(3)(b) is distinguished from 'criminal recklessness,' because only the latter includes a subjective component. We therefore conclude that recklessly causing harm to a child, unlike criminal recklessness, does not contain a subjective component." ¶23. Thus, reckless child abuse does not require that the defendant was subjectively aware of the risk to the child's safety.

In State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393, the issue was whether the defendant was entitled to an instruction on the mistake defense in his prosecution for physical abuse of a child by recklessly causing great bodily harm. The court of appeals concluded that the mistake defense did not apply because the crime charged does not require a mental element that the alleged mistake could negate. "Inasmuch as § 948.03 sets out its own unique definition of 'recklessly,' the general definition of criminal recklessness [in § 939.24] does not apply." 2006 WI App 185, ¶11.

3. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though"recklessly" is defined differently in § 948.03, the basic concept is the same – all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

In the Committee's judgment, the purpose of the conduct may also be considered in making this determination. This would include the purpose of parental discipline, even though it is not completely clear whether the privilege as defined in § 939.45(5) would apply. See Wis JI-Criminal 951.

4. Section 939.23(6).

5. Section 939.43(2).

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2112 PHYSICAL ABUSE OF A CHILD: RECKLESSLY CAUSING BODILY HARM — § 948.03(3)(b)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(3)(b) of the Criminal Code of Wisconsin, is committed by one who recklessly causes bodily harm to a child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[1]

2. The defendant recklessly caused bodily harm.

   This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).[2]

   In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the

conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim) .[3]

3. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

Knowledge of (name of victim) 's age by the defendant is not required[4] and mistake regarding (name of victim) 's age is not a defense.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2112 was originally published in 1989. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse.

This instruction is for a violation of § 948.03(3)(b), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

1. This is the definition of "bodily harm" provided in § 939.22(4).

2. The definition of "recklessly" is the one provided in § 948.03(1). Note that this definition is different from the definition of "criminal recklessness" in § 939.24. The Wisconsin Court of Appeals has discussed the difference in two cases.

In State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719, the court held that "'recklessly' causing harm to a child under § 948.03(3)(b) is distinguished from 'criminal recklessness,' because only the latter includes a subjective component. We therefore conclude that recklessly causing harm to a child, unlike criminal recklessness, does not contain a subjective component." ¶23. Thus,

reckless child abuse does not require that the defendant was subjectively aware of the risk to the child's safety.

In State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393, the issue was whether the defendant was entitled to an instruction on the mistake defense in his prosecution for physical abuse of a child by recklessly causing great bodily harm. The court of appeals concluded that the mistake defense did not apply because the crime charged does not require a mental element that the alleged mistake could negate. "Inasmuch as § 948.03 sets out its own unique definition of 'recklessly,' the general definition of criminal recklessness [in § 939.24] does not apply." 2006 WI App 185, ¶11.

3. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though"recklessly" is defined differently in § 948.03, the basic concept is the same – all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

In the Committee's judgment, the purpose of the conduct may also be considered in making this determination. This would include the purpose of parental discipline, even though it is not completely clear whether the privilege as defined in § 939.45(5) would apply. See Wis JI-Criminal 951.

4. Section 939.23(6).

5. Section 939.43(2).

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2113 PHYSICAL ABUSE OF A CHILD: RECKLESSLY CAUSING BODILY HARM BY CONDUCT WHICH CREATES A HIGH PROBABILITY OF GREAT BODILY HARM — § 948.03(3)(c)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(3)(c) of the Criminal Code of Wisconsin, is committed by one who recklessly causes bodily harm to a child by conduct which creates a high probability of great bodily harm.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   Bodily harm means physical pain or injury, illness, or any impairment of physical condition.[1]

2. The defendant recklessly caused bodily harm.

   This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).[2]

   In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should

consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim) .[3]

3. The defendant's conduct created a high probability of great bodily harm.

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[4]

4. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

Knowledge of (name of victim) 's age by the defendant is not required[5] and mistake regarding (name of victim) 's age is not a defense.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2113 was originally published in 1989. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse.

This instruction is for a violation of § 948.03(3)(c), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

1. This is the definition of "bodily harm" provided in § 939.22(4).

2. The definition of "recklessly" is the one provided in § 948.03(1). Note that this definition is different from the definition of "criminal recklessness" in § 939.24. The Wisconsin Court of Appeals has discussed the difference in two cases.

In State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719, the court held that "'recklessly' causing harm to a child under § 948.03(3)(b) is distinguished from 'criminal recklessness,' because only the latter includes a subjective component. We therefore conclude that recklessly causing harm to a child, unlike criminal recklessness, does not contain a subjective component." ¶23. Thus, reckless child abuse does not require that the defendant was subjectively aware of the risk to the child's safety.

In State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393, the issue was whether the defendant was entitled to an instruction on the mistake defense in his prosecution for physical abuse of a child by recklessly causing great bodily harm. The court of appeals concluded that the mistake defense did not apply because the crime charged does not require a mental element that the alleged mistake could negate. "Inasmuch as § 948.03 sets out its own unique definition of 'recklessly,' the general definition of criminal recklessness [in § 939.24] does not apply." 2006 WI App 185, ¶11.

3. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though "recklessly" is defined differently in § 948.03, the basic concept is the same – all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

In the Committee's judgment, the purpose of the conduct may also be considered in making this determination. This would include the purpose of parental discipline, even though it is not completely clear whether the privilege as defined in § 939.45(5) would apply. See Wis JI-Criminal 951.

4. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

5. Section 939.23(6).

6. Section 939.43(2).

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2114 PHYSICAL ABUSE OR SEXUAL ASSAULT OF A CHILD BY A PERSON RESPONSIBLE FOR THE WELFARE OF THE CHILD — §§ 948.02(3m), 948.025(2m), and 948.03(5)

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

ADD THE FOLLOWING TO WIS JI-CRIMINAL 2102-2105, 2107, or 2108-2113:[1]

The information alleges not only that the defendant committed the crime of (name of offense)[2] of a child but also that the defendant was responsible for the welfare of the child who is alleged to be the victim of that crime.

If you find the defendant guilty, you must answer the following question:

"At the time of the (name of offense),[3] was the defendant responsible for the welfare of (name of victim)?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant was responsible for the welfare of (name of victim) at the time of the (name of offense).[4]

A "person responsible for the welfare of a child" includes _____.[5]

If you are satisfied beyond a reasonable doubt that the defendant was responsible for the welfare of (name of victim) at the time of the (name of offense),[6] you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2114 was originally published in 1990 and revised in 1995 and 1996. This revision was approved by the Committee in February 2003.

Sections 948.02(3m), 948.025(2m), and 948.03(5) were repealed by 2001 Wisconsin Act 109, effective February 1, 2003. This instruction is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by §§ 948.02(3m), 948.025(2m), and 948.03(5) have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(6).

This instruction is drafted for use in cases involving any one of three provisions that enhance the penalty for offenses against children when those offenses are committed by a "person responsible for the welfare of the child." Each of the following statutes allows for increasing the maximum term of imprisonment by not more than 5 years: § 948.02(3m) for sexual assault of a child; § 948.025(2m) for repeated acts of sexual assault of a child; and § 948.03(5) for physical abuse of a child.

Sections 948.02(3m) and 948.025(2m) were created by 1995 Wisconsin Act 14 and apply to offenses committed on or after May 31, 1995.

The Committee has concluded that penalty enhancement provisions are best handled by submitting them to the jury as a special question. For other examples, see Wis JI-Criminal 990, 994, and 996. The following form is suggested for the guilty verdict:

> We, the jury, find the defendant guilty of physical abuse of a child, under Wis. Stat. § 948.03___, at the time and place charged in the information.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> "At the time of the physical abuse, was the defendant responsible for the welfare of <u>(name of victim)</u> ?"

1. The penalty enhancement provision found in § 948.02(3m) applies to offenses defined in § 948.02(1) and (2). Wis JI-Criminal 2102 and 2104 are the instructions for those offenses.

The penalty enhancement provision in § 948.025(2m) applies to the offense defined in § 948.025. See Wis JI-Criminal 2107.

Sections 948.02(3m) and 948.025(2m) were created by 1995 Wisconsin Act 14 and apply to offenses committed on or after May 31, 1995.

The penalty enhancement provision in § 948.03(5) applies to offenses defined in § 948.03(2) and (3). Wis JI-Criminal 2108, 2109, and 2110 are the instructions for the three types of intentional physical abuse defined in sub. (2). Wis JI-Criminal 2111, 2112, and 2113 are the instructions for the three types of reckless physical abuse defined in sub. (3).

2. Use the name of the offense: "sexual assault" if the case involves § 948.02(3m); "repeated acts of sexual assault" if the case involves § 948.025(2m); "physical abuse" if the case involves § 948.03(5).

3. See note 2, supra.

4. See note 2, supra.

5. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; an employe of a public or private residential home, institution, or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child. [NOTE: "Stepparent" was added to the definition by 1995 Wisconsin Act 214 (effective date: May 1, 1996).]

The Committee concluded that the § 948.01(3) definition applies even though there is a slight difference in the wording of the phrase in § 948.03(5). Compare ". . . the person is responsible for the welfare of the child" in § 948.03(5) with "person responsible for the child's welfare" in § 948.01(3).

[NOTE: The same phrase is used in defining the class of persons who have the privilege to discipline a child under § 939.45(5), but a different definition applies. Compare § 939.45(5)(c)3 with § 948.01(3).]

In State v. Sostre, 198 Wis.2d 409, N.W.2d (1996), the Wisconsin Supreme Court held that a live-in boyfriend, who is a volunteer caretaker of a child, is a "person . . . responsible for the welfare of [a] child" under § 948.01(3). The defendant had lived with the mother of the victim for about three years. During this time the defendant did everything the mother did with regard to taking care of the children, including feeding and bathing them. The child considered the defendant his father or stepfather, called him "Poppy," and had a father-son relationship with the defendant. The definition of "person responsible . . ." includes those who are "employed by one legally responsible for the child's welfare to exercise temporary control or care for the child." The court held:

> A common meaning of the word "employed" is to "engage the service of" or "to make use of." Under these facts, it seems clear that the mother made use of the services of the defendant, or engaged the services of the defendant, in order to take care of her child when it was necessary for her to be away. In other words, the defendant was clearly "employed" by a person "legally responsible" for a child to "care for that child."

The fact that the word "employed" is usually equated with economic payment for services does not require a different result. Nor does the fact that a person in this defendant's position may not qualify as a "person responsible" for purposes of the privilege of parental discipline defined in § 939.45(5). That definition does not include the phrase "employed by one legally responsible . . ." that was at issue in this case. [State v. Dodd, 185 Wis.2d 560, 518 N.W.2d 300 (Ct. App. 1994), held that a live-in boyfriend was not covered by the privilege.] The court concluded the legislature specifically and deliberately defined the same term differently in the two statutes.

A biological father, who has admitted paternity in writing, is a "parent" and thus a "person responsible for the child's welfare" under § 948.21, Neglecting a Child. State v. Evans, 171 Wis.2d 471,

492 N.W.2d 141 (1992). The definition of "person responsible . . ." in § 948.01(3) applies to § 948.21 and to the offenses covered by this instruction.

6. See note 2, supra.

2114A REPEATED ACTS OF PHYSICAL ABUSE OF A CHILD — § 948.03(5)

Statutory Definition of the Crime

Section 948.03(5) of the Criminal Code of Wisconsin is violated by one who, within a specified period of time,[1] commits three or more acts of physical abuse of the same child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant committed at least three acts of physical abuse of (name of victim).

   In this case, the defendant is alleged to have committed physical abuse of a child by violating (identify the subsection of § 948.03 that defines the physical abuse alleged).[2]

   Section _____ requires the State to prove that:[3]

   LIST THE ELEMENTS OF THE CRIME AS IDENTIFIED IN THE APPLICABLE INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.[4]

2. At least three acts of physical abuse took place within a specified period of time.

The specified period of time is from (beginning date of specified period) through (ending date of specified period).[5]

GIVE THE FOLLOWING ONLY IF MORE THAN THREE ACTS HAVE BEEN ALLEGED.

[More Than Three Acts Alleged]

[Before you may find the defendant guilty you must unanimously agree that at least three acts of physical abuse occurred between (beginning date of specified period) and (ending date of specified period), but you need not agree on which acts constitute the required three.][6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant committed three violations of (specify statute) within the specified period of time, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS A, B, C, OR D FELONY AND THERE IS EVIDENCE THAT THE PENALTY-INCREASING FACT IS PRESENT.[7]

[If you find the defendant guilty, you must answer the following question:

(Did at least one violation cause the death of the child? You must all agree on the violation that caused death.)

(Did at least two violations involve intentionally causing great bodily harm to the child? You must all agree on the violations that caused great bodily harm.)

(Did at least one violation cause great bodily harm to the child? You must all agree on the violation that caused[8] great bodily harm.)

(Did at least one violation create a high probability of great bodily harm to the child?

You must all agree on the violation that created a high probability of great bodily harm.)

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."]

COMMENT

Wis JI-Criminal 2114A was originally published in 2017. This revision was approved by the Committee in February 2019; it updated footnote 5.

This instruction is for a violation of § 948.03(5), which was created by 2015 Wisconsin Act 366 [effective date: April 21, 2016].

NOTE: This instruction is drafted for a case where the predicate acts alleged are all violations of the same subsection of § 948.03. See Wis JI-Criminal 2114A EXAMPLE for a case where all predicates are violations of § 948.03(2)(a). If the charge alleges violations of different subsections of § 948.03, considerable complexity could result and great care should be taken in drafting the instruction. Issues of concern include:

- determining whether less serious violations of § 948.03(5) are lesser included offenses – there is no special rule for § 948.03(5) in § 939.66, so the strict compare-the-statutory elements test would apply;
- submitting individual predicate offenses as lesser included offenses;
- making a proper statement regarding jury agreement – see § 948.03(5)(b); and,
- potential confusion if evidence of other similar acts is submitted under § 904.04(2).

There are five possible penalties for convictions under § 948.03(5):

- § 948.03(5)(a)1. provides that it is a Class A felony "if at least one violation caused the death of the child."

- § 948.03(5)(a)2. provides that it is a Class B felony "if at least 2 violations were violations of sub. (2)(a)" – referring to intentionally causing great bodily harm to a child.

- § 948.03(5)(a)3. provides that it is a Class C felony "if at least one violation resulted in great bodily harm to the child."

- § 948.03(5)(a)4. provides that it is a Class D felony "if at least one violation created a high probability of great bodily harm to the child."

- § 948.03(5)(a)5. states: "A Class E felony." The Committee concluded that this applies where none of the facts addressed by the other penalty provisions are alleged.

If the offense is charged as a Class E felony, nothing need be added to the text of the instruction. If the offense is charged as a Class A, B, C, or D felony, a special question should be added to assure a jury finding on the penalty-increasing fact. See footnote 7, below.

Section 939.635, as amended by 2015 Wisconsin Act 366, provides that the maximum penalty for violations of § 948.03(5)(a)1., 2., or 3. "may be increased by not more than 5 years" if the offense was "against a child for whom the person was providing child care for compensation." See Wis JI-Criminal 2115 for a special question that should be added to the instruction when that penalty-increasing fact is charged.

1. The statute refers to 3 or more violations "within a specified period of time." The Committee concluded that the intent of the statute must be that the prosecutor will specify the applicable period in the charge. That "specified period" should be carried over to the jury instruction. See note 5, below.

2. This instruction is drafted for a case where the predicate acts alleged are all violations of the same subsection of § 948.03. Refer to the standard instruction for that subsection and insert it here, using bullet points in place of numbers for each element. For an illustration, see Wis JI-Criminal 2114A EXAMPLE.

3. To avoid a second reference to "elements" in defining the predicate crimes, the Committee decided that a bullet-point list should be used instead of a numerical one. The instruction introduces the list with ". . . requires the State to prove that: . ." to allow simply plugging in the regular statement of the element without change, using a bullet point instead of a number. See Wis JI-Criminal 2114A EXAMPLE.

4. The Committee recommends that a complete listing of the elements of the crime be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion in similar situations: bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698] and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

5. Here identify the beginning and ending dates of the period specified by the prosecution. For example: "The specified period of time is from July 1, 2016, through October 1, 2016."

Section 948.025 Engaging in repeated acts of sexual assault of the same child, also requires specifying the time period. In State v. Schultz, 2019 WI App 3, 385 Wis.2d 494, 922 N.W.2d 866, the defendant was tried and acquitted on a charge of repeated sexual assault of child. The specified time period was identified as "late summer or early fall" of 2012. After the acquittal, he was charged with a single act of child sexual assault against the same victim alleged to have occurred on or about Oct. 19, 2012. This was based on a paternity test showing he was the father of a child conceived at that time. Schultz argued that principles of double jeopardy should bar the charge for child sexual assault. The issue for the court of appeals was whether Oct. 19 was included in the specified time period of "late summer or early fall."

The court concluded that "early fall" was ambiguous and that it was "appropriate to look at the entire record to clarify the meaning of the phrase ..." ¶25. The proper test "is to consider how a reasonable person familiar with the facts and circumstances of a particular case would understand that charging language." ¶30. The court concluded that the reasonable person "would not consider the phrase 'early fall of 2012' to include October 19." ¶34.

The court added:

> We thus emphasize an important point, lest our decision be read to encourage the use of ambiguous charging language to manipulate double jeopardy protections in future prosecutions: well-established law in Wisconsin already provides a remedy for a defendant facing an ambiguous charge. Specifically, a defendant may move for the dismissal – or, in the alternative, move to make more definite and certain the allegations against him or her – of charges based on allegedly overbroad or ambiguous timeframes in a charging document.
> ¶35.

[The Wisconsin Supreme Court granted review in Schultz on April 2, 2019.]

6. This statement is based on § 948.03(5)(b).

7. The penalties for convictions under § 948.03(5) range from a Class A to a Class E felony – see the Comment preceding footnote 1, above. If the offense is charged as a Class E felony, nothing need be added to the text of the instruction. If the offense is charged as a Class A, B, C, or D felony, a special question should be added to assure a jury finding on the penalty-increasing fact. While the jury need not agree on which acts constitute the required three for conviction under § 948.03(5) if more than three acts were alleged, see § 948.03(5)(b), the Committee concluded that the jury must unanimously agree on the on the facts that increase the penalty. Those facts are the equivalent of elements of the Class A, B, C, or D felony.

If the facts may support submitting more than one question, the situation is essentially the same as one involving lesser included offenses. SM-6 Instructing On Lesser Included Offenses provides a review of the law relating to lesser included offenses, including the recommended way to instruct on the transition between greater and lesser offenses.

8. Section 948.03 (5)(a)3. uses "resulted in" rather than "caused." The instruction uses "cause;" Wisconsin case law holds that the two terms have the same meaning. See State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989) and State v. Wille, 2007 WI App 27, 299 Wis.2d 531, 798 N.W.2d 343.

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2114A EXAMPLE REPEATED ACTS OF PHYSICAL ABUSE OF A CHILD — § 948.03(5)

Statutory Definition of the Crime

Section 948.03(5) of the Criminal Code of Wisconsin is violated by one who, within a specified period of time, commits three or more acts of physical abuse of the same child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant committed at least three acts of physical abuse of (name of victim).

   In this case, the defendant is alleged to have committed physical abuse of a child by violating Section 948.03(2)(a).

   Section 948.03(2)(a) requires the State to prove that:

   - The defendant caused great bodily harm to (name of victim).

     "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

   - The defendant intentionally caused great bodily harm.

This requires that the defendant had the mental purpose to cause great bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

- (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

Knowledge of (name of victim)'s age by the defendant is not required, and mistake regarding (name of victim)'s age is not a defense.

2. At least three acts of physical abuse took place within a specified period of time. The specified period of time is from (beginning date of specified period) through (ending date of specified period).

GIVE THE FOLLOWING ONLY IF MORE THAN THREE ACTS HAVE BEEN ALLEGED.

[More Than Three Acts Alleged]

[Before you may find the defendant guilty, you must unanimously agree that at least three acts of physical abuse occurred between (beginning date of specified period) and (ending date of specified period), but you need not agree on which acts constitute the required three.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant committed three violations of Section 948.03(2)(a) within the specified period of time, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

SEE WIS JI-CRIMINAL 2114A IF SPECIAL QUESTIONS ON PENALTY-INCREASING FACTS ARE NECESSARY.[1]

COMMENT

Wis JI-Criminal 2114A EXAMPLE was approved by the Committee in August 2017. It was revised in 2023 to correct a formatting issue.

This instruction is for a violation of § 948.03(5), which was created by 2015 Wisconsin Act 366 [effective date: April 21, 2016].

The instruction is drafted as an example of how Wis JI-Criminal 2114A would read when applied to a case where all the predicate offenses for the charge under § 948.03(5) are violations of § 948.03(2)(a) – intentionally causing great bodily harm to a child.

1. The instruction assumes that the case is charged as a Class B felony under § 948.03(5)(a)2.: "at least 2 violations were violations of sub. (2)(a)." If only three predicate offenses were alleged, a special question on penalty is not necessary – the jury returning a guilty verdict will have agreed that the same three acts in violation of § 948.03(2)(a) were proved. If more than three predicate acts were alleged, the jury will have been told that agreement is not required on which acts constituted the required three. However, for purposes of the penalty, the jurors must all agree that the same two acts "were violations of sub. (2)(a)." Wis JI-Criminal 2114A provides special questions for the penalty-increasing facts.

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2115 SEXUAL ASSAULT OR PHYSICAL ABUSE OF A CHILD BY A CHILD CARE PROVIDER — § 939.635

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED ON OR AFTER DECEMBER 9, 2011.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON OFFENSES CHARGED UNDER §§ 948.02, 948.025, 948.03(2) and (3), AND 948.03(5)(a)1., 2., 3., and 4.[1]

The information alleges not only that the defendant committed the crime of _____ but also that the defendant did so against a child for whom the defendant was providing child care for compensation.

If you find the defendant guilty, you must answer the following question:[2]

"Did the defendant commit the crime of _____ against a child for whom the defendant was providing child care for compensation?"[3]

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant committed the crime against a child for whom the defendant was providing child care for compensation.

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2115 was approved by the Committee in August 2017. This revision was approved in December 2018; it updated the list of statutes to which it applies.

This instruction is drafted for the penalty enhancer found in § 939.635, which was created by 2011 Wisconsin Act 82 [effective date: December 9, 2011.] It allows an increase of not more than 5 years for violations of §§ 948.02, 948.025, 948.03(2) and (3), and 948.03(5)(a)1., 2., 3., and 4. if the defendant committed the crime against a child for whom the defendant was providing child care for compensation. The reference to offenses under § 948.03(5), Engaging In Repeated Acts Of Physical Abuse Of A Child, was added by 2015 Wisconsin Act 366 [effective date: April 21, 2016] to include the Class A, B, C, and

D felony violations of that statute. The prosecutor's intention to seek the enhanced penalty authorized by § 939.635 should be disclosed by alleging in the charging document that the defendant committed the crime against a child for whom the defendant was providing child care for compensation. This instruction should be added to the instruction for the crime charged if the evidence would support a finding that the penalty-increasing facts are established.

Until repealed by 2001 Wisconsin Act 109 (TIS II), a set of penalty enhancers existed for violations of §§ 948.02, 948.025, and 948.03 committed by a "person responsible for the welfare of the child." See Wis JI-Criminal 2114. Act 109 eliminated many penalty enhancers in the view that penalties had increased for most offenses and the new maximums provided sufficient sentencing authority. Act 109 recast them as aggravating circumstances to be considered in imposing a bifurcated sentence. The enhancers formerly found in §§ 948.02, 948.025, and 948.03 were recognized as aggravating factors in § 973.017(6) AGGRAVATING FACTORS; CHILD SEXUAL ASSAULT OR CHILD ABUSE.

1. The relevant instructions are:

- for violations of §§ 948.02: JI 2102A through 2102E; JI 2104; JI 2105A and B; 2106, and 2107.
- for violations of § 948.03(2): JI 2107; JI 2108; and JI 2109.
- for violations of § 948.03(3): JI 2111; JI 2112; and JI 2113.
- for violations of § 948.03(5)(a)1., 2., 3., and 4.: JI 2114.

2. The Committee recommends that the penalty enhancing fact be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant commit the crime of _____ against a child for whom the defendant was providing child care for compensation?"

3. Section 939.635 does not define "for compensation." The bill creating the statute originally specified that it applied only to persons licensed under certain statutes relating to providers of child care. [See 2011 Assembly Bill 102.] Senate Amendment 1 to AB 102 was adopted and changed the specific statutory references to the more general "child care for compensation."

2116 CAUSING MENTAL HARM TO A CHILD — § 948.04

Statutory Definition of the Crime

Causing mental harm to a child, as defined in § 948.04 of the Criminal Code of Wisconsin, is committed by one who is exercising temporary or permanent control of a child and causes mental harm to that child by conduct which demonstrates substantial disregard for the mental well-being of the child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was exercising temporary or permanent control[1] of (name of victim) .

2. (Name of victim) suffered mental harm.

"Mental harm" means substantial harm to a child's psychological or intellectual functioning which may be evidenced by a substantial degree of certain characteristics of the child, including, but not limited to, anxiety, depression, withdrawal, or outward aggressive behavior. "Mental harm" may be demonstrated by a substantial and observable change in behavior, emotional

response, or cognition that is not within the normal range for the child's age and stage of development.[2]

3. The defendant caused mental harm to (name of victim) .

This requires that the defendant's conduct was a substantial factor in producing the mental harm.[3]

4. The defendant caused mental harm by conduct which demonstrated substantial disregard for the mental well-being of (name of victim) .[4]

5. (Name of victim) had not attained the age of 18 years at the time the alleged harm was caused.[5]

Knowledge of (name of victim) 's age by the defendant is not required[6] and mistake regarding (name of victim) 's age is not a defense.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2116 was originally published in 1989. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 948.04, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

The offense defined by § 948.04 did not exist under prior law, at least to the extent that "cruel maltreatment" under § 940.201, 1985-86 Wis. Stats., did not include "mental harm" as defined for purposes of this offense.

1. "Exercising temporary or permanent control of a child" is not defined in Chapter 948. Compare the definition of "person responsible for the child's welfare" in § 948.01(3). There was nothing in the legislative history that indicated the intended scope of this term, so the Committee concluded that further definition in the instruction could not be provided with substantial assurance of accuracy.

2. This is the definition provided in § 948.01(2). It is comparable to the definition of "emotional damage" in the statute requiring the reporting of child abuse or neglect. See § 48.981(1)(cm). The term "emotional damage" is also used in § 813.122 which provides for child abuse restraining orders and injunctions. The definition provided in § 813.122(1)(e) is similar to the one in § 948.01(2). The Wisconsin Court of Appeals applied the § 813.122(1)(e) definition in In The Interest of H.Q., 152 Wis.2d 701, 449 N.W.2d 75 (Ct. App. 1989), and found that "emotional damage" was not established by evidence showing that children were concerned or upset about their father's drunken behavior:

> That a child became upset and cried twice in six months because of a parent's acts and dislikes being with the parent is insufficient for a finding of emotional damage, in the absence of expert testimony.

152 Wis.2d 701, 709.

3. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of mental harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

4. "Demonstrates substantial disregard for the mental well-being" appears to state a standard related to "recklessness." It is similar to the definition of recklessness used in § 948.03 – "demonstrates a conscious disregard for the safety of the child." The Wisconsin Court of Appeals has held that the § 948.03 definition states a different standard than the one provided by the definition of "criminal recklessness" in § 939.24 which requires a substantial and unreasonable risk and awareness of that risk. Those cases have made it clear that a subjective awareness of the risk is not required. See State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719 and State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393.

5. The crime is defined as causing mental harm "to a child," that is, to someone who has not attained the age of 18 years. Thus, the victim must have suffered mental harm before reaching the age of 18, even though the expanded statute of limitations would allow prosecution after the victim's 18th birthday. See § 939.74(2)(c).

6. Section 939.23(6).

7. Section 939.43(2).

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2119 FAILURE TO REPORT CHILD ABUSE — § 48.981(2), (3), and (6)

Statutory Definition of the Crime

Failure to report child abuse, as defined in § 48.981[1] of the Wisconsin Statutes, is committed by one who is required to report child abuse or neglect, has reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected, and intentionally fails to report as required.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was required to report child (abuse) (neglect).

   A _____ is required to report child (abuse) (neglect).[2]

2. The defendant saw (name of child) in the course of professional duties.

3. The defendant had reasonable cause to suspect that (name of child) had been (abused) (neglected).

   "Reasonable cause to suspect" means that a reasonable person in the defendant's position would have suspected that the child had been (abused) (neglected).[3]

["Abused" means physical injury inflicted by other than accidental means.][4]

["Neglected" means failure, refusal, or inability on the part of a caregiver, for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care, or shelter so as to seriously endanger the physical health of the child.][5]

4. The defendant intentionally failed to report.

"Intentionally," as used here, means that the defendant purposely failed to report. This does not require that the defendant knew that the law required the reporting of suspected (abuse) (neglect).[6]

"Report" requires immediately informing, by telephone or personally, the county department of (social) (human) services, or the sheriff, or the city police department of the facts and circumstances contributing to the reasonable suspicion that (abuse) (neglect) has occurred.[7]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2119 was originally published as Wis JI-Criminal 1221C in 1987. It was renumbered Wis JI-Criminal 2119 and republished without substantive change in 1992. The 2002 revision adopted a new format, made nonsubstantive changes to the text, and updated the Comment. This revision was approved by the Committee in December 2011; it updated the text and the Comment.

The offense defined by the combination of subsections (2), (3), and (6) of § 48.981 (see note 1, below) can be committed in two different situations: where a person has "reasonable cause to suspect" that a child has been abused or neglected; and where a person has "reason to believe" that a child has been threatened with abuse or neglect and that abuse or neglect will occur. Wis JI-Criminal 2119 is drafted for the first situation: reasonable cause to suspect that a child has been abused or neglected.

Section 48.981 was amended by 1987 Wisconsin Act 27 (the Budget Bill) to create an exception to the reporting requirement for "health care providers." The exception apparently excuses health care providers from the reporting requirement with regard to instances of consensual sexual contact and sexual intercourse with persons other than relatives, guardians, etc. The statutory changes are complex; see § 48.981(2m).

Subsection (2r) of § 48.981 recognizes an exception for persons delegated care and custody of a child under § 48.979.

1. The facts necessary to constitute the crime of failure to report child abuse or neglect are derived from subs. (2), (3), and (6) of § 48.981. Subsection (6) is the penalty section, providing that "whoever intentionally violates this section by failure to report as required" may be fined not more than $1,000 or imprisoned not more than 6 months or both. Those who are required to report are identified in sub. (2). Subsection (2m) provides an exception to the reporting requirement for "health care providers." Subsection (2r) of § 48.981 recognizes an exception for persons delegated care and custody of a child under § 48.979. Subsection (3) describes the nature of the required report.

2. The Committee suggests inserting the title of required reporters from the list provided in § 48.981(2) that allegedly applies to the defendant. For example: "A nurse is required to report child (abuse) (neglect)." It is for the jury to determine whether the defendant is in fact a person required to report.

Note that an exception to the reporting requirement is provided in § 48.981(2m) for "health care providers" in connection with some cases of sexual contact or sexual intercourse.

2011 Wisconsin Act 81 added to the list of required reporters by creating subsec. (2)(a)(16m) to read: "A school employee not otherwise specified in this paragraph."

3. The definition is adapted from the discussion in State v. Hurd, 135 Wis.2d 266, 400 N.W.2d 42 (Ct. App. 1986), where the constitutionality of the standard was upheld. The statute actually phrases the test in two different ways: "reasonable cause to suspect" that a child has been abused or neglected and

"having reason to believe" that a child has been threatened with abuse or neglect and that abuse or neglect will occur. The instruction would have to be modified if the case involved the "threatened with abuse" option.

In Hurd, the court held that "the test becomes whether a prudent person would have had reasonable cause to suspect child abuse if presented with the same totality of circumstances as that acquired and viewed by the defendant. Under this statute, conviction is only permitted when, under the totality of the circumstances presented to the defendant, a prudent person would have had reasonable cause to suspect child abuse." 135 Wis.2d 266, 273.

4. The definition of "abused" is based on the alternative provided in § 48.02(1)(a). Nine other types of harm are also defined as "abuse" by § 48.02(1). "Physical injury" is further defined in § 48.02(14g).

5. The definition of "neglect" is based on the one provided in § 48.02(12g).

6. In State v. Hurd, note 3, supra, the court of appeals interpreted § 48.981 in its previous version when it used the word "wilfully." The court said "wilfully" means the same thing as "intentionally" under § 939.23(3). Section 48.981 was amended by 1985 Wis. Act. 29, sec. 926, to substitute "intentionally" for "wilfully." So it is fair to assume that what the Hurd court said about the "wilfully" version of the statute also applies to the present statute.

The Committee believes that "intentionally" failing to report requires an actual suspicion of child abuse (see element three) and an intentional (that is, purposeful) failure to report (element four). The statute is "intended to hold accountable those persons who reasonably suspect child abuse and intentionally fail to notify the appropriate agencies." State v. Hurd, 135 Wis.2d 266, 278. Knowledge of the statutory duty itself is not required. See § 939.23(3) and (5) and State v. Hurd, 135 Wis.2d 266, 277.

7. The definition of "report" is based on the description of the reporting requirement provided in § 48.981(3)(a)(1), which refers to "the county department." Section 48.02(2g) provides: "'County department' means a county department under s. 46.22 or 46.23, unless the context requires otherwise." Section 46.22 refers to the county department of social services; section 46.23 refers to the county department of human services.

2120 SEXUAL EXPLOITATION OF A CHILD — § 948.05(1)(a)

[USE THIS INSTRUCTION IF THERE IS NO EVIDENCE OF THE DEFENSE UNDER § 948.05(3).][1]

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1)(a) of the Criminal Code of Wisconsin, is committed by one who employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording[2] or displaying in any way the conduct, with knowledge of the character and content of the sexually explicit conduct involving the child.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (employed) (used) (persuaded) (induced) (enticed) (coerced) (name of child) to engage in sexually explicit conduct.[4]

   [Consent by (name of child) is not a defense.][5]

2. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][6]

3. The defendant acted for the purpose of (recording) (displaying in any way) the sexually explicit conduct.

["Record" means to reproduce an image or a sound or to store data representing an image or a sound.][7]

4. The defendant knew that the person in the (recording) (display) was engaged in sexually explicit conduct.[8]

Meaning of "Sexually Explicit Conduct"

"Sexually explicit conduct" means[9] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

If you find the defendant guilty, you must answer the following question:

Had the defendant attained the age of 18 years at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2120 was approved by the Committee in June 2010. This revision was approved by the Committee in July 2019; it added to the Comment to reflect changes made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

NOTE: The instruction previously designated as Wis JI-Criminal 2120 was renumbered Wis JI-Criminal 2121 in 2010.

This instruction is for violations of sub. (1)(a) of § 948.05 where there is no evidence of the affirmative defense defined in sub. (3). Section 948.05 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. Section 948.05 was based on § 940.203, 1987 Wis. Stats., for which there had been no published instruction.

Subsection (2) of § 948.05 extends liability to a person responsible for the welfare of a child who "knowingly permits, allows or encourages the child" to engage in conduct prohibited by sub. (1). See Wis JI-Criminal 2123.

Section 948.05 was amended by 1999 Wisconsin Act 3, effective date: May 13, 1999. The act recreated what was sub. (1)(c) as new sub. (1m); see Wis JI-Criminal 2122. Act 3 also amended the affirmative defense provided in sub. (3), which can apply to violations addressed by this instruction. For cases involving the affirmative defense, see Wis JI-Criminal 2120A.

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by providing a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations of § 948.05.

1. Wis JI-Criminal 2120A provides instruction for violations of § 948.05(1)(a) where there is evidence of the defense provided in § 948.05(3). The defense applies if the defendant is reasonably mistaken about the age of the child.

2. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

3. The statement of the facts necessary to constitute the crime is derived by combining the definition of the offense found in sub. (1)(a) of § 948.05 with the introductory statement in that portion of § 948.05(1) which precedes sub. (a).

4. If the name of the child is not known, substitute "the person" wherever the instruction calls for "(name of child)."

5. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

6. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2). However, sub. (3) of § 948.05 provides an affirmative defense if the defendant is reasonably mistaken about the age. Do not use this statement where there is evidence of the defense. Instead, use Wis JI-Criminal 2120A.

7. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

8. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the person in the recording was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

9. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

> (7) "Sexually explicit conduct" means actual or simulated:
> (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
> (b) Bestiality;
> (c) Masturbation;
> (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
> (e) Lewd exhibition of intimate parts.

10. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

> "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually

explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

11. 2005 Wisconsin Act 433 [effective date: June 6, 2006] changed the penalty structure for violations of sec. 948.05: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by providing a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

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2120A SEXUAL EXPLOITATION OF A CHILD: AFFIRMATIVE DEFENSE — § 948.05(1)(a)

[USE THIS INSTRUCTION IF THERE IS EVIDENCE OF THE DEFENSE UNDER § 948.05(3).][1]

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1)(a) of the Criminal Code of Wisconsin, is committed by one who employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording[2] or displaying in any way the conduct, with knowledge of the character and content of the sexually explicit conduct involving the child.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (employed) (used) (persuaded) (induced) (enticed) (coerced) (name of child) to engage in sexually explicit conduct.[4]

   [Consent by (name of child) is not a defense.][5]

2. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][6]

3. The defendant acted for the purpose of (recording) (displaying in any way) the sexually explicit conduct.

["Record" means to reproduce an image or a sound or to store data representing an image or a sound.][7]

4. The defendant knew that the person in the (recording) (display) was engaged in sexually explicit conduct.[8]

"Sexually explicit conduct" means[9] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).[10]

Consider Whether the Defense is Proved

Wisconsin law provides that it is a defense to this crime if the defendant had reasonable cause to believe that (name of child) had attained the age of 18 years.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.[11]

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must find the defendant not guilty.[12]

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[13]

If you find the defendant guilty, you must answer the following question:

Had the defendant attained the age of 18 years at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2120A was approved by the Committee in June 2010. This revision was approved by the Committee in July 2019; it added to the Comment to reflect changes made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

NOTE: The instruction previously designated as Wis JI-Criminal 2120A was renumbered JI 2121A in 2010.

This instruction is for a case involving a violation of sub. (1)(a) of § 948.05 where there is evidence of the affirmative defense defined in sub. (3) of the same statute. See Wis JI-Criminal 2120 for an instruction intended to be used where there is no evidence of the affirmative defense. See the Comment to that instruction for general information about the statute.

The definition of the affirmative defense in § 948.05(3) was amended by 1999 Wisconsin Act 3; effective date: May 13, 1999. The defense was limited to violations of subs. (1)(a), (1)(b), and (2) and requirements that the defendant's reasonable belief be supported by some sort of documentary proof of age exhibited by the child were deleted. The defense now requires only that "the defendant had reasonable cause to believe that the child had attained the age of 18 years."

The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

Subsection (2) of § 948.05 extends liability to a person responsible for the welfare of a child who "knowingly permits, allows or encourages the child" to engage in conduct prohibited by sub. (1). See Wis JI-Criminal 2123.

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by providing a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations § 948.05.

1. Wis JI-Criminal 2120A provides instruction for violations of § 948.05(1)(a) where there is evidence of the defense provided in § 948.05(3). The defense applies if the defendant is reasonably mistaken about the age of the child. The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

2. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

3. The statement of the facts necessary to constitute the crime is derived by combining the definition of the offense found in sub. (1)(a) of § 948.05 with the introductory statement in that portion of § 948.05(1) which precedes sub. (a).

4. If the name of the child is not known, substitute "the person" wherever the instruction calls for "(name of child)."

5. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

6. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2). However, sub. (3) of § 948.05 provides an affirmative defense if the defendant is reasonably mistaken about the age. Do not use this statement where there is evidence of the defense. Instead, use Wis JI-Criminal 2120A.

7. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

8. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the person in the recording was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

9. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

(7) "Sexually explicit conduct" means actual or simulated:
(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts.

10. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

11. The statute provides that the defendant "has the burden of proving this defense by a preponderance of the evidence." The statement used in the instruction is the description typically used to explain the civil burden of persuasion.

12. This statement is included to assure that both options for a not guilty verdict are clearly presented:

(1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and

(2) not guilty even though the elements are proven, because the defense has been established.

13. Section 948.05 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age

of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of sexual exploitation of a child, under sec. 948.05(1)(b), at the time and place charged in the information.
>
> We, the jury find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

2121 SEXUAL EXPLOITATION OF A CHILD — § 948.05(1)(b)

[USE THIS INSTRUCTION IF THERE IS NO EVIDENCE OF THE DEFENSE UNDER § 948.05(3).][1]

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1)(b) of the Criminal Code of Wisconsin, is committed by one who records[2] or displays in any way a child engaged in sexually explicit conduct with knowledge of the character and content of the sexually explicit conduct involving the child.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (recorded) (displayed in any way) (name of child).[4]

   "Record" means to reproduce an image or a sound or to store data representing an image or a sound.[5]

   [Consent by (name of child) is not a defense.][6]

2. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][7]

3. The defendant (recorded) (displayed in any way) (name of child) while (name of child) was engaged in sexually explicit conduct.

"Sexually explicit conduct" means[8] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).[9]

4. The defendant knew that the person in the (recording) (display) was engaged in sexually explicit conduct.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

This instruction was originally published as Wis JI-Criminal 2120 in 1995 and revised in 2000, 2001, 2003, 2004, 2007, and 2010. The 2010 revision renumbered the instruction as Wis JI-Criminal 2121.

This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

This instruction is for violations of sub. (1)(b) of § 948.05 where there is no evidence of the affirmative defense defined in sub. (3). Section 948.05 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. Section 948.05 was based on § 940.203, 1987 Wis. Stats., for which there had been no published instruction.

Subsection (2) of § 948.05 extends liability to a person responsible for the welfare of a child who "knowingly permits, allows or encourages the child" to engage in conduct prohibited by sub. (1). See Wis JI-Criminal 2123.

Section 948.05 was amended by 1999 Wisconsin Act 3, effective date: May 13, 1999. The act recreated what was sub. (1)(c) as new sub. (1m); see Wis JI-Criminal 2122. Act 3 also amended the affirmative defense provided in sub. (3), which can apply to violations addressed by this instruction. For cases involving the affirmative defense, see Wis JI-Criminal 2121A.

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations of § 948.05.

1. Wis JI-Criminal 2121A provides instruction for violations of § 948.05(1)(b) where there is evidence of the defense provided in § 948.05(3). The defense applies if the defendant is reasonably mistaken about the age of the child.

2. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

3. The statement of the facts necessary to constitute the crime is derived by combining the definition of the offense found in sub. (1)(b) of § 948.05 with the introductory statement in that portion of § 948.05(1) which precedes sub. (a).

4. If the name of the child is not known, substitute "the person" wherever the instruction calls for "(name of child)."

5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

6. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

7. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2). However, sub. (3) of § 948.05 provides an affirmative defense if the defendant is reasonably mistaken about the age. Do not use this statement where there is evidence of the defense. Instead, use Wis JI-Criminal 2121A.

8. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

> (7) "Sexually explicit conduct" means actual or simulated:
> (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
> (b) Bestiality;
> (c) Masturbation;
> (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
> (e) Lewd exhibition of intimate parts.

9. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

> "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

10. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the person in the photograph was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

11. Section 948.05 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of sexual exploitation of a child, under sec. 948.05(1)(b), at the time and place charged in the information.
>
> We, the jury find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2121A SEXUAL EXPLOITATION OF A CHILD: AFFIRMATIVE DEFENSE — § 948.05(1)(b)

[USE THIS INSTRUCTION IF THERE IS EVIDENCE OF THE DEFENSE UNDER § 948.05(3).][1]

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1)(b) of the Criminal Code of Wisconsin, is committed by one who records[2] or displays in any way a child engaged in sexually explicit conduct with knowledge of the character and content of the sexually explicit conduct involving the child.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (recorded) (displayed in any way) (name of child).[4]

   "Record" means to reproduce an image or a sound or to store data representing an image or a sound.[5]

   [Consent by (name of child) is not a defense.][6]

2. (Name of child) had not attained the age of 18 years.

3. The defendant (recorded) (displayed in any way) (name of child) while (name of child) was engaged in sexually explicit conduct.

"Sexually explicit conduct" means[7] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate parts)).[8]

4. The defendant knew that the person in the (recording) (display) was engaged in sexually explicit conduct.[9]

Consider Whether the Defense is Proved

Wisconsin law provides that it is a defense to this crime if the defendant had reasonable cause to believe that (name of child) had attained the age of 18 years.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.[10]

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must find the defendant not guilty.[11]

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[12]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

This instruction was originally published as Wis JI-Criminal 2120A in 2000 and revised in 2001, 2003, 2004, 2007, 2008, and 2010. The 2010 revision renumbered the instruction Wis JI-Criminal 2121A. This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

This instruction is for a case involving a violation of sub. (1)(b) of § 948.05 where there is evidence of the defense provided in sub. (3) of the same statute. See Wis JI-Criminal 2121 for an instruction intended to be used where there is no evidence of the affirmative defense. See the Comment to that instruction for general information about the statute.

The definition of the affirmative defense in § 948.05(3) was amended by 1999 Wisconsin Act 3; effective date: May 13, 1999. The defense was limited to violations of subs. (1)(a), (1)(b), and (2) and requirements that the defendant's reasonable belief be supported by some sort of documentary proof of age exhibited by the child were deleted. The defense now requires only that "the defendant had reasonable cause to believe that the child had attained the age of 18 years."

The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations of § 948.05.

1. This instruction is intended to be used for cases involving violations of § 948.05(1)(b) where there is evidence of the defense provided in § 948.05(3). The defense applies if the defendant "had reasonable cause to believe that the child had attained the age of 18 years." The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

2. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

3. The statement of the facts necessary to constitute the crime is derived by combining the definition of the offense found in sub. (1)(b) of § 948.05 with the introductory statement in that portion of § 948.05(1) which precedes sub. (a).

4. If the name of the child is not known, substitute "the person" wherever the instruction calls for "(name of child)."

5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

6. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

7. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

> (7) "Sexually explicit conduct" means actual or simulated:
> (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
> (b) Bestiality;
> (c) Masturbation;
> (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
> (e) Lewd exhibition of intimate parts.

8. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

> "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

9. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the child in the photograph was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

10. The statute provides that the defendant "has the burden of proving this defense by a preponderance of the evidence." The statement used in the instruction is the description typically used to explain the civil burden of persuasion.

11. This statement is included to assure that both options for a not guilty verdict are clearly presented:

(1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and

(2) not guilty even though the elements are proven, because the defense has been established.

12. Section 948.05 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of sexual exploitation of a child, under sec. 948.05(1)(b), at the time and place charged in the information.
>
> We, the jury find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2122 SEXUAL EXPLOITATION OF A CHILD — § 948.05(1m)

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1m) of the Criminal Code of Wisconsin, is committed by one who distributes[1] any recording[2] of a child engaged in sexually explicit conduct, knows the character and content of the sexually explicit conduct involving the child and knows or reasonably should know that the child engaged in the sexually explicit conduct has not attained the age of 18 years.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant distributed a recording of [a child] [(name of child)][4] engaged in sexually explicit conduct.

   "Recording" means a reproduction of an image or a sound or the storage of data representing an image or a sound.[5]

   "Sexually explicit conduct" means[6] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate parts)).[7]

2. The defendant knew that [the person] [(name of child)] in the recording was engaged in sexually explicit conduct.[8]

[Consent by (name of child) is not a defense.][9]

3. [The person] [(Name of child)] had not attained the age of 18 years.

4. The defendant knew or reasonably should have known that [the person] [(name of child)] had not attained the age of 18 years.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2122 was originally published in 2000 and revised in 2001, 2003, 2004, and 2007. The 2007 revision involved adding a special question at the end of the instruction. This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

This instruction is for a violation of sub. (1m) of § 948.05, which was created as sub. (1)(c) by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. Section 948.05 was based on § 940.203, 1987 Wis. Stats., for which there had been no published instruction.

The statute was amended by 1999 Wisconsin Act 3, effective date: May 13, 1999. That amendment renumbered sub. (1)(c) as sub. (1m) and added a mental element relating to the child's age. The latter change was intended to remedy the constitutional defect noted in State v. Zarnke, 224 Wis.2d 116, 589 N.W.2d 370 (1999). See note 10, below.

Subsection (2) of § 948.05 extends liability to a person responsible for the welfare of a child who "knowingly permits, allows or encourages the child" to engage in conduct prohibited by sub. (1)(a) or (b) or (1m).

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations of § 948.05.

1. "Distributes" refers to just one of the activities proscribed by § 948.05(1m) and was selected for use in the instruction because it appears to be an alternative likely to be used. The other alternatives are: produces; performs in; profits from; promotes; imports into the state; reproduces; advertises; sells; or, possesses with intent to sell or distribute. For cases involving one of those alternatives, the applicable term would, of course, have to be substituted for "distributes" throughout the instruction.

2. This reflects the change made in § 948.05(1m) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to "any undeveloped film, photographic negative, motion picture, videotape, sound recording, or other reproduction . . ."

3. The requirement that the defendant knew or reasonably should have known the age of the child was added to the statute by 1999 Wisconsin Act 3, effective date: May 13, 1999. The change was intended to remedy the constitutional defect noted in State v. Zarnke, 224 Wis.2d 116, 589 N.W.2d 370, (1999). See note 10, below.

4. One of the alternatives should be selected: using the name of the child if known, or just referring to "a child" if the name of the child is not known.

5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

6. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

(7) "Sexually explicit conduct" means actual or simulated:
(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts.

7. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

8. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the child in the photograph was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

9. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

10. The knowledge element was extended to the age of the child by 1999 Wisconsin Act 3, effective date: May 13, 1999. The change was intended to remedy the constitutional defect noted in State v. Zarnke, 224 Wis.2d 116, 589 N.W.2d 370 (1999) [reversing 215 Wis.2d 71, 572 N.W.2d 491 (Ct. App. 1997)]. The defendant in Zarnke was charged with distributing pictures of children engaged in sexually explicit conduct in violation of sub. (1)(c) of § 948.05, 1997-98 Wis. Stats. In rejecting Zarnke's constitutional challenges to the statute, the court of appeals interpreted it to require the state to prove the defendant's knowledge of the child being under age. The court concluded that the legislature did not intend to treat the knowledge issue as an affirmative defense "where the illegal conduct occurs outside of the child's presence." 215 Wis.2d 71, 82-83.

The supreme court held that sub. (1)(c) of § 948.05 was "unconstitutional as it applies to the distribution of sexually explicit material depicting minors, as well as to the other prohibited conduct which does not entail a personal interaction between the accused and the child-victim." 224 Wis.2d 116, 124. The defect is the statute's "failing to require that the State prove that a distributor of sexually explicit materials had knowledge of the minority of person(s) depicted in the materials." 224 Wis.2d 116, 120-21. Act 3 renumbered sub. (1)(c) to sub. (1m) and revised it to include an element requiring that the defendant knew, or reasonably should have known, the age of the child. It also revised the affirmative defense provision in § 948.05(3) so that it does not apply to violations of sub. (1m).

11. Section 948.05 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of sexual exploitation of a child, under sec. 948.05(1m), at the time and place charged in the information.
>
> We, the jury find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2123 SEXUAL EXPLOITATION OF A CHILD: BY A PERSON RESPONSIBLE FOR THE CHILD'S WELFARE — § 948.05(2)

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(2) of the Criminal Code of Wisconsin, is committed by a person responsible for the welfare of a child who knowingly permits, allows, or encourages the child to engage in sexually explicit conduct for the purpose of recording[1] or displaying it in any way.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a person responsible for the welfare of a child, (name of victim).

   A "person responsible for the welfare of a child" includes (use the appropriate term from § 948.01(3)).[2]

2. The defendant knowingly permitted, allowed, or encouraged (name of victim) to engage in sexually explicit conduct.

   "Sexually explicit conduct" means[3] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).[4]

3. The defendant intended that the sexually explicit conduct be recorded or displayed in any way.[5]

["Record" means to reproduce an image or a sound or to store data representing an image or a sound.][6]

4. (Name of child) had not attained the age of 18 years.[7]

[Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][8]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2123 was approved by the Committee in June 2007. This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

This instruction is for violations of sub. (2) of § 948.05 which applies only to "a person responsible for a child's welfare." Violations of sub. (1)(b) are addressed by Wis JI-Criminal 2120 and 2120A; violations of sub. (1m) are addressed by Wis JI-Criminal 2122.

Subsection (3) of § 948.05 provides that it is an affirmative defense if a defendant "has reasonable cause to believe that the child ha d attained the age of 18 years." It may be unlikely that the defense

would apply to violations of sub. (2), where the defendant must be a person responsible for the child's welfare. If the defense does apply, see Wis JI-Criminal 2120A for a model that could be adapted for use for violations of sub. (2).

1. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

2. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

A biological father, who has admitted paternity in writing, is a "parent" and thus a "person responsible for the child's welfare" under § 948.21. State v. Evans, 171 Wis.2d 471, 391 N.W.2d 141 (1992).

See the Comment to Wis JI-Criminal 2114 for discussion of case law interpreting this term.

3. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

> (7) "Sexually explicit conduct" means actual or simulated:
> (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
> (b) Bestiality;
> (c) Masturbation;
> (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
> (e) Lewd exhibition of intimate parts.

4. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

> "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats.

The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

5. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

The statute requires that the defendant "knowingly permit, allow or encourage the child to engage in sexually explicit conduct for a purpose proscribed in sub. (1)(a) or(b) or (1m) . . ." In the Committee's judgment, the "purpose proscribed" in the cross-referenced sections boil down to "recording or displaying" sexually explicit conduct. The element uses the more direct requirement that the defendant "intend" that the conduct be recorded or displayed as the equivalent of permitting, allowing or encouraging for that purpose. No change of meaning is intended.

6. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

7. See s. 948.01(1).

8. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2). However, sub. (3) of § 948.05 provides an affirmative defense if the defendant is reasonably mistaken about the age. Do <u>not</u> use this statement where there is evidence of the defense. Instead, see Wis JI-Criminal 2120A for a model that could be adapted for use for violations of sub. (2).

2124 TRAFFICKING OF A CHILD — § 948.051(1)

Statutory Definition of the Crime

Trafficking of a child, as defined in § 948.051 of the Criminal Code of Wisconsin, is committed by one who knowingly [(recruits) (entices) (provides) (obtains) (harbors) (transports) (patronizes) (solicits)] [attempts to (recruit) (entice) (provide) (obtain) (harbor) (transport) (patronize) (solicit)] any child for the purpose of commercial sex acts.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly [(recruited) (enticed) (provided) (obtained) (harbored) (transported) (patronized) (solicited)] [attempted to (recruit) (entice) (provide) (obtain) (harbor) (transport) (patronize) (solicit)] (name of child) .
2. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child) 's age is not required and mistake regarding (name of child) 's age is not a defense.][1]
3. The defendant (use the term selected in element 1.) (name of child) for the purpose of commercial sex acts.[2]

"Commercial sex act" means (sexual contact) (sexual intercourse) (sexually explicit performance) (any conduct done for the purpose of sexual humiliation, degradation, arousal, or gratification) for which anything of value is given to, promised, or received, directly or indirectly, by any person.[3]

[**Meaning of Sexual Contact**]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT"]

Deciding About Knowledge and Purpose

You cannot look into a person's mind to find out knowledge and purpose. Knowledge and purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2124 was originally published in 2011 and was revised in 2015. This revision was approved by the Committee in July 2016; it reflects changes made by 2015 Wisconsin Act 367.

This instruction is drafted for violations of § 948.051, Trafficking of a child, which was created by 2007 Wisconsin Act 116 [effective date: April 3, 2008]. The statute was amended by 2013 Wisconsin Act 362 [effective date April 25, 2014]. See footnotes 2 and 3. 2015 Wisconsin Act 367 amended the statute to add "transport" "patronize" and "solicit" to the list of prohibited acts. [Effective date: May 29, 2017.]

2007 Wisconsin Act 116 also created § 940.302, Human trafficking, – see Wis JI-Criminal 1276.

Subsection (2) of § 948.051 provides: "Whoever benefits in any manner from a violation of sub. (1) is guilty of a Class C felony if the person knows that the benefits come from an act described in sub. (1)." This instruction does not address this means of violating the statute.

2007 Wisconsin Act 116 also created § 939.46(1m) which provides an affirmative defense for any offense committed by a trafficking victim as a direct result of the violation of the trafficking statute.

1. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2).

2. 2013 Wisconsin Act 362 amended § 948.051(1) to eliminate a reference to "sexually explicit performance." The same conduct is now covered by the term "commercial sex act" as specified as prohibited conduct in § 940.302(1)(a), which applies to violations of § 948.051.

3. This is the definition provided in § 940.302(1)(a) as amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014]. Section 948.051(1) specifically refers to this definition. For a definition of "sexual contact" see Wis JI-Criminal 934 and § 939.22(34). The Committee concluded that the definition in § 939.22(34) applies to the offense because § 948.051(1) specifically refers to trafficking "any child for the purpose of commercial sex acts, as defined in s. 940.302(1)(a) . . ." The definition in § 940.302(1)(a) refers to "sexual contact" and, since that statute is not part of § 940.225 or in Chapter 948, the definition of "sexual contact" in § 939.22(34) applies.

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2125 CAUSING A CHILD TO VIEW OR LISTEN TO SEXUAL ACTIVITY — § 948.055

Statutory Definition of the Crime

Section 948.055 of the Criminal Code of Wisconsin is violated by a person who intentionally causes [a child] [an individual who the actor believes or has reason to believe has not attained 18 years of age] to view or listen to sexually explicit conduct for the purpose of sexually arousing or gratifying the person or humiliating or degrading the child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused [(name of child)] [an individual who the actor believes or has reason to believe has not attained 18 years of age][1] to view or listen to sexually explicit conduct.

   "Sexually explicit conduct"[2] means actual or simulated [sexual intercourse] [bestiality] [masturbation] [sexual sadism or sexual masochistic abuse] [lewd exhibition of (name intimate part)].[3]

   Consent by [(name of child)] [the individual] is not a defense.

2. The defendant intentionally caused [(name of child)] [an individual who the actor believes or has reason to believe has not attained 18 years of age] to view or listen to sexually explicit conduct.

"Intentionally" requires that the defendant acted with the purpose to cause [(name of child)] [the individual] to view or listen to sexually explicit conduct.[4]

[SELECT THE THIRD ELEMENT THAT FITS THE FACTS OF THE CASE.]

[3. (Name of child) had not attained the age of (13) (18) years.[5]

Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.[6]]

[3. The defendant believed or had reason to believe that the individual had not attained the age of (13) (18) years.[7]]

4. The defendant acted with the purpose of sexually arousing or gratifying the defendant or humiliating or degrading [(name of child)] [an individual who the actor believes or has reason to believe has not attained 18 years of age].

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2125 was originally published in 1996 and was revised in 2004 and 2011. The 2011 revision reflected changes made by 2011 Wisconsin Act 284. This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

Section 948.055 was originally enacted as § 940.227 by 1987 Wisconsin Act 334. It was renumbered § 948.055 by 1993 Wisconsin Act 218 and amended by 1995 Wisconsin Act 67.

The 1995 amendment made three changes in the text of § 948.055:

1) deleted the requirement that the defendant act "by use or threat of force or violence," replacing it with "intentionally";

2) added "or listen to"; and,

3) added "if the viewing or listening is for the purpose of sexually arousing or gratifying the actor or humiliating or degrading the child."

The statute was amended by 2011 Wisconsin Act 284 [effective date: April 27, 2012] to extend its coverage to situations where "the actor believes or has reason to believe [the individual] has not attained 18 years of age." Act 284 also created § 939.32(1)(cr) to read: "Whoever attempts to commit a crime under s. 948.055(1) is subject to the penalty for the completed act, as provided in s. 948.055(2)."

Violations of § 948.055 are punished as a Class F felony if the child has not attained the age of 13 years [or if the defendant believes or has reason to believe the person has not attained the age of 13 years] and as a Class H felony if the child has not attained the age of 18 years [or if the defendant believes or has reason to believe the person has not attained the age of 18 years]. See § 948.055(2). The Committee recommends inserting the appropriate age limit as part of the third element.

1. 2011 Wisconsin Act 284 amended § 948.055 to apply to causing "an individual who the actor believes or has reason to believe has not attained 18 years of age" to view or listen to sexually explicit conduct, in addition to causing a child to do the same. This is apparently intended to address the "internet sting" situation, where the actor believes he or she is communicating with a child but the supposed child is in fact a government investigator. For cases involving this situation, the Committee recommends using the entire phrase "an individual who the actor believes or has reason to believe has not attained 18 years of age" where the name of the child would otherwise be used.

2. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7).

3. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in § 948.01(7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area. . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

4. The instruction uses the common "mental purpose" definition of intent. Intent is also present where a defendant "is practically certain that his or her conduct" will have the prohibited result. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

5. Violations of this statute are punished as a Class F felony if the child has not attained the age of 13 years and as a Class H felony if the child has not attained the age of 18 years. The Committee recommends inserting the appropriate age limit as part of the third element.

6. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2).

7. This is the alternative added to the statute by 2011 Wisconsin Act 284. Violations of this statute are punished as a Class F felony if the defendant believes or has reason to believe the individual has not attained the age of 13 years and as a Class H felony if the defendant believes or has reason to believe the individual has not attained the age of 18 years. The Committee recommends inserting the appropriate age limit as part of the third element.

2130 INCEST WITH A CHILD: SEXUAL INTERCOURSE OR CONTACT — § 948.06(1)

Statutory Definition of the Crime

Incest with a child, as defined in § 948.06(1) of the Criminal Code of Wisconsin, is committed by one who has sexual [intercourse] [contact] with a child he or she knows is related, either by blood or adoption, and the child is related in a degree of kinship closer than second cousin.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [intercourse] [contact] with (name of victim) .
2. The defendant knew that (name of victim) was related to (him) (her) by blood or adoption.[1]
3. (Name of victim) was related to the defendant in a degree of kinship closer than second cousin.[2]
4. (Name of victim) was under the age of 18 years at the time of the alleged offense.[3]

Knowledge of (name of victim) 's age is not required[4] and mistake regarding (name of victim) 's age is not a defense.[5]

Consent to sexual [contact] [intercourse] is not a defense.[6]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2130 was originally published in 1974 and revised in 1980, 1991, 1994, and 1996. This revision was approved by the Committee in March 2007 and involved adoption of a new format and nonsubstantive changes to the text. This revision also combined the instructions formerly published as Wis JI-Criminal 2130 [incest involving sexual intercourse] and Wis JI-Criminal 2131 [incest involving sexual contact].

This instruction is for a violation of § 948.06(1), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. Note that § 944.06 also defines a crime of incest which is not limited to child victims. See Wis JI-Criminal 1510.

Section 948.06(1) also applies to one who marries a child. And sub. (2) imposes liability on a person responsible for a child's welfare whose failure to act exposes the child to a risk that incest may occur or facilitates incest. Neither of those offenses are addressed by uniform instructions.

Section 948.06 was amended by 2005 Wisconsin Act 277 to create sub. (1m) which prohibits sexual contact or intercourse by a child's stepparent. See Wis JI-Criminal 2131.

1. The knowledge requirement is included in the statutory definition of the offense. Note that the knowledge required is that the defendant and the victim are "related." The statute further requires that they be related "in a degree closer than second cousin," but the knowledge requirement apparently does not extend to the degree of relation.

2. "Second cousin" is defined in Black's Law Dictionary (7th Edition) as follows: "A person related to another by descending from the same great-grandfather or great-grandmother." The table

following footnote 6 shows the degree of relationship of second cousins.

3. Section 948.01(1) defines "child" as "a person who has not attained the age of 18 years."

4. Section 939.23(6).

5. Section 939.43(2).

6. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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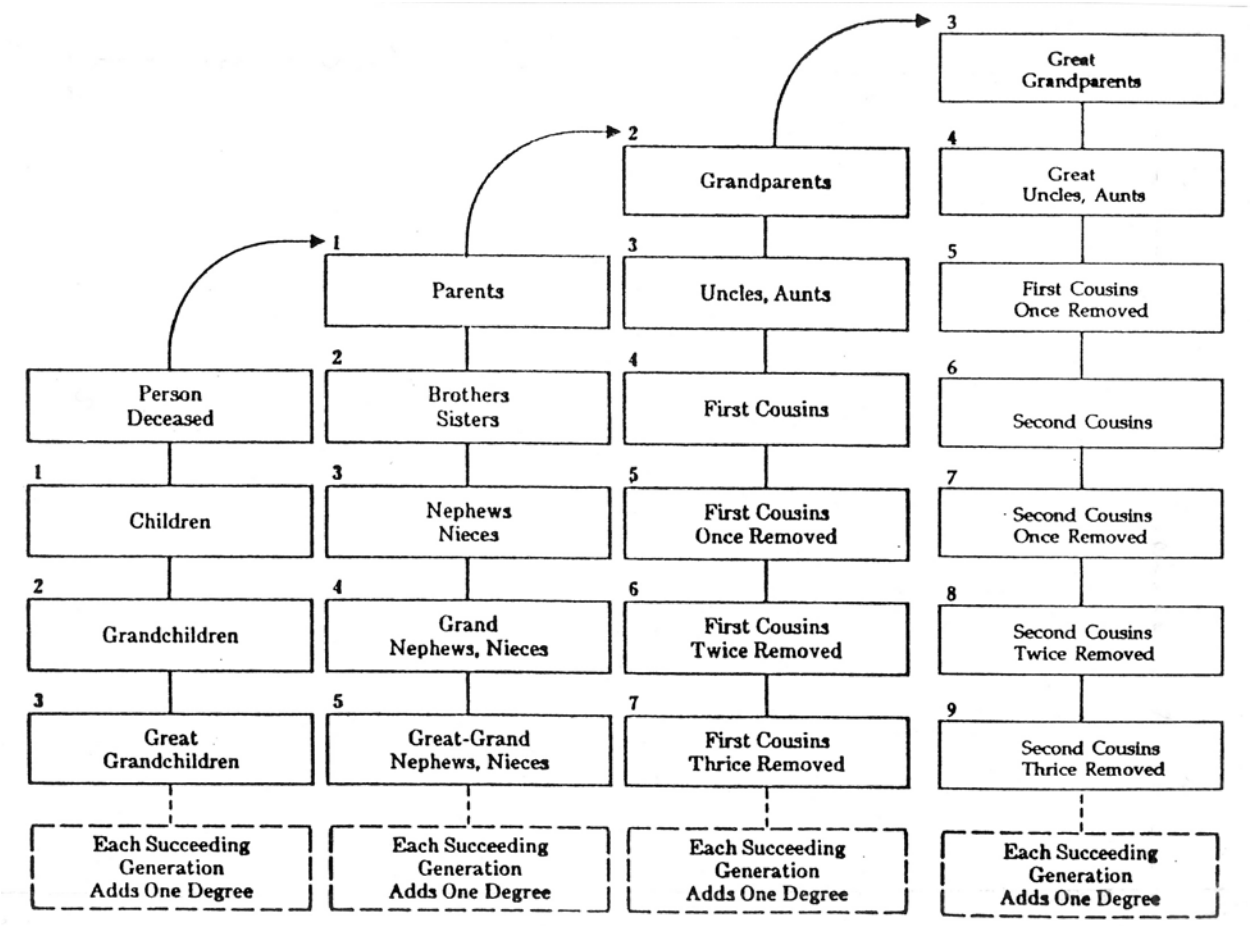
Degree of Kinship

The following chart is based on the table showing degrees of kinship found at s. 990.001(16) of the Wisconsin Statutes. The column at the far right has been added to show how the various degrees of kinship compare to second cousins. The added column is based on the chart appearing at page 48, Decedents' Estates and Trusts, by Ritchie, Alford, and Effland, 4th Edition, © 1971, Foundation Press. Note that the degree of kinship of second cousins is indicated by the number "6." Thus, all those degrees indicated by the number "5" or less are "related in a degree closer than second cousin" and fall within the prohibition of s. 948.096(1).



2131 INCEST WITH A CHILD: SEXUAL INTERCOURSE OR CONTACT BY STEPPARENT — § 948.06(1m)

Statutory Definition of the Crime

Incest with a child, as defined in § 948.06(1m) of the Criminal Code of Wisconsin, is committed by one who has sexual [intercourse] [contact] with a child and who is the child's stepparent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [intercourse] [contact] with (name of victim) .

2. The defendant was the stepparent of (name of victim) .

   USE THE FOLLOWING IF IT IS BELIEVED TO BE NECESSARY TO DEFINE "STEPPARENT"

   "Stepparent" means a person who was married to the biological or adoptive parent of (name of child) at the time of the alleged offense.[1]

3. (Name of victim) was under the age of 18 years at the time of the alleged offense.[2]

   Knowledge of (name of victim) 's age is not required[3] and mistake regarding (name of victim) 's age is not a defense.[4]

Consent to sexual [contact] [intercourse] is not a defense.[5]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2131 was approved by the Committee in March 2007.

An instruction formerly published as Wis JI-Criminal 2131 [incest involving sexual contact] was combined with Wis JI-Criminal 2130 in 2007.

This instruction is for a violation of § 948.06(1m), created by 2005 Wisconsin Act 277 [effective date: April 20, 2006].

See Wis JI-Criminal 2130 for violations of § 948.06(1). Subsection (2) of 948.06 imposes liability on a person responsible for a child's welfare whose failure to act exposes the child to a risk that incest may occur or facilitates incest. That offense is not addressed by uniform instructions.

1. There is no statutory definition of "stepparent." The definition suggested in the text was developed by the Committee.

2. Section 948.01(1) defines "child" as "a person who has not attained the age of 18 years."

3. Section 939.23(6).

4. Section 939.43(2).

5. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

2134 CHILD ENTICEMENT: COMPLETED ACT — § 948.07)

Statutory Definition of the Crime

Child enticement, as defined in § 948.07 of the Criminal Code of Wisconsin, is committed by one who with intent to _____[1] causes any child who has not attained the age of 18 years[2] to go into any vehicle, building, room, or secluded place.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused[3] (name of victim) to go into a (vehicle) (building) (room) (secluded place).[4]
2. The defendant caused (name of victim) to go into a (vehicle) (building) (room) (secluded place) with intent to _____.[5]

   The phrase "with intent to" means that the defendant must have had the mental purpose[6] to _____.[7]
3. (Name of victim) was under the age of 18 years.[8]

   Knowledge of (name of victim)'s age by the defendant is not required[9] and mistake regarding (name of victim)'s age is not a defense.[10]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2134 was originally published in 1989 and revised in 1994, 1997, 1998, 2000, 2003, 2006, 2011, 2014, and 2016. This revision was approved by the Committee in June 2018; it added to footnote 5.

This instruction is drafted for charges based on a completed act of enticement. For charges based on an attempt, see Wis JI-Criminal 2134A and 2134B.

This instruction is for a violation of § 948.07, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1530 (8 1983) which applied to an offense with the same name as defined in former § 944.12, 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332. The primary changes in the definition of the offense are explained in notes 1 and 4, below. One other change is to delete "the provision under current law limiting the applicability of the child enticement statute to offenders 18 years of age or over. Thus, any person can be charged with and convicted of enticing a child, even if the offender is also a child. Consequently, an offender who is a child would be treated as a juvenile offender, as is done with other crimes committed by minors." Note to § 948.07, 1987 Senate Bill 203 (enacted as 1987 Wisconsin Act 332).

In State v. Derango, 2000 WI 89, 236 Wis.2d 721, 613 N.W.2d 833, the Wisconsin Supreme Court held that § 948.07 prohibits the act of enticement, with any one of six prohibited intents. Jury unanimity on which intent is present is not required and multiple charges of child enticement are not proper where based on a single act of enticement done with more than one of the prohibited intents. On the latter point, also see State v. Church, 223 Wis.2d 641, 589 N.W.2d 638 (Ct. App. 1998). [Review dismissed as improvidently granted because the issue was resolved in Derango, State v. Church, 2000 WI 90.]

In Derango, supra, the court also held that charges of child enticement and attempted sexual exploitation of a child may be based on a single phone call. 2000 WI 89, ¶¶26-36.

In State v. Hanson, 182 Wis.2d 481, 513 N.W.2d 700 (Ct. App. 1994), the defendant argued that his conviction under § 948.07(3) was unconstitutional. He claimed that it was irrational to consider enticement to commit an act of indecent exposure, a Class C felony, [note: now a Class BC felony] to be so much more serious than the completed act of exposure itself, a Class A misdemeanor. The court rejected the argument, holding that a rational basis exists for the legislative scheme: "enticement of a child is a social evil in and of itself regardless of the specific sexual motive which causes the defendant to act." 182 Wis.2d 481, 487.

In State v. Gomez, 179 Wis.2d 400, 507 N.W.2d 378 (Ct. App. 1993), the court affirmed a conviction under § 948.07. The court held that the statute unambiguously applies to causing the child to enter any room, including the child's own bedroom. The court also found the evidence sufficient to establish intent to expose a sex organ to the child at the time the defendant told her to go to her bedroom.

In State v. Provo, 2004 WI App 97, ¶12, 272 Wis.2d 837, 681 N.W.2d 272, the court that prior cases had recognized "that the gravamen of the child enticement statute is to prevent children from being taken into places outside of the protection of the public where the commission of some illegal conduct might be facilitated . . . No language says that the place from which the child was taken had to be a public place."

1. In this blank, insert a statement identifying one or more of the prohibited acts specified in § 948.07(1)-(6):

(1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085, or 948.095.

(2) Causing the child to engage in prostitution.

(3) Exposing genitals, pubic area, or intimate parts to the child or causing the child to expose genitals, pubic area, or intimate parts in violation of s. 948.10.

(4) Recording the child engaging in sexually explicit conduct.

(5) Causing bodily or mental harm to the child.

(6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

Subsection (3) was amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014] to delete "sex organ" and to substitute "genitals, pubic area, or intimate parts."

Subsection (4) was amended by 2001 Wisconsin Act 16 (effective date: September 1, 2001) to refer to "recording." Recording is defined in § 948.01(3r).

Some of the acts listed are crimes defined in a specified statute: sexual assault in violation of § 948.02, § 948.085, or § 948.095 (see subsec. (1), supra), and exposing genitals, pubic area, or intimate parts in violation of § 948.10 (see subsec. (3), supra). The acts specified in subsecs. (2), (4), (5), and (6)

have identifiable counterparts in other criminal statutes found in chapter 948, but those statutes are not specifically identified. When the second element of this offense is explained, all the aspects of the underlying conduct should be identified. See note 4, below.

Specifying these acts is a change from prior § 944.12, which referred to "crimes against sexual morality." The Note to 1987 Senate Bill 203, which was enacted as 1987 Wisconsin Act 332, explains the change as follows:

> [This section] . . . enumerates specific intended purposes as those for which enticing a child would be a criminal act (e.g., having sexual contact, including sexual intercourse, with the child). These enumerated purposes are substituted for the current language requiring an intent to commit "a crime against sexual morality."

2. The age reference should be changed to "has not attained the age of 16 years" if the case involves a charge of enticement with intent to have sexual contact or sexual intercourse in violation of § 948.02. See subsec. (1) of § 948.07. Section 948.02 defines offenses against children who have not attained the age of 16 years.

3. Section 948.07 uses "causes or attempts to cause" in place of "persuades or entices" found in former § 944.12. The Note to 1987 Senate Bill 203 (enacted as 1987 Wisconsin Act 332) explained the change as follows:

> Note: This Section:
>
> 1. Deletes the words "persuades or entices" contained in the current child enticement statute [s. 944.12] and, instead, characterizes the crime of child enticement as "causing or attempting to cause" a child to go into any vehicle, building, room or secluded place with the intent to commit a criminal act or acts. The substitution of "causes" for "persuades or entices," eliminates as an element of the crime the state of mind of the child being enticed. The language "attempts to cause" is added to further clarify that the crime of child enticement includes the attempted act of enticement, consistent with s. 939.32(1)(d), as created by this bill.

Charges of child enticement based on "attempts to cause" are addressed by Wis JI-Criminal 2134A and 2134B.

4. The instruction has never included a definition of "secluded place." In State v. Pask, 2010 WI App 53, 324 Wis.2d 555, 781 N.W.2d 751, the court addressed the meaning of the term. Pask was convicted of enticing a child in violation of § 948.07 based on attempting to lure a 9-year old girl into a park shelter area for the purpose of having sexual contact. The court of appeals concluded that the park shelter qualifies as a "secluded place":

> . . . when there is evidence that a defendant has an intention to take a child to a place that is partially screened or hidden from view, a jury may find that it is with the purpose to take the child away from public safety. Indeed, any place that removes the child from the public's protection to a place less likely to be detected by the public could suffice as being a "secluded place." ¶1.

The instruction has never defined "secluded place." The trial judge in this case instructed that "secluded place means a place screened or hidden from view or remote from others." The court of appeals noted that this promoted a more limited definition of "secluded place" than the statute requires and therefore "inured to Pask's benefit."

5. Here identify the conduct specified in subsecs. (1) to (6) of § 948.07. Care should be taken to provide a complete description of what the conduct requires, including definition of terms where necessary. The Committee suggests the following:

Under subsec. (1), for violations based on § 948.02:

". . . have sexual intercourse with (name of victim) . Sexual intercourse means any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required."

or

". . . have sexual contact with (name of victim) . Sexual contact is an intentional touching by the defendant of an intimate part of another, done for the purpose of (sexual arousal or gratification) (sexually degrading or humiliating that person)."

See Wis JI-Criminal 2101B for discussion of the definition of sexual intercourse. See Wis JI-Criminal 2101A for discussion of the definition of sexual contact. Note that for violations of subsection (1), the victim must be under the age of 16 years. See note 2, supra.

Under subsec. (1), for violations based on § 948.085(1):

". . . have sexual (contact) (intercourse) in violation of § 948.085(1). Section 948.085(1) is violated by a person who has sexual [contact] [intercourse] with a child for whom the person is a (foster parent) (treatment foster parent).

Under subsec. (1), for violations based on § 948.085(2):

". . . have sexual (contact) (intercourse) in violation of § 948.085(2). Section 948.085(2) is violated by a person who has sexual [contact] [intercourse] with a child who was placed in a substitute care facility, where the person (works or volunteers at the facility) (is responsible for managing the facility).

Under subsec. (1), for violations based on § 948.095(2):

". . . have sexual (contact) (intercourse) in violation of § 948.095(2). Section 948.095(2) is violated by a person who has sexual [contact] [intercourse] with a child who has attained the age of 16 years and who is not the person's spouse, if the child is enrolled as a student in a school or a school district and the person is a member of the school staff of the school or school district in which the child is enrolled as a student."
[See Wis JI-Criminal 2139 for a complete description of the offense defined in § 948.095(2).]

Under subsec. (1), for violations based on § 948.095(3):

". . . have sexual (contact) (intercourse) in violation of § 948.095(3). Section 948.095(3) is violated by a person who has attained the age of 21 years, who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children, who has sexual [contact] [intercourse] with a child who has attained the age of 16 years, who is not the person's spouse, and with whom the person works or interacts through that occupation or volunteer position.

Under subsec. (2):

". . . cause (name of victim) to engage in an act that, if engaged in between adults, would be an act of prostitution. An act of prostitution is an act of sexual intercourse or sexual contact engaged in for something of value."

Under subsec. (3):

". . . expose genitals, pubic area, or intimate parts to (name of victim) for the purpose of sexual arousal or gratification."

See Wis JI-Criminal 2140 and 2141 for descriptions of two offenses defined by § 948.10.

Under subsec. (4):

". . . recording (name of victim) engaging in sexually explicit conduct. Sexually explicit conduct means actual or simulated (see § 948.01(7))."

The appropriate part of the definition of "sexually explicit conduct" provided in § 948.01(7) should be included.

Under subsec. (5):

". . . cause bodily harm to (name of victim) . Bodily harm means physical pain or injury, illness, or any impairment of physical condition."

The definition of "bodily harm" is from § 939.22(4).

A violation involving subsec. (5) may also be based on intent to cause mental harm, a term defined in § 948.01(2).

Under subsec. (6):

". . . give or sell a controlled substance to (name of victim) ."

Subsection (6) refers to giving or selling a controlled substance or controlled substance analog "in violation of Chapter 961." It is unclear what that reference adds, since any delivery to a

child would appear to be in violation of Chapter 961.

In any case, the facts may require elaborating on the brief statements suggested above. The key is to assure that the jury is told of all the aspects of the underlying conduct that the defendant must intend to perform to make the enticement a violation of § 948.07.

In State v. Hendricks, 2018 WI 15, 379 Wis.2d 549, 906 N.W.2d 666, the Wisconsin Supreme Court reviewed a guilty plea acceptance colloquy for a child enticement charge based on "intent to have sexual contact." The court held that the colloquy was sufficient despite the court's failure to explain the definition of "sexual contact." The decision makes several references to sexual contact not being an "element" of the crime of child enticement. See, for example, ¶33. The Committee concluded that these statements do not affect the approach reflected in the instruction which calls for fully defining the crime the defendant intended to commit by the act of enticement. The purpose with which the defendant acted – e.g., with intent to have sexual contact – is a fact necessary to constitute the crime and must be proved beyond a reasonable doubt. See In Re Winship, 397 U.S. 358, 364 (1970): ". . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

6. "With intent to" is defined in § 939.23(4). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "with intent to." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

7. Add the same statement used at note 5, supra.

8. See note 2, supra.

9. Section 939.23(6).

10. Section 939.43(2).

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2134A CHILD ENTICEMENT: ATTEMPT: ACTUAL CHILD — § 948.07

Statutory Definition of the Crime

Child enticement, as defined in § 948.07 of the Criminal Code of Wisconsin, is committed by one who with intent to _____[1] attempts to cause any child who has not attained the age of 18 years[2] to go into any vehicle, building, room, or secluded place.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant attempted to cause[3] (name of victim) to go into a (vehicle) (building) (room) (secluded place).
2. The defendant attempted to cause (name of victim) to go into a (vehicle) (building) (room) (secluded place) with intent to _____.[4]

   The phrase "with intent to" means that the defendant must have had the mental purpose[5] to _____.[6]
3. (Name of victim) was under the age of 18 years.[7]

   Knowledge of (name of victim)'s age by the defendant is not required[8] and mistake regarding (name of victim)'s age is not a defense.[9]

Definition of Attempt

Attempt requires that the defendant intended to cause (name of victim) to go into a (vehicle) (building) (room) (secluded place) for the purpose of _____[10] and that the defendant did acts which demonstrate unequivocally, under all of the circumstances, that he had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.[11]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2134A was originally published in 2003 and revised in 2007 and 2015. This revision was approved by the Committee in June 2018; it added to footnote 4.

Section 948.07 prohibits "causing or attempting to cause" a child to go into designated places for one of several prohibited purposes. Thus, it punishes the completed crime and the attempt equally. This instruction is drafted for the enticement case based on an attempt to entice an actual child. A separate instruction is provided for enticement cases based on an attempt to entice what turns out to be a fictitious child. See Wis JI-Criminal 2134B.

When an enticement charge is based on an attempt, it incorporates attempt as defined in § 939.32. State v. Koenck, 2001 WI App 93, ¶20, 242 Wis.2d 693, 626 N.W.2d 359; State v. Robins, 2002 WI 65, ¶28, 253 Wis.2d 298, 646 N.W.2d 287. This instruction incorporates the definition of attempt provided in § 939.32 as interpreted by Wis JI-Criminal 580.

See the Comment to Wis JI-Criminal 2134 for a general discussion of § 948.07 and the crime of child enticement.

1. In this blank, insert a statement identifying one or more of the prohibited acts specified in § 948.07(1)-(6):

(1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085, or 948.095.

(2) Causing the child to engage in prostitution.

(3) Exposing genitals, pubic area, or intimate parts to the child or causing the child to expose genitals, pubic area, or intimate parts in violation of s. 948.10.

(4) Recording the child engaging in sexually explicit conduct.

(5) Causing bodily or mental harm to the child.

(6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

Subsection (3) was amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014] to delete "sex organ" and to substitute "genitals, pubic area, or intimate parts."

Subsection (4) was amended by 2001 Wisconsin Act 16 (effective date: September 1, 2001) to refer to "recording." Recording is defined in § 948.01(3r).

Some of the acts listed are crimes defined in a specified statute: sexual assault in violation of § 948.02, § 948.085, or § 948.095 (see subsec. (1), supra), and exposing genitals, pubic area, or intimate parts in violation of § 948.10 (see subsec. (3), supra). The acts specified in subsecs. (2), (4), (5), and (6) have identifiable counterparts in other criminal statutes found in chapter 948, but those statutes are not specifically identified. When the second element of this offense is explained, all the aspects of the underlying conduct should be identified. See note 4, below.

Specifying these acts is a change from prior § 944.12, which referred to "crimes against sexual morality." The Note to 1987 Senate Bill 203, which was enacted as 1987 Wisconsin Act 332, explains the change as follows:

> [This section] . . . enumerates specific intended purposes as those for which enticing a child would be a criminal act (e.g., having sexual contact, including sexual intercourse, with the child). These enumerated purposes are substituted for the current language requiring an intent to commit "a crime against sexual morality."

2. The age reference should be changed to "has not attained the age of 16 years" if the case involves a charge of enticement with intent to have sexual contact or sexual intercourse in violation of § 948.02. See subsec. (1) of § 948.07. Section 948.02 defines offenses against children who have not attained the age of 16 years.

3. Section 948.07 uses "causes or attempts to cause" in place of "persuades or entices" found in former § 944.12. The Note to 1987 Senate Bill 203 (enacted as 1987 Wisconsin Act 332) explained the change as follows:

> Note: This Section:
>
> 1. Deletes the words "persuades or entices" contained in the current child enticement statute [s. 944.12] and, instead, characterizes the crime of child enticement as "causing or attempting to cause" a child to go into any vehicle, building, room or secluded place with the intent to commit a criminal act or acts. The substitution of "causes" for "persuades or entices," eliminates as an element of the crime the state of mind of the child being enticed. The language "attempts to cause" is added to further clarify that the crime of child enticement includes the attempted act of enticement, consistent with s. 939.32(1)(d), as created by this bill.

This instruction is drafted for enticements based on attempt to entice an actual child. For enticements based on attempt to entice a fictitious child, see Wis JI-Criminal 2134B. For enticements based on completed acts, see Wis JI-Criminal 2134.

4. Here identify the conduct specified in subsecs. (1) to (6) of § 948.07. Care should be taken to provide a complete description of what the conduct requires, including definition of terms where necessary. The Committee suggests the following:

Under subsec. (1), for violations based on § 948.02:

". . . have sexual intercourse with (name of victim) . Sexual intercourse means any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required."

or

". . . have sexual contact with (name of victim) . Sexual contact is an intentional touching by the defendant of an intimate part of another, done for the purpose of (sexual arousal or gratification) (sexually degrading or humiliating that person)."

See Wis JI-Criminal 2101B for discussion of the definition of sexual intercourse. See Wis JI-Criminal 2101A for discussion of the definition of sexual contact. Note that for violations of subsection (1), the victim must be under the age of 16 years. See note 2, supra.

Under subsec. (1), for violations based on § 948.085(1):

". . . have sexual (contact) (intercourse) in violation of § 948.085(1). Section 948.085(1) is violated by a person who has sexual [contact] [intercourse] with a child for whom the person is a (foster parent) (treatment foster parent).

Under subsec. (1), for violations based on § 948.085(2):

". . . have sexual (contact) (intercourse) in violation of § 948.085(2). Section 948.085(2) is violated by a person who has sexual [contact] [intercourse] with a child who was placed in a substitute care facility, where the person (works or volunteers at the facility) (is responsible for managing the facility).

Under subsec. (1), for violations based on § 948.095(2):

". . . have sexual (contact) (intercourse) in violation of § 948.095(2). Section 948.095(2) is violated by a person who has sexual [contact] [intercourse] with a child who has attained the age of 16 years and who is not the person's spouse, if the child is enrolled as a student in a school or a school district and the person is a member of the school staff of the school or school district in which the chile is enrolled as a student."
[See Wis JI-Criminal 2139 for a complete description of the offense defined in § 948.095(2).]

Under subsec. (1), for violations based on § 948.095(3):

". . . have sexual (contact) (intercourse) in violation of § 948.095(3). Section 948.095(3) is violated by a person who has attained the age of 21 years, who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with

children, who has sexual [contact] [intercourse] with a child who has attained the age of 16 years, who is not the person's spouse, and with whom the person works or interacts through that occupation or volunteer position.

Under subsec. (2):

". . . engage in an act with (name of victim), that, if engaged in between adults, would be an act of prostitution. An act of prostitution is an act of sexual intercourse or sexual contact engaged in for something of value."

Under subsec. (3):

". . . expose genitals, pubic area, or intimate parts to (name of victim) for the purpose of sexual arousal or gratification."

See Wis JI-Criminal 2140 and 2141 for descriptions of two offenses defined by § 948.10.

Under subsec. (4):

". . . recording (name of victim) engaging in sexually explicit conduct. Sexually explicit conduct means actual or simulated (see § 948.01(7))."

The appropriate part of the definition of "sexually explicit conduct" provided in § 948.01(7) should be included.

Under subsec. (5):

". . . cause bodily harm to (name of victim). Bodily harm means physical pain or injury, illness, or any impairment of physical condition."

The definition of "bodily harm" is from § 939.22(4).

A violation involving subsec. (5) may also be based on intent to cause mental harm, a term defined in § 948.01(2).

Under subsec. (6):

". . . give or sell a controlled substance to (name of victim)."

Subsection (6) refers to giving or selling a controlled substance or controlled substance analog "in violation of Chapter 961." It is unclear what that reference adds, since any delivery to a child would appear to be in violation of Chapter 961.

In any case, the facts may require elaborating on the brief statements suggested above. The key is to assure that the jury is told of all the aspects of the underlying conduct that the defendant must intend to perform to make the enticement a violation of § 948.07.

In State v. Hendricks, 2018 WI 15, 379 Wis.2d 549, 906 N.W.2d 666, the Wisconsin Supreme Court reviewed a guilty plea acceptance colloquy for a child enticement charge based on "intent to have sexual contact." The court held that the colloquy was sufficient despite the court's failure to explain the definition of "sexual contact." The decision makes several references to sexual contact not being an "element" of the crime of child enticement. See, for example, ¶33. The Committee concluded that these statements do not affect the approach reflected in the instruction which calls for fully defining the crime the defendant intended to commit by the act of enticement. The purpose with which the defendant acted – e.g., with intent to have sexual contact – is a fact necessary to constitute the crime and must be proved beyond a reasonable doubt. See In Re Winship, 397 U.S. 358, 364 (1970): ". . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

5. "With intent to" is defined in § 939.23(4). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "with intent to." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

6. Use the same statement used at note 4, supra.

7. See note 2, supra.

8. Section 939.23(6).

9. Section 939.43(2).

10. Use same statement used at note 4, supra.

11. The definition of attempt is based on § 939.32 and Wis JI-Criminal 580. For explanation of the definitions of "unequivocally," "another person," and "extraneous factor," see the footnotes to Wis JI-Criminal 580.

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2134B CHILD ENTICEMENT: ATTEMPT: FICTITIOUS CHILD — § 948.07

Statutory Definition of the Crime

Child enticement, as defined in § 948.07 of the Criminal Code of Wisconsin, is committed by one who, with intent to have sexual contact with a child,[1] attempts to cause a person (he) (she) believed to be a child who has not attained the age of 16 years[2] to go into any vehicle, building, room, or secluded place.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant attempted to cause a person to go into a (vehicle) (building) (room) (secluded place).
2. The defendant attempted to cause a person to go into a (vehicle) (building) (room) (secluded place) with intent to have sexual contact.

   The phrase "with intent to" means that the defendant must have had the mental purpose[3] to engage in sexual contact.
3. The defendant believed that the person was under the age of 16 years.[4]

Definition of Attempt

Attempt requires that the defendant intended to cause a person the defendant believed to be a child who was under 16 years of age[5] to go into a (vehicle) (building) (room)

(secluded place) for the purpose of having sexual contact and that the defendant did acts which demonstrate unequivocally, under all of the circumstances, that he had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.[6]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

That the victim was fictitious can constitute an extraneous factor. What is required is that the defendant believed the person (he) (she) was dealing with was a child who was under the age of 16 years and that the defendant intended to have sexual contact with that person.[7]

Meaning of Sexual Contact

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND INSERT THE APPROPRIATE DEFINITION HERE

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2134B was originally published in 2003 and revised in 2007, 2014, and 2016. This revision was approved by the Committee in June 2018; it added to footnote 2.

Section 948.07 prohibits "causing or attempting to cause" a child to go into designated places for one of several prohibited purposes. Thus, it punishes the completed crime and the attempt equally. This instruction is drafted for the enticement case based on an attempt to entice what turns out to be a fictitious child. A separate instruction is provided for enticement cases based on an attempt to entice an actual child. See Wis JI-Criminal 2134A.

When an enticement charge is based on an attempt, it incorporates attempt as defined in § 939.32. State v. Koenck, 2001 WI App 93, ¶20, 242 Wis.2d 693, 626 N.W.2d 359; State v. Robins, 2002 WI 65, ¶28, 253 Wis.2d 298, 646 N.W.2d 287. This instruction incorporates the definition of attempt provided in § 939.32 as interpreted by Wis JI-Criminal 580.

In State v. Robins, 2002 WI 65, the Wisconsin Supreme Court upheld the application of the child enticement statute to a defendant charged with arranging, over the internet, a meeting in a motel with a boy he believed to be 13 years old. In fact, the boy was the fictitious creation of a government agent. The court held:

> . . . attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the "child" is fictitious. 2002 WI 65, ¶34.

Robins upheld State v. Koenck, 2001 WI App 93, where the court of appeals reached the same conclusion: "the fictitiousness of the girls constituted an extraneous factor beyond Koenck's control that prevented him from successfully enticing a child for the express purpose of sexual intercourse or contact." 2001 WI App 93, ¶28.

Both Robins and Koenck stop short of expressly holding that the defendant must believe that the person with whom he or she is dealing is a child. The Committee concluded that the statement in Robins that the fact that the victim is a fictitious child must be "unbeknownst" to the defendant is the equivalent of requiring that the defendant believe the victim is a child. This requirement is reflected in the instruction's definition of attempt.

The court of appeals interpreted Robins and Koenck in this manner in State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284. Grimm held that "the state may properly charge attempted child enticement . . . when the intended victim is actually an adult whom the defendant believes to be a child." ¶2.

Robins also rejected claims that applying § 948.07 based on communications over the internet violated the First Amendment:

> The child enticement statute regulates conduct, not speech. . . That an act of child enticement is initiated or carried out in part by means of language does not make the child enticement statute susceptible of First Amendment scrutiny. 2002 WI 65, ¶43.

See the Comment to Wis JI-Criminal 2134 for a general discussion of § 948.07 and the crime of child enticement.

1. This instruction is drafted for a case involving intent to have sexual contact with a child. Other types of prohibited conduct are specified in § 948.07(1)-(6):

> (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085, or 948.095.
>
> (2) Causing the child to engage in prostitution.
>
> (3) Exposing genitals, pubic area, or intimate parts to the child or causing the child to expose genitals, pubic area, or intimate parts in violation of s. 948.10.
>
> (4) Recording the child engaging in sexually explicit conduct.
>
> (5) Causing bodily or mental harm to the child.
>
> (6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

Subsection (3) was amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014] to delete "sex organ" and to substitute "genitals, pubic area, or intimate parts."

Subsection (4) was amended by 2001 Wisconsin Act 16 (effective date: September 1, 2001) to refer

to "recording." Recording is defined in § 948.01(3r).

Some of the acts listed are crimes defined in a specified statute: sexual assault in violation of § 948.02, § 948.085, or § 948.095 (see subsec. (1), supra), and exposing genitals, pubic area, or intimate parts in violation of § 948.10 (see subsec. (3), supra). The acts specified in subsecs. (2), (4), (5), and (6) have identifiable counterparts in other criminal statutes found in chapter 948, but those statutes are not specifically identified. See footnote 4, Wis JI-Criminal 2134A for suggested summaries of the elements of the other predicate crimes.

Specifying these acts is a change from prior § 944.12, which referred to "crimes against sexual morality." The Note to 1987 Senate Bill 203, which was enacted as 1987 Wisconsin Act 332, explains the change as follows:

> [This section] . . . enumerates specific intended purposes as those for which enticing a child would be a criminal act (e.g., having sexual contact, including sexual intercourse, with the child). These enumerated purposes are substituted for the current language requiring an intent to commit "a crime against sexual morality."

2. The instruction is drafted for a case alleged to involve intent to have "sexual contact with a child under § 948.02," as prohibited in § 948.07(1). Sexual contact [or sexual intercourse] with a child in violation of § 948.02 requires that the victim be under the age of 16 years. The other prohibited conduct specified in subs. (2) through (6) of § 948.07 apply when the victim is under the age of 18 years.

In State v. Hendricks, 2018 WI 15, 379 Wis.2d 549, 906 N.W.2d 666, the Wisconsin Supreme Court reviewed a guilty plea acceptance colloquy for a child enticement charge based on "intent to have sexual contact." The court held that the colloquy was sufficient despite the court's failure to explain the definition of "sexual contact." The decision makes several references to sexual contact not being an "element" of the crime of child enticement. See, for example, ¶33. The Committee concluded that these statements do not affect the approach reflected in the instruction which calls for fully defining the crime the defendant intended to commit by the act of enticement. The purpose with which the defendant acted – e.g., with intent to have sexual contact – is a fact necessary to constitute the crime and must be proved beyond a reasonable doubt. See In Re Winship, 397 U.S. 358, 364 (1970): ". . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

3. "With intent to" is defined in § 939.23(4). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "with intent to." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

4. The Committee concluded that where the case involves a fictitious victim, that is, where a government agent poses as a child, the state must prove that the defendant believed that the person with whom he or she was dealing was a child. In a case involving intent to engage in sexual contact with a child in violation of § 948.02, for which this instruction is drafted, the victim must be under the age of 16, so the defendant's belief must match that element of the crime.

The Committee concluded that requiring that the defendant believe the victim was a child is the equivalent of the requirement stated in State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287: "attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the 'child' is fictitious." 2002 WI 65, ¶34.

The court of appeals interpreted Robins and Koenck in this manner in State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284. Grimm held that "the state may properly charge attempted child enticement . . . when the intended victim is actually an adult whom the defendant believes to be a child." ¶2.

5. See note 4, supra.

6. The definition of attempt is based on § 939.32 and Wis JI-Criminal 580. For explanation of the definitions of "unequivocally," "another person," and "extraneous factor," see the footnotes to Wis JI-Criminal 580.

7. This is based on the statement in State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287, that "attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the "child" is fictitious." 2002 WI 65, ¶34.

2135 USE OF A COMPUTER TO FACILITATE A CHILD SEX CRIME — § 948.075

Statutory Definition of the Crime

Section 948.075 is violated by a person who uses a computerized communication system to communicate with an individual who the person believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following (four) (five)[2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant used a computerized communication system[3] to communicate with an individual.
2. The defendant believed or had reason to believe that the individual was under the age of 16 years.
3. The defendant used a computerized communication system to communicate with the individual with intent to have sexual (contact) (intercourse) with the individual.
4. The defendant did an act, in addition to using a computerized communication system, to carry out the intent to have sexual (contact) (intercourse).[4]

ADD THE FOLLOWING AS A FIFTH ELEMENT IF SUPPORTED BY THE EVIDENCE[5]

[5. At the time of the communication, the defendant did not reasonably believe that the age of the individual to whom the communication was sent was no more than 24 months less than the age of the defendant.][6]

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

Deciding About Intent and Belief

You cannot look into a person's mind to find intent and belief. Intent and belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and belief.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all (four) (five) elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2135 was originally published in 2003 and revised in 2007, 2009 and 2013. The 2009 revision updated footnote 4 and the 2013 revision updated the Comment. This revision was approved by the Committee in July 2016; it added to the Comment and to footnote 3.

This instruction is for violations of § 948.075, which was created by 2001 Wisconsin Act 109 [effective date: July 30, 2002.]

2011 Wisconsin Act 284 [effective date: April 27, 2012] created § 939.32(1)(de), which provides: "Whoever attempts to commit a crime under s. 948.075(1r) is subject to the penalty provided in that section for the completed act."

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. As amended by 2011 Wisconsin Act 272, it provides for a minimum sentence of 5 years for violations of § 948.075. In State v. Heidke, 2016 WI App 55, 370 Wis.2d 771, 883 N.W.2d 162, the court of appeals addressed the constitutionality of § 939.617. Heidke argued that the mandatory penalty was irrational and unconstitutional because it doesn't apply to the completed sex crimes that he allegedly intended to facilitate by his computer use. The court of appeals rejected the claim, finding that the legislature had a rational basis for the distinction.

Conduct that may violate § 948.075 may also constitute enticement of a child under § 948.07 or attempted sexual assault of a child. See State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287; State v. Koenck, 2002 WI App 93, 242 Wis.2d 693, 626 N.W.2d 359; and, State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284. Also see, Wis JI-Criminal 2134B Child Enticement: Attempt: Fictitious Child.

1. The statutory definition of the crime refers to "sexual contact or sexual intercourse in violation of s. 948.02(1) or (2)." The reference to the statute numbers was not included in the instruction because the Committee concluded that it was not necessary. Any sexual contact or sexual intercourse with a person under the age of 16 is a violation of § 948.02(1) or (2).

2. The instruction will contain five elements if there is evidence of the defense recognized in sub. (2) of § 948.75. See note 5, below.

3. "Computerized communication system" is not defined in § 948.075. Section 943.70, Computer crimes, provides definitions of "computer" and "computer system." See § 943.70(1)(am) and (e).

In State v. McKellips, 2016 WI 51, 369 Wis.2d 437, 881 N.W.2d 258, the trial court may have followed these references in adding the following to the standard instruction:

> Evidence has been received that the defendant communicated with a child under the age of 16 via a mobile or cellphone. You must determine whether the phone described in the evidence constitutes a computerized communication system. To aid you in that determination, you are instructed that under Wisconsin law, a computer is defined as – computer is defined as computer, which means an electronic device that performs logical, arithmetic, and memory functions by manipulating electronic or magnetic impulses, and includes all input, output, processing, storage, computer software and communication facilities that are connected or related to a computer in a computer system or computer network. Computer system is defined as a set of related computer equipment, hardware, or software.

The Wisconsin Supreme Court found that this instruction, "while not perfect," accurately stated the law. The court also provided its own definition, based on the plain meaning of the terms used: "A group of interacting, interrelated, or interdependent elements forming a complex whole used to exchange thoughts or messages through a computer." 2016 WI 51, ¶34.

4. This element is intended to reflect sub. (3) of § 948.075, which provides:

> Proof that the actor did an act, other than use a computerized communication system to communicate with the individual, to effect the actor's intent under sub. (1) shall be necessary to prove that intent.

The instruction departs from the statutory language in two respects: it uses "in addition to" in place of the statute's "other than"; and, it uses "to carry out" in place of the statute's "to effect." Both changes are intended to make the instruction clearer for the jury; no substantive change is intended. The conclusion that "carry out" has the same meaning as "effect" was cited with apparent approval in State v. Olson, 2008 WI App 171, 314 Wis.2d 630, 762 N.W.2d 393 at footnote 6.

In State v. Schulpius, 2006 WI App 263, 298 Wis.2d 155, 726 N.W.2d 706, the court found the evidence sufficient to prove that the defendant did something "other than use a computerized communication system to communicate with" the person he believed to be a fourteen-year old girl. The defendant drove through the victim's neighborhood for the purpose of meeting her and purchased condoms, which he referred to in his computer communication.

In State v. Olson, 2008 WI App 171, 314 Wis.2d 630, 762 N.W.2d 393, the court found there was not sufficient evidence to satisfy the "act" requirement. The defendant's use of a webcam to transmit video of himself was nothing more than using his computer to communicate. The court noted, however, that in other situations, "it may be possible to use a communication function of a computer to engage in an 'act' within the meaning of the statute." 2008 WI App 171, ¶16.

5. The fifth element should be added if there is evidence of the defense recognized by § 948.075(2). That subsection provides:

> This section does not apply if, at the time of the communication, the actor reasonably believed that the age of the person to whom the communication was sent was no more than 24 months less than the age of the actor.

The Committee concluded that this provision should be handled like other statutory exceptions: when the evidence supports the exception, the state must prove that the exception does not apply. For example, this is the way the exception for peace officers is handled with regard to charges of carrying a concealed weapon. See Wis JI-Criminal 1335 and State v. Williamson, 58 Wis.2d 514, 206 N.W.2d 613 (1973).

6. This statement takes the statement of the exception in sub. (2) and phrases it so the state has to prove the exception does not apply.

2136 SOLICITING A CHILD FOR PROSTITUTION — § 948.08

Statutory Definition of the Crime

Soliciting a child for prostitution, as defined in § 948.08 of the Criminal Code of Wisconsin, is committed by one who intentionally solicits any child to engage in an act of prostitution.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant solicited (name of victim) to engage in an act of prostitution.

   "To solicit" means to command, encourage, or request another person to engage in specific conduct that constitutes an act of prostitution.[2]

   "An act of prostitution" means engaging in [sexual intercourse][3] [(specify act that would constitute prostitution under § 944.30)][4] for anything of value.

2. The defendant solicited (name of victim) intending that an act of prostitution be committed.

3. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

Knowledge of (name of victim)'s age by the defendant is not required[5] and mistake regarding (name of victim)'s age is not a defense.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2136 was originally published in 1989 and revised in 1986. This revision was approved by the Committee in December 2008. It updated the text to reflect changes made by 2007 Wisconsin Act 80 and adopted a new format.

This instruction is for a violation of § 948.08, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. Section 948.08 replaced § 944.32, Soliciting Prostitutes, for offenses involving children. Soliciting a person under the age of 18 years was specified as a fact that increased the penalty under that statute. Section 944.32 is retained but amended to provide that it applies "except as provided under s. 948.08." See Wis JI-Criminal 1566 for violations of § 944.32.

Section 948.08 was amended by 2007 Wisconsin Act 80 to refer to "engage in an act of prostitution" in place of "to practice prostitution." [Effective date: March 27, 2008.] "To practice prostitution" was interpreted to require engaging in acts of prostitution on an ongoing basis. See State v. Johnson, 108 Wis.2d 703, 324 N.W.2d 447 (Ct. App. 1982), interpreting § 944.32.

1. Section 948.08 refers to "solicits or causes any child to engage in an act of prostitution or establishes any child in a place of prostitution." The instruction is drafted for what is believed to be the most common offense – soliciting a child to engage in an act of prostitution.

2. The definition of "solicit" is adapted from the one used in § 5.02(1), Model Penal Code. Also see § 939.30, defining the inchoate crime of solicitation as "advising" another to commit a crime. Also see § 939.05(2)(c), defining party to a crime liability in terms of "advises, hires, counsels or procures another to commit a crime."

3. If a definition of "sexual intercourse" is needed, see Wis JI-Criminal 2101B.

4. The committee concluded that "act of prostitution" as used in § 948.08 must refer to those acts that could be the basis for a charge of prostitution under § 944.30: sexual intercourse, acts of sexual gratification, masturbation, and sexual contact.

5. Section 939.23(6).

6. Section 939.43(2).

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2136A PATRONIZING A CHILD — § 948.081)

Statutory Definition of the Crime

Section 948.081 of the Criminal Code of Wisconsin is violated by one who enters or remains in any place of prostitution with intent to have nonmarital sexual intercourse or to commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another, masturbation or sexual contact with a child.

State's Burden of Proof

Before the defendant may be found guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant entered or remained in a place of prostitution.

   "Place of prostitution" means any place where persons habitually engage in or offer to engage in nonmarital acts of sexual intercourse or sexual contact for anything of value.[1]

2. The defendant entered or remained in the place with intent to (have nonmarital sexual intercourse) (commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another) (commit an act of masturbation) (have sexual contact) with a person who had not attained the age of 18 years at the time of the alleged offense.[2]

Knowledge of the person's age by the defendant is not required and mistake regarding the person's age is not a defense.[3]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2136A was approved by the Committee in April 2018.

Wis JI-Criminal 2136A is drafted for a violation of § 948.081, created by 2017 Wisconsin Act 128 [effective date: December 10, 2017]. The offense is a Class G felony.

1. "Place of prostitution" is defined in § 939.22(24) as "a place where a person habitually engages, in public or in private, in nonmarital acts of sexual intercourse, sexual gratification . . ., masturbation, or sexual contact for anything of value." The Committee concluded that referring to "acts of sexual intercourse or sexual contact" would make the instruction more understandable to the jury and would cover acts of sexual gratification and masturbation.

If further explanation is required, see § 939.22(36) for a definition of "sexual intercourse" and § 939.22(34) for a definition of "sexual contact."

While the "state must . . . prove 'habitual use' of the premises [as a place of prostitution] beyond a reasonable doubt . . . [it] need not be established by specifically proving a number of incidents beyond a reasonable doubt. Rather, what is required is that evidence be adduced at trial from which the jury can infer 'habitual use.'" Johnson v. State, 76 Wis.2d 672, 678, 251 N.W.2d 834 (1977).

"Habitual" is defined as "customary . . . resorted to on a regular basis." Webster's New Collegiate Dictionary.

2. The crime is defined as intending to commit one of the specified acts "with a person . . . if that person is a child." "Child" is defined as "a person who has not attained the age of 18 years." § 948.01(1). The statement of element two condenses this into the statement: "with a person who has not attained the age of 18 years."

3. Section 948.081(1) provides: "In a prosecution under this section, it need not be proven that the actor knew the age of the person and it is not a defense that the actor reasonably believed that the person was not a child." This states the same rules as §§ 939.23(6) and 939.43(2).

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2137A SEXUAL ASSAULT OF A FOSTER CHILD — § 948.085(1)

Statutory Definition of the Crime

Sexual assault of a child, as defined in § 948.085(1) of the Criminal Code of Wisconsin, is committed by a person who has sexual [contact] [intercourse] with a child for whom the person is a foster parent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

2. (Name of victim) was under the age of 18 years[1] at the time of the alleged sexual [contact] [intercourse].

   Knowledge of (name of victim)'s age is not required[2] and mistake regarding (name of victim)'s age is not a defense.[3]

   Consent to sexual [contact] [intercourse] is not a defense.[4]

3. The defendant was a foster parent to (name of victim).

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2137A was originally published in 2007. This revision was approved by the Committee in July 2009.

This instruction is for violations of § 948.085(1), which was created by 2005 Wisconsin Act 277 (effective date: April 20, 2006). For violations of § 948.085(2), see Wis JI-Criminal 2137B.

The 2010 revision deleted reference to "treatment foster parent" which was removed from § 948.085 by 2009 Wisconsin Act 28 (Section 3353).

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each instruction for sexual assault offenses. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."

2. Section 939.23(6).

3. Section 939.43(2).

4. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

2137B SEXUAL ASSAULT OF A CHILD PLACED IN A SUBSTITUTE CARE FACILITY[1] — § 948.085(2)

Statutory Definition of the Crime

Sexual assault of a child, as defined in § 948.085(2) of the Criminal Code of Wisconsin, is committed by a person who has sexual [contact] [intercourse] with a child who was placed in a substitute care facility, where the person (works or volunteers at the facility) (is responsible[2] for managing the facility).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim) .

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

2. (Name of victim) was under the age of 18 years[3] at the time of the alleged sexual [contact] [intercourse].

   Knowledge of (name of victim) 's age is not required[4] and mistake regarding (name of victim) 's age is not a defense.[5]

Consent to sexual [contact] [intercourse] is not a defense.[6]

3. (Name of victim) was placed in a substitute care facility.

"Substitute care facility" means

[a shelter care facility licensed under s. 48.66(1)(a).][7]

[a group home licensed under s. 48.625 or 48.66(1).][8]

[a facility described in s. 940.295(2)(m).][9]

4. The defendant (worked or volunteered at the facility) (was responsible[10] for managing the facility).

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2137B was approved by the Committee in August 2006.

This instruction is for violations of § 948.085(2), which was created by 2005 Wisconsin Act 277 (effective date: April 20, 2006). For violations of § 948.085(1), see Wis JI-Criminal 2137A.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each instruction for sexual assault offenses. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. The instruction uses the term "substitute care facility," borrowing it from the title of the statute. The offense definition refers to "any of the following facilities" and then lists three types of facilities that are defined primarily by cross references to other statutes. See notes 7, 8, and 9, below.

2. The statute refers to a person who "is directly or indirectly responsible" for managing the facility. The Committee concluded that it was not necessary to include the full statement in most cases. If the case is expected to focus on the defendant being "indirectly" responsible for managing the facility it may be helpful to add Adirectly or indirectly" to the fourth element. See note 10, below.

3. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."

4. Section 939.23(6).

5. Section 939.43(2).

6. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

7. Section 48.66(1)(a) refers to licensing shelter care facilities but does not provide a definition of the term.

8. Section 48.625 requires a license to operate a group home but does not provide a definition of the term. Section 48.66(1) lists a variety of institutions and agencies.

9. Section 940.295(2)(m) refers to: "A residential care center for children and youth operated by a child welfare agency licensed under s. 48.60 or an institution operated by a public agency for the care of neglected, dependent, or delinquent children."

Sec. 48.60 does not include a definition or list of agencies to which it applies. Sub. (2) lists many types of institutions to which it does not apply.

10. The statute refers to a person who "is directly or indirectly responsible" for managing the facility. The Committee concluded that it was not necessary to include the full statement in most cases. If the case is expected to focus on the defendant being "indirectly" responsible for managing the facility it may be helpful to add "directly or indirectly" to the fourth element.

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2138 SEXUAL INTERCOURSE WITH A CHILD — § 948.09

Statutory Definition of the Crime

Sexual intercourse with a child, as defined in § 948.09 of the Criminal Code of Wisconsin, is committed by one who has attained the age of 19 years and has sexual intercourse with a child[1] who has not attained the age of 18 years[2] and who is not his or her spouse.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements where present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse with (name of victim) .

2. (Name of victim) had not attained the age of age of 18 years at the time of the alleged sexual intercourse.

   Knowledge of (name of victim) 's age is not required[3] and mistake regarding (name of victim) 's age is not a defense.[4]

   Consent to sexual intercourse is not a defense.[5]

3. Defendant had attained the age of 19 year at the time of the alleged sexual intercourse.[6]

4. (Name of victim) was not the defendant's spouse at the time of the alleged sexual intercourse.

Meaning of Sexual Intercourse

REFER TO WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, then you should find the defendant guilty.

If you are not so satisfied, then you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2138 was originally published in 1989 and revised in 1996 and 2009. This revision was approved by the Committee in June 2018 and involved adding element 3 pertaining to the age of the defendant.

This instruction is for a violation of § 948.09, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

Section 948.09 replaces sub. (2) of § 944.15 which prohibits sexual intercourse with a minor who is 16 years old or older but younger than 18. It replaces sub. (2)(b) of § 944.17 which prohibited acts of sexual gratification with a minor of the same age. Repeal of the sexual gratification statute was possible because the definition of sexual intercourse covers all of the acts covered by the former statute.

Section 948.09 was amended by 2017 Wisconsin Act 174 to add the following at the end of the offense definition: "Yif the defendant has attained the age of 19 years when the violation occurs." The effective date of the change is March 30, 2018.

1. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."

2. The instruction states the age limits "has not attained the age of 18 years" because this is how "child" is defined in § 948.01(1). The Committee believes that is preferable to following the statement in § 948.09 that the victim must be "a child . . . who has attained the age of 16 years." There is no reason to submit the lower age limit (has attained the age of 16 years) to the jury because if the victim is under the age of 16, the offense would be a more serious one: sexual assault of a child defined in § 948.02(1) or (2).

This interpretation comports with the common sense conclusion that a person should not be able to defend against a criminal charge on the grounds that he or she is actually guilty of a more serious offense that in fact includes the one charged. This issue was raised in a number of cases interpreting the state's homicide law at a time when first degree murder required "premeditated design" and second degree murder required "without design to effect death." Defendant's convicted of second degree murder appealed on the ground that they were really guilty of first degree murder because they intended to kill. The Wisconsin Supreme Court rejected this argument on several occasions. See Walsh v. State, 195 Wis. 543-45, 218 N.W. 714 (1928), and cases cited therein. Though the cases involved jury verdicts finding the defendant guilty of lesser included offenses, the logic of the decision applies in the present context.

3. See § 939.23(6).

4. See § 939.43(2).

5. "Without consent" is not an element of this offense, and the Committee concluded that it may be helpful to advise the jury of that fact.

6. This element was added to reflect changes made by 2017 Wisconsin Act 174 [effective date: March 30, 2018].

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2138A UNDERAGE SEXUAL ACTIVITY — § 948.093

Statutory Definition of the Crime

Underage sexual activity, as defined in § 948.093 of the Criminal Code of Wisconsin, is committed by one who has not attained the age of 19 years and has [sexual contact with a child who has attained the age of 15 years but has not attained the age of 16 years] [sexual intercourse with a child who has attained the age of 15 years] and is not his or her spouse.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim) .
2. The defendant had not attained the age of 19 years at the time of the alleged sexual [contact] [intercourse].
3. (Name of victim) had attained the age of 15 years [but had not attained the age of 16 years at the time of the alleged sexual contact] [but had not attained the age of 18 years[1] at the time of the alleged sexual intercourse].

   Knowledge of (name of victim) 's age is not required[2] and mistake regarding (name of victim) 's age is not a defense.[3]

Consent to sexual [contact] [intercourse] is not a defense.[4]

4. (Name of victim) was not the defendant's spouse at the time of the alleged sexual [contact] [intercourse].

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2138A was approved by the Committee in June 2018.

This instruction is for criminal violations of § 948.093, underage sexual activity, created by 2017 Wisconsin Act 174 [effective date: March 30, 2018]. This instruction provides for two types of underage sexual activity defined by § 948.093: sexual contact with a child who has attained the age of 15 years but has not attained the age of 16 years, or sexual intercourse with a child who has attained the age of 15 years. For violations of § 948.09, see Wis JI-Criminal 2138.

This instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definition material was formerly included in the text of each instructions for sexual assault offenses. When a new alternative was added to the statutory definition of sexual contact by the 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instructions that is tailored to the facts of the case.

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant's alleged "constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation." State v. Fisher, 211 Wis.2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997).

1. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."

2. See § 939.23(6).

3. See § 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis.2d 418, 680 N.W.2d 810, the court held that "no affirmative defense of the victim's intentional misrepresentation of his or her age exists in a prosecution under § 948.02(2). . . If an accused's reasonable belief about the victim's age, based on the victim's intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant's belief about the victim's age nor evidence regarding the cause for or reasonableness of that belief is relevant.

4. "Without consent" is not an element of this offense, and the Committee concluded that it may be helpful to advise the jury of that fact.

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2139 SEXUAL ASSAULT OF A CHILD BY A SCHOOL STAFF PERSON — § 948.095(2)

Statutory Definition of the Crime

Sexual assault of a child, as defined in § 948.095(2) of the Criminal Code of Wisconsin, is committed by a person who has sexual [contact] [intercourse] with a child who has attained the age of 16 years and who is not the person's spouse, if the child is enrolled as a student in a school or a school district and the person is a member of the school staff of the school or school district in which the child is enrolled as a student.

State's Burden of Proof

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present at the time of the offense.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim), who was not the defendant's spouse.

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

2. (Name of victim) had attained the age of 16 years and had not attained the age of 18 years.[1]

Knowledge of (name of victim) 's age is not required[2] and mistake regarding (name of victim) 's age is not a defense.[3]

Consent to sexual [contact] [intercourse] is not a defense.[4]

3. (Name of victim) was enrolled as a student in a school or a school district.

["School" means a public or private elementary or secondary school.][5]

4. The defendant was a member of the school staff of the school or school district in which (name of victim) was enrolled as a student.

["School staff" means any person who provides services to a school or a school board, including an employee of a school or school board and a person who provides services to a school or a school board under a contract.][6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2139 was originally published in 1997 and revised in 2004. This revision was approved by the Committee in October 2006; it reflects changes made by 2005 Wisconsin Act 274.

This instruction is for violations of § 948.095, which was created by 1995 Wisconsin Act 456 (effective date: July 11, 1996). 2005 Wisconsin Act 274 amended the title of the statute to read as follows: "Sexual assault of a child by a school staff person or a person who works or volunteers with children." Act 274 also created sub. (3), which defines a new offense addressed by Wis JI-Criminal 2139A.

Before being amended by Act 274, the title of the statute referred to "instructional staff" but the text referred simply to "staff." The definition of "school staff" in sub. (1)(b) extends to anyone who provides "services" – it is not limited to "instructional services." In State v. Kaster, 2003 WI App 105, 264 Wis.2d

751, 663 N.W.2d 390, the court of appeals noted the potentially broad application of the statutory definition but concluded that it did not make the statute unconstitutional or ambiguous. The statute does not require that a person be "under contract" and can apply to volunteers. The court also concluded that Wis JI-Criminal 2139 adequately instructs the jury on § 948.095. 2003 WI App 105, ¶16. Kaster returned to the appellate courts, claiming that the court of appeals had added a new element to the statute and that he was denied the opportunity to present a defense to that element. The court of appeals held that the first decision "did not create an additional element but instead provided a description of Kaster's relationship with the school for the purpose of analyzing whether Kaster was school staff. . . . Thus, we reject Kaster's argument that he was denied the right to present a defense . . ." State v. Kaster, 2006 WI App 72, ¶8, 292 Wis.2d 252, 714 N.W.2d 238.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each instruction for sexual assault offenses. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. The statute requires that the victim be "a child who has attained the age of 16 years." "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years." Thus, the victim must have attained the age of 16 but not 18. Sexual contact or intercourse with a child under the age of 16 is made criminal by § 948.02.

2. Section 939.23(6).

3. Section 939.43(2).

4. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

5. This is the definition provided in § 948.095(1)(a).

6. This is the definition provided in § 948.095(1)(b). See the discussion of State v. Kaster in the Comment preceding footnote 1.

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2139A SEXUAL ASSAULT OF A CHILD BY A PERSON WHO WORKS OR VOLUNTEERS WITH CHILDREN — § 948.095(3)

Statutory Definition of the Crime

Sexual assault of a child, as defined in § 948.095(3) of the Criminal Code of Wisconsin, is committed by a person who has attained the age of 21 years, who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children, who has sexual [contact] [intercourse] with a child who has attained the age of 16 years, who is not the person's spouse, and with whom the person works or interacts through that occupation or volunteer position.

State's Burden of Proof

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present at the time of the offense.

Elements of the Crime That the State Must Prove

1. The defendant had attained the age of 21 years.
2. The defendant (engaged in an occupation) (participated in a volunteer position) that required (him) (her) to work or interact directly with children.
3. The defendant had sexual [contact] [intercourse] with (name of victim), who was not the defendant's spouse.

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

4. (Name of victim) had attained the age of 16 years and had not attained the age of 18 years.[1]

Knowledge of (name of victim) 's age is not required[2] and mistake regarding (name of victim) 's age is not a defense.[3]

Consent to sexual [contact] [intercourse] is not a defense.[4]

5. (Name of victim) was a person with whom the defendant worked or interacted through (his) (her) (occupation) (volunteer position).

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2139A was approved by the Committee in October 2006.

This instruction is for violations of § 948.095(3)(a), which was created by 2005 Wisconsin Act 274 (effective date: April 20, 2006). For violations of § 948.095(2), see Wis JI-Criminal 2139.

Act 274 also changed the title of § 948.095 to refer to "school staff person or a person who works or volunteers with children." This, with the addition of sub. (3), arguably makes it more clear that the statute applies to a broad category of individuals. See State v. Kaster, 2003 WI App 105, 264 Wis.2d 751, 663 N.W.2d 390, where the court of appeals noted the potentially broad application of the statute before the changes made by Act 274 and concluded that it did not make the statute unconstitutional or ambiguous. See the discussion in the Comment, Wis JI-Criminal 2139.

Subsection (3)(d) of § 948.095 provides that evidence that a person engages in any of several listed occupations or positions is "prima facie evidence that the occupation or position requires him or her to work or interact directly with children . . ." The instruction does not address this provision. See Wis JI-Criminal 225 for a general model for instructing on "prima facie cases."

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each instruction for sexual assault offenses. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. The statute requires that the victim be "a child who has attained the age of 16 years." "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years." Thus, the victim must have attained the age of 16 but not 18. Sexual contact or intercourse with a child under the age of 16 is made criminal by § 948.02.

2. Section 939.23(6).

3. Section 939.43(2).

4. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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2140 EXPOSING GENITALS, PUBIC AREA, OR INTIMATE PARTS TO A CHILD — § 948.10

Statutory Definition of the Crime

Section 948.10 of the Criminal Code of Wisconsin, is violated by one who exposes genitals, pubic area, or intimate parts to a child for the purpose of sexual arousal or sexual gratification.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [three] [four][1] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant exposed (genitals) (pubic area) (name intimate part)[2] to (name of child).

   "Expose" means to exhibit to the view of another person.

2. The defendant exposed (genitals) (pubic area) (name intimate part) for the purpose of the defendant's sexual arousal or sexual gratification.[3]

3. (Name of child) was under the age of 18 years at the time of the alleged offense.

   Knowledge of (name of child)'s age by the defendant is not required[4] and mistake regarding (name of child)'s age is not a defense.[5]

ADD ONE OF THE FOLLOWING IF THE FELONY OFFENSE IS CHARGED.[6]

[4. The defendant had attained the age of 17 years when the alleged offense occurred.[7]]

[4. The defendant had attained the age of 17 years but not the age of 19 years at the time of the alleged offense and was more than 4 years older[8] than (name of child) .]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all [three] [four] elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2140 was originally published in 1989 and revised in 1998, 2007, and 2011. The 2011 revision modified the instruction to reflect the penalty structure created by 2009 Wisconsin Act 202. This revision was approved by the Committee in October 2014; it modified the instruction to reflect changes made by 2013 Wisconsin Act 362.

This instruction is for a violation of § 948.10, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. The offense is similar to the crime defined in § 944.20(2): lewd and lascivious behavior by publicly and indecently exposing a sex organ. (See Wis JI-Criminal 1544.)

Section 948.10 was amended by 2009 Wisconsin Act 202 to create a new penalty structure. [Effective date: May 6, 2010.] Violations are Class I felonies unless conditions specified in sub. (1)(b)1. or 2. are present, in which case violations are Class A misdemeanors. The Committee concluded that the facts determining which penalty applies are best addressed by adding a fourth element for cases where felony violations are charged.

2013 Wisconsin Act 362 amended § 948.10 to add "intimate parts" to the title and the offense definition [effective date: April 25, 2014.]

There are two different offenses under § 948.10: exposing genitals, pubic area, or intimate parts to a child (this instruction); and, causing a child to expose genitals, pubic area, or intimate parts (see Wis JI-Criminal 2141).

Subsection (2) of § 948.10 provides that "Subsection (1) does not apply under any of the following circumstances:

(a) The child is the defendant's spouse.
(b) A mother's breast-feeding of her child."

The breast-feeding exclusion was created by 1995 Wisconsin Act 165. [Effective date: April 6, 1996.].

1. Use three elements if the misdemeanor offense is charged; use four elements if the felony offense is charged.

2. 2013 Wisconsin Act 362 amended § 948.10 to add "intimate parts" to the title and the offense definition [effective date: April 25, 2014.] "Intimate part" is defined in § 939.22(19): "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved.

3. Section 948.10 avoids one of the problems with traditional indecent exposure statutes in that it does not use words like "indecently" or "lewd." Rather, the "purpose of sexual arousal or sexual gratification" is required. This is the phrase used in the definition of "sexual contact" in §§ 940.225(5)(b) and 948.01(5).

4. Section 939.23(6).

5. Section 939.43(2).

6. Section 948.10(1)(a) provides that the penalty for violations of § 948.10 is a Class I felony, "except as provided in par. (b)." Paragraph (b) provides that the penalty is a Class A misdemeanor "if any of the following applies:

1. The actor is a child when the violation occurs.
2. At the time of the violation, the actor had not attained the age of 19 years and was not more than 4 years older than the child."

The Committee concluded that the preferred way to deal with this penalty structure was to treat the absence of the penalty-reducing facts in sub. (b)1. and 2. as elements of the felony offense. Thus, the instruction provides two alternatives for element 4: that the defendant was not a child (i.e, that the defendant had not attained the age of 17 years); or, that the defendant had attained the age of 17 but not 19 years and was more than 4 years older than the child.

7. For the purposes of prosecuting a person for violating provisions of Chapter 948, the person is a "child" if under the age of 17. Section 948.01(1) provides:

> "Child" means a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, "child" does not include a person who has attained the aged of 17 years.

8. A similar four-year age gap is included in § 301.45(1m), the sex offender registration law. In

State v. Parmley, 2010 WI App 79, 325 Wis.2d 769, 785 N.W.2d 655, the court held that determining whether the actor is "'not more than 4 years older,' is determined by calculating the time between the birthday of the actor and the birthday of the victim. . . [I]t was error . . . to only compare calendar year ages." ¶28.

2141 CAUSING A CHILD TO EXPOSE GENITALS, PUBIC AREA, OR INTIMATE PARTS — § 948.10

Statutory Definition of the Crime

Section 948.10 of the Criminal Code of Wisconsin is violated by one who causes a child to expose genitals, pubic area, or intimate parts for the purpose of sexual arousal or sexual gratification.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [three] [four][1] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused (name of child) to expose (genitals) (pubic area) (name intimate part).[2]

   "Expose" means to exhibit to the view of another person.

2. The defendant caused (name of child) to expose (genitals) (pubic area) (name intimate part) for the purpose of the defendant's sexual arousal or sexual gratification.[3]

3. (Name of child) was under the age of 18 years at the time of the alleged offense.

   Knowledge of (name of child)'s age by the defendant is not required[4] and mistake regarding (name of child)'s age is not a defense.[5] That the defendant had attained the age of 18 at the time of the alleged incident.]

ADD ONE OF THE FOLLOWING IF THE FELONY OFFENSE IS CHARGED.[6]

[4. The defendant had attained the age of 17 years when the alleged offense occurred.[7]]

[4. The defendant had attained the age of 17 years but not the age of 19 years at the time of the alleged offense and was more than 4 years older[8] than (name of child) .]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all [three] [four] elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2141 was originally published in 1989 and revised in 1998, 2007, and 2011. The 2011 revision modified the instruction to reflect the penalty structure created by 2009 Wisconsin Act 202. This revision was approved by the Committee in October 2014; it modified the instruction to reflect changes made by 2013 Wisconsin Act 362.

This instruction is for a violation of § 948.10, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

Section 948.10 was amended by 2009 Wisconsin Act 202 to create a new penalty structure. [Effective date: May 6, 2010.] Violations are Class I felonies unless conditions specified in sub. (1)(b)1. or 2. are present, in which case violations are Class A misdemeanors. The Committee concluded that the facts determining which penalty applies are best addressed by adding a fourth element for cases where felony violations are charged.

2013 Wisconsin Act 362 amended § 948.10 to add "intimate parts" to the title and the offense definition [effective date: April 25, 2014.]

There are two different offenses under § 948.10: exposing genitals or pubic area to a child (see Wis JI-Criminal 2141); and, causing a child to expose genitals or pubic area (this instruction).

Subsection (2) of § 948.10 provides that "Subsection (1) does not apply under any of the following circumstances:

(a) The child is the defendant's spouse.
(b) A mother's breast-feeding of her child."

The breast-feeding exclusion was created by 1995 Wisconsin Act 165. [Effective date: April 6, 1996.]

1. Use three elements if the misdemeanor offense is charged; use four elements if the felony offense is charged.

2. 2013 Wisconsin Act 362 amended § 948.10 to add "intimate parts" to the title and the offense definition [effective date: April 25, 2014.] "Intimate part" is defined in § 939.22(19): "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved.

3. Section 948.10 avoids one of the problems with traditional indecent exposure statutes in that it does not use words like "indecently" or "lewd." Rather, the "purpose of sexual arousal or sexual gratification" is required. This is the phrase used in the definition of "sexual contact" in §§ 940.225(5)(b) and 948.01(5).

4. Section 939.23(6).

5. Section 939.43(2).

6. Section 948.10(1)(a) provides that the penalty for violations of § 948.10 is a Class I felony, "except as provided in par. (b)." Paragraph (b) provides that the penalty is a Class A misdemeanor "if any of the following applies:

1. The actor is a child when the violation occurs.
2. At the time of the violation, the actor had not attained the age of 19 years and was not more than 4 years older than the child."

The Committee concluded that the preferred way to deal with this penalty structure was to treat the absence of the penalty-reducing facts in sub. (b)1. and 2. as elements of the felony offense. Thus, the instruction provides two alternatives for element 4: that the defendant was not a child (i.e, that the defendant had not attained the age of 17 years); or, that the defendant had attained the age of 17 but not 19 years and was more than 4 years older than the child.

7. For the purposes of prosecuting a person for violating provisions of Chapter 948, the person is a "child" if under the age of 17. Section 948.01(1) provides:

> "Child" means a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, "child" does not include a person who has attained the aged of 17 years.

8. A similar four-year age gap is included in § 301.45(1m), the sex offender registration law. In State v. Parmley, 2010 WI App 79, 325 Wis.2d 769, 785 N.W.2d 655, the court held that determining whether the actor is "'not more than 4 years older,' is determined by calculating the time between the birthday of the actor and the birthday of the victim. . . [I]t was error . . . to only compare calendar year ages." ¶28.

2142 EXPOSING A CHILD TO HARMFUL MATERIAL — § 948.11(2)(a)

[USE THIS INSTRUCTION IF THERE IS NO EVIDENCE OF THE DEFENSE UNDER § 948.11(2)(c).][1]

Statutory Definition of the Crime

Exposing a child to harmful material, as defined in § 948.11(2)(a) of the Criminal Code of Wisconsin, is committed by one who, with knowledge of the character and content of the material, knowingly sells, rents, exhibits, plays, distributes, or loans to a child any harmful material, with or without monetary consideration and [knows or reasonably should know that the child has not attained the age of 18 years] [has face-to-face contact with the child before or during the sale, rental, exhibit, playing, distribution, or loan].[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly (sold) (rented) (exhibited) (played) (distributed) (loaned) harmful material to (name of child).[3]

   This does not require that the defendant received any monetary consideration.[4]

"Harmful material"[5] means (identify the type of material)[6] of a person or portion of the human body that depicts nudity, sexually explicit conduct, sadomasochistic abuse, physical torture, or brutality, and that is harmful to children.

"Harmful to children"[7] means that quality of any description, narrative account, or representation of nudity,[8] sexually explicit conduct,[9] sexual excitement,[10] sadomasochistic abuse,[11] physical torture, or brutality when it

(1) predominantly appeals to the prurient,[12] shameful or morbid interest of children; and

(2) is patently offensive to prevailing standards in the adult community of Wisconsin[13] as a whole with respect to what is suitable material for children; and

(3) lacks serious literary, artistic, political, scientific, or educational value for children of the age of (name of child),[14] when taken as a whole.

2. The defendant had knowledge of the character and content of the material.[15]

This requires that the defendant knew that the material contained a description, narrative account, or representation of nudity, sexually explicit conduct, sexual excitement, sadomasochistic abuse, physical torture, or brutality.

3. (Name of child) was under the age of 18 years.[16]

4. The defendant [knew or reasonably should have known that the child was under the age of 18 years] [had face-to-face contact with the child before or during the (sale) (rental) (exhibit) (playing) (distribution) (loan)].[17]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2142 was originally published in 1992 and revised in 1997, 1999, 2000, 2003, 2006, 2007, 2009, and 2011. The 2011 revision added "knowingly" to the definition of the crime and to the first element. This revision was approved by the Committee in October 2018; it added the comment in regard to § 948.11(2)(am).

Section 948.11 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. A similar offense was defined by § 944.25 under prior law. That statute was repealed and replaced by § 948.11. There was no uniform instruction for violations of § 944.25.

This instruction is for a violation of § 948.11(2)(a), which prohibits providing a child with harmful material and is punished as a Class E felony. Subsection (2)(am) prohibits verbally communicating a harmful description or narrative to a child and sub. (2)(b) applies to possession of harmful material with intent to transfer and is punished as a Class A misdemeanor. See uniform instruction 2143 for violations of sub. (2)(am). There are no uniform instructions for violations of sub. (2)(b).

Section 948.11 has been described as a "variable obscenity statute" – "a law which prohibits a person from exhibiting to children materials determined to be obscene to children, though not obscene to adults." State v. Kevin L.C., 216 Wis.2d 166, 185, 576 N.W.2d 62 (Ct. App. 1997).

In State v. Thiel, 183 Wis.2d 505, 515 N.W.2d 847 (1994), the court held that § 948.11 was not unconstitutionally overbroad.

In State v. Weidner, 2000 WI 52, ¶1, 235 Wis.2d 306, 611 N.W.2d 684, the Wisconsin Supreme Court held that "§ 948.11(2) is unconstitutional in the context of the internet and other situations that do not involve face-to-face contact between the minor and the accused." The defect was that the statute eliminated a mental state regarding the age of the child while imposing a burden on the defendant to establish lack of knowledge as an affirmative defense. The defense would be extremely difficult, if not impossible, to establish in a case that does not involve face-to-face confrontation. Apparently the statute remained constitutional for situations that do involve face-to-face contact between the defendant and the child. See State v. Kevin L.C., 216 Wis.2d 166, 576 N.W.2d 62 (Ct. App. 1997), upholding the constitutionality of the statute where there was face-to-face interaction.

The statute was amended by 2001 Wisconsin Act 16 to remedy the defect identified in Weidner by adding the requirement reflected in the new fourth element of the instruction: that the defendant knew or reasonably should have known that the child was under the age of 18 years or had face-to-face contact with the child before or during the sale, rental, exhibit, playing, distribution, or loan.

In State v. Trochinski, 2002 WI 56, 253 Wis.2d 38, 644 N.W.2d 891, the court affirmed a court of appeals decision denying withdrawal of a no contest plea and upholding the constitutionality of § 948.11(2). The defendant gave nude pictures of himself to a 17 year old female clerk at a convenience store, along with letters saying his pictures had been accepted for publication in Playgirl magazine. He sought to withdraw his plea on the ground that he did not understand the "harmful to children" element of the crime. The court found his understanding was adequately demonstrated by the plea form and the plea colloquy. His constitutional claim was also rejected: prior decisions (Thiel and Kevin L.C.) have established that § 948.11(2) is constitutional as applied to situations involving face-to-face interaction. The "personal contact between the perpetrator and the child-victim is what allows the State to impose on the defendant the risk that the victim is a minor." 2002 WI 56, ¶39.

1. This instruction is intended to be used for all cases involving violations of § 948.11(2)(a)1. and for cases involving violations of § 948.11(2)(a)2. where there is not evidence of the defense provided in § 948.11(2)(c). As amended by 2001 Wisconsin Act 16, the defense applies to violations of subsec. (2)(a)2. – those involving violations face-to-face contact – if the defendant "had reasonable cause to believe that the child had attained the age of 18 years" and the child presented documentary evidence of age. The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

For cases involving the affirmative defense, see Wis JI-Criminal 2142A.

2. The statement of the offense reflects changes in § 948.11(2)(a) made by 2001 Wisconsin Act 16: substituting knowledge of the "character and content" of the material for knowledge of the "nature" of the material; adding "rents," "plays," and "distributes" to the list of prohibited acts and striking "transfers" from that list; and, adding the requirement that the defendant either know or have reason to know the child's age or have face-to-face contact with the child. As to the latter, see State v. Gonzalez, 2011 WI 63, 335 Wis.2d 270, 802 N.W.2d 454, where the court found that selecting the wrong alternative was reversible error.

3. In State v. Thiel, 183 Wis.2d 505, 515 N.W.2d 847 (1994), the court construed "exhibit" to mean "to offer or present for inspection," emphasizing that, like the other terms in the statute, it "represents a knowing and affirmative act."

In State v. Gonzalez, 2011 WI 63, 335 Wis.2d 270, 802 N.W.2d 454, the court addressed whether "knowingly" must be added to the jury instruction for this offense. Three justices concluded that the word "knowingly" should simply be added to the instruction. Two justices agreed that this would effectively address the problem, but noted that "knowingly" does not appear in the statute and had not been added to the uniform jury instruction. They would not resolve the issue in this case. Two other justices concluded that "knowingly" should not be added because it does not appear in the statute. They hold that the verbs used in the statute all contemplate a "knowing and affirmative act" but apparently conclude that the jury will understand this without a specific instruction.

The Committee concluded that in light of the fact that there is agreement that the statute does require a "knowing and affirmative act," the simplest and clearest way to assure that the jury accurately understands what the statute requires is to add "knowingly" to the instruction.

4. The statutory definition of this offense provides that it applies to transfers of material, "with or without monetary consideration." § 948.11(2)(a). The Committee interprets this provision as one that makes proof of consideration unnecessary, as opposed to one that creates alternative means of proving a required fact. Thus, the instruction recommends telling the jury that proof of consideration is not required. No further mention of consideration is made.

5. This is the definition provided in § 948.11(1)(ar)1. Subsection (1)(ar)2. provides a similar definition applicable to books, other printed matter, recordings, verbal descriptions, and narrative accounts.

6. Here identify the type of material involved: picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image. See sub. (1)(ar)1. of § 948.11. Subdivision 2. of that subsection extends coverage to "any book, pamphlet, magazine, printed matter or recording that contains any matter enumerated in subd. 1."

7. This is the definition provided in § 948.11(1)(b).

In State v. Booker, 2005 WI App 182, 286 Wis.2d 747, 704 N.W.2d 336, the court of appeals reversed a conviction under § 948.11(2) because it found that the evidence was not sufficient to establish that the material was "harmful to children." The material was on a videotape that the jury did not view. The Wisconsin Supreme Court reversed, concluding that "testimony that depicted the content of the video scenes shown to the children was sufficient to support the jury's verdict." State v. Booker, 2006 WI 79, ¶1, 292 Wis.2d 43, 717 N.W.2d 676.

8. "Nudity" is defined in § 948.11(1)(d).

9. "Sexually explicit conduct" is defined in § 948.01(7).

10. "Sexual excitement" is defined in § 948.11(1)(f).

11. "Sadomasochistic abuse" is defined in § 948.01(4).

12. The definition of "harmful to children" is based in part on the three-part test used to define obscenity. One part of that definition refers to "prurient interest." Jury instructions defining "prurient interest" in a proceeding under § 944.21, Obscene material or performance, were reviewed in County of Kenosha v. C&S Management, 223 Wis.2d 373, 588 N.W.2d 236 (1999). The court held that the following instruction complied with the constitutional test based on Miller v. California, 413 U.S. 15 (1973):

> 'Appealing to the prurient interest' does not encompass normal healthy sexual desires but means the material appeals generally to a shameful, unhealthy, unwholesome, degrading or morbid interest in sex, nudity, or excretion.

A second part of the definition refers to "prevailing standards in the adult community as a whole." In State v. Tee & Bee, Inc., 229 Wis.2d 446, 600 N.W.2d 230 (Ct. App. 1999), the court found three errors in a jury instruction under § 944.21. Two of those errors related to the relevant "community standard" used to determine whether material is obscene: contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community (229 Wis.2d 446, 452); and, statewide community standards must be used, not standards of a smaller geographic area (229 Wis.2d 446, 454).

In Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002), the court held that reliance on "community standards" to determine whether material is "harmful to minors" under the federal Child Online Protection Act does not by itself make that statute unconstitutionally overbroad. The court did find the statute unconstitutionally overbroad on other grounds.

13. The reference to the "adult community of Wisconsin" was added in 2009 in response to an unpublished decision of the Wisconsin Court of Appeals that suggested the failure to include that reference "invites error." See, State v. McCoy, 2008 AP 1512-CR, December 23, 2008.

14. See State v. Thiel, 183 Wis.2d 505, 536, 515 N.W.2d 847 (1994) and State v. Trochinski, 2002 WI 56, ¶32, 253 Wis.2d 38, 644 N.W.2d 891, which hold that whether the material is "harmful to children" is to be judged by reference to a reasonable minor "of like age" with the child in the case, at least as to the issue of literary, artistic, political, scientific, or educational value under § 948.11(1)(b)3.

15. This knowledge element is stated in these terms by § 948.11(2)(a) as revised by 2001 Wisconsin Act 16. Before that change, the statute referred to knowledge of the "nature" of the material and defined that as knowledge of the "character and content" of the material.

The Committee concluded that "knowledge of the character and content" of the material refers to knowledge that the material contains "any description or representation of nudity, sexually explicit conduct, sexual excitement, sadomasochistic abuse, physical torture, or brutality." The quoted material is from the first part of the definition of "harmful to children" in § 948.11(1)(b). The balance of that definition describes the attributes of the material that makes it the equivalent of "obscene." As is the case with criminal prohibition of obscenity, knowledge of those attributes, which are essentially legal issues, is not required. See Hamling v. United States, 418 U.S. 121, 123 (1974):

> . . . . It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.

16. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years." Section 948.11 does not require the state to prove that a defendant knew the person to whom the harmful materials are transfered is a child. State v. Kevin L.C., 216 Wis.2d 166, 185, 576 N.W.2d 62 (Ct. App. 1997). This does not make the statute unconstitutional, because it criminalizes acts in which the defendant confronts the underage victim personally and therefore may reasonably be required to ascertain the victim's age. Id. at 187.

17. The alternative supported by the evidence should be selected. This element was added in response to changes made in the statute by 2001 Wisconsin Act 16. If the second alternative is used – face-to-face contact – and there is evidence of the affirmative defense defined in sub. (2)(c), Wis JI-Criminal 2142A should be used. As to the latter, see State v. Gonzalez, 2011 WI 63, 335 Wis.2d 270, 802 N.W.2d 454, where the court found that selecting the wrong alternative was reversible error.

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2142A EXPOSING A CHILD TO HARMFUL MATERIAL: FACE-TO-FACE CONTACT AFFIRMATIVE DEFENSE — § 948.11(2)(a)2. and (c)

[USE THIS INSTRUCTION FOR VIOLATIONS OF § 948.11(2)(a)2. IF THERE IS EVIDENCE OF THE DEFENSE UNDER § 948.11(2)(c).][1]

Statutory Definition of the Crime

Exposing a child to harmful material, as defined in § 948.11(2)(a) of the Criminal Code of Wisconsin, is committed by one who, with knowledge of the character and content of the material, sells, rents, exhibits, transfers, or loans to a child any harmful material, with or without monetary consideration and has face-to-face contact with the child before or during the sale, rental, exhibit, playing, distribution, or loan].[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (sold) (rented) (exhibited)[3] (played) (distributed) (loaned) harmful material to (name of child) .

   This does not require that the defendant received any monetary consideration.[4]

   "Harmful material"[5] means (identify the type of material) [6] of a person or portion of the human body that depicts nudity, sexually explicit conduct,

sadomasochistic abuse, physical torture, or brutality, and that is harmful to children.

"Harmful to children"[7] means that quality of any description, narrative account, or representation of nudity,[8] sexually explicit conduct,[9] sexual excitement,[10] sadomasochistic abuse,[11] physical torture, or brutality when it

(1) predominantly appeals to the prurient,[12] shameful or morbid interest of children; and

(2) is patently offensive to prevailing standards in the adult community of Wisconsin[13] as a whole with respect to what is suitable material for children; and

(3) lacks serious literary, artistic, political, scientific, or educational value for children of the age of (name of child),[14] when taken as a whole.

2. The defendant had knowledge of the character and content of the material.[15]

This requires that the defendant knew that the material contained a description, narrative account, or representation of nudity, sexually explicit conduct, sexual excitement, sadomasochistic abuse, physical torture, or brutality.

3. (Name of child) was under the age of 18 years.[16]

4. The defendant had face-to-face contact with the child before or during the (sale) (rental) (exhibit) (playing) (distribution) (loan).[17]

Consider Whether The Defense Is Proved

Wisconsin law provides that it is a defense to this crime if the defendant had reasonable cause to believe that (name of child) had attained the age of 18 years and that (name of child) exhibited to the defendant (a draft card) (a driver's license) (a birth certificate) (an official or apparently official document) purporting to establish that (name of child) had attained the age of 18 years.[18]

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.[19]

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.[20]

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, and you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must find the defendant not guilty.[21]

COMMENT

Wis JI-Criminal 2142A was originally published in 2001 and revised in 2003 and 2006. This revision was approved by the Committee in February 2009.

This instruction is for a violation of § 948.11(2)(a) involving face-to-face contact and where there is evidence of the defense provided in sub. (2)(c) of the same statute. See Wis JI-Criminal 2142 for the instruction intended to be used where there is no evidence of the affirmative defense. See the Comment to that instruction for general information about the statute.

Where the offense involves material on a videotape, producing evidence sufficient to establish that the material is "harmful to children" is likely to require that the jury view the videotape. See State v. Booker, 2005 WI App 182, 286 Wis.2d 747, 704 N.W.2d 336, discussed in note 7, below.

Section 948.11 has been described as a "variable obscenity statute" – "a law which prohibits a person from exhibiting to children materials determined to be obscene to children, though not obscene to adults." State v. Kevin L.C., 216 Wis.2d 166, 185, 576 N.W.2d 62 (Ct. App. 1997).

In State v. Weidner, 2000 WI 52, ¶1, 235 Wis.2d 306, 611 N.W.2d 684, the Wisconsin Supreme Court held that "§ 948.11(2) is unconstitutional in the context of the internet and other situations that do not involve face-to-face contact between the minor and the accused." The defect was that the statute eliminated a mental state regarding the age of the child while imposing a burden on the defendant to establish lack of knowledge as an affirmative defense. The defense would be extremely difficult, if not impossible, to establish in a case that does not involve face-to-face confrontation. Apparently the statute remained constitutional for situations that do involve face-to-face contact between the defendant and the child. See State v. Kevin L.C., 216 Wis.2d 166, 576 N.W.2d 62 (Ct. App. 1997), upholding the constitutionality of the statute where there was face-to-face interaction.

The statute was amended by 2001 Wisconsin Act 16 to remedy the defect identified in Weidner by adding the requirement reflected in the new fourth element of the instruction: that the defendant knew or reasonably should have known that the child was under the age of 18 years or had face-to-face contact with the child before or during the sale, rental, exhibit, playing, distribution, or loan.

In State v. Trochinski, 2002 WI 56, 253 Wis.2d 38, 644 N.W.2d 891, the court affirmed a court of appeals decision denying withdrawal of a no contest plea and upholding the constitutionality of § 948.11(2). The defendant gave nude pictures of himself to a 17 year old female clerk at a convenience store, along with letters saying his pictures had been accepted for publication in Playgirl magazine. He sought to withdraw his plea on the ground that he did not understand the "harmful to children" element of the crime. The court found his understanding was adequately demonstrated by the plea form and the plea colloquy. His constitutional claim was also rejected: prior decisions (Thiel and Kevin L.C.) have established that § 948.11(2) is constitutional as applied to situations involving face-to-face interaction. The "personal contact between the perpetrator and the child-victim is what allows the State to impose on the defendant the risk that the victim is a minor." 2002 WI 56, ¶39.

1. This instruction is intended to be used for cases involving violations of § 948.11(2)(a)2. where there is evidence of the defense provided in § 948.11(2)(c). The defense applies to cases where there has been face-to-face contact if the defendant "had reasonable cause to believe that the child had attained the

age of 18 years" and the child has exhibited documentary evidence purporting to establish that age. The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

2. The statement of the offense reflects changes in § 948.11(2)(a) made by 2001 Wisconsin Act 16: substituting knowledge of the "character and content" of the material for knowledge of the "nature" of the material; adding "rents," "plays," and "distributes" to the list of prohibited acts and striking "transfers" from that list; and, adding the requirement that the defendant have face-to-face contact with the child.

3. See note 3, Wis JI-Criminal 2142.

4. See note 4, Wis JI-Criminal 2142.

5. See note 5, Wis JI-Criminal 2142.

6. Here identify the type of material involved: picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image. See sub. (1)(ar)1. of § 948.11. Subdivision 2. of that subsection extends coverage to "any book, pamphlet, magazine, printed matter or recording that contains any matter enumerated in subd. 1."

7. See note 7, Wis JI-Criminal 2142.

8. See note 8, Wis JI-Criminal 2142.

9. See note 9, Wis JI-Criminal 2142.

10. See note 10, Wis JI-Criminal 2142.

11. See note 11, Wis JI-Criminal 2142.

12. See note 12, Wis JI-Criminal 2142.

13. See note 13, Wis JI-Criminal 2142.

14. See State v. Thiel, 183 Wis.2d 505, 536, 515 N.W.2d 847 (1994) and State v. Trochinski, 2002 WI 56, ¶32, 253 Wis.2d 38, 644 N.W.2d 891, which hold that whether the material is "harmful to children" is to be judged by reference to a reasonable minor "of like age" with the child in the case, at least as to the issue of literary, artistic, political, scientific, or educational value under § 948.11(1)(b)3.

15. See note 14, Wis JI-Criminal 2142.

16. See note 15, Wis JI-Criminal 2142.

17. This element was added in response to changes made in the statute by 2001 Wisconsin Act 16, specifically, adding subsec. (2)(a)2.

18. This is the full statement of the defense found in sub. (2)(c).

19. The statute provides that the defendant "has the burden of proving this defense by a preponderance of the evidence." The statement used in the instruction is the description typically used to explain the civil burden of persuasion.

20. This is a slight revision of the standard description of the civil burden of proof, intended to improve its understandability. No change in meaning is intended.

21. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and,

2) not guilty even though the elements are proven, because the defense has been established.

2143 EXPOSING A CHILD TO HARMFUL MATERIAL: VERBALLY COMMUNICATING A HARMFUL DESCRIPTION OR NARRATIVE ACCOUNT — § 948.11(2)(am)

[USE THIS INSTRUCTION IF THERE IS NO EVIDENCE OF THE DEFENSE UNDER § 948.11(2)(c).][1]

Statutory Definition of the Crime

Exposing a child to harmful material, as defined in § 948.11(2)(am) of the Criminal Code of Wisconsin, is committed by a person who has attained the age of 17 and who, with knowledge of the character and content of the material, verbally communicates, by any means, a harmful description or narrative account to a child, with or without monetary consideration and [knows or reasonably should know that the child has not attained the age of 18 years] [has face-to-face contact with the child before or during the communication].[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had attained the age of 17 at the time of the alleged offense.
2. The defendant verbally communicated,[3] by any means, a harmful description or narrative account to (name of child).

[This does not require that the defendant received any monetary consideration.][4]

"Harmful description or narrative account" means any explicit and detailed description or narrative account of sexual excitement, sexually explicit conduct, sadomasochistic abuse, physical torture, or brutality that, taken as a whole, is harmful to children.[5]

"Harmful to children"[6] means that quality of any description, narrative account, or representation of nudity,[7] sexually explicit conduct,[8] sexual excitement,[9] sadomasochistic abuse,[10] physical torture, or brutality when it

(1) predominantly appeals to the prurient, shameful, or morbid interest of children; and

(2) is patently offensive to prevailing standards in the adult community of Wisconsin[11] as a whole with respect to what is suitable material for children; and

(3) lacks serious literary, artistic, political, scientific, or educational value for children of the age of (name of child),[12] when taken as a whole.[13]

3. The defendant had knowledge of the character and content of the material.[14]

This requires that the defendant knew that the material contained a description, narrative account, or representation of nudity, sexually explicit conduct, sexual excitement, sadomasochistic abuse, physical torture, or brutality.

4. (Name of child) was under the age of 18 years.[15]

5. The defendant [knew or reasonably should have known that (name of child) was under the age of 18 years] [had face-to-face contact with (name of child) before or during the communication].[16]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2143 was originally published in 2008 and revised in 2009. This revision was approved by the Committee in October 2018.

Section 948.11 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. A similar offense was defined by § 944.25 under prior law. That statute was repealed and replaced by § 948.11. There was no uniform instruction for violations of § 944.25.

This instruction is for a violation of § 948.11(2)(am), which prohibits verbally communicating a harmful description or narrative to a child.

In State v. Thiel, 183 Wis.2d 505, 515 N.W.2d 847 (1994), the court held that § 948.11 was not unconstitutionally overbroad.

In State v. Weidner, 2000 WI 52, ¶1, 235 Wis.2d 306, 611 N.W.2d 684, the Wisconsin Supreme Court held that "§ 948.11(2) is unconstitutional in the context of the internet and other situations that do not involve face-to-face contact between the minor and the accused." The defect was that the statute eliminated a mental state regarding the age of the child while imposing a burden on the defendant to establish lack of knowledge as an affirmative defense. The defense would be extremely difficult, if not

impossible, to establish in a case that does not involve face-to-face confrontation. Apparently the statute remained constitutional for situations that do involve face-to-face contact between the defendant and the child. See State v. Kevin L.C., 216 Wis.2d 166, 576 N.W.2d 62 (Ct. App. 1997), upholding the constitutionality of the statute where there was face-to-face interaction.

The statute was amended by 2001 Wisconsin Act 16 to remedy the defect identified in Weidner by adding the requirement reflected in the new fifth element of the instruction: that the defendant knew or reasonably should have known that the child was under the age of 18 years or had face-to-face contact with the child before or during the communication.

In State v. Trochinski, 2002 WI 56, 253 Wis.2d 38, 644 N.W.2d 891, the court affirmed a court of appeals decision denying withdrawal of a no contest plea and upholding the constitutionality of § 948.11(2). The defendant gave nude pictures of himself to a 17 year old female clerk at a convenience store, along with letters saying his pictures had been accepted for publication in Playgirl magazine. He sought to withdraw his plea on the ground that he did not understand the "harmful to children" element of the crime. The court found his understanding was adequately demonstrated by the plea form and the plea colloquy. His constitutional claim was also rejected: prior decisions (Thiel and Kevin L.C.) have established that § 948.11(2) is constitutional as applied to situations involving face-to-face interaction. The "personal contact between the perpetrator and the child-victim is what allows the State to impose on the defendant the risk that the victim is a minor." 2002 WI 56, ¶39.

1. This instruction is intended to be used for all cases involving violations of § 948.11(2)(am)1. and for cases involving violations of § 948.11(2)(am)2. where there is not evidence of the defense provided in § 948.11(2)(c). As amended by 2001 Wisconsin Act 16, the defense applies to violations of subsec. (2)(am)2. – those involving violations face-to-face contact – if the defendant "had reasonable cause to believe that the child had attained the age of 18 years" and the child presented documentary evidence of age. The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

For cases involving the affirmative defense, see Wis JI-Criminal 2142A, which can be used as model for adapting this instruction.

2. Choose the applicable alternative. See, § 948.11(2)(am)1. and 2.

3. In State v. Ebersold, 2007 WI App 232, ¶14, 306 Wis.2d 371, 742 N.W.2d 876, the court held that "'verbally' is most reasonably read here as proscribing communication to children of harmful matter in words, whether oral or written, and to distinguish § 948.22(2)(am) from § 948.22(2)(a), which primarily proscribes visual representations." Thus, the court held that the statute applied to Ebersold's message sent via an Internet chat room.

4. The statutory definition of this offense provides that it applies to transfers of material, "with or without monetary consideration." § 948.11(2)(am). The Committee interprets this provision as one that makes proof of consideration unnecessary, as opposed to one that creates alternative means of proving a required fact. The Committee recommends telling the jury that proof of consideration is not required if the issue has been raised in the case. No further mention of consideration is made.

5. This is the definition provided in § 948.11(1)(ag).

6. This is the definition provided in § 948.11(1)(b).

7. "Nudity" is defined in § 948.11(1)(d).

8. "Sexually explicit conduct" is defined in § 948.01(7).

9. "Sexual excitement" is defined in § 948.11(1)(f).

10. "Sadomasochistic abuse" is defined in § 948.01(4).

11. The reference to the "adult community of Wisconsin" was added in 2009 in response to an unpublished decision of the Wisconsin Court of Appeals that suggested the failure to include that reference "invites error." See, State v. McCoy, 2008 AP 1512-CR, December 23, 2008.

12. See State v. Thiel, 183 Wis.2d 505, 536, 515 N.W.2d 847 (1994) and State v. Trochinski, 2002 WI 56, ¶32, 253 Wis.2d 38, 644 N.W.2d 891, which hold that whether the material is "harmful to children" is to be judged by reference to a reasonable minor "of like age" with the child in the case, at least as to the issue of literary, artistic, political, scientific, or educational value under § 948.11(1)(b)3.

13. The definition of "harmful to children" is based in part on the three-part test used to define obscenity. One part of that definition refers to "prurient interest." Jury instructions defining "prurient interest" in a proceeding under § 944.21, Obscene material or performance, were reviewed in County of Kenosha v. C&S Management, 223 Wis.2d 373, 588 N.W.2d 236 (1999). The court held that the following instruction complied with the constitutional test based on Miller v. California, 413 U.S. 15 (1973):

> 'Appealing to the prurient interest' does not encompass normal healthy sexual desires but means the material appeals generally to a shameful, unhealthy, unwholesome, degrading or morbid interest in sex, nudity, or excretion.

A second part of the definition refers to "prevailing standards in the adult community as a whole." In State v. Tee & Bee, Inc., 229 Wis.2d 446, 600 N.W.2d 230 (Ct. App. 1999), the court found three errors in a jury instruction under § 944.21. Two of those errors related to the relevant "community standard" used to determine whether material is obscene: contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community (229 Wis.2d 446, 452); and, statewide community standards must be used, not standards of a smaller geographic area (229 Wis.2d 446, 454).

In Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002), the court held that reliance on "community standards" to determine whether material is "harmful to minors" under the federal Child Online Protection Act does not by itself make that statute unconstitutionally overbroad. The court did find the statute unconstitutionally overbroad on other grounds.

14. This knowledge element is stated in these terms by § 948.11(2)(am).

The Committee concluded that "knowledge of the character and content" of the material refers to knowledge that the material contains "any description or representation of nudity, sexually explicit

conduct, sexual excitement, sadomasochistic abuse, physical torture, or brutality." The quoted material is from the first part of the definition of "harmful to children" in § 948.11(1)(b). The balance of that definition describes the attributes of the material that makes it the equivalent of "obscene." As is the case with criminal prohibition of obscenity, knowledge of those attributes, which are essentially legal issues, is not required. See Hamling v. United States, 418 U.S. 121, 123 (1974):

> . . . . It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.

15. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."

16. The alternative supported by the evidence should be selected. If the second alternative is used – face-to-face contact – and there is evidence of the affirmative defense defined in sub. (2)(c), see Wis JI-Criminal 2142A for a model incorporating the affirmative defense.

2146 POSSESSION OF CHILD PORNOGRAPHY — § 948.12(1m)

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 2146 was originally published in 1994 and withdrawn in 2002 when it was divided into two versions: Wis JI-Criminal 2146A Child Pornography: Possession Of A Recording, and Wis JI-Criminal 2146B Child Pornography: Exhibiting Or Displaying A Recording.

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2146A CHILD PORNOGRAPHY: POSSESSION OF OR ACCESSING A RECORDING — § 948.12(1m)

Statutory Definition of the Crime

Possession of child pornography, as defined in § 948.12(1m) of the Criminal Code of Wisconsin, is committed by one who knowingly possesses[1] or accesses in any way with intent to view any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct, knows or reasonably should know that the recording contained depictions of sexually explicit conduct, and knows or reasonably should know that the child depicted in the material has not attained the age of 18 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly (possessed a recording) (accessed a recording in any way with intent to view it).[2]

   ["Possessed" means that the defendant knowingly[3] had actual physical control of the recording.][4]

   ADD THE FOLLOWING PARAGRAPHS IN POSSESSION CASES WHEN THEY ARE SUPPORTED BY THE

EVIDENCE:

[A recording is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the recording.]

[It is not required that a person own a recording in order to possess it. What is required is that the person exercise control over the recording.]

[Possession may be shared with another person. If a person exercises control over a recording, the recording is in that person's possession, even though another person may also have similar control.]

"Recording" means a reproduction of an image or a sound or the storage of data representing an image or a sound.[5]

2. The recording showed a child engaged in sexually explicit conduct.

A child is a person who is under the age of 18 years.[6]

"Sexually explicit conduct" means[7] actual or simulated [sexual intercourse] [bestiality] [masturbation] [sexual sadism or sexual masochistic abuse] [lewd exhibition of (name intimate part)].[8]

3. The defendant knew or reasonably should have known that the recording contained depictions of a person engaged in actual or simulated _____.[9]

4. The defendant knew or reasonably should have known[10] that the person [shown in the recording] [depicted in the material] engaged in sexually explicit conduct was under the age of 18 years.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS D FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

This instruction was originally published as Wis JI-Criminal 2146 in 1992 and revised in 1998, 2002, 2003, 2006, 2007, 2011, and 2012. The 2002 revision involved renumbering as Wis JI-Criminal 2146A, adopting a new format, and updating the instruction to reflect changes made in the statute by 2001 Wisconsin Act 16. The 2006 revision added a definition of "possession" to element 1. The February 2007 revision involved adding a special question at the end of the instruction and updating the Comment. The 2011 revision added to footnote 4. The 2012 revision reflected changes made by 2011 Wisconsin Acts 271 and 272. The 2019 revision amended the comment based on 2019 Wisconsin Act 16. This revision was approved by the Committee in October 2023; it updated case law citations in the comment.

This instruction is for a violation of § 948.12(1m), as amended by 2011 Wisconsin Act 271, effective date: April 24, 2012. For a violation of § 948.12(2m), created by 2001 Wisconsin Act 16, see Wis JI-Criminal 2146B.

The United States Supreme Court upheld the constitutionality of a New York statute prohibiting persons from distributing child pornography in New York v. Ferber, 458 U.S. 747 (1982). The statute

before the court differed from § 948.12, but some of the decision's discussion of constitutional issues implicated by prohibiting child pornography may be relevant to questions arising under the Wisconsin statute.

In State v. Whistleman, 2001 WI App 189, 247 Wis.2d 337, 633 N.W.2d 249, the court held that "pictorial reproductions" as used in § 948.12, 1999-2000 Wis. Stats., included computer disks that store images of child pornography. 2001 Wisconsin Act 16 amended § 948.12 by replacing "pictorial reproduction" with "recording," defining the latter in § 948.01(3r) to include "storage of data representing an image. . ."

In State v. Multaler, 2002 WI 35, 252 Wis.2d 54, 643 N.W.2d 437, the court held that charging a separate count under § 948.12, 1997-98 Wis. Stats., for each of 28 files containing pornographic images on two computer diskettes did not violate the rule prohibiting multiplicitous charges. Also see State v. Schaefer, 2003 WI App 164, 266 Wis.2d 719, 668 N.W.2d 760.

Section 948.12 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a minimum sentence of 3 years for violations of § 948.12. Section 939.617 was amended by 2011 Wisconsin Act 272 [effective date: April 24, 2012] to limit the exception to the minimum sentence for violations of § 948.12 to those where the defendant "is no more than 48 months older than the child who engaged in the sexually explicit conduct." See § 939.617(2)(b).

1. Section 948.12(1m)(a) requires that "the person knows that he or she possesses the material." Rather than state this as a separate element, the Committee concluded it was clearer to use the phrase "knowing possession."

2. Section 948.12(1m) was amended by 2011 Wisconsin Act 271 [effective date: April 24, 2012] to add "or accesses in any way with intent to view" as an alternative to possession. This change may address some of the difficulties presented by trying to apply "possession" to certain fact situations. See footnote 4 below and State v. Mercer, cited therein.

The statute prohibits possession or accessing of undeveloped film, a photographic negative, a photograph, a motion picture, a videotape, or a recording. The statute was revised by 2001 Wisconsin Act 16 [effective date: September 1, 2001] to delete reference to "pictorial reproduction" and "audio recording" and replace them with "recording." "Recording" is defined in § 948.01(3r) as follows: "'Recording' includes the creation of a reproduction of an image or a sound or the storage of data representing an image or a sound." The Committee concluded that the new term "recording" is defined to include all the specific items listed in the statute. That is, undeveloped film, or a photographic negative, or a photograph, etc., is a "recording" as that term is defined in § 948.01(3r). The Committee further concluded that it is permissible to instruct the jury that, for example, "A photographic negative is a recording." This applies only to items listed in the statute; whether other items qualify as a "recording" is a factual issue for the jury to resolve.

3. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414-18, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 493, 508-09, 451 N.W.2d 752 (1990).

4. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the item is arguably under the defendant's control but not directly in the physical possession of the defendant.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

Questions about "knowing possession" and "control" of a recording arise in cases involving images on a computer hard drive. In State v. Lindgren, 2004 WI App 159, 275 Wis.2d 851, N.W.2d, the court of appeals found that the evidence was sufficient to show "possession" where images were "cached" on the hard drive and there was evidence that the defendant knew that would happen when he accessed pornographic material. Lindgren adopted the rationale of U.S. v. Tucker, 305 F.3d. 1193 (10th Cir. 2002).

In State v. Mercer, 2010 WI App 47, 324 Wis.2d 506, 782 N.W.2d 125, the court held that possession of images of child pornography in violation of § 948.12(1m) can be proved by evidence from computer monitoring software showing that the defendant searched for and obtained access to web sites and viewed the images. It is not required that the defendant retained control of the images after viewing them by, for example, storing them on the computer or allowing them to remain in the computer's cache. The court's conclusion:

> . . . an individual knowingly possesses child pornography when he or she affirmatively pulls up images of child pornography on the Internet and views those images knowing that they contain child pornography. Whether the proof is hard drive evidence or something else, such as the monitoring software here, should not matter because both capture a "videotape" of the same behavior. And images in either place can be controlled by taking actions like printing or copying the images. ¶31.

The trial court in the Mercer case had added to the standard definition of "possession" in the instruction, giving examples of what could constitute possession:

> [p]ossessed means that the defendant knowingly had actual physical control of the recording, or that the recording is in an area over which the person has control and the person intends to exercise control over the recording.
>
> In cases involving digital images, if you are satisfied that the defendant intentionally visited child pornography websites when [sic] contained child pornography images; and (a) acted on or manipulated the child pornography image; or (b) viewed the child pornography image knowing that his web browser automatically saved the image in the temporary Internet cache file; you may find knowing possession of such images.
>
> It is not required that a person own a recording in order to possess it. What is required is that the

person exercise control over the recording. Recording means a reproduction of an image or a sound or the storage of data representing an image or a sound, including a digital image.

The court of appeals commented that this instruction "actually inured to Mercer's benefit because it gave an example fitting his theory of defense, a defense to which he was not entitled." ¶36.

For two articles providing helpful information about basic computer functioning and analysis of the "possession" of material viewed via computer, see Ty E. Howard, Don't Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files, 19 Berkeley Tech. L.J. 1227, 1267-68 (2004); Giannina Marin, Possession of Child Pornography: Should You Be Convicted When the Computer Cache Does the Saving for You?, 60 Fla. L. Rev. 1205, 1213-14 (2008).

5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. See note 2, supra. "Means" was substituted for the phrase "includes the creation of" used in the statutory definition. No change in substance was intended.

6. Section 948.01(1) defines "child" as "a person who has not attained the age of 18 years."

7. Section 948.01(7) defines "sexually explicit conduct" as follows:

"Sexually explicit conduct" means actual or simulated:
(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts.

8. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually

suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

9. The statement of the third element reflects changes made by 2011 Wisconsin Act 271 [effective date: April 24, 2012]. The change added "or reasonably should know" as an alternative to "know." It also deleted the reference to "the character and content" of the conduct and replaced it with "material that contains depictions of" sexually explicit conduct. The Committee concluded that the best way to describe this requirement to the jury is to insert the name of the type of conduct used in the preceding element.

10. The "knew or reasonably should have known" requirement is set forth in § 948.12(1m)c. This is contrary to the general rule in the Criminal Code that knowledge of the age of a minor victim is not required and mistake about age is not a defense. See §§ 939.23(6) and 939.43(2). This element satisfies the requirement that pornography statutes include "scienter." State v. Schaefer, 2003 WI App 164, ¶36, 266 Wis.2d 719, 668 N.W.2d 760.

11. Section 948.12 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of child pornography: possession of a recording, under sec. 948.12(1m), at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2146B CHILD PORNOGRAPHY: EXHIBITING OR PLAYING A RECORDING — § 948.12(2m)

Statutory Definition of the Crime

Section 948.12(2m) of the Criminal Code of Wisconsin, is violated by one who knowingly exhibits or plays a recording of a child engaged in sexually explicit conduct, knows the character and content of the sexually explicit conduct in the material, and knows or reasonably should know that the child has not attained the age of 18 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly (exhibited)[1] (played) a recording.[2]

   "Recording" means a reproduction of an image or a sound or the storage of data representing an image or a sound.[3]

2. The recording showed a child engaged in sexually explicit conduct.

   A child is a person who is under the age of 18 years.[4]

   "Sexually explicit conduct" means[5] actual or simulated [sexual intercourse] [bestiality] [masturbation] [sexual sadism or sexual masochistic abuse] [lewd exhibition of (name intimate part)].[6]

3. The defendant knew that the recording showed a person engaged in actual or simulated _____.[7]

4. The defendant knew or reasonably should have known[8] that the person shown in the recording engaged in sexually explicit conduct was under the age of 18 years.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS D FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[9]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2146B was originally published in 2002 and revised in 2004 and 2007. The 2007 revision involved adding a special question at the end of the instruction and updating the Comment. This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

This instruction is for a violation of § 948.12(2m), as created by 2001 Wisconsin Act 16, effective date: September 1, 2001. For a violation of § 948.12(1m), as amended by 2001 Wisconsin Act 16, see Wis JI-Criminal 2146A, Possession of Child Pornography.

The United States Supreme Court upheld the constitutionality of a New York statute prohibiting persons from distributing child pornography in New York v. Ferber, 458 U.S. 747 (1982). The statute before the court differed from § 948.12, but some of the decision's discussion of constitutional issues implicated by prohibiting child pornography may be relevant to questions arising under the Wisconsin statute.

Section 948.12 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 3 years for violations of § 948.12.

1. 2001 Wisconsin Act 16 created § 948.01(1d), which reads as follows:

(1d) "Exhibit," with respect to a recording of an image that is not viewable in its recorded form, means to convert the recording of the image into a form in which the image may be viewed.

2. Section 948.12(2m)(a) requires that "the person knows that he or she has exhibited or played the recording." Rather than state this as a separate element, the Committee concluded it was clearer to use the phrase "knowingly (exhibited) (played) a recording."

3. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

4. Section 948.01(1) defines "child" as "a person who has not attained the age of 18 years."

5. Section 948.01(7) defines "sexually explicit conduct" as follows:

"Sexually explicit conduct" means actual or simulated:
(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts.

6. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

7. Insert the name of the type of conduct used in the preceding element. Section 948.12(2) requires that "the person know the character and content of the sexually explicit conduct shown in the material." (Emphasis added.) The Committee concluded that stating this requirement as, for example, "knowing that the photograph showed actual or simulated sexual intercourse" adequately covers the "character and content" aspect.

8. The "knew or reasonably should have known" requirement is explicitly set forth in § 948.12(2m)(c). This is contrary to the general rule in the Criminal Code that knowledge of the age of a minor victim is not required and mistake about age is not a defense. See §§ 939.23(6) and 939.43(2). The same element in sub. (1m) was held to satisfy the requirement that pornography statutes include "scienter." State v. Schaefer, 2003 WI App 164, ¶36, 266 Wis.2d 719, 668 N.W.2d 760.

9. Section 948.12 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of child pornography: exhibiting or playing a recording, under sec. 948.12(2m), at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

2147 CHILD SEX OFFENDER WORKING WITH CHILDREN — § 948.13

[IF THE UNDERLYING CONVICTION IS FOR VIOLATING § 948.02(2) OR § 948.025, EXCEPTIONS MAY APPLY – SEE § 948.13(2)(b) AND (c)]

Statutory Definition of the Crime

Section 948.13 of the Criminal Code of Wisconsin is violated by a person who has been convicted of a serious child sex offense and who subsequently engages in an occupation or participates in a volunteer position that requires the person to work or interact primarily and directly with children under 16 years of age.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had been convicted of a serious child sex offense. [Identify the serious child sex offense listed in § 948.13(1)(a)] [1] is a serious child sex offense.
2. After being convicted of a serious child sex offense, the defendant [engaged in an occupation] [participated in a volunteer position] that required the defendant (to work) (to interact) primarily and directly with children under 16 years of age.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2147 was originally published in 1996 and the Comment was revised in 1999 and 2003. This revision was approved by the Committee in October 2006 and involved updating footnote 1 to reflect changes made by 2005 Wisconsin Act 277.

This instruction is for a violation of § 948.13, which was created by 1995 Wisconsin Act 265. Act 265 provides that "[t]his act first applies to offenses committed on the effective date of this subsection", which is May 6, 1996. It further provides that this "does not preclude the counting of other offenses as prior serious child sex offenses for determining whether a person is subject to section 948.13(2) . . ."

2001 Wisconsin Act 97 [effective date: May 3, 2002] amended § 948.13 so that (2)(a) begins as follows: "Except as provided in pars. (b) and (c) . . . ." The referenced exceptions relate to defendants who were convicted under § 948.02(2) before the effective date of Act 97 [sub. (b)] or § 948.025 [sub. (c)]. In both situations, the defendant must have been under age 19 at the time of the offense and other criteria specified in sub. (2m) must be satisfied. The Committee concluded that the existence of the exceptions are likely to be determined before trial and are not likely to become issues for a jury to determine.

1999 Wisconsin Act 265 also created § 973.034 which requires that when a person is sentenced for an offense that qualifies as a "serious child sex offense" under § 948.13(1)((a), "the court shall inform the defendant of the requirements and penalties under s. 948.13." The Committee concluded that failure to so inform the defendant would not affect the validity of a criminal charge for violating § 948.13. [See, State v. Phillips, 172 Wis.2d 391, 451 N.W.2d 238 (Ct. App. 1989), reaching the same conclusion with respect to a similar requirement for informing a convicted felon that the felon may not possess a firearm.].

1. Section 948.13(1)(a) lists specific statutes that are "serious child sex offenses" for the purposes of § 948.13. The instruction provides for the insertion of the name of these specifically identified offenses, which are:

- sexual exploitation by therapist under § 940.22, if the victim was under the age of 18;
- second degree sexual assault under § 940.225(2)(c) (victim suffers from a mental illness or deficiency), if the victim was under the age of 18;
- first degree sexual assault of a child under § 948.02(1) (victim has not attained the age of 13 years);
- second degree sexual assault of a child under § 948.02(2) (victim has not attained the age of 16 years);
- repeated acts of sexual assault of the same child under § 948.025(1);
- sexual exploitation of a child under § 948.05(1);
- incest under § 948.06;
- child enticement under subsections (1), (2), (3), and (4) of § 948.07. (Note: subsection (5) and (6) of § 948.07 are not included.);
- use of a computer to facilitate a child sex crime under § 948.075; and,

- sexual assault of a child placed in substitute care under § 948.085.

Note: Reference to sexual assault of a child placed in substitute care under § 948.085 was added to § 948.13(1)(a) by 2005 Wisconsin Act 277.

In addition to these specifically identified offenses, § 948.13((1)(b) also provides that "[a] crime under federal law or the law of any other state or, prior to the effective date of this paragraph, under the law of this state that is comparable to a crime specified in par. (a)" is a "serious child sex offense." The instruction must be modified if one of these alternatives is used.

2. Subsection (3) of § 948.13 provides as follows:

> Evidence that a person engages in an occupation or participates in a volunteer position relating to any of the following is prima facie evidence that the occupation or position requires him or her to work or interact primarily and directly with children under 16 years of age: teaching children, child care, youth counseling, youth organization, coaching children, parks or playground recreation or school bus driving.

If it is believed to be helpful or necessary to instruct on this prima facie evidence provision, see Wis JI-Criminal 225, which provides a model for instructing the jury on "presumed facts" and "prima facie cases."

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2148 ABANDONMENT OF A CHILD — § 948.20)

Statutory Definition of the Crime

Abandonment of a child, as defined in § 948.20 of the Criminal Code of Wisconsin, is committed by any person who, with intent to abandon the child, leaves any child in a place where the child may suffer because of neglect.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) was under the age of 18 years.[1]

   Knowledge of (name of child)'s age by the defendant is not required[2] and mistake regarding (name of child)'s age is not a defense.[3]

2. The defendant left (name of child) in a place where the child may have suffered because of neglect.

   "Neglect" means to seriously endanger the health or safety of a child by failing to provide necessary care, food, clothing, medical or dental care, or shelter.[4]

This does not require that (name of child) actually suffered because of neglect, but it requires only that (name of child) was left in a place where the child may have suffered because of neglect.

3. The defendant left (name of child) with intent to abandon (name of child).

Meaning of "With Intent To Abandon"

The term "with intent to abandon" requires that the defendant had the purpose to abandon or was aware that (his) (her) conduct was practically certain to cause that result.[5]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2148 was originally published in 1989. This revision was approved by the Committee in April 2003, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

This instruction is for a violation of § 948.20, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

Section 948.20 replaced § 940.28, 1985-86 Wis. Stats. The only substantive change was to make the statute applicable to all children (persons under the age of 18). Section 940.28 had applied only to children under age 6.

Section 48.195(4) provides "immunity from prosecution under s. 948.20 for abandonment of a child" where a parent relinquishes custody of a child under § 48.195(1). The instruction does not address this provision.

1. Under prior law, the offense of abandoning a child applied only to children under the age of 6 years. See § 940.28, 1985-86 Wis. Stats. That statute was described as covering "a very special type of conduct – the abandonment of children who are so young that they are unable to care for themselves. It covers cases such as the abandonment of a baby on a doorstep." Comment to § 340.23, 1953 Legislative Council Report on the Criminal Code. The note to new § 948.20 indicates a different conclusion: "The special committee determined that there is no substantial reason for distinguishing between children under the age of 6 and other children for purposes of this offense. Legislative Council note to § 948.20, 1987 Senate Bill 203.

While there may be no reason to make such age distinctions, applying the statute to older children may give more importance to the "intent to abandon" element.

2. This is the rule provided in § 939.23(6).

3. This is the rule provided in § 939.43(2).

4. "Neglect" is not defined in Chapter 948 or elsewhere in the Criminal Code. In the Children's Code, the term "neglected child" has been replaced with a broad category of "children alleged to be in need of protection or services" set forth in § 48.13. That section lists twelve different situations which indicate that a child is in need of protection or services. The definition used in the instruction was adapted from the type of neglect described in § 48.13(10).

5. See § 939.23(3) and Wis JI-Criminal 932A and 923B.

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2150 NEGLECTING A CHILD — § 948.21(2)

Statutory Definition of the Crime

Neglecting a child, as defined in Section 948.21(2) of the Criminal Code of Wisconsin is committed by any person who is responsible for a child's welfare who, through his or her action or failure to take action, for reasons other than poverty, negligently fails to provide any of the following, so as to seriously endanger the physical, mental, or emotional health of the child: necessary care, necessary food, necessary clothing, necessary medical care, necessary shelter, education in compliance with section 118.15, protection from exposure to the distribution or manufacture of controlled substances, as defined in section 961.01(4), or controlled substance analogs, as defined in section 961.01(4m), or to drug abuse, as defined in section 46.973(1)(b).[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][2]

2. The defendant was a person responsible for the welfare of (name of child).

A "person responsible for the welfare of a child" includes (use the appropriate term from § 948.01(3)).[3]

3. The defendant, through action or failure to take action, and for reasons other than poverty, failed to provide[4]

[necessary (care)[5] (food) (clothing) (medical care) (shelter).]

[education in compliance with section 118.15.]

[protection from exposure (to the distribution or manufacture of controlled substances, as defined in section 961.01(4), or controlled substance analogs, as defined in section 961.01(4m)) (or) (to drug abuse, as defined in section 46.973(1)(b))].[6]

4. The failure to provide seriously endangered the physical, mental, or emotional health of the child.

To "seriously endanger" means to create a serious risk of harm or injury.[7]

5. The failure to provide was negligent.

"Negligent" means acting, or failing to act, in such a way that a reasonable person would know or should know seriously endangers the physical, mental, or emotional health of a child.[8]

6. [(Name of child)

(suffered death as a consequence).[9]

(suffered great bodily harm as a consequence).[10]

(became a victim of a child sex offense as a consequence).[11]

(suffered emotional damage as a consequence).[12]

(suffered bodily harm as a consequence).[13]

(had not attained the age of 6 years and the natural and probable consequences of the neglect would be identify a harm specified in § 948.21(3)(a), (b), (c) or (d) although the harm did not actually occur).[14]

(had a physical, cognitive, or developmental disability that was known or should have been known by the defendant and the natural and probable consequences of the neglect would be identify a harm specified in § 948.21(3)(a), (b), (c) or (d) although the harm did not actually occur).[15]]

[The natural and probable consequences of the neglect would be identify a harm specified in § 948.21(3)(a), (b), (c) or (d) although the harm did not actually occur.[16]]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2150 was originally published in 1989 and revised in 1995, 2001, and 2009. This revision was approved by the Committee in December 2018.

This is a complete rewrite of the former instruction to reflect the repeal and recreation of § 948.21 by 2017 Wisconsin Act 283 [effective date: April 18, 2018]. The new statute provides penalties for eight

types of violations – seven felonies and one misdemeanor. The instruction attempts to deal with them by including all options in element 6. Some of the penalties bear a lesser included offense-like relationship to one another. See Wis JI-Criminal 2150A which illustrates how multiple penalties might be addressed.

1. This paragraph is the offense definition provided in § 948.21(2) without change. The Committee recommends striking parts of the definition that do not apply. Element 3 illustrates how the alternatives may be broken down.

2. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2).

3. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

See Wis JI-Criminal 2106A for discussion of authority relating to "person responsible for the welfare of a child."

4. The Committee recommends submitting only the alternatives supported by the evidence; more than one alternative may be submitted.

5. Section § 948.21(1)(c) defines "necessary care" as follows: "care that is vital to the needs of a child's physical, emotional, or mental health based on all of the facts and circumstances bearing on the child's need for care, including the child's age; the child's physical, mental, or emotional condition; and any special needs of the child."

6. Reference to other uniform instructions may be helpful in further defining this element. Distribution of a controlled substance is addressed by Wis JI-Criminal 6020 Delivery Of A Controlled Substance; see Wis JI-Criminal 6020A for delivery of a controlled substance analog. Manufacture of a controlled substance is addressed by Wis JI-Criminal 6021 Manufacture Of A Controlled Substance. Section 46.973(1)(b) defines "drug abuse" as "the use of a drug in such a manner as to endanger the public health, safety or welfare."

7. The definition of "seriously endanger" is adapted from Wis JI-Children 250.

8. This is based on the definition of "negligently" provided in § 948.21(1)(d). The definition of "criminal negligence" in § 939.25, which ordinarily applies when the word "negligently" is used in the Criminal Code, does not apply here. See § 939.25(3).

9. This makes the offense a Class D felony; see § 948.21(3)(a).

10. This makes the offense a Class F felony; see § 948.21(3)(b)1.

11. This makes the offense a Class F felony; see § 948.21(3)(b)2. "Child sex offenses" are specified in § 948.21(1)(a): an offense under s. 948.02, 948.025, 948.05, 948.051, 948.055, 948.06,

948.07, 948.08, 948.10, 948.11, or 948.12. Refer to the uniform instructions for the elements and definitions applicable to any "child sex offense" that is alleged.

12. This makes the offense a Class G felony; see § 948.21(3)(c). § 948.21(1)(b) provides: "'Emotional damage' has the meaning given in § 48.02(5j)."

13. This makes the offense a Class H felony; see § 948.21(3)(d).

14. This makes the offense a Class I felony; see § 948.21(3)(e)1.

15. This makes the offense a Class I felony; see § 948.21(3)(e)2.

16. This makes the offense a Class A misdemeanor; see § 948.21(3)(f).

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2150A NEGLECTING A CHILD: DEATH, GREAT BODILY HARM, OR BODILY HARM AS A CONSEQUENCE — § 948.21(2)

Statutory Definition of the Crime

Neglecting a child, as defined in Section 948.21(2) of the Criminal Code of Wisconsin is committed by any person who is responsible for a child's welfare who, through his or her action or failure to take action, for reasons other than poverty, negligently fails to provide any of the following, so as to seriously endanger the physical, mental, or emotional health of the child: necessary care, necessary food, necessary clothing, necessary medical care, necessary shelter, education in compliance with section 118.15, protection from exposure to the distribution or manufacture of controlled substances, as defined in section 961.01 (4), or controlled substance analogs, as defined in section 961.01 (4m), or to drug abuse, as defined in section 46.973 (1) (b).[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][2]

2. The defendant was a person responsible for the welfare of (name of child).

A "person responsible for the welfare of a child" includes (use the appropriate term from § 948.01(3).[3]

3. The defendant, through action or failure to take action, and for reasons other than poverty, failed to provide[4]

[necessary (care)[5] (food) (clothing) (medical care) (shelter).]

[education in compliance with section 118.15.]

[protection from exposure to (the distribution or manufacture of controlled substances, as defined in section 961.01(4), or controlled substance analogs, as defined in section 961.01(4m)) (or) (drug abuse, as defined in section 46.973 (1) (b))].[6]

4. The failure to provide seriously endangered the physical, mental, or emotional health of the child.

To "seriously endanger" means to create a serious risk of harm or injury.[7]

5. The failure to provide was negligent.

"Negligent" means acting, or failing to act, in such a way that a reasonable person would know or should know seriously endangers the physical, mental, or emotional health of a child.[8]

6. (Name of child)

(suffered death as a consequence).[9]

(suffered great bodily harm as a consequence).[10]

(suffered bodily harm as a consequence).[11]

This requires that the defendant's action or failure to take action caused (the death of) (great bodily harm to) (bodily harm to) (name of child).

"Cause" means that the defendant's act was a substantial factor in producing the (death) (great bodily harm) (bodily harm).[12]

["Great bodily harm" means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.)[13]

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.][14]

IF MORE THAN ONE PENALTY-DETERMINING FACT IS SUPPORTED BY THE EVIDENCE, ADD ONE OR BOTH OF THE FOLLOWING AS APPROPRIATE.[15]

If you are not satisfied beyond a reasonable doubt that the defendant's action or failure to take action caused the death of (name of child), you should consider whether the defendant's action or failure to take action caused great bodily harm to (name of child).

If you are not satisfied beyond a reasonable doubt that the defendant's action or failure to take action caused great bodily harm to (name of child), you should consider whether the defendant's action or failure to take action caused bodily harm to (name of child).

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2150A was approved by the Committee in December 2018.

This is a sample instruction for what may be a common situation under § 948.21 – where more than one penalty option may be submitted. It is based on JI 2150, which is a complete rewrite of the former instruction to reflect the repeal and recreation of § 948.21 by 2017 Wisconsin Act 283 [effective date: April 18, 2018].

The recreated statute provides penalties for eight types of violations – seven felonies and one misdemeanor. This instruction attempts to deal with three situations: where death, great bodily harm, or bodily harm is caused. Because the penalties for these violations bear a lesser included offense-like relationship to one another, the instruction may be used for submitting lesser penalties if the evidence supports it. Transitional text is provided in element 6.

1. This paragraph is the offense definition provided in § 948.21(20 without change. The Committee recommends striking parts of the definition that do not apply. Element 3 illustrates how the alternatives may be broken down.

2. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2).

3. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

See Wis JI-Criminal 2106A for discussion of authority relating to "person responsible for the welfare of a child."

4. The Committee recommends submitting only the alternatives supported by the evidence; more than one alternative may be submitted.

5. Section § 948.21(1)(c) defines "necessary care" as follows: "care that is vital to the needs of a child's physical, emotional, or mental health based on all of the facts and circumstances bearing on the

child's need for care, including the child's age; the child's physical, mental, or emotional condition; and any special needs of the child."

6. Reference to other uniform instructions may be helpful in further defining this element. Distribution of a controlled substance is addressed by Wis JI-Criminal 6020 Delivery Of A Controlled Substance; see Wis JI-Criminal 6020A for delivery of a controlled substance analog. Manufacture of a controlled substance is addressed by Wis JI-Criminal 6021 Manufacture Of A Controlled Substance. Section 46.973(1)(b) defines "drug abuse" as "the use of a drug in such a manner as to endanger the public health, safety or welfare."

7. The definition of "seriously endanger" is adapted from Wis JI-Children 250.

8. This is based on the definition of "negligently" provided in § 948.21(1)(d). The definition of "criminal negligence" in § 939.25, which ordinarily applies when the word "negligently" is used in the Criminal Code, does not apply here. See § 939.25(3).

9. This makes the offense a Class D felony; see § 948.21(3)(a).

10. This makes the offense a Class F felony; see § 948.21(3)(b)1.

11. This makes the offense a Class H felony; see § 948.21(3)(d).

12. The Committee has concluded that the statutory phrase "suffered . . . as a consequence" is equivalent to requiring "cause" as used in most criminal statutes. Wisconsin courts have reached this conclusion with statutes that use the phrases "as a result" or "results in." See State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), and State v. Wille, 2007 WI App 27, 2999 Wis.2d 531, 798 N.W.2d 343.

The Committee has also concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of (death) (great bodily harm) (bodily harm). The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

13. This is the definition of "great bodily harm" provided in § 939.22(14) should apply. See Wis JI-Criminal 914 for a more complete discussion of issues relating to "great bodily harm."

14. This is the definition of "bodily harm" provided in § 939.22(4).

15. The penalties for violations of § 948.21 causing death, great bodily harm, or bodily harm bear a lesser included offense-like relationship to one another and the Committee concluded that more than one penalty-determining fact could be submitted if the regular lesser included offense evidentiary test is satisfied. The question is, whether the evidence is such that a reasonable jury could find that the fact

supporting the higher penalty is not proved beyond a reasonable doubt but could find that the fact supporting the lesser penalty is.

2151 CHRONIC NEGLECT OF A CHILD; REPEATED ACTS OF NEGLECT — § 948.215

Statutory Definition of the Crime

Section 948.215 of the Criminal Code of Wisconsin is violated by one who commits three or more violations of Section 948.21(2) within a specified period of time involving the same child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant committed three or more violations of Section 948.21(2) involving the same child.

   Section 948.21(2) of the Criminal Code of Wisconsin is violated by any person who is responsible for a child's welfare who, through his or her action or failure to take action, for reasons other than poverty, negligently fails to provide any of the following, so as to seriously endanger the physical, mental, or emotional health of the child: necessary care, necessary food, necessary clothing, necessary medical care, necessary shelter, education in compliance with section 118.15, protection from exposure to the distribution or manufacture of controlled substances, as defined in section 961.01(4), or controlled substance

analogs, as defined in section 961.01(4m), or to drug abuse, as defined in section 46.973(1)(b).[1]

SPECIFY THE ELEMENTS OF THREE VIOLATIONS OF § 948.21(2) – SEE WIS JI-CRIMINAL 2150. ADD DEFINITIONS AS NECESSARY.

2. At least three violations of Section 948.21(2) involving the same child took place within a specified period of time. The specified period of time is from (beginning date of specified period) through (ending date of specified period).[2]

GIVE THE FOLLOWING ONLY IF MORE THAN THREE ACTS HAVE BEEN ALLEGED.

[More Than Three Acts Alleged]

[Before you may find the defendant guilty you must unanimously agree that at least three violations of Section 948.21 involving the same child occurred between (beginning date of specified period) and (ending date of specified period), but you need not agree on which acts constitute the required three.][3]

3. [(Name of child)

(suffered death as a consequence).[4]

(suffered great bodily harm as a consequence).[5]

(became a victim of a child sex offense as a consequence).[6]

(suffered emotional damage as a consequence).[7]

(suffered bodily harm as a consequence).][8]

[The natural and probable consequences of the neglect would be ((identify a harm specified in § 948.215(2)(a), (b), (c), or (d))) although the harm did not actually occur).[9]]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2151 was approved by the Committee in December 2018.

This instruction is drafted for violations of § 948.215, created by 2017 Wisconsin Act 283 [effective date: April 18, 2018]. The statute provides penalties for six types of violations – ranging from Class B to Class H felonies. The instruction attempts to deal with them by including all options in element 3.

In requiring repeated criminal acts as the basis for a violation, this offense is similar to those defined in § 948.025, Repeated acts of sexual assault of a child, and § 948.03(5), Repeated acts of physical abuse of a child. See Wis JI-Criminal 2107 and 2114A, respectively.

1. This paragraph is the offense definition provided in § 948.21(2) without change. The Committee recommends striking parts of the definition that do not apply. Element 3 of Wis JI-Criminal 2150 illustrates how the alternatives may be broken down.

2. Here identify the beginning and ending dates of the period specified by the prosecution. For example: "The specified period of time is from June 1, 2018 through September 16, 2018." NOTE: "Specified period of time" also appears in § 948.025, Repeated Acts Of Sexual Assault Of A Child. See note 5, Wis JI-Criminal 2107.

3. This statement is based on § 948.215(3).

4. This makes the offense a Class B felony; see § 948.215(2)(a).

5. This makes the offense a Class D felony; see § 948.215(2)(b)1.

6. This makes the offense a Class D felony; see § 948.215(2)(b)2. "Child sex offenses" are specified in § 948.21(1)(a): an offense under s. 948.02, 948.025, 948.05, 948.051, 948.055, 948.06,

948.07, 948.08, 948.10, 948.11, or 948.12. Refer to the uniform instructions for the elements and definitions applicable to any "child sex offense" that is alleged.

7. This makes the offense a Class F felony; see § 948.215(2)(c). § 948.21(1)(b) provides: "'Emotional damage' has the meaning given in § 48.02(5j)."

8. This makes the offense a Class F felony; see § 948.215(2)(d).

9. This makes the offense a Class H felony; see § 948.215(2)(e).

2152 FAILURE TO SUPPORT — § 948.22[1]

Statutory Definition of the Crime

Failure to support, as defined in § 948.22 of the Criminal Code of Wisconsin, is committed by one who intentionally fails for 120 or more consecutive days[2] to provide spousal or child support[3] which the person knows or reasonably should know the person is legally obligated to provide.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally failed to provide (spousal) (child) support.[4]

"Intentionally" means that the defendant had the mental purpose to fail to pay support or was aware that his conduct was practically certain to cause that result.[5]

IF THERE IS EVIDENCE THAT THE DEFENDANT FAILED TO PAY SUPPORT REQUIRED UNDER A COURT ORDER,[6] ADD THE FOLLOWING:[7]

[Evidence has been received that the defendant failed to pay support payments required by a court order.

If you are satisfied beyond a reasonable doubt that the defendant knew or reasonably should have known that (he) (she) was required to pay support under a court order and failed to pay support payments as required, you may find that the failure to provide support was intentional, but you are not required to do so. You must not find that the failure to support was intentional unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[It is not a defense that support was provided wholly or partially by any other person.][8]

2. The failure to provide support continued for 120 or more consecutive days.[9]
3. The defendant (knew) (reasonably should have known) that (he) (she) was legally obligated to provide the (spousal) (child) support.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2152 was originally published in 1989 and revised in 1993 and 2001. This revision was approved by the Committee in August 2005 and involved updating footnotes 4 and 6.

This instruction is drafted for violations of § 948.22 that do not involve evidence of the affirmative defense provided by sub. (6). For offenses involving the affirmative defense, see Wis JI-Criminal 2152A.

". . . [U]nder § 948.22, Stats., it does not matter that the support owed is an arrearage, when that arrearage accrued or what the current age of the child is. The crime is the intentional failure to pay child support during a 120-day consecutive-day period. Child support is 'an amount which a person is ordered to pay for the support of a child,' and its character is not changed by the passage of time or the name it is given. The crime is complete after each 120-day period during which the defendant intentionally fails to pay child support and continues until he or she no longer intentionally fails to pay child support. The statute of limitations begins to run from the end of each 120-day period." State v. Monarch, 230 Wis.2d 542, 551, 602 N.W.2d 179 (Ct. App. 1999).

". . . § 948.22, Stats., criminalizes the failure to pay arrearages even after the child for whom support is ordered attains majority. . . . [I]f a defendant's tax refunds are intercepted and are allocated to a given period, the defendant cannot be said to have failed to provide support for that period." State v. Lenz, 230 Wis.2d 529, 541, 602 N.W.2d 172 (Ct. App. 1999).

1. Failure to support under § 948.22 is a Class E felony if the failure continues for 120 or more consecutive days. (§ 948.22(2).) If the failure is for less than 120 consecutive days, the offense is punished as a Class A misdemeanor. (§ 948.22(3).) Wis JI-Criminal 2152 is drafted for the felony offense. It can be modified for a misdemeanor charge simply by dropping the phrase "for 120 or more consecutive days" wherever it appears and reducing the elements from three to two.

Subsection 948.22(2) has been interpreted to permit "a prosecutor to charge one count of felony nonsupport for each 120-day term a person fails to pay child support, even if that person failed to pay over one continuous period." State v. Grayson, 172 Wis.2d 156, 158 493 N.W.2d 23 (1992). Thus, "if a person fails to pay child support for 360 consecutive days, a prosecutor could charge him with three counts of felony nonsupport." Ibid., at note 1.

2. If the misdemeanor offense is charged, delete the phrase "for 120 or more consecutive days" from this paragraph and in the other places it appears. See discussion in note 1.

3. 1985 Wisconsin Act 56 added "grandchild support" to the statute. "'Grandchild support' means an amount which a person is legally obligated to provide under s. 49.90(1)(a)2 and (11)." Subsec. 948.22(1)(b). In a case involving a grandparent's failure to support, the suggested instruction needs to be modified by substituting "grandchild support" throughout the instruction.

4. The statute uses the terms "spousal" or "child" support and defines them by reference to other statutes using the terms. See subsecs. (1)(a) and (c) of § 948.22. For the purposes of instructing the jury, the Committee concluded that definition of "support" would rarely be necessary in the usual case. Should the facts present an issue, the statutes referenced in subs. (1)(a) and (c) may offer some guidance. But see State v. Smith, 2005 WI 104, 283 Wis.2d 57, 699 N.W.2d 508, quoted in note 6, below. Also see note 3, regarding the revision of the statute to include "grandchild support."

5. This is the definition of "intentionally" provided in § 939.23. The "aware that his conduct was practically certain to cause that result" alternative was added by the 1987 revision of the homicide statutes. See Wis JI-Criminal 923A and 923B for further discussion of the definition of "intentionally." The unusual composition of § 948.22 makes unclear the mental state that is required. With offenses involving the failure to do something, "intentionally" is usually interpreted to require a showing that the defendant be able to do what is required: a failure to do X cannot be "intentionally" done unless the person knew he was supposed to do X and had the ability to do it.

Two provisions of § 948.22 are inconsistent with this definition of "intentionally." Subsec. (4) provides that failure to pay the amount required by court order or an amount equal to that derived from the AFDC standards (§ 49.19(11)(a)1) is "prima facie" evidence of intentional failure to provide support. The Committee concluded that the "prima facie" case should be implemented as described in note 6, below.

The second problematical subsection is subsec. (6) which provides that ". . . affirmative defenses include but are not limited to inability to provide child or spousal support." As explained above, the usual definition of "intentionally" requires that there be ability to do that which is required. For a case involving the "affirmative defense," use Wis JI-Criminal 2152A.

6. In State v. Smith, 2005 WI 104, ¶34, 283 Wis.2d 57, 699 N.W.2d 508, the Wisconsin Supreme Court held that "whether a court of competent jurisdiction issued the child support underlying a prosecution for the crime of failure to pay child support is not an element of that crime."

7. Subsection (4) of § 948.22 recognizes two facts as "prima facie evidence" of intentional failure to provide support: failure to make payments required by court order, when the person knows or reasonably should have known that he or she is required to pay support under an order; or, in a situation where there is no court order, failure to pay an amount equal to the AFDC level set forth in § 49.19(11)(a)1, when the person knows or reasonably should have known that he or she has a dependent. The "knows or reasonably should have known" requirements were added to the statute by 1989 Wisconsin Act 212. (The instruction suggests an addition for a case involving a court order. For a case involving the AFDC formula, a similar addition would be necessary.)

The suggested paragraphs attempt to instruct on the effect of a prima facie case in the way required by § 903.03: if the jury finds that the basic fact (failure to pay as required by a court order) exists, it may find that the presumed fact (intentional failure to provide support) exists, but it is not required to do so. Before finding the defendant guilty, the jury must be satisfied beyond a reasonable doubt, from all the evidence, that the failure to support was intentional. See Wis JI-Criminal 225.

An instruction in these terms was approved in State v. Schleusner, 154 Wis.2d 821, 825, 454 N.W.2d 51 (Ct. App. 1990).

8. See § 948.22(5). A comparable provision in the previous version of this statute, § 940.27(6), was discussed in State v. Schleusner, note 7, supra.

Support payments made as a result of the state's interception of tax refunds count as support payments. See State v. Lenz, cited in the Comment preceding note 1, supra.

9. The basic offense is punished as a Class A misdemeanor. The penalty increases to that of a Class E felony if a person fails to provide support "for 120 or more consecutive days." In State v. Duprey, 149 Wis.2d 655, 439 N.W.2d 837 (Ct. App. 1989), the court of appeals interpreted this part of the statute as it applies to an order requiring payment of 25% of income as child support. The court held that the state is not required to prove that the defendant in fact had income for 120 consecutive days where the amount of the support obligation is determined on a percentage basis.

2152A FAILURE TO SUPPORT: AFFIRMATIVE DEFENSE — § 948.22[1]

[USE THIS INSTRUCTION IF THERE IS EVIDENCE OF THE DEFENSE UNDER § 948.22(6).][2]

Statutory Definition of the Crime

Failure to support, as defined in § 948.22 of the Criminal Code of Wisconsin, is committed by one who intentionally fails for 120 or more consecutive days[3] to provide spousal or child support[4] which the person knows or reasonably should know the person is legally obligated to provide.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally failed to provide (spousal) (child) support.[5]

"Intentionally" means that the defendant had the mental purpose to fail to pay support or was aware that his conduct was practically certain to cause that result.[6]

IF THERE IS EVIDENCE THAT THE DEFENDANT FAILED TO PAY SUPPORT REQUIRED UNDER A COURT ORDER, ADD THE FOLLOWING:[7]

[Evidence has been received that the defendant failed to pay support payments required by a court order.

If you are satisfied beyond a reasonable doubt that the defendant knew or reasonably should have known that he was required to pay support under a court order and failed to pay support payments as required, you may find that the failure to provide support was intentional, but you are not required to do so. You must not find that the failure to support was intentional unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[It is not a defense that support was provided wholly or partially by any other person.][8]

2. The failure to provide support continued for 120 or more consecutive days.[9]

3. The defendant (knew) (reasonably should have known) that (he) (she) was legally obligated to provide the (spousal) (child) support.

Consider Whether the Defense is Proved

Wisconsin law provides that it is a defense to this crime if the defendant was unable to provide support. The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that (he) (she) was unable to provide support.

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[A person may not demonstrate inability to provide support if the person is employable but, without reasonable excuse, either fails to diligently seek employment, terminates employment, or reduces his earnings or assets.][10]

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.[11]

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, and you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you must find the defendant not guilty.[12]

COMMENT

Wis JI-Criminal 2152A was approved by the Committee in May 2000.

This instruction is drafted for violations of § 948.22 involving evidence of the affirmative defense provided by sub. (6). For offenses not involving the affirmative defense, see Wis JI-Criminal 2152.

1. Failure to support under § 948.22 is a Class E felony if the failure continues for 120 or more consecutive days. (§ 948.22(2).) If the failure is for less than 120 consecutive days, the offense is punished as a Class A misdemeanor. (§ 948.22(3).) Wis JI-Criminal 2152 is drafted for the felony offense. It can be modified for a misdemeanor charge simply by dropping the phrase "for 120 or more consecutive days" wherever it appears and reducing the elements from three to two.

Subsection 948.22(2) has been interpreted to permit "a prosecutor to charge one count of felony

nonsupport for each 120-day term a person fails to pay child support, even if that person failed to pay over one continuous period." State v. Grayson, 172 Wis.2d 156, 158 493 N.W.2d 23 (1992). Thus, "if a person fails to pay child support for 360 consecutive days, a prosecutor could charge him with three counts of felony nonsupport." Ibid., at footnote 1.

2. Subsection (6) of § 948.22 provides as follows:

> 948.22(6) Under this section, affirmative defenses include but are not limited to inability to provide child, grandchild or spousal support. A person may not demonstrate inability to provide child, grandchild or spousal support if the person is employable but, without reasonable excuse, either fails to diligently seek employment, terminates employment or reduces his or her earnings or assets. A person who raises an affirmative defense has the burden of proving the defense by a preponderance of the evidence.

The Committee's decision on how to implement this provision can best be explained by a brief review of affirmative defenses generally, followed by an analysis of the nonsupport statute.

Consideration of affirmative defenses, presumptions (their close relatives), and burdens of production and persuasion can be complicated. But the general rule can be stated quite simply: The legislature has the power to define the conduct that is subject to criminal penalty and in doing so may specify whatever facts it wishes as those necessary to constitute the crime. The burden of persuasion is always on the state to prove these facts beyond a reasonable doubt. If the legislature wishes to identify defenses which are not inconsistent with the facts necessary to constitute the crime, it may do so. On such defenses, the state may impose the burden of persuasion on the defendant.

These statements are the distillation of several decisions of the United States Supreme Court. Specifically, In re Winship, 397 U.S. 358 (1970), is the source of the requirement that the burden is on the prosecution to prove all facts necessary to constitute the crime beyond a reasonable doubt. In Mullaney v. Wilbur, 421 U.S. 684 (1975), the Court elaborated on Winship, holding that it is a denial of due process to relieve the state of its burden to prove such facts, or shift the burden to the defendant, by presumptions or similar evidentiary devices.

The Winship/Mullaney principles were refined by a later decision in Patterson v. New York, 432 U.S. 197 (1977), which held that those principles extended only to the elements included in the definition of the offense. The state is not required to prove the absence of an affirmative defense, so long as the defense is not inconsistent with the statutory elements of the crime. And it is up to the legislature to determine which facts will be elements and which will be defenses. (The court noted that there are some limits beyond which the legislature may not go but did not identify what those limits are.)

The Patterson decision and its limits on the application of Mullaney and Winship have been followed in subsequent cases. See McMillan v. Pennsylvania, 477 U.S. 79 (1986) – possession of a firearm is a sentencing factor, not an element, and Martin v. Ohio, 480 U.S. 228 (1987) – a defendant charged with murder can be required to prove the affirmative defense of self-defense because it is not inconsistent with any of the elements of the crime.

[Note the importance of the change from the broad concept – facts necessary to constitute the crime – used in Winship and, to a lesser degree, in Mullaney to the narrower concept – statutory elements –

adopted in Patterson.]

It is now well established that the constitutional principles set forth in Mullaney and Patterson allow the state legislatures to recognize affirmative defenses and to require the defendant to carry the burden of persuasion on such defenses. Wisconsin has generally chosen to stay with a Mullaney type of procedure for most defenses: when there is evidence of a defense in the case, the state must prove its absence to justify a finding of guilt. To put it in Winship terms, the absence of the defense becomes a fact necessary to constitute the crime (though it is not, in Patterson terms, a statutory element). There are exceptions to this approach, however, the most notable being the affirmative defense recognized in § 940.09, Homicide by Intoxicated Use of Vehicle or Firearm. The constitutionality of this affirmative defense has been upheld. State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 1188.

Subsection 948.22(2) makes it a crime to "intentionally" fail to provide support. Subsection 948.22(6) recognizes an affirmative defense – inability to provide support – and provides that the defendant has the burden of proving the defense by a preponderance of the evidence. This drafting style creates a question – is the defense of inability to provide support something that can coexist with the element of intentional failure to pay? If it can, making it an affirmative defense and imposing the burden on the defendant is all right under Patterson. If it cannot, doing so violates the principle of Mullaney.

The former nonsupport statute, § 940.27 (1985-86 Wis. Stats.) also recognized inability to provide support as an affirmative defense but did not explicitly place the burden of persuasion on the defendant. [The suggested uniform jury instruction treated it as imposing only a burden of production on the defendant – once there was evidence of inability to pay support, the state had to prove the defendant did have the ability to pay. See Wis JI-Criminal 1264 8 1986.] The former statute was reviewed in State v. Duprey, 149 Wis.2d 655, 439 N.W.2d 837 (Ct. App. 1989). The court assumed that the defendant did have the burden of persuasion and upheld the constitutionality of the statutory scheme. The court held that because inability to pay does not negate any element of the crime, requiring the defendant to prove it does not unconstitutionally shift any burden to him.

Statutes like new § 948.22 have been reviewed by the U.S. Supreme Court and the U.S. Court of Appeals for the 7th Circuit. In Hicks v. Feiock, 108 S.Ct. 1423 (1988), the U.S. Supreme Court reviewed a California statute that treated failure to pay support as a contempt offense. It was like Wisconsin's statute in that it required intentional failure to pay support but made inability to pay an affirmative defense. The issue before the Court was whether the statute imposed a civil or a criminal penalty. A standard for resolving that question was set forth, and the case was remanded for application of that standard. Not directly addressed was the question whether, if the statute did impose a criminal penalty, it violated due process to require the defendant to prove inability to pay where the intentional failure to pay was an affirmative defense. The state court held that ability to comply was an element of the crime, not an affirmative defense, and that the attempt to make the defendant prove the defense was a due process violation. The Supreme Court concluded it was bound by the state court's determination of this issue and did not analyze it.

The Indiana nonsupport statute was reviewed by the U.S. Court of Appeals for the 7th Circuit in Davis v. Barber, 853 F.2d 1418 (7th Cir. 1988). Section 35-46-1-5 of the Indiana Code defines criminal nonsupport as "knowingly or intentionally fails to provide support" and provides that "it is a defense that the accused person was unable to provide support." The Seventh Circuit noted that Hicks set the standard to be used in analyzing the statutory scheme: one looks to state law to determine what the

elements of the crime are. The court concluded that under Indiana law, ability to pay is not an element. That being the case, due process principles do not prevent making inability to pay an affirmative defense. Further, the court specifically rejected several of the defendant's arguments. First, inability to pay is not the negative side of the requirement that the failure to pay be "intentional" or "knowing." As Indiana law defines those terms, either "conscious objective" or "awareness of a high probability" is sufficient. Inability to pay is not inconsistent with awareness of a high probability that he is failing to provide support. (NOTE: In this respect, the recent change in the definition of "intentionally" under Wisconsin law may save the Wisconsin nonsupport statute – it now includes "mental purpose" and "aware(ness) that the conduct is practically certain to cause the result.") Second, the court rejected the defendant's argument that general principles of criminal liability require that acts be voluntary. Assuming this general rule applies to omissions, the seventh circuit concludes that the general rule is not applicable where a specific statute defines the offense in a contradictory manner.

If one can say that intentional failure to provide support does not require ability to pay, making inability to pay an affirmative defense with the burden of persuasion on the defendant does not violate the due process clause of the U.S. Constitution. Given the decisions in Duprey and in Davis v. Barber, the Committee concluded that the Wisconsin statute is likely to be interpreted as a constitutional definition of the crime of failure to support.

3. If the misdemeanor offense is charged, delete the phrase "for 120 or more consecutive days" from this paragraph and in the other places it appears. See discussion in note 1, supra.

4. 1985 Wisconsin Act 56 added "grandchild support" to the statute. "'Grandchild support' means an amount which a person is legally obligated to provide under s. 49.90(1)(a)2 and (11)." Subsec. 948.22(1)(b). In a case involving a grandparent's failure to support, the suggested instruction needs to be modified by substituting "grandchild support" throughout the instruction.

5. The statute uses the terms "spousal" or "child" support and defines them by reference to other statutes using the terms. See subsecs. (1)(a) and (c) of § 948.22. For the purposes of instructing the jury, the Committee concluded that definition of "support" would rarely be necessary in the usual case. Should the facts present an issue, the statutes referenced in subs. (1)(a) and (c) may offer some guidance. See note 3, supra, regarding the revision of the statute to include "grandchild support."

6. This is the definition of "intentionally" provided in § 939.23. The "aware that his conduct was practically certain to cause that result" alternative was added by the 1987 revision of the homicide statutes. See Wis JI-Criminal 923A and 923B for further discussion of the definition of "intentionally." The unusual composition of § 948.22 makes unclear the mental state that is required. With offenses involving the failure to do something, "intentionally" is usually interpreted to require a showing that the defendant be able to do what is required: a failure to do X cannot be "intentionally" done unless the person knew he was supposed to do X and had the ability to do it.

Two provisions of § 948.22 are inconsistent with this definition of "intentionally." Subsec. (4) provides that failure to pay the amount required by court order or an amount equal to that derived from the AFDC standards (§ 49.19(11)(a)1) is "prima facie" evidence of intentional failure to provide support. The Committee concluded that the "prima facie" case should be implemented as described in note 7, below.

The second problematical subsection is subsec. (6) which provides that ". . . affirmative defenses include but are not limited to inability to provide child or spousal support." As explained above, the usual definition of "intentionally" requires that there be ability to that which is required.

7. Subsection (4) of § 948.22 recognizes two facts as "prima facie evidence" of intentional failure to provide support: failure to make payments required by court order, when the person knows or reasonably should have known that he or she is required to pay support under an order; or, in a situation where there is no court order, failure to pay an amount equal to the AFDC level set forth in § 49.19(11)(a)1, when the person knows or reasonably should have known that he or she has a dependent. The "knows or reasonably should have known" requirements were added to the statute by 1989 Wisconsin Act 212. (The instruction suggests an addition for a case involving a court order. For a case involving the AFDC formula, a similar addition would be necessary.)

The suggested paragraphs attempt to instruct on the effect of a prima facie case in the way required by § 903.03: if the jury finds that the basic fact (failure to pay as required by a court order) exists, it may find that the presumed fact (intentional failure to provide support) exists, but it is not required to do so. Before finding the defendant guilty, the jury must be satisfied beyond a reasonable doubt, from all the evidence, that the failure to support was intentional. See Wis JI-Criminal 225.

An instruction in these terms was approved in State v. Schleusner, 154 Wis.2d 821, 825, 454 N.W.2d 51 (Ct. App. 1990).

8. See § 948.22(5). A comparable provision in the previous version of this statute, § 940.27(6), 1985-86 Wis. Stats. was discussed in State v. Schleusner, note 6, supra.

Support payments made as a result of the state's interception of tax refunds count as support payments. See State v. Lenz, cited in the Comment preceding note 1, Wis JI-Criminal 2152.

9. The basic offense is punished as a Class A misdemeanor. The penalty increases to that of a Class E felony if a person fails to provide support "for 120 or more consecutive days." In State v. Duprey, 149 Wis.2d 655, 439 N.W.2d 837 (Ct. App. 1989), the court of appeals interpreted this part of the statute as it applies to an order requiring payment of 25% of income as child support. The court held that the state is not required to prove that the defendant in fact had income for 120 consecutive days where the amount of the support obligation is determined on a percentage basis.

10. This statement is taken directly from subsec. (6) of § 948.22.

A defendant's "lack of financial resources alone is insufficient to demonstrate inability to pay. If a defendant has the capacity to become gainfully employed and realize earnings it is no valid defense to felony nonsupport." State v. Clutter, 230 Wis.2d 472, 479, 602 N.W.2d 324 (Ct. App. 1999).

Evidence of "incarceration is relevant to a defense of inability because, depending on the circumstances of incarceration, incarceration may prevent a person from being employed and therefore may prevent a person from having earnings with which to pay child support. Whether a person commits a crime in order to avoid paying child support is a question of fact for the jury." State v. Stutesman, 221 Wis.2d 178, 184, 585 N.W.2d 181 (Ct. App. 1998).

11. This is a slight revision of the standard description of the civil burden of proof, intended to improve its understandability. No change in meaning is intended.

12. This statement is included to assure that both options for a not guilty verdict are clearly presented:

(1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and

(2) not guilty even though the elements are proven, because the defense has been established.

2154 CONCEALING THE DEATH OF CHILD — § 948.23(1)(a)

Statutory Definition of the Crime

Concealing the death of a child, as defined in § 948.23(1)(a) of the Criminal Code of Wisconsin, is committed by any person who conceals the corpse of any issue of a woman's body with intent to prevent a determination of whether it was born dead or alive.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant concealed the corpse of any issue of a woman's body.
2. The defendant concealed the corpse with intent to prevent a determination of whether it was born dead or alive.

"With intent to" means that the defendant had the purpose to prevent a determination of whether the corpse was born dead or alive or was aware that (his) (her) conduct was practically certain to cause that result.[1]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2154 was originally published in 1989 and revised in 2008. This revision was approved by the Committee in July 2012; the comment was updated to reflect 2011 Wisconsin Act 268.

Section 948.23 was amended by 2011 Wisconsin Act 268 [effective date: April 24, 2012]. The offense addressed by this instruction is now found in § 948.23(1)(a). The statute was expanded to cover three new types of conduct: failing to report the death of a child – § 948.23(1)(b); hiding or burying the corpse of a child without authorization – § 948.23(2); and, failure by a parent or guardian to report a child as missing – § 948.23(3). Uniform instructions have not been drafted for these offenses.

Section 948.23 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaced Wis JI-Criminal 1810 which applied to what was essentially the same offense under § 946.63, 1985-6 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332. The revision made one substantive change in what is now sub. (1)(a): it is no longer limited to a woman who conceals the corpse of any issue of her own body. The statute now applies to any person who conceals the corpse of any issue of any woman's body.

1. "With intent to" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version had "mental purpose" as one definition of "with intent to." It is the other alternative that charged from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B.

2160 ABDUCTION OF ANOTHER'S CHILD: TAKING FROM HOME OR CUSTODY — § 948.30(1)(a)

Statutory Definition of the Crime

Abduction of another's child, as defined in § 948.30(1)(a) of the Criminal Code of Wisconsin, is committed by one who for any unlawful purpose takes any child who is not his or her own by birth or adoption [from the child's home] [from the custody of the child's (parent) (guardian) (legal custodian)].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant took (name of victim) from [(his) (her) home)] [the custody of (his) (her) (parent) (guardian) (legal custodian)].

   [A child is in custody when the child is in the actual physical custody of (his) (her) (parent) (guardian) (legal custodian), or, if not in the actual physical custody of a (parent) (guardian) (legal custodian), when the (parent) (guardian) (legal custodian) continues to have control of the child.][1]

2. At the time of the alleged taking, (name of victim) was a child under the age of 18 years who was not the defendant's child by birth or adoption.

   Knowledge of (name of victim)'s age is not material[2] and mistake regarding (name of victim)'s age is not a defense.[3]

3. The defendant took the child for an unlawful purpose.

The defendant need not know that (his) (her) purpose was unlawful; it is sufficient if, in fact, the purpose was an unlawful one.[4]

The State alleges that the defendant's unlawful purpose was to commit the crime of (name of crime). (Name of crime) is committed by one who

LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.[5]

Deciding About Purpose

You cannot look into a person's mind to find purpose. Purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2160 was originally published in 1989 and was revised in 2010. The 2010 revision involved adoption of a new format and changes in how the first and third elements are defined. This revision was approved by the Committee in October 2022; it removed a reporter's note from the comment concerning "embedded crimes."

This instruction is for a violation of § 948.30(1)(a), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

Section 948.30 replaced former § 940.32 with a two-level offense applying only to the taking or detaining of the child of another. The more serious offense requires use of threat or force. See Wis JI-Criminal 2162 and 2163. The limitation to the child of another clears up a potential problem under the old statute, which could have been used against a parent. One of the offenses under the former statute – enticing

from the home or custody – was not reenacted.

1. Section 948.30(3) provides:

(3) For purposes of subs. (1)(a) and (2)(a), a child is in the custody of his or her parent, guardian or legal custodian if:

(a) The child is in the actual physical custody of the parent, guardian or legal custodian; or
(b) The child is not in the actual physical custody of his or her parent, guardian or legal custodian, but the parent, guardian or legal custodian continues to have control of the child.

2. Section 939.23(6).

3. Section 939.43(2).

4. While the statute does not specifically refer to an intent on the part of the defendant, it does require an unlawful purpose for the act. This is the mental element of the crime and is limited to the requirement that there be an unlawful purpose for the taking.

5. The instruction is drafted for a case where the alleged "unlawful purpose" is a crime. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

If an unlawful purpose is alleged that is not a crime, the instruction would need to be changed, using a statement like the following:

The State alleges that the defendant's unlawful purpose was to (identify the alleged unlawful purpose).

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2161 ABDUCTION OF ANOTHER'S CHILD: DETAINING AWAY FROM HOME — § 948.30(1)(b)

Statutory Definition of the Crime

Abduction of another's child, as defined in § 948.30(1)(b) of the Criminal Code of Wisconsin, is committed by one who for any unlawful purpose detains any child who is not his or her own by birth or adoption and who is away [from the child's home] [from the custody of the child's (parent) (guardian) (legal custodian)].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant detained (name of victim) who was away [from (his) (her) home] [from the actual physical custody[1] of (his) (her) (parent) (guardian) (legal custodian)].

2. At the time of the alleged detaining, (name of victim) was a child under the age of 18 years who was not the defendant's child by birth or adoption.

   Knowledge of (name of victim)'s age is not material[2] and mistake regarding (name of victim)'s age is not a defense.

3. The defendant detained the child for an unlawful purpose.

The defendant need not know that (his) (her) purpose was unlawful; it is sufficient if, in fact, the purpose was an unlawful one.[3]

The State alleges that the defendant's unlawful purpose was to commit the crime of (name of crime). (Name of crime) is committed by one who

> LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.[4]

Deciding About Purpose

You cannot look into a person's mind to find purpose. Purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2161 was originally published in 1989 and was revised in 2010. The 2010 revision involved adoption of a new format and changes in how the first and third elements are defined. This revision was approved by the Committee in October 2022; it removed a reporter's note from the comment concerning "embedded crimes."

This instruction is for a violation of § 948.30(1)(b), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or

after July 1, 1989.

See the Comment to Wis JI-Criminal 2160 for an explanation of how the offenses relates to "abduction" under former § 940.32.

1. In place of a definition of "custody," the instruction refers to detaining a child who is away from the "actual physical custody" of the parent, guardian, or custodian. The broader definition of "custody" provided in § 948.30(3) applies only "for purposes of subs. (1)(a) and (2)(a)."

2. Section 939.23(6).

3. While the statute does not specifically refer to an intent on the part of the defendant, it does require an unlawful purpose for the act. This is the mental element of the crime and is limited to the requirement that there be an unlawful purpose for the taking.

4. The instruction is drafted for a case where the alleged "unlawful purpose" is a crime. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

If an unlawful purpose is alleged that is not a crime, the instruction would need to be changed, using a statement like the following:

> The State alleges that the defendant's unlawful purpose was to (identify the alleged unlawful purpose).

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2162 ABDUCTION OF ANOTHER'S CHILD: TAKING BY FORCE OR THREAT OF FORCE — § 948.30(2)(a)

Statutory Definition of the Crime

Abduction of another's child, as defined in § 948.30(2)(a) of the Criminal Code of Wisconsin, is committed by one who for any unlawful purpose, and by force or threat of imminent force, takes any child who is not his or her own by birth or adoption [from the child's home] [from the custody of the child's (parent) (guardian) (legal custodian)].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant took (name of victim) from [(his) (her) home] [the custody of (his) (her) (parent) (guardian) (legal custodian)].

   [A child is in custody when the child is in the actual physical custody of (his) (her) (parent) (guardian) (legal custodian), or, if not in the actual physical custody of a (parent) (guardian) (legal custodian), when the (parent) (guardian) (legal custodian) continues to have control of the child.][1]

2. At the time of the alleged taking, (name of victim) was a child under the age of 18 years who was not the defendant's child by birth or adoption.

Knowledge of (name of victim)'s age is not material[2] and mistake regarding (name of victim)'s age is not a defense.[3]

3. The defendant took the child by force or threat of imminent force.

The term "imminent" means "near at hand" or "on the point of happening."[4]

4. The defendant took (name of victim) for an unlawful purpose.

The defendant need not know that (his) (her) purpose is unlawful; it is sufficient if, in fact, the purpose is an unlawful one.[5]

The State alleges that the defendant's unlawful purpose was to commit the crime of (name of crime). (Name of crime) is committed by one who

LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.[6]

Deciding About Purpose

You cannot look into a person's mind to find purpose. Purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2162 was originally published in 1989 and was revised in 2010. The 2010 revision involved adoption of a new format and changes in how the first and fourth elements are defined. This revision was approved by the Committee in October 2022; it removed a reporter's note from the comment concerning "embedded crimes."

This instruction is for a violation of § 948.30(2)(a), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

Section 948.30 replaces former § 940.32 with a two-level offense applying only to the taking or detaining of the child of another. The more serious offense requires use of threat of force. The limitation to the child of another clears up a potential problem under the old statute, which could have been used against a parent. One of the offenses under the former statute – enticing from the home or custody – is not reenacted. This instruction replaces Wis JI-Criminal 1285 which applied to violations of § 940.32(1) 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

1. Section 948.30(3) provides:

> (3) For purposes of subs. (1)(a) and (2)(a), a child is in the custody of his or her parent, guardian or legal custodian if:
>
> (a) The child is in the actual physical custody of the parent, guardian or legal custodian; or
> (b) The child is not in the actual physical custody of his or her parent, guardian or legal custodian, but the parent, guardian or legal custodian continues to have control of the child.

The Note to this section in 1987 Senate Bill 203, enacted as 1987 Wisconsin Act 332, indicates that this was intended to codify the definition of "custody" in Wis JI-Criminal 1285 and 1286 (© 1986). The same definition has been used in this instruction.

2. Section 939.23(6).

3. Section 939.43(2).

4. The definition is the one used in the instruction for armed robbery [Wis JI Criminal 1480]; it was originally adapted from the one used in Black's Law Dictionary, p. 884 (4th ed. 1951).

5. While the statute does not specifically refer to an intent on the part of the defendant, it does require an unlawful purpose for the act. This is the mental element of the crime and is limited to the requirement that there be an unlawful purpose for the taking.

6. The instruction is drafted for a case where the alleged "unlawful purpose" is a crime. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App.

1991)].

If an unlawful purpose is alleged that is not a crime, the instruction would need to be changed, using a statement like the following:

The State alleges that the defendant's unlawful purpose was to (identify the alleged unlawful purpose).

2163 ABDUCTION OF ANOTHER'S CHILD: DETAINING BY FORCE OR THREAT OF FORCE — § 948.30(2)(b)

Statutory Definition of the Crime

Abduction of another's child, as defined in § 948.30(2)(b) of the Criminal Code of Wisconsin, is committed by one who for any unlawful purpose, and by force or threat of imminent force, detains any child who is not his or her own by birth or adoption and who is away [from the child's home] [from the custody of the child's (parent) (guardian) (legal custodian)].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant detained (name of victim) who was away [from (his) (her) home] [from the actual physical custody[1] of (his) (her) (parent) (guardian) legal custodian)].

2. At the time of the alleged detention, (name of victim) was a child under the age of 18 years who was not the defendant's child by birth or adoption.

   Knowledge of (name of victim)'s age is not material[2] and mistake regarding (name of victim)'s age is not a defense.[3]

3. The defendant detained (name of victim) by force or threat of imminent force.

The term "imminent" means "near at hand" or "on the point of happening."[4]

4. The defendant detained (name of victim) for an unlawful purpose.

The defendant need not know that (his) (her) purpose is unlawful; it is sufficient if, in fact, the purpose is an unlawful one.[5]

The State alleges that the defendant's unlawful purpose was to commit the crime of (name of crime). (Name of crime) is committed by one who

> LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.[6]

Deciding About Purpose

You cannot look into a person's mind to find purpose. Purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2163 was originally published in 1989 and was revised in 2010. The 2010 revision

involved adoption of a new format and changes in how the first and fourth elements are defined. This revision was approved by the Committee in October 2022; it removed a reporter's note from the comment concerning "embedded crimes."

This instruction is for a violation of § 948.30(2)(b), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. It replaces Wis JI-Criminal 1287 which applied to violations of § 940.32(3) 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

See the Comment to Wis JI-Criminal 2162 for an explanation of how this offense relates to "abduction" under former § 940.32.

1. In place of a definition of "custody," the instruction refers to detaining a child who is away from the "actual physical custody" of the parent, guardian, or custodian. The broader definition of "custody" provided in § 948.30(3) applies only "for purposes of subs. (1)(a) and (2)(a)."

2. Section 939.23(6).

3. Section 939.43(2).

4. The definition is the one used in the instruction for armed robbery [Wis JI-Criminal 1480]; it was originally adapted from the one used in Black's Law Dictionary, p. 884 (4th ed. 1951).

5. While the statute does not specifically refer to an intent on the part of the defendant, it does require an unlawful purpose for the act. This is the mental element of the crime and is limited to the requirement that there be an unlawful purpose for the taking.

6. The instruction is drafted for a case where the alleged "unlawful purpose" is a crime. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

If an unlawful purpose is alleged that is not a crime, the instruction would need to be changed, using a statement like the following:

The State alleges that the defendant's unlawful purpose was to (identify the alleged unlawful purpose).

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2166 INTERFERENCE WITH CUSTODY OF A CHILD — § 948.31(1)(b)

Statutory Definition of the Crime

Interference with the custody of a child, as defined in § 948.31(1)(b) of the Criminal Code of Wisconsin, is committed by one who intentionally (causes a child to leave) (takes a child away) (withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period)[1] from a legal custodian with intent to deprive the custodian of custody rights without the consent of the custodian.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. On (date of alleged offense), (name of child) had not attained the age of 18 years.[3]
2. (Name of custodian) had legal custody[4] of (name of child) under a (court order)[5] (judgment) in an action for (specify the type of action).[6]
3. The defendant (caused (name of child) to leave) (took (name of child) away) (withheld (name of child) for more than 12 hours beyond the court-approved period of physical placement or visitation period) from (name of custodian) without the consent of (name of custodian).[7]

"Without consent" means no consent in fact.[8]

The act need not be accompanied by force or violence.

4. The defendant acted intentionally.

"Intentionally" means that the defendant acted with the mental purpose to (cause (name of child) to leave) (take (name of child) away) (withhold (name of child) for more than 12 hours beyond the court-approved period of physical placement or visitation period).

"Intentionally" also requires that the defendant knew that (name of custodian) had legal custody of (name of child) under a (court order) (judgment)[9] and knew that (name of custodian) did not give consent to (cause (name of child) to leave) (take (name of child) away) (withhold (name of child)).

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2166 was originally published in 1989 and revised in 1994, 1997 and 2009. This revision was approved by the Committee in October 2014; it revised the Comment and footnotes.

This instruction is for a violation of § 948.31(1)(b), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1834 which applied to what was essentially the same offense under § 946.71(3), 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Section 948.31(1)(b), and this instruction, apply to situations where a person interferes with the rights of a child's legal custodian. The Committee concluded that the statute does not apply to a situation where a legal custodian allegedly interferes with rights that a non-legal custodian may have.

Affirmative defenses are recognized by subsection (4) of § 948.31. The burden of persuasion is placed on the defendant to establish them by a preponderance of the evidence. See the discussion of the affirmative defense provision in Wis JI-Criminal 2169.

Section 948.31(1)(b) begins with the statement: "Except as provided under chs. 48 and 938. . ." A similar statement preceded the definition of substantive offenses in § 946.71, 1985-86 Wis. Stats. That exclusion is believed to be intended to make it clear that legally authorized placements and interventions under chapters 48 and 938 are not to be considered to be violations of § 948.31(1)(b).

1. Section 948.31(1)(b) reads in part as follows: ". . . causes a child to leave, takes a child away or withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period. . ." The Committee interprets this statute as prohibiting any causing to leave, any taking away, and the withholding for more than 12 hours beyond the court-approved period. That is, the "for more than 12 hours" applies only to the "withholding" alternative, not to the causing to leave or taking.

The 2009 revision added all the statutory alternatives, in parentheses, to the text of the instruction. This was done to avoid the problem that arose in State v. Inglin, 224 Wis.2d 764, 592 N.W.2d 666 (Ct. App. 1999), where the trial court may have inadvertently failed to completely revise the standard instruction for a "withholding" case. The error was not prejudicial because the court of appeals found the evidence was sufficient to support conviction for "taking away." See note 8, below.

"A defendant causes a child to leave a parent if the defendant is responsible for or brings about an abandoning, departing or going away from the parent. 'Causes to leave' suggests the defendant engages in some sort of mental, rather than physical, manipulation by doing things to persuade the child to leave the parent. Force or violence is unnecessary and the conduct need not be intentional." State v. Bowden, 2007 WI App 234, ¶16, 306 Wis.2d 393, 742 N.W.2d 332. Also see, State v. Samuel, 2001 WI App 25, 240 Wis.2d 756, 623 N.W.2d 565.

Section 948.31(1)(b) was amended by 1989 Wisconsin Act 31, section 2836ym, to apply to a "period of physical placement" as well as to visitation periods. The same Act (at section 2836ap) created § 948.01(3m) to provide: "'Physical placement' has the meaning given in § 767.001(5)."

2. The statutory definition of this offense includes the statement: "This paragraph is not applicable if the court has entered an order authorizing the person to so take or withhold the child." The Committee assumes that court consent is usually a matter of record and can be clearly resolved. In a case where court consent is a factual issue, the Committee concluded that the matter should be treated in the same manner as other statutory exceptions. That is, the matter of court consent need not be included in the criminal complaint and only becomes an issue when it is raised by the evidence. If the issue is raised by the evidence, the state must prove beyond a reasonable doubt that there was no consent by the court. The phrase "or consent of the court" could simply be added at this point and to the third element.

Section 948.31(1)(b) was amended by 1989 Wisconsin Act 31 section 2836ym, to provide a new concluding sentence: "The fact that joint legal custody has been awarded to both parents by a court does not preclude a court from finding that one parent has committed a violation of this paragraph." The same Act (at section 2836ag) created § 948.01(1g) to provide: "'Joint legal custody' has the meaning given in § 767.001(1)."

3. The statute applies to interfering with the custody of any "child," defined in § 948.01(1) as "any person who has not attained the age of 18 years." This is a change from the counterpart offense under prior law, which applied only to children under the age of 14. See § 946.71(4), 1985-86 Wis. Stats.

4. "Legal custodian" is defined as follows in § 948.31(1)(a) (as amended by 1989 Wisconsin Act 31, section 2836(1m):

(a) In this subsection, "legal custodian of a child" means:

1. A parent or other person having legal custody of the child under an order or judgment in an action for divorce, legal separation, annulment, child custody, paternity, guardianship or habeas corpus.

2. The department of children and families or the department of corrections or any person, county department under s. 46.215, 46.22 or 46.23 or licensed child welfare agency, if custody or supervision of the child has been transferred under ch. 48 or 938 to that department, person or agency.

Under former § 946.71, interference with custody transferred under chapter 48 was defined as a separate offense. Section 946.71(1), 1985-86 Wis. Stats.

Wis JI-Criminal 2166 is drafted for a case involving a legal custodian under subsec. (1)(a)1. of the above definition. The Committee interprets that definition as applying to a parent or other person having legal custody under a court order or judgment in one of the specified types of actions. That is, both the "parent" and the "other person" must have custody as a result of court order or judgment.

1989 Wisconsin Act 31, section 2836am, created § 948.01(1r) to provide: "'Legal custody' has the meaning given in § 767.001(2)."

5. In State v. Campbell, 2006 WI 99, 294 Wis.2d 100, 718N.W.2d 649, the court rejected the defendant's claim that the trial court erred when it prevented him from collaterally attacking the custody order on the ground that his wife obtained the order by fraud. The supreme court concluded that "a court

may permit a collateral attack on a judgment or order procured by fraud if the fraud is jurisdictional, making the judgment or order void, thereby negating an element of a crime, or if the fraud raises an affirmative defense to the crime. Because Campbell's allegations of fraud do not tend to negate any element of a crime and do not constitute an affirmative defense, the circuit court properly excluded evidence of the alleged fraud and prevented Campbell from collaterally attacking the custody order." 2006 WI 99, ¶4.

6. Section 948.31(1) applies to orders resulting from several types of legal proceedings: divorce, legal separation, annulment, custody, paternity, guardianship, or habeas corpus. The applicable term should be specified in the blank provided.

7. Add "or consent of the court" if court consent is raised by the evidence. See discussion in note 2, supra.

8. See § 939.22(48). Where the custodial parent consents to the taking of the child based on the defendant's misrepresentation about the nature of the taking, "public policy calls for treatment of the consent . . . as a nullity." State v. Inglin, 224 Wis.2d 764, 773, 592 N.W.2d 666 (Ct. App. 1999), citing § 939.48(22)(c).

9. The source of the knowledge requirement is § 939.23(3), which provides that whenever the word "intentionally" is used in a criminal statute, "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally'."

In State v. Britzke, 108 Wis.2d 675, 683, 324 N.W.2d 289 (Ct. App. 1982), the court of appeals interpreted the prior version of the statute defining this offense. The court held that knowledge of the existence of the court order is sufficient; it is not necessary to prove that the defendant knew the order had the effect of granting "legal custody." [Affirmed on other grounds, 110 Wis. 728, 329 N.W.2d 207 (1983), per curiam.]

The Committee concluded that this means that knowledge of what "legal custody" means is not required. The intent element is satisfied if the defendant knew that the court order existed and knew that it had the effect of transferring the custody of the child. This is consistent with the court's definition of "legal custody" as any custody transferred under a court order (even if that order affects only the "physical custody" of the child).

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2167 INTERFERENCE WITH CUSTODY OF A CHILD — § 948.31(2)[1]

Statutory Definition of the Crime

Interference with the custody of a child, as defined in § 948.31(2) of the Criminal Code of Wisconsin, is committed by one who (causes a child to leave) (takes a child away) (withholds a child for more than 12 hours)[2] from the parents[3] of the child without the consent[4] of the parents.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. On (date of alleged offense), (name of child) had not attained the age of 18 years.[5]
2. (Name of parents) were the parents[6] of (name of child).
3. The defendant (caused (name of child) to leave) (took (name of child) away) (withheld (name of child) for more than 12 hours)[7] from (name of parents) without their consent.[8]

   "Without consent" means no consent in fact.[9]

   The act need not be accompanied by force or violence.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2167 was originally published in 1989. This revision was approved by the Committee in April 2009; it involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 948.31(2), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1835 which applied to what was essentially the same offense under § 946.71(4), 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Affirmative defenses are recognized by subsection (4) of § 948.31. The burden of persuasion is placed on the defendant to establish them by a preponderance of the evidence. See the discussion of the affirmative defense provision in Wis JI-Criminal 2169.

1. Wis JI-Criminal 2167 is drafted for a violation of § 948.31(2) which involves taking a child from the parents. For a case involving a taking from the mother of a nonmarital child, see Wis JI-Criminal 2167A.

2. Section 948.31(2) reads in part as follows: ". . . causes a child to leave, takes a child away or withholds a child for more than 12 hours . . ." The Committee interprets this statute as prohibiting any causing to leave, any taking away, and the withholding for more than 12 hours. That is, the "for more than 12 hours" applies only to the "withholding" alternative, not to the causing to leave or taking. [Note: the "withholding" alternative under this statute does not include a reference to "beyond the court-approved period" that is included in sub. (1)(b) of § 948.31).]

The 2009 revision added all the statutory alternatives, in parentheses, to the text of the instruction. This was done to avoid the problem that arose in State v. Inglin, 224 Wis.2d 764, 592 N.W.2d 666 (Ct. App. 1999), where the trial court may have inadvertently failed to completely revise the standard instruction for a "withholding" case under § 948.31(1)(b). The error was not prejudicial because the court of appeals found the evidence was sufficient to support conviction for "taking away." See note 9, below.

"A defendant causes a child to leave a parent if the defendant is responsible for or brings about an abandoning, departing or going away from the parent. 'Causes to leave' suggests the defendant engages in some sort of mental , rather than physical, manipulation by doing things to persuade the child to leave the parent. Force or violence is unnecessary and the conduct need not be intentional." State v. Bowden, 2007 WI App 234, ¶16, 306 Wis.2d 393, 742 N.W.2d 332. Also see, State v. Samuel, 2001 WI App 25, 240 Wis.2d 756, 623 N.W.2d 565.

3. Although the statute uses the plural, "parents," it also applies to taking from one parent. See § 990.001(1): "The singular includes the plural, and the plural includes the singular."

4. Section 948.31(2) (as amended by 1989 Wisconsin Act 31, section 2836ym) concludes with the statement: "This subsection is not applicable if legal custody has been granted by court order to the person taking or withholding the child." The Committee assumes that court consent is usually a matter of record and can be clearly resolved. In a case where court consent is a factual issue, the Committee concluded that the matter should be treated in the same manner as other statutory exceptions. That is, the matter of court consent need not be included in the criminal complaint and only becomes an issue when it is raised by the evidence. If the issue is raised by the evidence, the state must prove beyond a reasonable doubt that there was no consent by the court. The phrase "or consent of the court" could simply be added at this point and to the third element.

5. The statute applies to interfering with the custody of any "child," defined in § 948.01(1) as "any person who has not attained the age of 18 years." This is a change from the counterpart offense under prior law, which applied only to children under the age of 14. See § 946.71(4), 1985-86 Wis. Stats.

6. See note 3, supra.

7. Section 948.31(2) does not require that the acts be done "intentionally." (Compare § 948.31(1)(b) and § 946.71(4), 1985-86 Wis. Stats., which do include "intentionally.") The Committee assumed this was not an inadvertent omission and neither "intentionally" nor any knowledge requirement is included in the instruction. (Compare Wis JI-Criminal 2166 for violations of § 948.31(1)(b).)

8. Add "or consent of the court" if court consent is raised by the evidence. See note 4, supra.

9. See § 939.22(48). Where a parent consents to the taking of the child based on the defendant's misrepresentation about the nature of the taking, "public policy calls for treatment of the consent . . . as a nullity." State v. Inglin, 224 Wis.2d 764, 773, 592 N.W.2d 666 (Ct. App. 1999), citing § 939.48(22)(c).

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2167A INTERFERENCE WITH CUSTODY OF A NONMARITAL CHILD — § 948.31(2)[1]

Statutory Definition of the Crime

Interference with the custody of a child, as defined in § 948.31(2) of the Criminal Code of Wisconsin, is committed by one who (causes a child to leave) (takes a child away) (withholds a child for more than 12 hours)[2] from the (mother of the child) (father of the child, if he has been granted legal custody) without the consent[3] of the (mother) (father) where the child is a nonmarital child whose parents have not intermarried.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. On (date of alleged offense), (name of child) had not attained the age of 18 years.[4]

2. (Name of parent) was the (mother) (father who had been granted legal custody) of (name of child).

3. (Name of child) is a nonmarital child.

   A nonmarital child is one who is neither conceived nor born while his or her parents are lawfully married to each other and whose parents have not subsequently married each other.[5]

4. The defendant (caused (name of child) to leave) (took (name of child) away) (withheld (name of child) for more than 12 hours)[6] from (name of parent) without(his) (her) consent.[7]

"Without consent" means no consent in fact.[8]

The act need not be accompanied by force or violence.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2167A was originally published in 1989. This revision was approved by the Committee in April 2009 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 948.31(2), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1835A which applied to what was essentially the same offense under § 946.71(4), 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Affirmative defenses are recognized by subsection (4) of § 948.31. The burden of persuasion is placed on the defendant to establish them by a preponderance of the evidence. See the discussion of the affirmative defense provision in Wis JI-Criminal 2169.

1. Wis JI-Criminal 2167A is drafted for a violation of § 948.31(2) which involves taking a child from the mother of a nonmarital child or from the father of the child, if he has been granted legal custody. For a case involving a taking of a marital child from the parents, see Wis JI-Criminal 2167.

In State v. Hill, 91 Wis.2d 446, 283 N.W.2d 451 (Ct. App. 1979), the court held that the then-existing version of the statute replaced by § 948.31(1) did not deny equal protection of the laws or due process to fathers of nonmarital children.

2. Section 948.31(2) reads in part as follows: ". . . causes a child to leave, takes a child away or withholds a child for more than 12 hours . . ." The Committee interprets this statute as prohibiting any causing to leave, any taking away, and the withholding for more than 12 hours. That is, the "for more

than 12 hours" applies only to the "withholding" alternative, not to the causing to leave or taking. [Note: the "withholding" alternative under this statute does not include a reference to "beyond the court-approved period" that is included in sub. (1)(b) of § 948.31).]

The 2009 revision added all the statutory alternatives, in parentheses, to the text of the instruction. This was done to avoid the problem that arose in State v. Inglin, 224 Wis.2d 764, 592 N.W.2d 666 (Ct. App. 1999), where the trial court may have inadvertently failed to completely revise the standard instruction for a "withholding" case under § 948.31(1)(b). The error was not prejudicial because the court of appeals found the evidence was sufficient to support conviction for "taking away." See note 8, below.

"A defendant causes a child to leave a parent if the defendant is responsible for or brings about an abandoning, departing or going away from the parent. 'Causes to leave' suggests the defendant engages in some sort of mental, rather than physical, manipulation by doing things to persuade the child to leave the parent. Force or violence is unnecessary and the conduct need not be intentional." State v. Bowden, 2007 WI App 234, ¶16, 306 Wis.2d 393, 742 N.W.2d 332. Also see, State v. Samuel, 2001 WI App 25, 240 Wis.2d 756, 623 N.W.2d 565.

3. Section 948.31(2) (as amended by 1989 Wisconsin Act 31, section 2836ym) concludes with the statement: "This subsection is not applicable if legal custody has been granted by court order to the person taking or withholding the child." The Committee assumes that court consent is usually a matter of record and can be clearly resolved. In a case where court consent is a factual issue, the Committee concluded that the matter should be treated in the same manner as other statutory exceptions. That is, the matter of court consent need not be included in the criminal complaint and only becomes an issue when it is raised by the evidence. If the issue is raised by the evidence, the state must prove beyond a reasonable doubt that there was no consent by the court. The phrase "or consent of the court" could simply be added at this point and to the third element.

4. The statute applies to interfering with the custody of any "child," defined in § 948.01(1) as "any person who has not attained the age of 18 years." This is a change from the counterpart offense under prior law, which applied only to children under the age of 14. See § 946.71(4), 1985-86 Wis. Stats.

5. This definition of "nonmarital child" is based on the one provided in § 990.01(23m). Both the § 990.01(23m) definition and the statement of this offense in § 948.31(2) include the reference: "where parents do not intermarry under s. 767.60." Section 767.60 provides that a nonmarital child becomes a marital child "[i]n any case where the father and mother of any nonmarital child shall enter into a lawful marriage." Since the section apparently applies to any subsequent marriage of the parents of a nonmarital child, there appeared to be no reason to include it in the instruction.

6. Section 948.31(2) does not require that the acts be done "intentionally." (Compare § 948.31(1)(b) and § 946.71(4), 1985-86 Wis. Stats., which do include "intentionally.") The Committee assumed this was not an inadvertent omission and neither "intentionally" nor any knowledge requirement is included in the instruction. (Compare Wis JI-Criminal 2166 for violations of § 948.31(1)(b).)

7. Add "or consent of the court" if there is evidence of court consent in the case. See note 3, supra.

8. See § 939.22(48). Where a parent consents to the taking of the child based on the defendant's misrepresentation about the nature of the taking, "public policy calls for treatment of the consent . . . as a

nullity." State v. Inglin, 224 Wis.2d 764, 773, 592 N.W.2d 666 (Ct. App. 1999), citing § 939.48(22)(c).

2168 INTERFERENCE WITH THE CUSTODY OF A CHILD BY A PARENT OR PERSON ACTING PURSUANT TO THE DIRECTION OF A PARENT: CONCEALING A CHILD[1] — § 948.31(3)(a)

Statutory Definition of the Crime

Interference with the custody of a child by a parent, as defined in § 948.31(3)(a) of the Criminal Code of Wisconsin, is committed by (a parent) (any person acting pursuant to directions from a parent) who intentionally conceals a child from the child's other parent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. On (date of alleged offense), (name of child) had not attained the age of 18 years.[2]
2. (Name of defendant) was (a parent)[3] (acting pursuant to directions from a parent) of (name of child).
3. (Name of defendant) concealed (name of child) from the other parent.

   "Conceal" means to hide the child or do something else which prevents or makes more difficult the discovery of the child by the other parent.[4]
4. The defendant intentionally concealed (name of child).

This requires that the defendant acted with the purpose[5] to conceal (name of child) from the other parent and to interfere with that parent's custody rights.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2168 was originally published in 1989. This revision was approved by the Committee in April 2009; it involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 948.31(3), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1838 which applied to what was essentially the same offense under § 946.715, 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Affirmative defenses are recognized by subsection (4) of § 948.31. The burden of persuasion is placed on the defendant to establish them by a preponderance of the evidence. See the discussion of the affirmative defense provision in Wis JI-Criminal 2169.

The prior version of this statute, § 946.715, 1985-86 Wis. Stats., is discussed in State v. McCoy, 143 Wis.2d 274, 420 N.W.2d 107 (1988), affirming 139 Wis.2d 291, 407 N.W.2d 319 (Ct. App. 1987).

1. This instruction is drafted for offenses under subsection (3)(a) of § 948.31 whereby one parent intentionally conceals a minor child from the child's other parent. Additional offenses are defined by subsections (3)(b) and (c), for which there are no suggested uniform instructions.

2. See § 948.01(1).

3. The only statutory definition of "parent" is found in § 48.02(13), which reads:

> "Parent" means either a biological parent, a husband who has consented to the artificial insemination of his wife under s. 891.40, or a parent by adoption. If the child is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.803, "parent" includes a person acknowledged under s. 767.805 or a substantially similar law of another state or adjudicated to be the biological father. "Parent" does not include any person whose parental rights have been terminated.

4. The definition of "conceal" is adapted from the one used in Wis JI-Criminal 1481, Receiving or Concealing Stolen Property.

5. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one part of the definition. It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

6. The Committee concluded that the essence of this offense, as indicated by the title of the statute, is concealing a child with the purpose of interfering with the custody rights of the other parent – specifically, the right to be with the child and know where the child is.

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2169 INTERFERENCE WITH THE CUSTODY OF A CHILD: AFFIRMATIVE DEFENSES — § 948.31(4)

IF THERE IS EVIDENCE OF AN AFFIRMATIVE DEFENSE RECOGNIZED IN § 948.31(4), SUBSTITUTE THE FOLLOWING FOR THE FINAL TWO PARAGRAPHS OF THE APPLICABLE INSTRUCTION:

If you are not satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must find the defendant not guilty.

If you are satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must consider whether the action taken by the defendant (state the applicable defense as set forth in subsecs. (4)(a)1.-4.).[1]

Wisconsin law provides that it is a defense to this crime if the person took the action (state the applicable defense).[2]

The burden is on the defendant to satisfy you to a reasonable certainty by the greater weight of the credible evidence that (state the applicable defense).

By the greater weight of the evidence is meant evidence which, when weighed against that opposed to it, has more convincing power. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that the defendant (state the applicable defense), you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that the defendant (state the applicable defense) and you are satisfied beyond a

reasonable doubt that all the elements of this offense have been proved, you should find the defendant guilty.

COMMENT

Wis JI-Criminal 2169 was approved by the Committee in August 1989; the comment was updated in 1994. This revision was approved by the Committee in February 2009; it involved adoption of a new format and nonsubstantive changes to the text.

Subsection (4) of § 948.31 recognizes four affirmative defenses to the crime of interference with the custody of a child and imposes the burden of persuasion on the defendant to establish the defense. When there is evidence raising one of the defenses, the instruction for the offense charged must be modified. This instruction illustrates a general format for modifying the final two paragraphs of the instruction on the substantive offense.

Subsection (4) of § 948.31 provides as follows:

(4)(a) It is an affirmative defense to prosecution for violation of this section if the action:

1. Is taken by a parent or by a person authorized by a parent to protect his or her child in a situation in which the parent or authorized person reasonably believes that there is a threat of physical harm or sexual assault to the child;

2. Is taken by a parent fleeing in a situation in which the parent reasonably believes that there is a threat of physical harm or sexual assault to himself or herself;

3. Is consented to by the other parent or any other person or agency having legal custody of the child; or

4. Is otherwise authorized by law.

(b) A defendant who raises an affirmative defense has the burden of proving the defense by a preponderance of the evidence.

The defenses stated in sub. (4)(a).1 and 2. were changed by 1993 Wisconsin Act 302, effective date: April 29, 1994. Before the change, subsection (a)1. referred to actions taken to protect the child "from imminent physical harm or sexual assault"; sub. (a)2. referred to a parent fleeing "from imminent physical harm to himself or herself."

The defenses specified in subsecs. (4)(a)1. and 2. appear to be true "affirmative defenses." That is, they describe facts that are not inconsistent with the facts necessary to constitute the crime. However, the defenses specified in subsec. (4)(a)3. and 4. may, at least in some cases, be the same as the statutory elements of the crimes to which they might apply. For example, subsec. (4)(a)3. provides that the consent of the parent is a defense. If applied to the offense defined in § 948.31(2), it would make consent a defense to a crime which has "without consent" as a required element. It violates due process to relieve

the state of its burden to prove all required elements beyond a reasonable doubt by use of affirmative defenses or presumptions. (See the more extensive discussion of these principles in the Comment to Wis JI-Criminal 2152.) The Committee recommends that the consent defense not be the subject of a special jury instruction in cases involving charges under § 948.31(1)(b) and § 948.31(2) which have "without consent" as an element, at least where the consent issue relates to the consent of one individual. (It could be possible, one supposes, that the charge could be based on taking a child without the consent of the legal guardian and the defense could be raised that the parent consented. In such a case, the elements of the crime and the defense could coexist, avoiding constitutional problems.) The Committee perceives no problem in treating consent as an affirmative defense to charges under § 948.31(3) because "without consent" is not an element of that crime. Similar problems could arise with respect to the "otherwise authorized by law" defense specified in subsec. (4)(a)4. Care should be taken to assure that the defense does not duplicate, and shift the burden of persuasion on, a fact that is already identified by the statute as a fact necessary to constitute the crime.

The former version of one statute replaced by § 948.31 – § 946.715, 1985-86 Wis. Stats. – also recognized defenses that were similar to some of those at issue here. One of those provisions recognized a defense if the action was taken "to protect the child from imminent physical harm." (Compare subsec. (4)(a)1., above.) The constitutionality of that defense was extensively discussed in State v. McCoy, 143 Wis.2d 274, 420 N.W.2d 107 (1988), affirming 139 Wis.2d 291, 407 N.W.2d 319 (Ct. App. 1987). The court held that the phrase "imminent physical harm" was not unconstitutionally vague because "[i]t gives reasonable notice of proscribed conduct to persons bent on obedience of the law and to those who must apply it," 143 Wis.2d 274, 288.

In McCoy, supra, the Wisconsin Supreme Court also held that the legislature intended that a "reasonable person" standard apply to the defense:

> While recognizing that § 946.715, Stats., does not expressly articulate the level of objective or subjective belief a person must hold before the privilege to conceal arises, an analysis of this statute supports a finding that a reasonable person standard was intended. Subsection (1) of the statute evidences the legislature's broad concern for deterrence of parental child snatching, regardless of the marital status of the parents, creating a remedy for the other parent by imposing felony sanctions. Subsection (2) expressly exempts a person from liability when providing protection for minor children who are in danger of imminent physical harm. We conclude that both provisions can only be harmonized by imposing a reasonableness standard on action taken to protect a child from imminent harm.
>
> The language of this statute encourages the maintenance of parental rights against unlawful interruption. A test, as proposed by the defendant, based strictly on subjective belief would vitiate this purpose, permitting a child to be concealed any time harm seemed imminent to a parent, no matter how irrational the belief. This court has determined that an interpretation which fulfills the objectives of a statute is to be favored over an interpretation which would defeat legislative objectives. Belleville State Bank v. Steele, 117 Wis.2d 563, 570, 345 N.W.2d 405, 409 (1984). A subjective standard would not serve the objectives of this statute.

143 Wis.2d 274, 290-91.

Thus, the court concluded that "[l]anguage requiring the defendant's actions to be 'reasonably necessary' . . . properly reflected the treatment of this privilege as a statutory defense." 143 Wis.2d 274, 291.

For a discussion of the evidence required to raise the affirmative defense, see State v. Inglin, 224 Wis.2d 764, 592 N.W.2d 666 (Ct. App. 1999).

1. Here summarize the applicable defense from subsec. (4)(a)1.-4. For example, for the defense set forth in (4)(a)1., the statement might be completed as follows: ". . . that the parent took the action to protect the child in a situation in which the parent reasonably believed that there was a threat of physical harm to the child."

2. See note 1, supra.

2170 CONTRIBUTING TO THE DELINQUENCY OF A CHILD — § 948.40(1)

Statutory Definition of the Crime

Contributing to the delinquency of a child, as defined in § 948.40(1) of the Criminal Code of Wisconsin, is committed by any person who intentionally encourages or contributes to the delinquency of a child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) was under the age of 18 years.[1]

   Knowledge of (name of child)'s age by the defendant is not required[2] and mistake regarding (name of child)'s age is not a defense.[3]

2. The defendant intentionally encouraged or contributed to the delinquency of (name of child).

Meaning of "Intentionally Encourage or Contribute"

The term "intentionally encourages or contributes" means that the defendant either had a purpose to encourage or contribute to delinquency or was aware that (his) (her) conduct was practically certain to cause that result.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Meaning of "Delinquency"

Delinquency is any violation of state criminal law by a child.[5]

Committing (name crime) violates state criminal law.

The crime of (name crime) is committed by one who

> LIST THE ELEMENTS OF THE INTENDED CRIME AS DEFINED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[6]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[It is not required that the child actually commit a delinquent act. A defendant's conduct contributes to the delinquency of a child if the natural and probable consequences of that conduct would be to cause the child to commit a delinquent act.][7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2170 was originally published in 1989 and revised in 1997, 2001, 2009, and 2011. This revision was approved by the Committee in October 2022; it removed a reporter's note from the comment concerning "embedded crimes."

This instruction is for a violation of § 948.40, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989, and replaces the delinquency portion of Wis JI-Criminal 1960 which has been withdrawn.

Section 948.40 addresses the delinquency portion of the crime covered by former sec. 947.15, Contributing To The Delinquency Or Neglect Of A Child. The neglect portion is addressed by a separate statute, sec. 948.20.

The basic penalty is that of a Class A misdemeanor. "If the child's act which is encouraged or contributed to is a violation of a state or federal criminal law which is punishable as a felony, the person is guilty of a Class H felony." Section 948.40(4)(b). If death is a consequence, the penalty is that of a Class D felony. Section 948.40(4)(a). See Wis JI-Criminal 2170A.

This instruction is for an offense under subsection (1) of § 948.40, where the defendant may be any person. Subsection (2) applies where a person responsible for the welfare of a child is alleged to have contributed to the delinquency of a child by disregard of the welfare of the child. See Wis JI Criminal 2171.

1. A seventeen-year-old is a "child" for purposes of this offense, even though a person of that age would not be a juvenile for purposes of prosecuting the child. State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909, 790 N.W.2d 909, affirming, 2009 WI 161, 321 Wis.2d 752, 776 N.W.2d 602.

2. This is the rule provided in § 939.23(6).

3. This is the rule provided in § 939.43(2).

4. This is the definition of "intentionally" provided in § 939.23. The "aware that his conduct is practically certain to cause that result" alternative was added by the 1987 revision of the homicide statutes. See Wis JI-Criminal 923A and 923B for further discussion of the definition of "intentionally."

5. Section 948.40(1) formerly referred to § 48.02(3m) for the definition of delinquency. That reference was eliminated by 1995 Wisconsin Act 77. "Delinquent" is defined in § 938.02(3m):

> 938.02(3m) "Delinquent" means a juvenile who is 10 years of age or older who has violated any state or federal criminal law. . .

The instruction is drafted for what is expected to be the most common case: where the basis for delinquency is a violation of Wisconsin criminal law.

Only children over the age of 10 can be considered delinquent if they violate a criminal law. However, it is an offense under § 948.40 if a person intentionally encourages or contributes to an act by a child under the age of 10 if that act would be a delinquent act if committed by a child over the age of 10 (§ 948.40(1)). Therefore, the simple definition of "delinquent" in the instruction should be accurate for purposes of this

offense.

6. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

The Committee concluded that the jury need not be instructed that they must reach unanimous agreement as to what delinquent act was encouraged, if evidence has been introduced that tends to show more than one. The Wisconsin Court of Appeals reached the same conclusion in a similar situation, holding that unanimity is not required as to which felony was intended in a prosecution for burglary with intent to commit a felony. State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997). See the Comment to Wis JI-Criminal 517, collecting cases addressing jury unanimity.

Violations of § 948.40 are punished as a Class A misdemeanor unless either death results [see Wis JI Criminal 2170A] or the child's act encouraged or contributed to is punishable as a felony. The Committee concluded that a jury determination on the felony issue is required because that fact increases the maximum sentence for the crime. See, Apprendi v. New Jersey, 530 U.S. 466 (2000). By specifying a crime in the definition of "delinquency," the instruction assures that a jury verdict of guilty will include a finding that the crime was the felony or misdemeanor specified.

It could be possible that reasonable views of the evidence could differ as to the felony status of the delinquent act. For example, a case could involve a dispute over the value of stolen property; giving the standard theft instruction, including the special question regarding value, would allow the jury to make the required finding. See Wis JI-Criminal 1441.

7. This is the rule stated in subsection (3) of § 948.40, which includes reference to "failure to take action." The instruction's reference to "the defendant's conduct" is intended to cover affirmative acts and failure to act.

2170A CONTRIBUTING TO THE DELINQUENCY OF A CHILD: DEATH AS A CONSEQUENCE — § 948.40(1), (4)(a)

Statutory Definition of the Crime

Contributing to the delinquency of a child, as defined in § 948.40(1) of the Criminal Code of Wisconsin, is committed by any person who intentionally encourages or contributes to the delinquency of a child where death is a consequence.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) was under the age of 18 years.[1]

   Knowledge of (name of child)'s age by the defendant is not required[2] and mistake regarding (name of child)'s age is not a defense.[3]

2. The defendant intentionally encouraged or contributed to the delinquency of (name of child).

3. Death of (name of child)[4] was a consequence of intentionally encouraging or contributing to the delinquency of (name of child).

   This requires that the defendant's contributing to the delinquency of (name of child) was a substantial factor in producing the death of (name of child).[5]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Meaning of "Intentionally Encourage or Contribute"

The term "intentionally encourages or contributes" means that the defendant either had a purpose to encourage or contribute to delinquency or was aware that (his) (her) conduct was practically certain to cause that result.[6]

Meaning of "Delinquency"

Delinquency is any violation of state criminal law by a child.[7]

Committing (name crime) violates state criminal law.

The crime of (name crime) is committed by one who

> LIST THE ELEMENTS OF THE INTENDED CRIME AS DEFINED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[8]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[It is not required that the child actually commit a delinquent act. A defendant's conduct contributes to the delinquency of a child if the natural and probable consequences of that conduct would be to cause the child to commit a delinquent act.][9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense

have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1989 and was revised in 1997, 2001, 2009, 2010, and 2011. This revision was approved by the Committee in October 2022; it removed a reporter's note from the comment concerning "embedded crimes."

This instruction is for a violation of § 948.40, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989, and replaces the delinquency portion of Wis JI-Criminal 1960 which has been withdrawn.

Section 948.40 addresses the delinquency portion of the crime covered by former sec. 947.15, Contributing To The Delinquency Or Neglect Of A Child. The neglect portion is addressed by a separate statute, sec. 948.20.

The basic penalty is that of a Class A misdemeanor. "If the child's act which is encouraged or contributed to is a violation of a state or federal criminal law which is punishable as a felony, the person is guilty of a Class H felony." Section 948.40(4)(b). If death is a consequence, the penalty is that of a Class D felony. Section 948.40(4)(a).

This instruction is for an offense based on subsection (1) of § 948.40, where the defendant may be any person. Subsection (2) applies where a person responsible for the welfare of a child is alleged to have contributed to the delinquency of a child by disregard of the welfare of the child. See Wis JI-Criminal 2171.

Charging a defendant with violating § 948.40(4)(a) and with first degree reckless homicide under § 940.02(2) is not multiplicitous. The offenses each require proof of a fact that the other does not and there is no evidence that the legislature did not intend multiple punishments. Further, a violation of § 948.40(4)(a) is not "a less serious type of criminal homicide" under § 939.66(2) and thus is not a lesser included offense of first degree reckless homicide. State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909.

1. A seventeen-year-old is a "child" for purposes of this offense, even though a person of that age would not be a juvenile for purposes of prosecuting the child. State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909.

2. This is the rule provided in § 939.23(6).

3. This is the rule provided in § 939.43(2).

4. Section 948.40(4)(a) provides that the penalty for contributing to the delinquency of a child

increases to that of a Class D felony "if death was a consequence." The same phrase was used in prior law, see § 947.15(1), 1985 86 Wis. Stats. The statutory language does not indicate whether the death must be of the child to whose delinquency the defendant contributes or whether it extends to other persons who are harmed by the child's conduct.

5. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Section 948.40 does not use the word "cause" but rather refers to death being "a consequence." In this respect, it is like several other criminal statutes using "results in" or "as a result" to establish the causal connection between the actor's conduct and the prohibited result. The Committee has concluded that "as a result" or "results in" should be interpreted to mean "cause," traditionally defined in terms of "substantial factor." This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court held that § 346.17(3) was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that he defendant's conduct was a substantial factor in causing the death. The court noted that more than but for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

6. This is the definition of "intentionally" provided in § 939.23. The "aware that his conduct is practically certain to cause that result" alternative was added by the 1987 revision of the homicide statutes. See Wis JI-Criminal 923A and 923B for further discussion of the definition of "intentionally."

7. Section 948.40(1) formerly referred to § 48.02(3m) for the definition of delinquency. That reference was eliminated by 1995 Wisconsin Act 77. "Delinquent" is defined in § 938.02(3m):

> 938.02(3m) "Delinquent" means a juvenile who is 10 years of age or older who has violated any state or federal criminal law. . .

The instruction is drafted for what is expected to be the most common case: where the basis for delinquency is a violation of Wisconsin criminal law.

Only children over the age of 10 can be considered delinquent if they violate a criminal law. However, it is an offense under § 948.40 if a person intentionally encourages or contributes to an act by a child under the age of 10 if that act would be a delinquent act if committed by a child over the age of 10 (§ 948.40(1)). Therefore, the simple definition of "delinquent" in the instruction should be accurate for purposes of this offense.

8. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App.

1991)].

The Committee concluded that the jury need not be instructed that they must reach unanimous agreement as to what delinquent act was encouraged, if evidence has been introduced that tends to show more than one. The Wisconsin Court of Appeals reached the same conclusion in a similar situation, holding that unanimity is not required as to which felony was intended in a prosecution for burglary with intent to commit a felony. State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997). See the Comment to Wis JI-Criminal 517, collecting cases addressing jury unanimity.

9. This is the rule stated in subsection (3) of § 948.40, which includes reference to "failure to take action." The instruction's reference to "the defendant's conduct" is intended to cover affirmative acts and failure to act.

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2171 CONTRIBUTING TO THE DELINQUENCY OF A CHILD BY A PERSON RESPONSIBLE FOR THE CHILD'S WELFARE — § 948.40(2)

Statutory Definition of the Crime

Contributing to the delinquency of a child, as defined in § 948.40(2) of the Criminal Code of Wisconsin, is committed by any person who is responsible for the child's welfare and who contributes to the delinquency of a child by disregard of the welfare of the child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) was under the age of 18 years.[1]

   Knowledge of (name of child)'s age by the defendant is not required[2] and mistake regarding (name of child)'s age is not a defense.[3]

2. The defendant was responsible for the welfare of (name of child).

   A "person responsible for the child's welfare" includes (use the appropriate term from § 948.01(3)).[4]

3. The defendant contributed to the delinquency of (name of child) by disregard of the child's welfare.

Meaning of "Delinquency"

Delinquency is any violation of state criminal law by a child.[5]

Committing (name crime) violates state criminal law.

The crime of (name crime) is committed by one who

> LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.[6]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[It is not required that the child actually commit a delinquent act. A defendant's conduct contributes to the delinquency of a child if the natural and probable consequences of that conduct would be to cause the child to commit a delinquent act.][7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2171 was originally published in 1989 and revised in 1997, 2001, 2009, 2010 and 2011. This revision was approved by the Committee in October 2022; it removed a reporter's note from the comment concerning "embedded crimes."

This instruction is for a violation of § 948.40, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989, and replaces the delinquency portion of Wis JI-Criminal 1960 which has been withdrawn.

Section 948.40 addresses the delinquency portion of the crime covered by former sec. 947.15, Contributing To The Delinquency Or Neglect Of A Child. The neglect portion is addressed by a separate

statute, sec. 948.20.

The basic penalty is that of a Class A misdemeanor. "If the child's act which is encouraged or contributed to is a violation of a state or federal criminal law which is punishable as a felony, the person is guilty of a Class H felony." Section 948.40(4)(b). If death is a consequence, the penalty is that of a Class D felony. Section 948.40(4)(a). See Wis JI-Criminal 2170A.

This instruction is for an offense under subsection (2) of § 948.40, where the defendant must be a person responsible for the welfare of a child. Subsection (1) applies to any person. See Wis JI-Criminal 2170. This instruction replaces Wis JI-Criminal 1961 which has been withdrawn.

1. A seventeen-year-old is a "child" for purposes of this offense, even though a person of that age would not be a juvenile for purposes of prosecuting the child. State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909.

2. This is the rule provided in § 939.23(6).

3. This is the rule provided in § 939.43(2).

4. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

See Wis JI-Criminal 2106A for discussion of authorities relating to "person responsible for the child's welfare."

5. Section 948.40(1) formerly referred to § 48.02(3m) for the definition of delinquency. That reference was eliminated by 1995 Wisconsin Act 77. "Delinquent" is defined in § 938.02(3m):

938.02(3m) "Delinquent" means a juvenile who is 10 years of age or older who has violated any state or federal criminal law . . .

Only children over the age of 10 can be considered delinquent if they violate a criminal law. However, it is an offense under § 948.40 if a person intentionally encourages or contributes to an act by a child under the age of 10 if that act would be a delinquent act if committed by a child over the age of 10 (‘ 948.40(1)). Therefore, the simple definition of "delinquent" in the instruction should be accurate for purposes of this offense.

6. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

The Committee concluded that the jury need not be instructed that they must reach unanimous

agreement as to what delinquent act was encouraged, if evidence has been introduced that tends to show more than one. The Wisconsin Court of Appeals reached the same conclusion in a similar situation, holding that unanimity is not required as to which felony was intended in a prosecution for burglary with intent to commit a felony. State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997). See the Comment to Wis JI-Criminal 517, collecting cases addressing jury unanimity. However, the jury must unanimously agree that the child's act was a felony if the felony violation of § 948.40 is charged.

Violations of § 948.40 are punished as a Class A misdemeanor unless either death results [see Wis JI-Criminal 2170A] or the child's act encouraged or contributed to is punishable as a felony. The Committee concluded that a jury determination on the felony issue is required because that fact increases the maximum sentence for the crime. See, Apprendi v. New Jersey, 530 U.S. 466 (2000). By specifying a crime in the definition of "delinquency," the instruction assures that a jury verdict of guilty will include a finding that the crime was the felony or misdemeanor specified.

It could be possible that reasonable views of the evidence could differ as to the felony status of the delinquent act. For example, a case could involve a dispute over the value of stolen property; giving the standard theft instruction, including the special question regarding value, would allow the jury to make the required finding. See Wis JI-Criminal 1441.

7. This is the rule stated in subsection (3) of § 948.40, which includes reference to "failure to take action." The instruction's reference to "the defendant's conduct" is intended to cover affirmative acts and failure to act.

2173 CONTRIBUTING TO TRUANCY — § 948.45

Statutory Definition of the Crime

Section 948.45 of the Wisconsin Statutes is violated by any person 17 years of age or older who, by any act or omission, knowingly encourages or contributes to the truancy of a child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had attained the age of 17 years.
2. (Name of child) was under the age of 18 years.[1]

   Knowledge of (name of child)'s age is not required and mistake regarding of (name of child)'s age is not a defense.[2]
3. (Name of child) was truant.

   "Truant" means being absent from school for part or all of one or more days during which the school attendance officer, principal, or teacher has not been notified of the legal cause of the absence.[3]
4. The defendant, by any act or omission, knowingly encouraged or contributed[4] to the truancy of (name of child).

"Knowingly" requires that the defendant knew or believed that the defendant's act or omission would contribute to truancy.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2173 was originally published in 1998. This revision was approved by the Committee in August 2005.

This instruction is drafted for violations of § 948.45(1). Subsection (2) provides: "Subsection (1) does not apply to a person who has under his or her control a child who has been sanctioned under s. 49.26(1)(h)." That reference is to sanctions under the "learnfare" program.

A related offense is defined in § 188.15, Compulsory school attendance. See Wis JI-Criminal 2174.

1. This is the definition of "child" provided in § 948.01(1).

2. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2).

3. This definition is based on the definition of "truancy" in provided in § 118.16(1)(c), which is expressly cross-referenced in § 948.45(1).

4. Section 948.45(3) provides: "An act or omission contributes to the truancy of a child, whether or not the child is adjudged to be in need of protection or services, if the natural and probable consequences of that actor or omission would be to cause the child to be truant."

5. "'Know' requires only that the actor believes that the specified fact exists." § 939.23(2).

2174 COMPULSORY SCHOOL ATTENDANCE — § 118.15(1) and (5)

Statutory Definition of the Crime

Section 118.15 of the Wisconsin Statutes is violated by a person who has under (his) (her) control a child between the ages of 6 and 18 years and fails to cause the child to attend school regularly during the full period and hours that the school is in session until the end of the school term, quarter or semester of school year in which the child becomes 18 years of age.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had a child who was between the ages of 6 and 18 years under (his)(her) control.

   This requires that the defendant was a person who had the legal right and duty to control the child, that is, the child's parent or guardian.[1]

2. The defendant failed to cause the child to attend school regularly during the full period and hours that the school is in session until the end of the school term, quarter or semester of school year in which the child becomes 18 years of age.

   "Regularly" means "constantly and uniformly."[2]

USE THE FOLLOWING CLOSING IF THERE IS NO EVIDENCE OF THE "DISOBEDIENCE" DEFENSE RECOGNIZED IN §118.15(5)(b)2.[3]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

USE THE FOLLOWING CLOSING IF THERE IS EVIDENCE OF THE "DISOBEDIENCE" DEFENSE RECOGNIZED IN §118.15(5)(b)2.[4]

Consider Whether The Defense Is Proved

Wisconsin law provides that it is a defense to this crime if the defendant was unable to comply with the law because of the disobedience of the child.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.[5]

Evidence has greater weight when it has more convincing power that the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.[6]

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, and you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied that both elements of this offense have been proved, you must find the defendant not guilty.[7]

COMMENT

Wis JI-Criminal 2174 was approved by the Committee in August 2005.

This instruction is drafted for violations of § 118.15, Compulsory school attendance. The offense is defined primarily in sub. (1)(a); the penalty is set forth in sub. (5). Extensive exceptions are set forth in subs. (1)(b) to (d) and (4) which are not addressed in the instruction.

A related offense is defined in § 948.70, Contributing to truancy. See Wis JI-Criminal 2173.

In State v. White, 180 Wis.2d 203, 509 N.W.2d 434 (Ct. App. 1993), the court of appeals held that § 118.15 was not unconstitutionally vague.

1. State v. McGee, 2005 WI App 97, _14, 281 Wis.2d 756, 698 N.W.2d 850.

2. State v. White, 180 Wis.2d 203, 215, 509 N.W.2d 434 (Ct. App. 1993).

3. Section 118.15(5)(b)2. provides that "if the defendant proves that he or she is unable to comply with the law because of the disobedience of the child, the action shall be dismissed." If there is evidence of this defense, use the alternative closing provided.

4. Section 118.15(5)(b)2. provides that "if the defendant proves that he or she is unable to comply with the law because of the disobedience of the child, the action shall be dismissed." In State v. McGee, 2005 WI App 97, 281 Wis.2d 756, 698 N.W.2d 850, the court held that "the disobedience exception . . . is an affirmative defense to the charge here and thus should be presented to the fact-finder during the trial for resolution." ¶12. Where there is evidence of this defense in the case, the alternative set of closing paragraphs should be used.

5. Section 118.15(5)(b)2. expressly places the burden of persuasion on the defendant but does not state what that burden is. The Committee concluded that the civil burden of persuasion should apply, as is the case under other criminal statutes that require the defendant to prove a defense.

6. This is a slight revision of the standard description of the civil burden of proof, intended to improve its understandability. No change in meaning is intended.

7. Three concluding paragraphs are used to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and,

2) not guilty even though the elements are proven, because the defense has been established.

2175 CHILD UNATTENDED IN A CHILD CARE VEHICLE — § 948.53

Statutory Definition of the Crime

Section 948.53 of the Criminal Code of Wisconsin is violated by a person responsible for a child's welfare while the child is being transported in a child care vehicle who leaves the child unattended at any time from the time the child is placed in the care of that person to the time the child is placed in the care of another person responsible for the child's welfare.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) was placed in the care of the defendant.
2. (Name of child) was being transported in a child care vehicle.

"Child care vehicle" means a vehicle that is owned or leased by a child care provider or a contractor of the child care provider and that is used to transport children to and from the child care provider.[1]

"Child care provider" means [a child care center that is licensed under section 48.65(1)] [a child care provider that is certified under section 48.651] [a

child care program that is established or contracted for under section 120.13(14)].[2]

3. The defendant was a person responsible for (name of child)'s welfare[3] while (name of child) was being transported in a child care vehicle.

4. The defendant left (name of child) unattended before (name of child) was placed in the care of another person responsible for the child's welfare.

5. (Name of child) had not attained the age of 18 years.

[Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.[4]]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE DEFENDANT IS CHARGED WITH A FELONY OFFENSE.[5]

If you find the defendant guilty, you must consider the following question:

"Was (bodily harm) (great bodily harm) (death) a consequence of leaving (name of child) unattended?"

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[6]]

["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[7]]

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that (bodily harm) (great bodily harm) (death) was a consequence of leaving (name of child) unattended?

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2175 was approved by the Committee in July 2012.

This instruction is for violations of § 948.53. A simple violation is a Class A misdemeanor. The penalty increases to a Class I felony if bodily harm is a consequence; to a Class H felony if great bodily harm is a consequence; and to a Class G felony if death is a consequence. § 948.53(2)(b). If a felony violation is charged, the Committee recommends adding a special question if the evidence would support a finding that the penalty-increasing fact is established.

1. This is the definition provided in § 948.53(1)(b).

2. This is the definition provided in § 948.53(1)(a).

3. The term "person responsible for the child's welfare" is defined in § 948.01(3). It lists categories of persons that the term "includes," the last of which may be most likely to apply to this offense: "a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child."

4. See §§ 939.23(6) and 939.43(2).

5. A simple violation of § 948.53 is a Class A misdemeanor. The penalty increases to a Class I felony if bodily harm is a consequence; to a Class H felony if great bodily harm is a consequence; and to a Class G felony if death is a consequence. § 948.53(2)(b). If a felony violation is charged, the Committee recommends adding a special question if the evidence would support a finding that the penalty-increasing fact is established. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of leaving a child unattended in a child care vehicle under Wis. Stat. § _____, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Was (bodily harm) (great bodily harm) (death) a consequence of leaving (name of child) unattended in a child care vehicle?"

6. This is the definition provided in § 939.22(4).

7. This is the definition provided in § 939.22(14). Also see Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

2176 POSSESSION OF A DANGEROUS WEAPON BY A CHILD[1] — § 948.60(2)(a)

Statutory Definition of the Crime

Possession of a dangerous weapon by a child, as defined in § 948.60(2)(a) of the Criminal Code of Wisconsin, is committed by any child who possesses or goes armed with a dangerous weapon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed an object.[2]

"Possessed" means that the defendant knowingly had the object under (his) (her) actual physical control.[3]

Deciding About Knowledge[4]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

2. The object was a dangerous weapon.

A _____ is a dangerous weapon.[5]

3. The defendant had not attained the age of 18 years[6] at the time (he) (she) allegedly possessed a dangerous weapon.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2176 was originally published in 1989 and revised in 1991, 1992, 1998, 2009, and 2011. The 2011 revision corrected a statutory cross-reference in footnote 4 to reflect a change made by 2011 Wisconsin Act 35. This revision was approved by the Committee in August 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

This instruction is for a violation of § 948.60(2)(a). Section 948.60 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1325 which applied to what was essentially the same offense under § 941.22, 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Section 948.60 was amended by 1991 Wisconsin Act 18 (see note 4, below) and by 1991 Wisconsin Act 139. The latter divided what was formerly sub. (2) into sub (2)(a) and (b). For violations of § 948.60(2)(b) involving selling a dangerous weapon to a child, see Wis JI-Criminal 2177.

The statute provides an exception for possession by a child in a course of instruction in the traditional and proper use of the weapon under adult supervision. See § 948.60(3)(a). Additional exceptions are recognized in subsections (3)(b) and (c); they were added by 1991 Wisconsin Act 18, effective date: June 8, 1991. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. This instruction is for the offense defined by § 948.60(2)(a) that can be committed only by a child. Section 948.60(2)(d) provides: "A person under 17 years of age who has violated this subsection is subject to the provisions of Ch. 938 unless jurisdiction is waived under s. 938.18 or the person is subject to the jurisdiction of a court of criminal jurisdiction under s. 938.183."

2. The statute applies to any child "who possesses or goes armed with" a dangerous weapon. (Former § 941.22 referred only to "goes armed with.") By adding the alternative of simple possession, the revision appears to make "goes armed with" superfluous. To the extent the two terms have a different meaning, "possess" is the more inclusive one. See the discussion of "goes armed with" in Wis JI-Criminal 1335.

3. The definition of "possession" is based on the one provided in Wis JI-Criminal 920. That instruction also includes optional explanations for cases where an object is arguably under the defendant's control but not in his physical possession. The approach taken in Wis JI-Criminal 920 was cited with approval in State v. Allbaugh, 148 Wis.2d 807, 436 N.W.2d 898 (Ct. App. 1989).

"Knowingly" is used because inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see Wis JI-Criminal 6000, Note on the Knowledge Requirement in Controlled Substances Cases.

4. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 3, supra. The Committee concluded that sec. 948.60(2)(a) does not require proof that defendants know of the prohibition against possessing the dangerous weapon. This conclusion is based on sec. 939.23(1).

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 939 to 951, such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute.

5. "Dangerous weapon" is specially defined for purposes of this offense; the definition in § 939.22(10) does not apply. Section 948.60(1) provides:

> In this section, "dangerous weapon" means any firearm loaded or unloaded; any electric weapon, as defined in s. 941.295(1c)(a); metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles; a nunchaku or any similar weapon consisting of 2 sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather; a cestus or similar material weighted with metal or other substance and worn on the hand; a shuriken or any similar pointed star-like object intended to injure a person when thrown; or a manrikigusari or similar length of chain having weighted ends.

This definition is essentially a list of seven objects that constitute a dangerous weapon for purposes of this offense. The Committee recommends inserting the name of the object into the instruction rather than reading the complete statutory definition. Note that many items that would qualify as dangerous weapons under § 939.22(10) do not fall within this definition.

The definition was amended by 1991 Wisconsin Act 18 (effective date: June 8, 1991) to substitute "loaded or unloaded" for "having a barrel less than 12 inches long" immediately after the word "firearm" in the first line of the definition.

6. "Child" is defined in this way in § 948.01(1).

2177 SALE, LOAN, OR GIFT OF A DANGEROUS WEAPON TO A CHILD — § 948.60(2)(b)

Statutory Definition of the Crime

Section 948.60(2)(b) of the Criminal Code of Wisconsin is violated by any person who intentionally sells, loans, or gives a dangerous weapon to a child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (sold) (loaned) (gave) an object to (name of child).

   "Intentionally" means that the defendant had the purpose to (sell) (loan) (give) an object to (name of child).[1]

2. The object was a dangerous weapon.

   A _____ is a dangerous weapon.[2]

3. The defendant knew that the object was a dangerous weapon.[3]

4. (Name of child) had not attained the age of 18 years[4] at the time the defendant allegedly (sold) (loaned) (gave) (him) (her) a dangerous weapon.

   Knowledge of (name of child)'s age is not required[5] and mistake regarding age is not a defense.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2177 was originally published in 1989 and revised in 1991, 1992 and 2009. This revision was approved by the Committee in October 2011; it corrected a statutory cross-reference in footnote 2 to reflect a change made by 2011 Wisconsin Act 35.

This instruction is for a violation of § 948.60(2)(b). Section 948.60 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1326 which applied to what was essentially the same offense under § 941.22, 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Section 948.60 was amended by 1991 Wisconsin Act 18 (see note 2, below) and by 1991 Wisconsin Act 139. The latter divided what was formerly sub. (2) into sub. (2)(a) and (2)(b). For violations of § 948.60(2)(a), involving possession of a dangerous weapon by a child, see Wis JI-Criminal 2176.

1991 Wisconsin Act 139 also created sub. (2)(c), which provides that violations of sub. (2)(b) become Class H felonies "if the child under par. (b) discharges the firearm and the discharge causes death to himself, herself, or another." See Wis JI-Criminal 2177A for a suggested instruction for the Class H felony offense.

The statute provides several exceptions. See § 948.60(3) and the discussion preceding note 1, Wis JI-Criminal 2176.

1. "Intentionally" is defined in § 939.23(3). The definition changed effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changed from "reasonably believes his act, if successful, will cause that result" to "is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

2. "Dangerous weapon" is specially defined for purposes of this offense; the definition in § 939.22(10) does not apply. Section 948.60(1) provides:

> In this section, "dangerous weapon" means any firearm loaded or unloaded; any electric weapon, as defined in s. 941.295(1c)(a); metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles; a nunchaku or any similar weapon consisting of 2 sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather; a cestus or similar material weighted with metal or other substance and worn on the hand; a shuriken or any similar pointed star-like object intended to

injure a person when thrown; or a manrikigusari or similar length of chain having weighted ends.

This definition is essentially a list of seven objects that constitute a dangerous weapon for purposes of this offense. The Committee recommends inserting the name of the object into the instruction rather than reading the complete statutory definition. Note that many items that would qualify as dangerous weapons under § 939.22(10) do not fall within this definition.

The definition was amended by 1991 Wisconsin Act 18 (effective date: June 8, 1991), to substitute "loaded or unloaded" for "having a barrel less than 12 inches long" immediately after the word "firearm" in the first line of the definition.

3. Section 939.23(3) provides that "intentionally" requires knowledge of all facts necessary to make the conduct criminal and appearing after the word "intentionally" in the statute.

4. "Child" is defined this way in § 948.01(1).

5. Section 939.23(6).

6. Section 939.43(2).

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2177A SALE, LOAN, OR GIFT OF A FIREARM TO A CHILD: DEATH CAUSED — § 948.60(2)(c)

Statutory Definition of the Crime

Section 948.60(2)(c) of the Criminal Code of Wisconsin is violated by any person who intentionally sells, loans, or gives a firearm[1] to a child if the child discharges the firearm and causes death to that child or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (sold) (loaned) (gave) a loaded or unloaded firearm to (name of child) .

   "Intentionally" means that the defendant had the purpose to (sell) (loan) (give) a firearm to (name of child) .[2]

   The term "firearm" means a weapon that acts by force of gunpowder.[3]

2. (Name of child) had not attained the age of 18 years[4] at the time the defendant allegedly (sold) (loaned) (gave) (him) (her) a firearm.

   Knowledge of (name of child) 's age is not required[5] and mistake regarding age is not a defense.[6]

3. (Name of child) discharged the firearm and had not attained the age of 18 years at the time.

To "discharge a firearm" simply means to shoot a gun.[7]

4. The discharge of the firearm caused the death of [(name of child)] [another person].

"Cause" means that the discharging of the firearm was a substantial factor in producing the death.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2177Awas originally published in 1992. This revision was approved by the Committee in February 2009 and involved adoption of a new format and nonsubstantive changes to the text.

Section 948.60 was amended by 1991 Wisconsin Acts 18 and 139. The latter change created a new felony offense which is addressed by this instruction and applies to offenses committed on or after April 16, 1992. Subsections (2)(b) and (c) provide the penalties:

> (2)(b) Except as provided in par. (c), any person who intentionally sells, loans or gives a dangerous weapon to a child is guilty of a Class I felony.
> (c) Whoever violates par. (b) is guilty of a Class H felony if the child under par. (b) discharges the firearm and the discharge causes death to himself, herself or another.

See Wis JI-Criminal 2177 for an instruction for the Class I felony offense under (2)(b).

1. "Dangerous weapon" is specially defined for purposes of violations of § 948.60. See § 948.60(1). But because violations of sub. (2)(c) require discharge of a firearm, none of the other alternatives provided in sub. (1) could apply. Thus, the instruction simply refers to "firearm" throughout.

2. "Intentionally" is defined in § 939.23(3). The definition changed effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changed from "reasonably believes his act, if successful, will cause that result" to "is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense. Implicit in this element's requirement of purpose is knowledge that the object was a firearm. Section 939.23(3) provides that "intentionally" requires knowledge of all facts necessary to make the conduct criminal and appearing after the word "intentionally" in the statute.

3. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes air guns.

4. "Child" is defined in this way in § 948.01(1).

5. Section 939.23(6).

6. Section 939.43(2).

7. This definition is used in instructions for other offenses requiring "discharge" of a firearm. See, for example, Wis JI-Criminal 1322.

8. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it or the acts of two or more persons might jointly produce it.

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2178A POSSESSION OF A FIREARM IN A SCHOOL ZONE — § 948.605(2)(a)

Statutory Definition of the Crime

Possession of a firearm on school grounds, as defined in § 948.605(2) of the Criminal Code of Wisconsin, is committed by any person who knowingly possesses a firearm at a place that the person knows, or has reasonable cause to believe, is in or on the grounds of a school.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly possessed a firearm.

   "Possessed" means that the defendant knowingly had a firearm under (his) (her) actual physical control.[1]

   The term "firearm" means a weapon that acts by the force of gunpowder.[2]

2. The defendant possessed a firearm in or on the grounds of a school.[3]

   ["School" means a public, parochial, or private school or a tribal school which provides an education program for one or more grades between grades 1 and 12 and which is commonly known as an elementary school, middle school, junior high school, senior high school, or high school.][4]

3. The defendant knew or had reasonable cause to believe that (he) (she) possessed a firearm in or on the grounds of a school.

"Reasonable cause to believe" means that a reasonable person in the defendant's position would have believed that the place where the firearm was possessed was in or on the grounds of a school.

Deciding About Knowledge Or Belief

You cannot look into a person's mind to determine knowledge or belief. Knowledge or belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and belief.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2178Awas originally published in 1991 and revised in 2009. It was amended in 2012 to reflect changes made by 2011 Wisconsin Act 35. This revision was approved by the Committee in July 2015; it revised the Comment.

This instruction is for a violation of § 948.605(2), created by 1991 Wisconsin Act 17. The statute had an effective date of September 1, 1991 and is a Class I felony. Subsection (3) of § 948.605 makes it a Class G felony to discharge a firearm in a school zone. See Wis JI-Criminal 2178B.

Related offenses are addressed by the following statutes: § 948.61, Dangerous weapons other than firearms on school premises (see Wis JI-Criminal 2179); § 941.20, Endangering safety by use of a dangerous weapon (see Wis JI-Criminal 1305 and 1321-1324); and § 941.23, Carrying a concealed weapon (see Wis JI-Criminal 1335).

Subsection (2)(b) of § 948.605 sets forth eight situations where the prohibition of sub. (2)(a) does not apply. The exceptions in sub. (2)(b)2d., 2f., and 2h. were created by 2015 Wisconsin Act 23 [effective date: June 26, 2015]. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 250 N.W.2d 38 (1951). Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, the are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. The definition of "possession" is based on the one provided in Wis JI-Criminal 920. That instruction also includes optional explanations for cases where an object is arguably under the defendant's control but not in his physical possession. The approach taken in Wis JI-Criminal 920 was cited with approval in State v. Allbaugh, 148 Wis.2d 807, 436 N.W.2d 898 (Ct. App. 1989).

The statutes expressly refers to "knowingly possesses." Even without such reference, "knowingly" would be required because inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see Wis JI-Criminal 6000, Note on the Knowledge Requirement in Controlled Substances Cases.

2. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes air guns.

3. 2011 Wisconsin Act 35 amended § 948.605(2) to limit the criminal offense to possession of a firearm "in or on the grounds of a school." Offenses "within 1,000 feet of the grounds of a school" are no longer criminal – they are Class B forfeitures (for those without a concealed carry license).

4. This is the definition of "school" provided in § 948.61(1)(b); § 948.605(1)(b) states that it applies to this offense.

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2178B DISCHARGE OF A FIREARM IN A SCHOOL ZONE — § 948.605(3)(a)

Statutory Definition of the Crime

Discharge of a firearm in a school zone, as defined in § 948.605(3) of the Criminal Code of Wisconsin, is committed by any person who knowingly[1] discharges[2] a firearm at a place that the person knows is a school zone.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly[3] discharged a firearm.

   The term "firearm" means a weapon that acts by the force of gunpowder.[4]

   To "discharge a firearm" simply means to shoot a gun.[5]

2. The defendant discharged a firearm in a school zone.

   "School zone" means in or on the grounds of a school (or within 1,000 feet from the grounds of a school).[6]

   ["School" means a public, parochial, or private school which provides an education program for one or more grades between grades 1 and 12 and which is commonly known as an elementary school, middle school, junior high school, senior high school, or high school.][7]

3. The defendant knew that (he) (she) was in a school zone when (he) (she) discharged a firearm.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2178B was originally published in 1991 and revised in 2009. This revision was approved by the Committee in July 2015; it revised the Comment.

This instruction is for a violation of § 948.605(3), created by 1991 Wisconsin Act 17. The statute had an effective date of September 1, 1991, and is punished as a Class G felony. Subsection (2) of § 948.605 makes it a Class I felony to possess a firearm in a school zone. See Wis JI-Criminal 2178A.

Related offenses are addressed by the following statutes: § 948.61, Dangerous weapons other than firearms on school premises (see Wis JI-Criminal 2179); § 941.20, Endangering safety by use of a dangerous weapon (see Wis JI-Criminal 1305 and 1321-1324); and § 941.23, Carrying a concealed weapon (see Wis JI-Criminal 1335).

Subsection (3)(b) of § 948.605 sets forth seven situations where the prohibition of sub. (3)(a) does not apply. The exceptions in sub. (3)(b)5., 6., and 7. were created by 2015 Wisconsin Act 23 [effective date: June 26, 2015]. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 250 N.W.2d 38 (1951). Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, the are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. The instruction deals only with "knowingly" discharging a firearm. But note that the statute reads in the disjunctive: ". . . knowingly, or with reckless disregard for the safety of another." Since the statute is written in the alternative, the Committee assumed that proof of either alternative is sufficient and that proof of "reckless disregard" is not required in all cases. If that is the case, it seems that the "reckless disregard" alternative would require substantially greater proof than the "knowingly" alternative

requires. "Recklessness" under the Criminal Code requires that the actor create a substantial and unreasonable risk of death or great bodily harm and that the actor be aware of that risk. See § 939.24. The "knowingly" alternative apparently requires only that the defendant know that he discharged a firearm; no additional risk to others or awareness of such a risk is necessary. That being the case, the Committee expects that all cases would be charged and prosecuted under the "knowingly" alternative.

2. The statute also prohibits "attempts to discharge" a firearm. If an attempt is involved, the instruction would have to be modified accordingly. See Wis JI-Criminal 580 for the general definition of "attempt," which may be useful in developing an instruction for the attempt variety of this offense (which is, of course, punished the same as the completed crime in this instance).

3. See note 1, supra.

4. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes air guns.

5. This definition is used in Wis JI-Criminal 1322.

6. This is the definition of "school zone" provided in § 948.605(1)(b).

7. This is the definition of "school" provided in § 948.61(1)(b); § 948.605(1)(b) states that it applies to this offense.

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2179 DANGEROUS WEAPONS OTHER THAN FIREARMS ON SCHOOL PREMISES — § 948.61

Statutory Definition of the Crime

Section 948.61 is violated by a person who knowingly possesses or goes armed with a dangerous weapon on school premises.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed an object.

   "Possessed" means that the defendant knowingly had the object under (his) (her) actual physical control.[1]

2. The object was a dangerous weapon.

   A "dangerous weapon" is (any device designed as a weapon and capable of producing death or great bodily harm) (any device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm).[2]

3. The defendant possessed a dangerous weapon on school premises.

"School premises" means any school building, grounds, recreation area or athletic field, or any other property owned, used, or operated for school administration.[3]

["School" means a public, parochial, or private school which provides an education program for one or more grades between grades 1 and 12 and which is commonly known as an elementary school, middle school, junior high school, senior high school, or high school.][4]

4. The defendant knew that (he) (she) possessed a dangerous weapon and knew that (he) (she) was on school premises.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2179 was originally published in 1991 and revised in 1994. This revision was approved by the Committee in April 2009; it involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 948.61, which is punished as a Class A misdemeanor if a first offense but as a Class E felony "if the violation is the person's 2nd or subsequent violation of this section within a 5-year period, as measured from the dates the violations occurred." § 948.61(2)(b). This instruction may be used for either the misdemeanor felony offenses. As to the latter, the Committee concluded that the fact of prior conviction need not be submitted to the jury. "Other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) [emphasis added.]

Section 948.61 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It was amended by 1991 Wisconsin Act 17, effective date: September 1, 1991. The amendment limited this statute to dangerous weapons other than firearms. The same Act created § 948.605 which prohibits possession of a firearm in a school zone. See Wis JI-Criminal 2178A.

1. The definition of "possession" is based on the one provided in Wis JI-Criminal 920. That instruction also includes optional explanations for cases where an object is arguably under the defendant's control but not in his physical possession. The approach taken in Wis JI-Criminal 920 was cited with approval in State v. Allbaugh, 148 Wis.2d 807, 436 N.W.2d 898 (Ct. App. 1989).

The statute expressly refers to "knowingly possesses." Even without such reference, "knowingly" would be required because inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

The evidence was found to be sufficient to establish "knowingly possessed" in a prosecution under § 948.61 in In Interest of Michelle A.D., 181 Wis.2d 917, 512 N.W.2d 248 (Ct. App. 1994).

2. Section 948.61(1)(a) provides that "'dangerous weapon' has the meaning specified in § 939.22(10), except 'dangerous weapon' does not include any firearm." The Committee suggests using the part of the statutory definition that applies to the facts of the case. The definition in the instruction does not include all the alternatives provided in § 939.22(10), which, as amended by 2007 Wisconsin Act 127 and excluding "firearm," provides as follows:

> "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede partially or completely, breathing or circulation of blood; any electric weapon as defined in § 941.295(4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

A "BB" air pistol is a "dangerous weapon" under §§ 948.61 and 939.22(10). In Interest of Michelle A.D., 181 Wis.2d 917, 512 N.W.2d 248 (Ct. App. 1994).

See Wis JI-Criminal 910 for discussion of substantive issues relating to "dangerous weapon."

3. This is the definition of "school premises" provided in § 948.61(1)(c).

4. This is the definition of "school" provided in § 948.61(1)(b).

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2180 RECEIVING STOLEN PROPERTY FROM A CHILD — § 948.62

Statutory Definition of the Crime

Receiving stolen property from a child, as defined in § 948.62 of the Criminal Code of Wisconsin, is committed by one who intentionally receives stolen property from a person who has not attained the age of 18 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally received (describe property) from (name of child).

   "Intentionally" requires that the defendant had the mental purpose to receive the property.[1]

   "To receive" means to acquire possession or control over the property.

2. (Name of child) was under the age of 18 years at the time the property was received.

   Knowledge of (name of victim)'s age is not required[2] and mistake regarding (name of victim)'s age is not a defense.[3]

3. The (describe property) was stolen property.[4]

Property is stolen property when it has intentionally been taken from the owner without consent and with the intent to deprive the owner of its possession permanently.[5]

4. When the property was received, the defendant knew that it was stolen property.[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF A FELONY OFFENSE IS CHARGED BASED ON THE PROPERTY BEING A FIREARM, ADD THE FOLLOWING.[8]

[If you find the defendant guilty, answer the following question:

"Was the property a firearm?"

A firearm is a weapon that acts by force of gunpowder.[9]

Answer: "yes" or "no."]

IF A FELONY OFFENSE IS CHARGED, BASED ON THE VALUE OF THE PROPERTY, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A

FINDING THAT THE VALUE OF THE PROPERTY WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[10]

[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of the property more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the property more than $2,500?"

Answer: "yes" or "no.")

("Was the value of the property more than $500?"

Answer: "yes" or "no.")

"Value" means the market value of the property or the replacement cost, whichever is less.[11] Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.].

COMMENT

Wis JI-Criminal 2180 was originally published in 1989 and revised in 2003. The 2003 revision adopted a new format and reflected changes in the penalties made by 2001 Wisconsin Act 109. This revision was approved by the Committee in February 2012; it reflects changes made by 2011 Wisconsin Act 99 [effective date: December 21, 2011].

Section 948.62 ostensibly prohibits two different kinds of conduct: receiving stolen property from a child and concealing stolen property received from a child. This instruction addresses only the receiving offense but should be sufficient to cover all situations. Because the concealing offense requires that the property has been received from a child, proof of the same basic facts (plus concealing) would seem to be required.

2011 Wisconsin Act 99 [effective date: December 21, 2011] amended § 948.62(1)(bm) to apply the Class H felony penalty to receiving a stolen firearm as well as to property whose value exceeds $2,500.

1. "Intentionally" is defined in § 939.23(3). It includes not only "mental purpose" but also being

"aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

2. Section 939.23(6).

3. Section 939.43(2).

4. The instruction for receiving stolen property in violation of § 943.34 explains this requirement as follows:

> A prior theft or other misappropriation in violation of the Criminal Code is an essential element of the crime. Accordingly, the state must prove beyond a reasonable doubt that the property was stolen property. State v. Godsey, 272 Wis. 406, 75 N.W.2d 572 (1956). The term "stolen" is not defined in the Criminal Code. Necessarily, the term includes all forms of theft covered by § 943.20(1) of the Criminal Code.
>
> Wis JI-Criminal 1481, n. 6.

5. The definition of "stolen property" provided in the instruction is appropriate for the usual case where the property was obtained by theft under § 943.20(1)(a). The standard instruction must be modified if the property was obtained by fraudulent representation or other type of criminal misappropriation.

6. Section 939.23(3) provides that when the word "intentionally" is used in a statute, it requires "knowledge of those facts which are necessary to make the conduct criminal and which are set forth after the word 'intentionally'." Also see, State v. Godsey, 272 Wis. 406, 75 N.W.2d 572 (1956); Oosterwyk v. State, 242 Wis. 398, 8 N.W.2d 346 (1943); Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1956); Meath v. State, 174 Wis. 80, 82, 83, 182 N.W. 334 (1921).

7. Evidence that the defendant was in "unexplained possession of recently stolen property" will often be offered as evidence tending to prove knowledge that the property was stolen. Caution should be exercised in instructing the jury on this issue, see Wis JI-Criminal 173, Circumstantial Evidence – Unexplained Possession of Recently Stolen Property, and the Comment to that instruction.

8. 2011 Wisconsin Act 99 [effective date December 21, 2011] amended § 948.62(1)(bm) to provide that a violation of the statute is a Class H felony "if the property is a firearm." Formerly, the Class H felony penalty applied only if the value of the property exceeded $2,500. The Committee has concluded that addressing these penalty-increasing facts by submitting a special question is the most efficient approach.

9. Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

10. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it

determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed by 2001 Wisconsin Act 109 [effective date: February 1, 2003]. The revised penalties are as follows:

- if the value of the property does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $500 but not $2,500, the offense is a Class I felony;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class H felony; and,
- if the value of the property exceeds $5,000, the offense is a Class G felony.

The questions in the instruction omit the upper limits of the categories for Class I and Class H felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

11. This is based on the definition provided in § 943.20(2)(d). See note 9, Wis JI-Criminal 1441.

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2185 RECKLESSLY STORING A FIREARM — § 948.55(2)

Statutory Definition of the Crime

Section 948.55(2) of the Criminal Code of Wisconsin is violated by any person who recklessly stores or leaves a loaded firearm within the reach or easy access of a child and the child obtains the firearm without the lawful permission of his or her parent or guardian or the person having charge of the child and the child discharges the firearm and the discharge causes bodily harm or death to himself, herself, or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant recklessly stored or left a loaded firearm within the reach or easy access of a child.

   "Child" means a person who has not attained the age of 14 years.[1]

   A "firearm" is a weapon that acts by force of gunpowder.[2]

   "Recklessly" means that the defendant's storing or leaving of the firearm created an unreasonable and substantial risk of death or great bodily harm to another human being and the defendant was aware of that risk.[3]

2. A child obtained the firearm without the lawful permission of his or her parent or guardian or the person having charge of the child.

3. The child discharged the firearm and the discharge caused (bodily harm) (death) to (the child) (another person).[4]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2185 was approved by the Committee in December 2012.

This instruction is for a violation of subsec. (2) of § 948.55, which is punished as a Class A misdemeanor. Subsection 948.55 was created by 1991 Wisconsin Act 139, effective date: April 16, 1992.

Subsections (4)(a) through (h) set forth exceptions to the applicability of § 948.55(2). Also see note 4, below. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1961).

1. Section 948.55(1).

2. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1882). This definition excludes airguns.

3. This is the definition of "criminal recklessness" provided in § 939.24(1). "If criminal recklessness is an element of a crime in Chs. 939 to 951, the recklessness is indicated by the term 'reckless' or 'recklessly.'" Section 939.24(2). Section 948.55(2) uses the term "recklessly."

4. Section 948.55(5) provides that "[s]ubsection (2) does not apply if the bodily harm or death resulted from an accident that occurs while the child is using the firearm in accordance with § 29.304 or 948.60(3)." Section 29.304 relates to parental supervision and hunter education and firearm safety programs for persons under 16 years of age; § 948.60(3) refers to target practice and instruction in proper use of weapons under the supervision of adults. See the Comment preceding note 1, supra, relating to the recommended treatment of such statutory exceptions.

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2196 REGISTERED SEX OFFENDER AND PHOTOGRAPHING MINORS — § 948.14

Statutory Definition of the Crime

Section 948.14 is violated by a person who is required to register under section 301.45 who intentionally captures a representation of any minor without the written consent of the minor's parent, legal custodian, or guardian.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a person who was required to register under § 301.45.

   A person who (describe the applicable criterion set forth in subs. (1g) of § 301.45 [1] is required to register.

2. The defendant captured a representation[2] of a minor.

   A minor is an individual who is under 17 years of age.[3]

   "Captures a representation" means takes a photograph, makes a motion picture, videotape, or other visual representation, or records or stores in any medium data that represents a visual image.[4]

3. The defendant captured the representation of the minor without the written consent of the minor's (parent) (legal custodian) (guardian).

[The written consent must state the person seeking consent is required to register under § 301.45.][5]

4. The defendant captured the representation intentionally.

This requires that the defendant acted with the purpose to capture the representation of the minor and knew that the minor's parent did not provide written consent.[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2196 was approved by the Committee in August 2007.

This instruction is for violations of § 948.14, created by 2005 Wisconsin Act 432. [Effective date: June 6, 2006.]

1. Specify the subsection of § 301.45(1g) that allegedly required the defendant to register as a sex offender.

2. Section 948.14(1)(c) provides that "'representation' has the meaning given in s. 942.09(1)(c)." That definition states: "'Representation' means a photograph, exposed film, motion picture, videotape, other visual representation, or data that represents a visual image." "Representation" is not separately defined here; the Committee concluded that it is adequately covered by the definition of "captures a representation" in element 2.

3. See § 948.14(1)(b).

4. This is the definition provided in § 942.09(1)(a), without change. Section 948.14(1)(a) provides that it applies to this offense.

5. Include the sentence in brackets if the case involved evidence of a written consent.

6. The use of "intentionally" requires "a purpose to do the thing or cause the result specified . . . [and] knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'" in the statute. See § 939.23(3). In this statute, that appears to require purpose to capture the representation – as distinguished, for example, from accidentally having a minor in the background of a photo intended to be of something or someone else. And it requires knowledge of "without parent's consent," a fact necessary to make the conduct criminal.

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2198 FAILURE TO COMPLY WITH SEX OFFENDER REGISTRATION REQUIREMENTS — § 301.45

Statutory Definition of the Crime

Section 301.45 of the Wisconsin Statutes is violated by one who knowingly fails to comply with a requirement to provide information under that statute.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a person who was required to provide information under section 301.45.

   A person who (describe the applicable criterion set forth in subs. (1g) of § 301.45) [1] is required to provide information under section 301.45.

2. The defendant failed to provide information as required.

   Section 301.45____ provides that persons required to provide information under section 301.45 must (describe the requirement set forth in subs. (2)-(4) of § 301.45) .[2]

3. The defendant knowingly failed to provide the required information.

   This requires that the defendant knew that (he) (she) was required to provide the information.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2198 was approved by the Committee in December 2004 and revised in 2012. This revision was approved by the Committee in June 2021; it updated the Comment.

This instruction provides a very general model for violations of § 301.45, Sex offender registration. The statute imposes a very detailed and complex set of requirements for persons who have been adjudicated for a sex offense. The key provisions are as follows:

- Those who are covered by the registration requirement are identified in sub. (1g) of § 301.45.
- The requirements for registration and providing information are set forth in subs. (2) to (4) of § 301.45.
- Subsection (6)(a) specifies criminal penalties for "whoever knowingly fails to comply with any requirement to provide information under subs. (2) to (4) . . ."
- Subsection (6)(ag) specifies criminal penalties for "whoever intentionally violates sub. (4r) . . ."
- Subsection (4r) restricts establishing or changing residence without complying with applicable requirements.

The instruction provides a model for violations based on sub. (6)(a): knowingly failing to comply with requirements in subs. (2) to (4). The basis for the defendant's being required to register should be described in element 1; the information that was not provided as required should be described in element 2.

2009 Wisconsin Act 131 [effective date: March 4, 2010] created § 301.45(2)(a)6m. to add email accounts, internet addresses for web sites, etc., to the information that must be provided by those required to register.

The sex offender registration law is not unconstitutional as applied to a defendant convicted of the non-sexual false imprisonment of a minor. False imprisonment in violation of § 940.30 is considered a "sex offense" under § 301.45(1d)(b) if the victim was a minor and the defendant was not the victim's parent.

Requiring registration in this type of case "is rationally related to a legitimate governmental interest." State v. Smith, 2010 WI 16, ¶40, 323 Wis.2d 377, 780 N.W.2d 90.

In State v. Dinkins, 2012 WI 24, 339 Wis.2d 78, 810 N.W.2d 787, the conviction of a homeless sex offender for failing to provide the address at which he will be residing as required by § 301.45(6) was reversed. The court held:

> . . . we conclude that a registrant cannot be convicted of violating Wis. Stat. § 301.45(6) for failing to report the address at which he will be residing when he is unable to provide this information. We determine that a registrant is unable to provide the required information when that information does not exist, despite the registrant's reasonable attempt to provide it. ¶5.

In reaching this conclusion, the court relied on the "unable to provide" language found in Wis. Stat. § 301.45(2)(d) which provides in relevant part:

> A person subject to [the registration requirements] who is not under the supervision of the [DOC] or the [DHS] shall provide the information specified in par. (a) to the [DOC] in accordance with the rules under sub. (8). If the person is unable to provide an item of information specified in par. (a), the [DOC] may request assistance from a circuit court or the [DHS] in obtaining that item of information.

In State v. Savage, 2020 WI 93, 935 Wis.2d 1, 951 N.W.2d 838, the Wisconsin Supreme Court reexamined Dinkins and its application to homeless registrants under the supervision of the Department of Corrections. The court held that "Dinkins does not conclude that homeless sex offenders are exempt from registration requirements." See id., ¶46. Instead, Dinkins merely answered the narrow question of whether a registrant, who is not under supervision, can be convicted under § 301.45(6) for failing to notify the Department of Corrections of the address at which they will be residing upon release from prison.

In contrast, registrants under the supervision of the Department of Corrections are subject to a different paragraph than the defendant in Dinkins. Specifically, the information requirements of such registrants are controlled by § 301.45(2)(b), which does not contain a provision for a person unable to provide information as provided in § 301.45(2)(d). Therefore, as the court in Savage provided, "Any hypothetical defenses formulated based upon the 'unable to provide' holding in Dinkins cannot be imputed to a case dealing with a defendant who is under DOC supervision pursuant to §301.45(2)(b)." See Savage, supra, 935 Wis.2d 1, ¶46.

In State v. Triebold, 2021 WI App 13, 396 Wis.2d 176, ¶13, 955 N.W.2d 415, the court held that the registrant's failure to update the Wisconsin Department of Corrections of a change of address that occurred exclusively within the jurisdiction of Minnesota had "the consequence of depriving Wisconsin authorities of information concerning the location of his residence." The court concluded that Wis. Stat expressly prohibits such a consequence. § 301.45.

The Triebold court also determined that double jeopardy principles did not preclude the registrant's dual convictions in Minnesota and Wisconsin under Wis. Stat. § 939.71 or Blockburger v. United States, 284 U.S. 299, 304 (1932) because the two offenses required proof of different facts. Triebold, supra, at ¶24-25.

In State v. Freland, 2011 WI App 80, 344 Wis.2d 722, 800 N.W.2d 18, the court of appeals ruled that the defendant was entitled to withdraw his plea of guilty to a felony charge of failing to provide sex offender information as required by § 301.45(2)(e). The plea was not knowing, voluntary, or intelligent because he

was not aware that the out-of-state conviction on which the registration requirement was based was eligible to be treated as a misdemeanor under § 301.45(6).

1. Subsection (1g) lists the categories of persons who are subject to the requirements of § 301.45. The applicable category should be used in the blank in element 1. For example, "A person who was convicted for a sex offense after December 25, 1993, is required to provide information under section 301.45." Offenses that are "sex offenses" are listed in § 301.45(1d)(b).

2. Specify the subsection of § 301.45 that is involved in the case and describe the requirement that was allegedly violated.

2199 SEX OFFENDER NAME CHANGE — § 301.47(2)(a)-(b)

Statutory Definition of the Crime

Section 301.47(2)(a) and (b) of the Wisconsin Statutes is violated by one who is subject to the requirements of section 301.45, and who intentionally changes his or her name or identifies by a name not identified with the Wisconsin Department of Corrections.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a sex offender[1] subject to the reporting requirements of section 301.45.
2. Before being released from the reporting requirements of section 301.45, the defendant intentionally [changed (his) (her) name][2] [identified (himself) (herself) by a name other than one by which (he) (she) is identified with the Wisconsin Department of Corrections].

   This requires that the defendant acted with the mental purpose to [change (his) (her) name] [identify (himself) (herself) by a name other than one by which (he) (she) is identified with the Wisconsin Department of Corrections].[3]

[It is not a defense to prosecution under this section that the department failed to (attempt to) notify the defendant of the prohibition (against using a name by which he or she is not identified with the department).][4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all two elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2199 was approved by the Committee in 2021. This revision was approved by the Committee in October 2022; it updated the comment.

This instruction is for violations of § 301.47(2)(a) and (b), created by 2003 Wisconsin Act 53 [effective date: September 5, 2003]. Section 301.47(3) provides: "Except as provided in par. (b), the person is guilty of a Class H felony."

1. Wis. Stat. § 301.47(1) provides "In this section, 'sex offender' means a person who is subject to s. 301.45 (1g) but does not include a person who, as a result of a proceeding under s. 301.45 (1m), is not required to comply with the reporting requirements of s. 301.45."

2. The Wisconsin Supreme Court has clarified that when read together, Wis. Stat. § 301.47(2)(a) and § 301.47(2)(a)1. do not prohibit a registrant from using an alias, provided the registrant notifies the

Department of Corrections of their intent to do so in advance. State v. C.G., 2022 WI 60, ¶56, 403 Wis.2d 229, 976 N.W.2d 318. Wis. Stat. § 301.47(2)(a) does, however, prohibit a registrant from petitioning the circuit court for a legal name change under § 786.36. Id.

3. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

4. This instruction should be given when warranted by the evidence. § 301.47(4).

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2300 INQUEST: PRELIMINARY INSTRUCTION

You have been summoned to serve as jurors at the inquest into the death of (name of deceased) to determine when, in what manner, and by what means (name of deceased) died.[1]

The district attorney will make a brief opening statement to acquaint you with the circumstances of (name of deceased) 's death. After the district attorney's statement, you will hear the testimony of sworn witnesses and examine various courtroom exhibits.

It is your duty to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility of the witnesses and of the weight and credit to be given to their testimony.

In weighing the evidence, you may take into account matters of your common knowledge and your observations and experience in the affairs of life.[2]

You may find that the testimony of one witness is entitled to greater weight than that of another witness, or even of several other witnesses, and you may give it such weight in considering your verdict.[3]

In determining the weight and credit you should give to the testimony of each witness, you should consider interest or lack of interest in the result of this inquest, conduct, appearance, and demeanor on the witness stand, bias or prejudice, if any has been shown, the clearness or lack of clearness of recollections, the opportunity for observing and knowing the matters and things testified to by the witness and the reasonableness of the testimony.

You should also take into consideration the apparent intelligence of each witness, the possible motives for falsifying, and all other facts and circumstances which tend either to support or to discredit the testimony, and then give to the testimony of each witness such weight and credit as you believe its is fairly entitled to receive.[4]

After all the evidence is presented, you will be asked to answer a series of questions and return your verdict as to when, in what manner, and by what means (name of deceased) died.

Your verdict must be based only on the evidence presented and the law given to you by the court. Do not let any personal feelings of bias or prejudice about such things as race, religion, national origin, sex, or age affect your deliberations. Consider the testimony and the exhibits, and listen to the court's instructions concerning the law to be applied to facts of the case. Your verdict will be considered by the district attorney in determining whether criminal charges should be filed.

Do not begin your deliberations and discussion of the case until all the evidence is presented and I have instructed you on the law. Do not discuss this case among yourselves or with anyone else until you deliberate in the jury room. If you come in contact with the district attorney, witnesses, or relatives of the deceased, do not speak with them. Do not listen to any conversations about this case.[5]

[ADD WIS JI-CRIMINAL 55, NOTETAKING PERMITTED, OR WIS JI-CRIMINAL 56, NOTETAKING NOT ALLOWED.]

[ADD WIS JI-CRIMINAL 57 IF THE JURORS WILL BE ALLOWED TO ASK QUESTIONS.]

You will not have a copy of the written transcript of the inquest testimony available for use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced at the inquest.[6].

COMMENT

Wis JI-Criminal 2300 was originally published in 1998. This revision was approved by the Committee in June 2009. It adopted a new format and did not make any substantive changes.

This instruction is recommended for use before the presentation of evidence begins at an inquest and is intended to give the jurors a general idea of their duties and how the inquest will proceed.

Any other standard instructions may be added that may appear to be helpful or appropriate. Any that are added should be reviewed to assure that they do not contain a reference to "trial" or "beyond a reasonable doubt."

Final instructions and suggested verdict forms are provided in Wis JI-Criminal 2302.

1. This phrase is adopted from the juror's oath provided in § 979.05(4):

> You do solemnly swear (affirm) that you will diligently inquire and determine on behalf of the state when, and in what manner and by what means, the person known as . . . . . who is now dead came to his or her death and that you will return a true verdict thereon according to your knowledge, according to the evidence presented and according to the instructions given to you by the . . . . (judge) (court commissioner).

2. This is based on Wis JI-Criminal 195, Juror's Knowledge.

3. This is based on Wis JI-Criminal 190, Weight of Evidence.

4. The preceding three paragraphs are based on Wis JI-Criminal 300, Credibility of Witnesses.

5. Portions of the preceding two paragraphs are based on Wis JI-Criminal 50, Preliminary Instruction on Jurors' Conduct, modified for use in the context of an inquest jury.

6. This paragraph is the text of Wis JI-Criminal 58, Transcript Not Available for Deliberations; Reading Back Testimony. Its purpose is to correct any misimpressions jurors may have about the immediate availability of written transcripts of the inquest testimony. The second sentence is in brackets to emphasize that it is not intended to encourage jury requests for reading back testimony and to indicate

that its use is within the court's discretion.

2302 INQUEST: FINAL INSTRUCTIONS: EXPLANATION OF VERDICTS

Members of the jury, this case will now be submitted to you in the form of a special verdict consisting of _____ questions. Your duty is to answer those questions which, according to the evidence and my instructions, it becomes necessary for you to answer to arrive at a completed verdict.[1]

Question 1 asks: Is there probable cause to believe that the death of (name of deceased) was caused under circumstances constituting (name of offense submitted to the jury), contrary to section _____ of the Wisconsin Statutes?[2]

If you answer question 1 "yes," answer question 2. Question 2 asks: Is there probable cause to believe that (name person) committed the offense of (name of offense submitted to the jury), contrary to section _____ of the Wisconsin Statutes, in causing the death of (name of deceased)?[3]

If you answer question 1 "no," answer question 3. Question 3 asks: Is there probable cause to believe that the death of (name of deceased) was a result of [natural causes] [an accident] [suicide] [an act privileged by law]?[4]

All three questions require you to apply the standard of "probable cause."

There is probable cause if the facts and circumstances would cause a cautious and prudent person to reasonably believe that a certain fact situation exists. Probable cause is more than mere suspicion, but the evidence necessary to support a finding of probable cause need not satisfy you beyond a reasonable doubt.[5]

Question 1 asks you to determine whether there is probable cause to believe that the death of (name of deceased) was caused under circumstances constituting (name of offense submitted to the jury) .[6]

DEFINE THE OFFENSE OR OFFENSES TO BE SUBMITTED TO THE JURY; WIS JI-CRIMINAL 1010 THROUGH 1191 ADDRESS HOMICIDE OFFENSES.

Question 3 asks you to determine whether there is probable cause to believe that the death of (name of deceased) was a result of [natural causes] [an accident] [suicide] [an act privileged by law].

["Accident" means that the death was caused by other than criminal means. The possible criminal causes of death that apply to this case were defined in connection with question 1.][7]

["Suicide" means the voluntary and intentional taking of one's own life."][8]

["An act privileged by law" as it applies in this case requires you to consider the privilege of (identify applicable privilege) .][9]

[ADD INSTRUCTION ON THE APPLICABLE PRIVILEGE; SEE WIS JI-CRIMINAL 800 THROUGH 885.]

In answering the questions provided in the verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence. You are to search for the truth.[10]

Your verdict will be advisory, which means that it will be a recommendation to the district attorney whether criminal charges should be filed against any person arising out of the circumstances of (name of deceased) 's death.

Before you may return a verdict which may legally be received, the verdict must be reached unanimously. All the jurors must agree.[11]

When you retire to the jury room, select one of your members to preside over your deliberations. His or her vote is entitled to no greater weight than the vote of any other juror.

When you have agreed upon your verdict, all of you must sign it and it should be dated by the person you have selected to preside.

Swear the officer.

COMMENT

Wis JI-Criminal 2302 was originally published in 1998. This revision was approved by the Committee in June 2009. It adopted a new format and did not make any substantive changes.

This is suggested as the final instruction to the inquest jury and is specifically keyed to the verdict questions the jury will be asked to answer. See Wis JI-Criminal 2302A for the suggested verdict questions. A preliminary instruction to the inquest jury is provided in Wis JI-Criminal 2300.

1. This statement is based on Wis JI-Civil 100, Opening.

2. Section 979.08(1) provides that "[t]he instructions shall include those criminal offenses for which the judge or court commissioner believes a reasonable jury might return a verdict based upon a finding of probable cause." Thus, if supported by the evidence, instructions on more than one offense may be required. If that is the case, the Committee recommends submitting additional questions in essentially the same form as question 1, specifying a different offense and including a definition of that offense.

3. The model is set up for the simple case where one person is being considered as the person who committed the crime. If more than one person is being considered, the Committee recommends adding a separate question for each person.

4. The model is drafted to provide for the selection of the one of the alternatives. If more than one of the alternatives is raised by the evidence, the Committee suggests adding questions for each one.

5. Section 979.08(2) provides that the inquest jury's verdict "shall be based upon a finding of probable cause."

6. Instructions on more than one offense may be necessary. See note 1, supra.

7. Section 979.08(3)(b) uses the term "accident" which has no formal meaning in the law of Wisconsin. The Committee concluded that it is best defined as a death resulting from other than criminal means. The criminal means that may apply to the case will have been defined for the jury in connection with question 1. If those criminal means do not apply, the jury should find that the death resulted from an "accident."

8. The definition of "suicide" is the one provided in Wis JI-Criminal 1195, Assisting Suicide.

9. The privileges most likely to apply are self-defense – see Wis JI-Criminal 800 through 820; defense of others – see Wis JI-Criminal 825 and 830; and the law enforcement officer's privilege to use deadly force – see Wis JI-Criminal 885. The applicable instruction should be adapted for use here.

10. This paragraph consists of the first and last sentences of Wis JI-Criminal 140, Burden of Proof and Presumption of Innocence.

11. Section 979.08(2) provides: "The jury's verdict shall be based upon a finding of probable cause and shall be unanimous." The instruction is based on Wis JI-Criminal 515, Unanimous Verdict and Selection of Presiding Juror.

2302A INQUEST: SUGGESTED VERDICTS

We, the undersigned jurors, find as follows:

1. Is there probable cause to believe that the death of (name of deceased) was caused under circumstances constituting (name of offense submitted to the jury), contrary to section _____ of the Wisconsin Statutes?[1]

Yes _____ No _____

Answer question 2 only if you answer question 1 "yes."

2. Is there probable cause to believe that the following person committed the offense of (name of offense submitted to the jury), contrary to section _____ of the Wisconsin Statutes, in causing the death of (name of deceased)?[2]

(Name person).

Yes _____ No _____

Answer question 3 only if you answer question 1 "no."

3. Is there probable cause to believe that the death of (name of deceased) was a result of [natural causes] [an accident] [suicide] [an act privileged by law]?[3]

Yes _____ No _____

We, the undersigned jurors, state that we are unanimous as to each question in the verdict, and the verdict is signed by each of us. Dated at _____, Wisconsin, this _____ day of _____, 20__.

_____ _____

_____ _____

_____ _____

Validated and signed this _____ day of

_____, 20__.

_____

(Name of judge) , Circuit Court Judge

COMMENT

Wis JI-Criminal 2302A was originally published in 1998. This revision was approved by the Committee in June 2009. It adopted a new format and did not make any substantive changes.

This provides a suggested form for verdict questions submitted to the inquest jury. Instructions explaining the questions are provided in Wis JI-Criminal 2302.

Section 979.08(3) specifies the form of the verdict:

> . . . The verdict shall be in a form which permits the following findings:
>
> (a) Whether the deceased came to his or her death by criminal means and, if so, the specific crimes committed and the name of the person or persons, if known, having committed the crimes.
>
> (b) Whether the deceased came to his or her death by natural causes, accident, suicide or an act privileged by law.

1. Section 979.08(1) provides that "[t]he instructions shall include those criminal offenses for which the judge or court commissioner believes a reasonable jury might return a verdict based upon a finding of probable cause." Thus, if supported by the evidence, instructions on more than one offense may be required. If that is the case, the Committee recommends submitting additional questions in essentially the same form as question 1, specifying a different offense and including a definition of that offense.

2. The model is set up for the simple case where one person is being considered as the person who committed the crime. If more than one person is being considered, the Committee recommends adding a separate question for each person.

3. The model is drafted to provide for the selection of the one of the alternatives. If more than one of the alternatives is raised by the evidence, the Committee suggests adding questions for each one.

2500 SUGGESTED ORDER OF INSTRUCTIONS: COMMITMENT AS A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

The following is a suggested order of instructions for proceedings under Chapter 980, Sexually Violent Persons Commitments. It is based on the list provided in Wis JI-Criminal 1. Most of the instructions may be given without change. Those that need to be changed appear in boldface. Drafts of those instructions are included here, with the changed material also indicated in boldface.

2501 Preliminary Instruction: Commitment As A Sexually Violent Person Under Chapter 980, Wis. Stats.

50 Preliminary Instruction: Juror's Conduct; Evidence; Transcripts Not Available; Credibility; Substantive Issues; Opening Statement
55 Notetaking Permitted
57 Instruction on Juror Questioning of Witnesses
58 Transcripts Not Available for Deliberations; Reading Back Testimony
100 Opening Instructions [**modified**]

2502 Commitment As A Sexually Violent Person Under Chapter 980, Wis. Stats.

103 Evidence Defined
147 Improper Questions
148 Objections of Counsel; Evidence Received Over Objection
150 Stricken Testimony
154 Summary of Evidence
155 Exhibits
157 Remarks of Counsel
160 Closing Arguments of Counsel
162 Agreed Facts [**modified**]
165 Judicially Noticed Facts
180 Statements of Defendant [modified]
190 Weight of Evidence
195 Juror's Knowledge
200 Expert Testimony: General
201 Opinion of Non-Expert Witness

205 Expert Testimony: Hypothetical Question
300 Credibility of Witnesses [**modified**]
315 Respondent Elects Not To Testify [TO BE GIVEN ONLY IF REQUESTED BY RESPONDENT] [**modified]**
325 Impeachment of Witness: Prior Conviction or Juvenile Adjudication
330 Impeachment of Witness: Character For Truthfulness
460 Closing Instruction [**modified**]
515 Unanimous Verdict and Selection of Presiding Juror [**modified**]

2503 Verdict: Commitment As A Sexually Violent Person Under Chapter 980, Wis. Stats.
525 Instruction After Verdict Received

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Following are the instructions that need to be modified for a Chapter 980 case.

COMMENT

Wis JI-Criminal 2500 was originally published in 2011 and revised in 2014. This revision was approved by the Committee in October 2015; it reflected a change in the title of Wis JI-Criminal 180.

100 OPENING INSTRUCTIONS [modified]

Members of the jury:

The court will now instruct you upon the principles of law which you are to follow in considering the evidence and in reaching your verdict.

It is your duty to follow all of these instructions. Regardless of any opinion you may have about what the law is or ought to be, you must base your verdict on the law I give you in these instructions. Apply that law to the facts in the case which have been properly proven by the evidence. Consider only the evidence received during this trial and the law as given to you by these instructions and from these alone, guided by your soundest reason and best judgment, reach your verdict.

If any member of the jury has an impression of my opinion as to whether **or not the respondent is a sexually violent person**, disregard that impression entirely and decide the issues of fact solely as you view the evidence. You, the jury, are the sole judges of the facts, and the court is the judge of the law only.

162 AGREED FACTS [modified]

[IF THE AGREED FACTS GO TO AN ELEMENT OF THE CRIME, A PERSONAL WAIVER BY THE DEFENDANT IS REQUIRED.]

The **parties** have stipulated or agreed to the existence of certain facts, and you must accept these facts as conclusively proved. (In this case, the **parties** have stipulated to the following facts:)

[state the agreed facts]

180 STATEMENTS OF RESPONDENT

The State has introduced evidence of (a statement) (statements) which it claims (was) (were) made by the **respondent**. It is for you to determine how much weight, if any, to give to (the) (each) statement.

In evaluating (the) (each) statement, you must determine three things:

- whether the statement was actually made by the **respondent**. Only so much of a statement as was actually made by a person may be considered as evidence.
- whether the statement was accurately restated here at trial.
- whether the statement or any part of it ought to be believed.

You should consider the facts and circumstances surrounding the making of (the) (each) statement, along with all the other evidence in determining how much weight, if any, the statement deserves.

300 CREDIBILITY OF WITNESSES

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

[GIVE THE FOLLOWING PARAGRAPH ONLY WHEN THE **RESPONDENT** TESTIFIES.]

[The **respondent** has testified in this case, and you should not discredit the testimony just because the **respondent** is **the subject of a petition for commitment**. Use the same factors to determine the credibility and weight of the **respondent**'s testimony that you use to evaluate the testimony of any other witness.]

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

315 RESPONDENT ELECTS NOT TO TESTIFY

[TO BE GIVEN ONLY IF REQUESTED BY **RESPONDENT**.]

The respondent has the right not to testify **in this proceeding**.

The **respondent**'s decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

460 CLOSING INSTRUCTION

Now, members of the jury, the duties of counsel and the court have been performed. The case has been argued by counsel. The court has instructed you regarding the rules of law which should govern you in your deliberations. The time has now come when the great burden of reaching a just, fair, and conscientious decision of this case is to be

thrown wholly upon you, the jurors, selected for this important duty. You will not be swayed by sympathy, prejudice, or passion. You will be very careful and deliberate in weighing the evidence. I charge you to keep your duty steadfastly in mind and, as upright citizens, to render a just and true verdict.

You are to decide only whether **or not** the **respondent is a sexually violent person**. Any consequences of your verdict are matters for the court alone to decide and must not affect your deliberations.

[Give instructions on the verdicts submitted.]

515 UNANIMOUS VERDICT AND SELECTION OF PRESIDING JUROR

Before the jury may return a verdict which may legally be received, the verdict must be reached unanimously; all 12 jurors must agree in order to arrive at a verdict.

When you retire to the jury room, select one of your members to preside over your deliberations. That person's vote is entitled to no greater weight than the vote of any other juror.

If you need to communicate with the court while you are deliberating, send a note through a bailiff, signed by the presiding juror. To have a complete record of this trial, it is important that you communicate with the court only by a written note. If you have questions, the court will talk with the attorneys before answering so it may take some

time. Your should continue your deliberations while you wait for an answer. The court will answer any questions in writing or orally here in open court.

When you have agreed upon your verdict, have it signed and dated by the person you have selected to preside.

After you have reached a verdict:

- The presiding juror will notify the bailiff that a verdict has been reached.
- Everyone will return to the courtroom.
- The verdict will be read into the record in open court.
- The court may ask each of you if you agree with the verdict.

Swear the officer.

2501 PRELIMINARY INSTRUCTION: COMMITMENT AS A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

A petition has been filed alleging that (name) is a sexually violent person. A sexually violent person is one who has been convicted of a sexually violent offense and is dangerous to others because he or she currently has a mental disorder that makes it more likely than not that the person will engage in future acts of sexual violence.

Wisconsin law requires that a jury determine whether or not a person is a sexually violent person. That is the purpose of this hearing.

You will now hear testimony. At the conclusion of the hearing, you will be asked to decide whether or not (name) is a sexually violent person.

COMMENT

Wis JI-Criminal 2501 was approved by the Committee in October 1994 and was revised in 1999 and 2005. The 2005 revision reflected changes made in Chapter 980 by 2003 Wisconsin Act 187. This revision was approved by the Committee in February 2011; it involved nonsubstantive changes in the text.

2003 Wisconsin Act 187 amended the definition of "sexually violent person" in § 980.01(7) by replacing "creates a substantial probability" that the person will engage in future acts of sexual violence with "makes it likely" that the person will do so. The Act also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instructions use "makes it more likely than not" throughout.

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2502 COMMITMENT AS A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

BEGIN WITH THE OPENING INSTRUCTIONS THAT WOULD BE USED IN A CRIMINAL CASE. MOST CAN BE USED WITHOUT CHANGE. INCLUDED IMMEDIATELY BELOW IS WIS JI-CRIMINAL 145 AND INCLUDED AT THE END IS WIS JI CRIMINAL 140, BOTH OF WHICH ARE MODIFIED FOR USE HERE.

A petition has been filed alleging that (name) is a sexually violent person. A sexually violent person is one who has been convicted of a sexually violent offense and is dangerous to others because he or she currently has a mental disorder that makes it more likely than not[1] that the person will engage in future acts of sexual violence.

You will now be asked to decide whether or not (name) is a sexually violent person.

The Petition

A petition is nothing more than a written, formal allegation that a person is a sexually violent person. You are not to consider it as evidence against (name) in any way.

State's Burden of Proof

Before you may find that (name) is a sexually violent person, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements are established.[2]

The Elements That Must be Proved

1. That (name) has been convicted of[3] a sexually violent offense.

ELECT ONE OF THE FOLLOWING DEPENDING ON WHAT IS ALLEGED IN THE PETITION.

[(Name crime specified in § 980.01(6)(a)) is a sexually violent offense.][4]

[(Name crime specified in § 980.01(6)(b)) may be a sexually violent offense if it is sexually motivated.[5] "Sexually motivated" means that one of the purposes for the offense was the actor's sexual arousal or gratification or the sexual humiliation or degradation of the victim.[6]]

2. That (name) currently has a mental disorder.

"Mental disorder" as used here, means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence[7] and causes serious difficulty in controlling behavior.[8]

The term "mental disorder" is also used in a more general way by the mental health profession to diagnose and describe mental health-related symptoms and disabilities. Only those mental disorders that predispose a person to engage in acts of sexual violence and cause serious difficulty in controlling behavior are sufficient for purposes of commitment as a sexually violent person.[9]

You are not bound by medical opinions given by witnesses, or by labels or definitions used by witnesses, relating to what is or is not a mental disorder.[10]

3. That (name) is dangerous[11] to others because (he) (she) has a mental disorder which makes it more likely than not[12] that (he) (she) will engage in one or more[13] future acts of sexual violence.

Meaning of "Acts of Sexual Violence"

"Acts of sexual violence" means acts which would constitute "sexually

violent offenses."[14]

ELECT ONE OF THE FOLLOWING DEPENDING ON WHAT IS ALLEGED IN THE PETITION.[15]

[(Name crime or crimes specified in § 980.01(6)(a)) is a sexually violent offense.][16]

[(Name crime or crimes specified in § 980.01(6)(b)) may be a sexually violent offense if it is sexually motivated.[17] "Sexually motivated" means that one of the purposes for the offense was the actor's sexual arousal or gratification or the sexual humiliation or degradation of the victim.[18]]

ADD THE FOLLOWING IF EVIDENCE OF OTHER SEXUALLY VIOLENT OFFENSES HAS BEEN ADMITTED.

Evidence of Other Offenses

[Evidence has been submitted that (name) committed other sexually violent offenses before committing (identify offense on which the petition is based) . This evidence alone is not sufficient to establish that (name) has a mental disorder. Before you may find that (name) has a mental disorder, you must be so satisfied beyond a reasonable doubt from all the evidence in the case.[19]]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the state has proved all three elements, you should find that (name) is a sexually violent person.

If you are not so satisfied, you must not find that (name) is a sexually violent person.

State's Burden of Proof

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

The law presumes that (name) is not a sexually violent person. Furthermore, (name) does not have to prove anything. The burden is on the State to convince you beyond a reasonable doubt that (name) is a sexually violent person.

If you can reconcile the evidence upon any reasonable hypothesis consistent with (name) not being a sexually violent person, you should do so and find that (name) is not a sexually violent person.

The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.

A reasonable doubt is not a doubt which is based on mere guesswork, speculation, sympathy, or fear. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

While it is your duty to give (name) the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.[20]

COMMENT

Wis JI-Criminal 2502 was originally published in 1995 and was revised in 1996, 1997, 1999, 2001, 2002, 2003, 2004, 2006, 2007, 2011, 2012, 2016, and 2021. The 2011 revision changed the definition of

"mental disorder" – see footnote 9. The 2016 revision added new footnote 20. This revision was approved by the Committee in February 2021; it added new footnote 14.

The 2007 revision of this instruction reflected changes made in Chapter 980 by 2005 Wisconsin Act 434, [effective date: August 1, 2006]. A significant change is the reduction from four elements to three. Former element 2 was deleted; it required that the jury find that the petition was filed within 90 days of the person's release from custody. The source of this requirement was State v. Thiel, 2000 WI 67, 235 Wis.2d 823, 612 N.W.2d 94, where the court held that this was a fact for the jury. See footnote 2, below. Thiel was based on the plain meaning of the statutes:

- § 980.05(3)(a) then required that the state prove "the allegations in the petition beyond a reasonable doubt"; and,
- § 980.02(2)(ag) identified the 90-day requirement as something that must be alleged in the petition.

Act 434 amended § 980.05(3)(a) as follows:

(3)(a) At a trial on a petition under this chapter, the petitioner has the burden of proving beyond a reasonable doubt that the person who is the subject of the petition is a sexually violent person.

Act 434 also repealed § 980.02(2)(ag).

Since Thiel was based on the plain meaning of the statutes, and since the statutes have been changed, the second element of Wis JI-Criminal 2502 has been deleted and the number of elements reduced from four to three.

Other significant changes made by 2005 Wisconsin Act 434 were:

- changes in the lists of "sexually violent offenses" in § 980.01(6)(a) and (b);
- creation of § 980.05(2m)(c), which allows trial by a jury less than 12 if the parties agree and the court approves;
- repeal of § 980.05(1m), which provided that "all constitutional rights available to a defendant in a criminal proceeding are available" to a person facing a Chapter 980 commitment; and,
- creation of §§ 980.031 - 980.038, which specify the procedures for the commitment hearing.

Before 2005 Wisconsin Act 434, significant changes in Chapter 980 had been made by 2003 Wisconsin Act 187. It amended § 980.02(2)(c) by replacing "creates a substantial probability" with "makes it likely." Act 187 also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instruction uses "more likely than not" throughout. The effective date of Act 187 is April 22, 2004. Section 8 of the Act, Initial applicability, reads as follows:

The treatment of section 980.01(1m) and (7) of the statutes, the renumbering and amendment of section 980.08(4) of the statutes, and the creation of section 980.08(4)(b)2. of the statutes first apply to hearings, trials, and proceedings that are commenced on the effective date of this subsection.

The changes made by Act 187 apply to all proceedings conducted on or after its effective date, including hearings held for individuals originally committed under Chapter 980 before the effective date.

State v. Tabor, 2005 WI 107, 282 Wis.2d 768, 699 N.W.2d 663.

This instruction is for the original commitment as a "sexually violent person" under chapter 980. Subsection 980.05(2) provides that "[t]he person who is the subject of the petition, the person's attorney, or the petitioner may request that a trial under this section be to a jury of 12." Subsection 980.03(3) provides that "[n]otwithstanding s. 980.05(2), if the person, the person's attorney, or the petitioner does not request a jury trial, the court may on its own motion require that the trial be to a jury." A verdict must be unanimous. § 980.03(3).

The 1995 version of this instruction was approved as a correct statement of the law in State v. Matek, 223 Wis.2d 611, 589 N.W.2d 441 (Ct. App. 1998). The court rejected the defendant's argument that the following statement should have been added to the instruction:

"Commitment must be based on a current diagnosis of a present disorder that specifically causes the person to be prone to sexually violent acts in the future."

The Committee believes the substance of the statement is included in the current version of the instruction, which was amended in 1999 to add the word "currently" to the statement of element 2. and to add the word "future" to the statement of element 3.

A Chapter 980 petition may be pursued against a person whose crime did not qualify as a Chapter 980 predicate offense at the time of conviction but did qualify at the time he neared the end of his sentence. State ex rel. Washington v. State, 2012 WI App 74, 343 Wis.2d 434, 819 N.W.2d 305.

In State v. Spaeth, 2014 WI 71, 355 Wis.2d 761, 850 N.W.2d 93, a petition for a Chapter 980 commitment was filed based on a conviction that was reversed while the petition was pending. The Wisconsin Supreme Court reversed the trial court's dismissal of the petition, holding that "the sufficiency of a Chapter 980 petition should be assessed as of the time of filing." 355 Wis.2d 761, ¶3. The court noted: "The fact that Spaeth's conviction was later overturned unquestionably impacts the strength of the State's case for his commitment, but this does not negate the validity of the State's petition at the time of the filing." 355 Wis.2d 761, ¶34.

Section 980.063(1) requires that if a person is found to be sexually violent person, the court shall require the person to provide a biological specimen for DNA analysis. 2013 Wisconsin Act 20 amended the statute to further require that "[t]he court shall inform the person that he or she may request expungement under s. 165.77(4)." The expungement referred to relates to inclusion in the DNA data bank.

See Wis JI-Criminal 2503 for a recommended verdict form. State v. Madison, 2004 WI App 46, 271 Wis.2d 218, 678 N.W.2d 607, rejected the argument that a special verdict was required in Chap. 980 cases either by § 805.12(1) or principles of equal protection. The court noted: ". . . our holding should not be read to conclude a respondent in a Wis. Stat. ch. 980 commitment proceeding should never have a special verdict." 271 Wis.2d 218, ¶10.

See Wis JI-Criminal 2505 and 2506 for instructions for the decision on discharge from a commitment under chapter 980.

The constitutionality of Wisconsin's Chapter 980 has been consistently upheld. To summarize, the challenges involve two types of claims. First, claims that the statutes violate protections against ex post facto laws and double jeopardy have been rejected on the basis that the statutes have a civil (treatment)

purpose, not a criminal (punitive) one. State v. Carpenter, 197 Wis.2d 252, 541 N.W.2d 105 (1995). The United States Supreme Court reached the same conclusion with respect to the Kansas law, which closely resembles Chapter 980. Kansas v. Hendricks, 521 U.S. 346 (1997). Second, claims based on due process and equal protection have been rejected on the basis that the statutes provide a sufficient definition of the "mental disorder" that is the predicate for a commitment. State v. Post, 197 Wis.2d 279, 541 N.W.2d 115 (1995); State v. Laxton, 2002 WI 82, 646 Wis.2d 185, 646 N.W.2d 784. Also see, Kansas v. Hendricks, supra, and Kansas v. Crane, 534 U.S. 407 (2002).

In State v. Rachels, 2002 WI 81, 646 Wis.2d 334, 646 N.W.2d 784, the court reaffirmed the constitutionality of Chapter 980 despite statutory changes made by 1999 Wisconsin Act 9. Those changes provided for automatic commitment to an institution and put limits on re examinations.

In State v. Bush, 2005 WI 103, 283 Wis.2d 90, 699 N.W.2d 80, the court rejected a due process challenge, summarizing its conclusion as follows:

> ¶40 . . . due process does not require proof of a recent overt act in evaluating the dangerousness of the offender when there has been a break in the offender's incarceration and the offender is reincarcerated for nonsexual behavior. Substantive due process allows for a chapter 980 commitment when there is sufficient evidence of current dangerousness. We decline to adopt any bright-line rule that requires current dangerousness to be proven by a particular type of evidence.

Equal protection principles do not require proof of a recent overt act for Chapter 980 commitments. See State v. Post, supra, and State v. Feldmann, 2007 WI App 35, 300 Wis.2d 474, 730 N.W.2d 440.

The State is not required to present expert testimony to prove element three—that a person is dangerous because his or her mental disorder makes it more likely than not that he or she will reoffend in a sexually violent manner. State v. Stephenson, 2020 WI 92, ¶¶19-29, 394 Wis. 2d 703, 951 N.W.2d 819. In Stephenson, the Wisconsin Supreme Court held that this element – regarding the likelihood the respondent will engage in future acts of sexual violence – is well within the province of the lay factfinder. Therefore, though expert testimony on the third element may inform the factfinder's decision, such testimony is not necessary to prove the element. While Stephenson involves a discharge proceeding rather than an original commitment, it also discusses more generally whether expert opinion testimony on dangerousness is required. In view of the Court's discussion, and given that the State must prove the same three elements in both original commitment and discharge proceedings, the Committee concluded Stephenson's holding also applies to original commitment proceedings.

In State v. Franklin, 2004 WI 38, 270 Wis.2d 271, 677 N.W.2d 276, the court held that "during a commitment proceeding under ch. 980, § 904.04(2) does not apply to evidence offered to prove that the respondent has a mental disorder that makes it substantially probable that the respondent will commit acts of sexual violence in the future." ¶1. The "other acts" evidence must, however, be relevant and not unfairly prejudicial. Franklin, supra, ¶16.

In State v. Sugden, 2010 WI App 166, ¶3, 330 Wis.2d 628, 795 N.W.2d 456, the court held that "the rule of completeness" did not require that an excluded part of the expert's report be put before the jury – that part stated that, if Sugden were released, his risk of reoffending was diminished by the fact that he would be supervised on parole for 22 years – until he was 74 years old.

Regarding appointments of experts under § 980.08(3) [for the court] and § 980.08(4) [for the person

facing commitment], see State v. Thiel, 2004 WI App 225, 277 Wis.2d 698, 691 N.W.2d 388.

In State v. Parrish, 2002 WI App 263, 258 Wis.2d 521, 654 N.W.2d 273, the court held that "claim preclusion" does not bar a Chapter 980 petition following revocation of parole where a pre parole revocation petition under Chapter 980 had been unsuccessful.

Several state appellate court decisions have addressed procedural matters relating to chapter 980 proceedings. In State v. Byers, 2003 WI 186, 263 Wis.2d 113, 665 N.W.2d 729, the court held that a district attorney may file Chapter 980 petition only if the Department of Corrections requests it and the Department of Justice decides not to file. A chapter 980 petition is timely if filed within 90 days of release from confinement based in any part on a sexually violent offense. State v. Keith, 216 Wis.2d 61, 573 N.W.2d 888 (Ct. App. 1997). Chapter 980 applies to crimes committed on the Lac Du Flambeau reservation. State v. Burgess, 2002 WI App 264, 258 Wis.2d 548, 654 N.W.2d 81. The general guarantee of criminal-related constitutional rights in 980.05(1m) does not overrule the alternate provisions for venue in 980.02(4) and (5). State v. Tainter, 2002 WI App 296, 259 Wis.2d 387, 655 N.W.2d 538. If there is a finding that a person is an appropriate candidate for supervised release, it is an erroneous exercise of discretion to commit that person to a secure facility rather than developing a workable plan for supervised release. State v. Keding, 214 Wis.2d 362, 571 N.W.2d 450 (Ct. App. 1997). Because a sexual predator commitment is civil, the time limits for civil appeal, not a criminal appeal, apply. State v. Brunette, 212 Wis.2d 139, 567 N.W.2d 647 (Ct. App. 1997). In State v. Zanelli, 212 Wis.2d 358, 569 N.W.2d 301 (Ct. App. 1997), the court addressed a variety of issues relating to sexual predator commitment proceedings: timely filing of petition; filing did not breach the earlier plea agreement that did not mention chapter 980; "sworn" petition is not required; reference at the hearing to silence when interviewed was improper; chapter 980 hearings are within the exception to patient-psychologist privilege; the use of a previously-prepared presentence report is within the court's discretion; and the evidence is found to be sufficient to support the commitment. In State v. Treadway, 2002 WI App 195, 257 Wis.2d 467, 651 N.W.2d 334, the court addressed: the time for filing the petition; the number of peremptory challenges allowed; admissibility of a probation officer's opinion regarding the likelihood the individual would reoffend; and, the sufficiency of the evidence to establish that the individual was "a sexually violent person."

The rights and procedures in § 51.61 regarding court authorization of involuntary medication for committed persons not competent to refuse medication apply to persons committed under chapter 980. State v. Anthony D.B., 2000 WI 94, 237 Wis.2d 1, 614 N.W.2d 435.

1. 2003 Wisconsin Act 187 amended § 980.02(2)(c) by replacing "creates a substantial probability" with "makes it likely." Act 187 also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instruction uses "more likely than not" throughout.

2. 2005 Wisconsin Act 434 amended § 980.05(3)(a) to provide that "the petitioner has the burden of proving beyond a reasonable doubt that the person who is the subject of the petition is a sexually violent person." Before the amendment, that statute required that the petitioner prove "the allegations in the petition" and § 980.02(2)(ag) required that the petition allege that it was filed within 90 days of the person's release from custody. State v. Thiel, 2000 WI 67, 235 Wis.2d 823, 612 N.W.2d 94, held that this was a fact for the jury. Thiel was based on the plain meaning of the statutes but those statutes were changed by Act 434. Since the statutes have been changed, the former second element of Wis JI-Criminal 2502 has been deleted and the number of elements reduced from four to three.

3. The instruction is drafted for a case alleging that the person has been "convicted of" a sexually

violent offense. But persons may also be committed under chapter 980 if they have been "found delinquent for a sexually violent offense" or "found not guilty of a sexually violent offense by reason of mental disease or defect." § 980.02(2)(a)2. and 3. If either of these other options is present, the appropriate term must be substituted for "convicted of" throughout the instruction.

4. Subsection 980.01(6)(a), as amended by 2005 Wisconsin Act 434, provides that the following crimes are "sexually violent offenses":

- § 940.225(1) First Degree Sexual Assault
- § 940.225(2) Second Degree Sexual Assault
- § 948.225(3) Third Degree Sexual Assault
- § 948.02(1) First Degree Sexual Assault Of A Child
- § 948.02(2) Second Degree Sexual Assault Of A Child
- § 948.025 Repeated Acts Of Sexual Assault Of A Child
- § 948.06 Incest With A Child
- § 948.07 Child Enticement
- § 948.085 Sexual Assault Of A Child Placed In Substitute Care

2005 Wisconsin Act 434 also created subsection (6)(am) to include as a sexually violent offense: "An offense that, prior to June 2, 1994, was a crime under the law of this state and that is comparable to any crime specified in par. (a)." This is consistent with the conclusion reached in State v. Irish, 210 Wis.2d 107, 565 N.W.2d 161 (Ct. App. 1997), where the court held that a conviction for child enticement under former § 944.12 can be the predicate for a sexual predator commitment. A conviction under § 944.11(3), 1973 74 Wis. Stats., can be a "sexually violent offense" because the conduct remains prohibited under § 948.02(1), a statute listed in § 948.01(6). "The legislature clearly intended to include, within the definition of 'sexually violent offense,' the conduct prohibited under a previous version of a statute enumerated in Wis. Stat. § 980.01(6), as long as the conduct prohibited under the predecessor statutes remains prohibited under the current enumerated statute." State v. Pharm, 2000 WI App 167, ¶19, 238 Wis.2d 97, 617 N.W.2d 163.

5. Section 980.01(6)(b), as amended by 2005 Wisconsin Act 434, provides that the following crimes are "sexually violent offenses" if they were sexually motivated:

- § 940.01 First Degree Intentional Homicide
- § 940.02 First Degree Reckless Homicide
- § 940.03 Felony murder
- § 940.05 Second Degree Intentional Homicide
- § 940.06 Second Degree Reckless Homicide
- § 940.19(2) Battery [Substantial Battery With Intent To Cause Bodily Harm]
- § 940.19(4) Battery [Causing Great Bodily Harm With Intent To Cause Bodily Harm]
- § 940.19(5) Battery [Causing Great Bodily Harm With Intent To Cause Great Bodily Harm]
- § 940.19(6) Battery [Substantial Risk Of Great Bodily Harm]
- § 940.195(4) Battery To An Unborn Child (Causing Great Bodily Harm With Intent To Cause Bodily Harm]
- § 940.195(5) Battery To An Unborn Child [Causing Great Bodily Harm With Intent To Cause Great Bodily Harm]
- § 940.30 False Imprisonment

- § 940.305 Taking Hostages
- § 940.31 Kidnapping
- § 941.32 Administering A Dangerous Or Stupefying Drug
- § 943.10 Burglary
- § 943.32 Robbery
- § 948.03 Physical Abuse Of A Child

2005 Wisconsin Act 434 also created subsection (6)(bm) to read:

(6)(bm) An offense that, prior to June 2, 1994, was a crime under the law of this state and that is comparable to any crime specified in par. (b) and that is determined, in a proceeding under s. 980.05(3)(b), to have been sexually motivated.

Subsection 980.05(3)(b) provides that if the petition alleges one of these crimes, "the state is required to prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated."

6. This is the definition provided in § 980.01(5), as amended by 2005 Wisconsin Act 434. Act 434 amended the statute to include reference to "for the sexual humiliation or degradation of the victim."

7. This is the definition provided in § 980.01(2). The Wisconsin Supreme Court found the definition "satisfies the mental condition component required by substantive due process for involuntary mental commitment." State v. Post, 197 Wis.2d 279, 303, 541 N.W.2d 115 (1995).

The Wisconsin definition of "mental disorder" is almost identical to the definition used in the state of Washington's Community Protection Act of 1990, which allows the commitment of "sexually violent predators." The Washington law uses the term "mental abnormality" where Wisconsin uses "mental disorder," but defines it as follows: "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts." RCW 71.09.020(2). The Washington Supreme Court upheld the constitutionality of the predator provisions in In re Young, 857 P.2d 989 (Wash. 1993). A federal court in Washington found the definition to be inadequate because it created "an unacceptable tautology." Young v. Weston, 898 F. Supp. 744, 750 (D.C. Wash. 1995).

The Kansas Supreme Court has held that a similar definition of "mental abnormality" found in the Kansas Sexually Violent Predator Act failed to satisfy constitutional standards. In re Hendricks, 912 P.2d 129 (Kan. 1996). The United States Supreme Court reversed the state court decision. See Kansas v. Hendricks, 521 U.S. 346 (1997).

8. The phrase "and causes serious difficulty in controlling behavior" was added in February 2002 in response to the decision of the United States Supreme Court in Kansas v. Crane, 534 U.S. 407 (2002). Crane vacated a decision of the Kansas Supreme Court that held the Kansas "sexually violent predator" statute was unconstitutional because it did not require a finding that the individual could not control his dangerous behavior. The Kansas court concluded that Kansas v. Hendricks, 521 U.S. 346 (1997), required that finding. Crane held that Hendricks did not set forth a requirement of total or complete lack of control. "It is enough to say that there must be proof of serious difficulty in controlling behavior." Kansas v. Crane, 534 U.S. 407, 413. The provisions of Wisconsin's Chapter 980 are similar to, though not identical with, the Kansas statutes reviewed in Crane. The Committee concluded that adding reference to "serious difficulty in controlling behavior" to the definition of "mental disorder" was an appropriate response to Crane.

On July 1, 2002, the Wisconsin Supreme Court decided State v. Laxton, 2002 WI 82, 254 Wis.2d 185, 646 N.W.2d 784. The court reaffirmed that Wisconsin's Chapter 980 is constitutional, held that a separate finding on difficulty in controlling behavior is not required, and held that a jury instruction without reference to "difficulty . . ." was not error: "In summary, we have concluded that civil commitment under Wis. Stat. ch. 980 does not require a separate factual finding that an individual's mental disorder involves serious difficulty for such person in controlling his or her behavior. The requisite proof of lack of control is established by proving the nexus between the person's mental disorder and dangerousness." 2002 WI 82, ¶30.

The Laxton court acknowledged the February 2002 revision of Wis JI Criminal 2502 in a footnote:

> 14. We recognize that after Crane, Wisconsin Jury Instruction Criminal 2502 was revised to add language linking the mental disorder to the person's difficulty in controlling behavior. The revised jury instruction reads, in part:
>
> > "Mental disorder" means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior. . . . Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior. Wis JI-Criminal 2502 (Special Release 2/2002) (footnotes omitted).
>
> The revised language was not used in Laxton's trial. Thus, we do not discuss the impact of the revised language, nor do we comment with either approval or disapproval of the revised language.
> 2002 WI 82, ¶24, footnote 14.

The Committee originally interpreted Crane as requiring that the "serious difficulty in controlling behavior" issue be communicated to the jury. Laxton clearly states that it need not be, because it is implicit in the other standards for a Chapter 980 commitment. Despite the decision in Laxton, the Committee decided to keep the Crane addition in Wis JI-Criminal 2502, concluding, in short, that it is prudent to make explicit what is implicit in the statutory standard.

The evidence was found to be sufficient in a post Laxton case in State v. Burgess, 2002 WI App 264, 258 Wis.2d 548, 654 N.W.2d 81. Also see State v. Tainter, 2002 WI App 296, 259 Wis.2d 389, 655 N.W.2d 538.

9. The 2011 revision changed the definition of "mental disorder" to make it more understandable to the jury and to address an inconsistency in the previously published version. In an unpublished decision, the Wisconsin Court of Appeals noted that the 2007 version of the instruction was "internally inconsistent" in its definition of "mental disorder," but concluded that the instruction as a whole properly conveyed the required elements. State v. Williams, No. 2010AP781, decided Nov. 18, 2010.

The source of the difficulty is that "mental disorder" is used as a term of art in Chapter 980 and has a specific definition – see § 980.01(2) – that is essential to the constitutionality of the sexually violent persons law. See State v. Post, 197 Wis.2d 279, 306, 541 N.W.2d 115 (1995). However, "mental disorder" is also the term used in a broader sense by mental health professionals to describe and categorize mental health-related symptoms. [See Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, American

Psychiatric Association (1994).] And, the term is one that lay persons, including jurors, may also use in a non-technical sense. The revised instruction acknowledges that the term "mental disorder" may have these other meanings in other contexts but emphasizes that "as used here" for purposes of Chapter 980 commitment, it must be given its specific Chapter 980 meaning.

In State v. Adams, 223 Wis.2d 60, 588 N.W.2d 336 (Ct. App. 1998), the court found the evidence sufficient to establish "mental disorder" and held that an antisocial personality disorder can qualify as a "mental disorder" if it predisposes the specific defendant to sexual violence. In State v. Zanelli, 223 Wis.2d 545, 589 N.W.2d 687 (Ct. App. 1998), the court found that the evidence was sufficient to show "mental disorder" based on pedophilia and held that proof is not limited to literal compliance with the DSM IV criteria for pedophilia – the ultimate issue is whether a "mental disorder" is established.

"[T]he jury must unanimously agree that [the person] suffers from a 'mental disorder' that predisposes him to commit acts of sexual violence . . . [U]nanimity requirements are satisfied, even if jurors disagree as to which mental disease predisposes the defendant to recidivism." State v. Pletz, 2000 WI App 221, ¶19, 239 Wis.2d 49, 619 N.W.2d 97.

10. This statement is based on the one included in Wis JI-Criminal 605, Instruction on the Issue of the Defendant's Criminal Responsibility (Mental Disease). A slightly different version of this statement was cited in Post as an "apt analogy illustrating the need for separation between legal and medical definitions" when "descriptions designed for clinical use are transplanted into the forensic setting." State v. Post, supra, 197 Wis.2d 279, 305.

11. In State v. Bush, 2005 WI 103, 283 Wis.2d 90, 699 N.W.2d 80, the court made several general comments about proof of the "dangerousness" requirement: due process does not require proof of a recent overt act while on parole [¶29]; ". . . chapter 980 is reserved for only the most dangerous offenders" [¶32]; "predicting an offender's dangerousness under chapter 980 is a complex evaluation" [¶33]; an offender's behavior while incarcerated can be relevant to a determination of current dangerousness [¶37]; and, ". . . the sexually violent offense for which Bush is incarcerated may be relevant evidence of current dangerousness." [¶38].

In State v. Sorenson, 2002 WI 78, 254 Wis.2d 54, 646 N.W.2d 354, the defendant contended it was error for the trial court to preclude him from introducing evidence relating to a prior conviction for a sexual offense in his Chapter 980 commitment trial. He sought to present evidence that the victim had recanted as part of a challenge to the claim that he suffered from a mental disorder and was dangerous. The Wisconsin Supreme Court remanded the case for a determination whether the recantation evidence "meets the test for newly discovered evidence sufficient to warrant a new trial." 2002 WI 78, ¶2. If it does, "any application of issue preclusion to exclude this evidence from Sorenson's ch. 980 trial would be fundamentally unfair. . ." 2002 WI 78, ¶25. [Note: Sorenson did not challenge the validity of the prior conviction. He sought to challenge its probative value as to the "mental disorder" and "dangerous to others" requirements.]

In State v. Olson, 2006 WI App 32, 290 Wis.2d 202, 712 N.W.2d 61, the court of appeals rejected a claim that the Chapter 980 definition "is unconstitutional because its definition of 'dangerousness' lacks a 'temporal context' limited to 'imminent danger.' . . . It is the propensity for sexual violence, not the precise point at which it may manifest itself, that makes the individual particularly threatening to society." ¶1.

Evidence of possible conditions of supervision is properly excluded from a commitment proceeding because it is not relevant to determining whether the person is a sexually violent person. State v. Mark,

2006 WI 78, ¶41, 292 Wis.2d 1, 718 N.W.2d 90.

12. 2003 Wisconsin Act 187 amended 980.02(2)(c) by replacing "creates a substantial probability" with "makes it likely." Act 187 also created 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instruction uses "more likely than not" throughout. See the Comment preceding note 1, supra, discussing the effective date of the change. In State v. Nelson, 2007 WI App 2, 298 Wis.2d 453, 727 N.W.2d 364, the court of appeals held that the change from "substantially probable" to "likely" did not violate the person's rights to due process or equal protection.

A preceding version of this instruction defined "substantial probability" as "much more likely than not." See State v. Curiel, 227 Wis.2d 389, 597 N.W.2d 697 (1999). For cases finding the evidence sufficient to satisfy the "substantial probability" standard, see State v. Marberry, 231 Wis.2d 581, 605 N.W.2d 612 (Ct. App. 1999) and State v. Brown, 2002 WI App 260, 258 Wis.2d 237, 655 N.W.2d 157.

In State v. Smalley, 2007 WI App 219, 305 Wis.2d 709, 741 N.W.2d 286, the court of appeals concluded that it was error for an expert to testify that his understanding of "more likely than not" meant "more than zero." However, the court determined that this "isolated misstep did not prevent the real controversy from being tried." ¶2. The court elaborated on the meaning of "more likely than not":

> ¶12 "More likely than not" is not an obscure or specialized term of art, but a commonly used expression. It is hard to think of a clearer definition of the term than the term itself; though perhaps its expansion to "more likely to happen than not to happen" is more explicit. We find it difficult to imagine that any juror was without an understanding of the phrase's meaning before, during or after the trial, or that any juror thought the phrase meant something other than "more likely to happen than not to happen."

13. The 2007 revision added the reference to "one or more" acts. 2005 Wisconsin Act 434 amended the definition of "sexually dangerous person" in sub. (7) of § 980.01 as follows: ". . . and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." While the instruction does not directly use this definition, element 3. expresses the same concept, using the statement in § 980.02(2)(c): "The person is dangerous to others because the person's mental disorder makes it likely that he or she will engage in acts of sexual violence." Act 434 did not amend sub. (2)(c) to add the reference to "one or more." However, Act 434 amended § 980.05(3)(a) to read:

(3)(a) At a trial on a petition under this chapter, the petitioner has the burden of proving beyond a reasonable doubt that the person who is the subject of the petition is a sexually violent person.

The Committee concluded that this was a sufficient basis for adding the reference to "one or more" to the definition in the instruction.

14. This was originally the Committee's conclusion; it was not directly stated in the statutes. However, 2005 Wisconsin Act 434 created § 980.01(1b) to read as follows: "'Act of sexual violence' means conduct that constitutes the commission of a sexually violent offense." This is virtually the same definition adopted in the instruction.

This interpretation results in having "sexually violent offense" as a part of each of three parts of the jury's determination. First, the person must have had a prior conviction for a "sexually violent offense." Second, the person's mental disorder must predispose the person to engage in acts of sexual violence,

defined as "sexually violent offenses." Third, the person must be dangerous because he has mental disorder which makes it more likely than not that he will engage in acts of sexual violence, again defined as "sexually violent offenses."

15. The Committee assumes that most cases will involve reference to the same "acts of sexual violence" for the purposes of both the second and third factual determinations. See note 16. If they differ, or if it is believed necessary to describe the offenses specifically, the instruction should be tailored to refer to the different offenses that apply in each situation.

16. See note 4, supra, for the offenses specified in § 980.01(6)(a). Since "mental disorder" is defined as a condition that predisposes a person to engage in "acts of sexual violence," it is apparently required that the predisposition go to one or more of the specific offenses that fit the statutory definition of "sexually violent offense." Thus, it may be necessary in some cases to refer to the elements of the offense.

17. See note 5, supra, for the offenses specified in § 980.01(6)(b). Since "mental disorder" is defined as a condition that predisposes a person to engage in "acts of sexual violence," it is apparently required that the predisposition go to one or more of the specific offenses that fit the statutory definition of "sexually violent offense." Thus, it may be necessary in some cases to refer to the elements of the offense.

18. This is the definition provided in § 980.01(5), as amended by 2005 Wisconsin Act 434. Act 434 amended the statute to include reference to "for the sexual humiliation or degradation of the victim."

19. The first sentence of the material in brackets is based on § 980.05(4) which provides that "[e]vidence that the person . . . was convicted for or committed sexually violent offenses before committing the offense or act on which the petition is based is not sufficient to establish beyond a reasonable doubt that the person has a mental disorder."

20. The explanation of the state's burden of proof is based on the standard instruction for criminal cases, Wis JI-Criminal 140 Burden Of Proof And Presumption Of Innocence. The concluding sentence of that instruction, which also appears here, was reviewed by the Committee in 2016. The Committee's conclusions, which also apply here, are described as follows in footnote 5, Wis JI-Criminal 140:

> In 2016, the Committee received several inquiries about the phrase "you are to search for the truth," some based on a recent law review article. Cecchini and White, "Truth Or Doubt? An Empirical Test Of Criminal Jury Instructions," 50 U. Richmond Law Review 1139 (2016). After careful consideration, the Committee decided not to change the text of the instruction. Challenges to including "search for the truth" in the reasonable doubt instruction have been rejected by Wisconsin appellate courts. State v. Avila, 192 Wis.2d 870, 890, 532 N.W.2d 423 (1995) (overruled on other grounds in State v. Gordon, 2003 WI 69, ¶40, 262 Wis.2d 380, 663 N.W.2d 765): "In the context of the entire instruction, we conclude that [JI 140] did not dilute the State's burden of proving guilt beyond a reasonable doubt." Also see, Manna v. State, 179 Wis. 384, 399 340, 192 N.W. 160 (1923).
>
> If an addition to the text is desired, the Committee recommends the following, which is modeled on the 1962 version of Wis JI Criminal 140:
>
> You are to search for the truth and give the defendant the benefit of any reasonable doubt that remains after carefully considering all the evidence in the case.

2503 VERDICT: COMMITMENT AS A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

The following two forms of verdict will be submitted to you for your consideration.

One reading: "We, the jury, find that (name) is a sexually violent person as alleged in the petition."

And the other reading: "We, the jury, do not find that (name) is a sexually violent person."

It is for you to determine which one of the forms of verdict submitted you will bring in as your verdict.

COMMENT

Wis JI-Criminal 2503 was approved by the Committee October 1994. It was republished without change in 1997, 2000, and 2011.

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2505 PRELIMINARY INSTRUCTION: HEARING ON DISCHARGE OF A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

Wisconsin law provides that a person may be committed to the custody of the Department of Health and Family Services if the person is found to be a sexually violent person. (Name of petitioner) was committed under this law.

A sexually violent person is one who has been convicted of a sexually violent offense and is dangerous to others because he or she currently has a mental disorder that makes it more likely than not that the person will engage in future acts of sexual violence.

Wisconsin law provides that a person committed may petition for discharge. (Name of petitioner) has filed a petition for discharge and Wisconsin law also provides that a jury determine whether the petition for discharge should be granted. The burden of proof is on the State to satisfy you to a reasonable certainty by evidence that is clear and convincing that (name of petitioner) is still a sexually violent person.

At the conclusion of the hearing you will be asked to decide whether (name of petitioner) is still a sexually violent person.

COMMENT

Wis JI-Criminal 2505 was originally published in 1996 and revised in 1999, 2005 and 2012. This revision was approved by the Committee in February 2014; it updated the Comment.

This instruction is intended to be used as a preliminary instruction at the beginning of a hearing on a petition for discharge of a person committed as a "sexually violent person" under Chapter 980. See §§ 980.09 and 980.095. Section 980.09, as originally enacted, provided that the discharge hearing "shall be to the court." The Wisconsin Supreme Court held in State v. Post, 197 Wis.2d 279, 541 N.W.2d 115 (1995), that equal protection requires that the person be afforded the right to a jury at the discharge hearing. The Post decision compared Chapter 980 proceedings with those applicable to civil mental commitments under Chapter 51, and held that a 6-person jury and the "clear and convincing" burden of

proof applied. Based on the comparison with Chapter 51, the Committee concluded that a five-sixths verdict should apply. See § 51.20(11)(b), providing for a five-sixths verdict for civil commitment reexaminations.

2005 Wisconsin Act 434 [effective date: August 1, 2006] repealed and recreated § 980.09 and created § 980.095. Both sections were also amended by 2013 Wisconsin Act 84 [effective date: December 14, 2013]. Section 980.09(3) provides for a trial before the court or a jury at which "the state has the burden to prove by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person." Section 980.095 provides as follows with regard to the trial:

- the district attorney or the department of justice, whichever filed the original petition, or the person who filed the petition for discharge may request that the trial be held before a jury of 6. [§ 980.095(1)(a)].

- a jury is deemed waived unless it is demanded within 10 days of the determination by the court that a court or jury would likely conclude under s. 980.09(1) that the person's condition has sufficiently changed. [§ 980.095(1)(a)].

- jury selection procedures are set forth in § 980.095(1)(b).

- the verdict must be agreed to by at least 5 jurors. [§ 980.095(1)(c)]

2003 Wisconsin Act 187 amended the definition of "sexually violent person" in § 980.01(7) by replacing "creates a substantial probability" that the person will engage in future acts of sexual violence with "makes it likely" that the person will do so. The Act also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instructions use "makes it more likely than not" throughout.

Wis JI-Criminal 2506 is the instruction to be given at the end of the hearing.

2506 DISCHARGE OF A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

You will now be asked to decide whether (name) is still a sexually violent person.[1]

State's Burden of Proof

Before you may find that (name) is still a sexually violent person, the state must prove by evidence which satisfies you to a reasonable certainty by evidence that is clear and convincing that the following three facts are established.[2]

The Facts That Must Be Established

1. That (name) has been convicted of[3] a sexually violent offense.

   ELECT ONE OF THE FOLLOWING DEPENDING ON THE BASIS FOR THE COMMITMENT.

   [(Name crime specified in § 980.01(6)(a)) is a sexually violent offense.][4]

   [(Name crime specified in § 980.01(6)(b)) may be a sexually violent offense if it is sexually motivated.[5] "Sexually motivated" means that one of the purposes for the offense was the actor's sexual arousal or gratification.][6]

2. That (name) currently has a mental disorder.

   "Mental disorder" as used here, means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence[7] and causes serious difficulty in controlling behavior.[8]

   The term "mental disorder" is also used in a more general way by the mental health profession to diagnose and describe mental health-related symptoms and disabilities. Only those mental disorders that predispose a person to engage in acts

of sexual violence and cause serious difficulty in controlling behavior are sufficient for purposes of commitment as a sexually violent person.[9]

You are not bound by medical opinions given by witnesses, or by labels or definitions used by witnesses, relating to what is or is not a mental disorder.[10]

3. That (name) is dangerous[11] to others because (he) (she) has a mental disorder which makes it more likely than not[12] that (he) (she) will engage in one or more[13] future acts of sexual violence.

Meaning of "Acts of Sexual Violence"

"Acts of sexual violence" means acts which would constitute "sexually violent offenses."[14]

ELECT ONE OF THE FOLLOWING DEPENDING ON THE BASIS FOR THE COMMITMENT.[15]

[(Name crime or crimes specified in § 980.01(6)(a)) is a sexually violent offense.][16]

[(Name crime or crimes specified in § 980.01(6)(b)) may be a sexually violent offense if it is sexually motivated.[17] "Sexually motivated" means that one of the purposes for the offense was the actor's sexual arousal or gratification.][18]

ADD THE FOLLOWING IF EVIDENCE OF OTHER SEXUALLY VIOLENT OFFENSES HAS BEEN ADMITTED.

Evidence of Other Offenses

[Evidence has been submitted that (name) committed other sexually violent offenses before committing (identify offense on which the commitment is based). This evidence

alone is not sufficient to establish that (name) has a mental disorder.[19] Before you may find that (name) has a mental disorder, you must be so satisfied to a reasonable certainty by evidence that is clear and convincing.]

Jury's Decision

The following verdict will be submitted to you for your consideration:

"Is (name) still a sexually violent person?"

Before you may answer this question "yes," the State must satisfy you to a reasonable certainty by evidence that is clear and convincing that (name) has been convicted of a sexually violent offense, that (he) (she) has a mental disorder, and that (he) (she) is dangerous to others because the mental disorder makes it more likely than not that (he) (she) will engage in one or more future acts of sexual violence.

If you are not so satisfied, you must answer the question "no."

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

The burden is on the State to satisfy you to a reasonable certainty by evidence that is clear and convincing that (name) is still a sexually violent person.

"Clear and convincing evidence" means evidence which, when weighed against that opposed to it, clearly has more convincing power.

"Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.[20]

The law provides that any verdict returned by the jury shall be agreed to by at least five of the jurors. I ask you to try to be unanimous if you can.[21]

Closing

When you retire to the jury room select one of your members to preside over your deliberations. His or her vote is entitled to no greater weight than the vote of any other juror.

When you have agreed upon your verdict, have it signed and dated by the person you have selected to preside. At the foot of the verdict, you will find a place provided where a dissenting juror, if there is one, will sign his or her name. Either the blank line or the space below it may be used for that purpose.

Swear the officer.

COMMENT

Wis JI-Criminal 2506 was originally published in 1996 and was revised in 1997, 1999, 2005, 2012, 2015, 2017, and 2021. The 2012 revision changed the definition of "mental disorder" – see footnote 9 – and revised and updated the Comment. The 2015 revision added a definition of the burden of persuasion and updated the Comment. This revision was approved by the Committee in February 2021; it added to the Comment.

This instruction is for the finding at a hearing on a petition for discharge of a person committed as a "sexually violent person" under Chapter 980. See §§ 980.09 and 980.095. Section 980.09, as originally enacted, provided that the discharge hearing "shall be to the court." The Wisconsin Supreme Court held in State v. Post, 197 Wis.2d 279, 541 N.W.2d 115 (1995), that equal protection requires that the person be afforded the right to a jury at the discharge hearing. The Post decision compared Chapter 980 proceedings with those applicable to civil mental commitments under Chapter 51, and held that a 6 person jury and the "clear and consuming" burden of proof applied. Based on the comparison with Chapter 51, the Committee concluded that a five sixths verdict should apply. See § 51.20(11)(b), providing for a five sixths verdict for civil commitment reexaminations.

2005 Wisconsin Act 434 [effective date: August 1, 2006] repealed and recreated § 980.09 and created § 980.095. Both sections were also amended by 2013 Wisconsin Act 84 [effective date: December 14,

2013]. Section 980.09(3) provides for a trial before the court or a jury at which "the state has the burden to prove by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person." Section 980.095 provides as follows with regard to the trial:

- the district attorney or the department of justice, whichever filed the original petition, or the person who filed the petition for discharge may request that the trial be held before a jury of 6. [§ 980.095(1)(a)].

- a jury is deemed waived unless it is demanded within 10 days of the determination by the court that a court or jury would likely conclude under s. 980.09(1) that the person's condition has sufficiently changed. [§ 980.095(1)(a)].

- jury selection procedures are set forth in § 980.095(1)(b).

- the verdict must be agreed to by at least 5 jurors. [§ 980.095(1)(c)]

2003 Wisconsin Act 187 amended the definition of "sexually violent person" in § 980.01(7) by replacing "creates a substantial probability" that the person will engage in future acts of sexual violence with "makes it likely" that the person will do so. The Act also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instructions use "makes it more likely than not" throughout.

Wis JI Criminal 2505 provides a preliminary instruction to be given at the beginning of the hearing.

There is no case law or statutory requirement that the jury at a Chapter 980 discharge hearing be advised of the consequence of a decision to discharge; whether to grant a person's request for an instruction telling the jury that he would be under supervision is within the trial court's discretion. State v. Lombard, 2004 WI App 52, 271 Wis.2d 529, 678 N.W.2d 338.

In State v. Richard, 2011 WI App 66, 333 Wis.2d 708, 799 N.W.2d 509, the court specified the procedure to be followed when a petition for discharge is filed:

> ¶11. . . . The circuit court must then engage in a two-step review process to determine if the offender is entitled to a discharge hearing. First, the court must conduct a "paper review" of the offender's petition and its attachments to see if there are any alleged facts "from which the court or jury may conclude the person's condition has changed since the date of his or her initial commitment order so that the person does not meet the criteria for commitment as a sexually violent person." State v. Arends, 2010 WI 46, ¶¶25 26, 325 Wis.2d 1, 784 N.W.2d 513 (quoting § 980.09(1)). The purpose of the paper review "is to weed out meritless and unsupported petitions." Arends, 325 Wis.2d 1, ¶28. If there are no facts alleged from which a trier of fact could conclude that the offender is no longer a sexually violent person, the circuit court must deny the petition. Id., ¶30.
>
> ¶12 If the offender passes the initial screen, the circuit court shall proceed to the second step of the review process. Id.; Wis. Stat. § 980.09(2). Under the second step of this process, the court must consider: (1) any current and past reexamination reports or treatment progress reports filed under Wis. Stat. § 980.07; (2) relevant facts in the petition and in the State's written response; (3) arguments of counsel; and (4) any supporting documentation provided by the person or the State.

> Arends, 325 Wis.2d 1, ¶32. If, after this second step in the review process, the circuit court determines that a fact finder could conclude that an offender no longer meets the criteria for commitment as a sexually violent person, the offender is entitled to a discharge hearing. Id., ¶43. If not, the offender's discharge petition must be denied.

The requirement in § 980.09(1) that a petition for a discharge from a Chapter 980 commitment allege facts from which the court or jury may conclude the person's condition has changed "includes not only a change in the person himself or herself, but also a change in the professional knowledge and research used to evaluate a person'\'s mental disorder or dangerousness, if the change is such that a fact-finder could conclude the person does not meet the criteria for a sexually violent person." State v. Ermers, 2011 WI App 113, ¶1, 336 Wis.2d 451, 802 N.W.2d 540.

Section 980.09(1) was amended by 2013 Wisconsin Act 84 [effective date: December 14, 2013] to slightly change the wording that was quoted in the Richard and Ermers cases. The amended statute provides that:

> . . . The court shall deny the petition . . . without a hearing unless the petition alleges facts from which the court or jury would likely conclude the person's condition has changed since the most recent order denying a petition for discharge after a hearing on the merits, or since the date of his or her initial commitment if the person has never received a hearing on the merits of a discharge petition, so that the person no longer meets the criteria for commitment as a sexually violent person.

In State v. Richard, 2014 WI App 28, 353 Wis.2d 219, 844 N.W.2d 370, the issue was whether a person committed under Chapter 980 was entitled to a discharge hearing when the petition was "based on amendments to an actuarial instrument used at trial that, in an evaluating expert's opinion, reduced the petitioner's risk to reoffend below the legal threshold of 'more likely than not.'" The court of appeals concluded "that when a petitioner alleges that he or she is no longer a sexually violent person, and supports his or her petition with a recent psychological evaluation applying new professional research to conclude that the petitioner is no longer likely to commit acts of sexual violence, the petitioner is entitled to a discharge hearing . . ." Richard, ¶1.

Summary judgment is not available to the respondent in a Chapter 980 proceeding. State v. Allison, 2010 WI App 103, 329 Wis.2d 129, 789 N.W.2d 120. In Allison, the experts who examined the committed person in connection with discharge proceedings concluded he was no longer dangerous. This led him to file a motion for summary judgment on the ground the state could not prove he was still a sexually violent person. Id., ¶¶6-9. The court of appeals held that, under the language of § 980.09, a court handling a discharge petition has two options: deny the petition without a hearing or hold a hearing. Thus, summary judgment was not available. Id., ¶¶13-25.

In State v. Stephenson, 2020 WI 92, 394 Wis. 2d 703, 951 N.W.2d 819, the Wisconsin Supreme Court addressed an issue not directly raised in Allison: whether the state is required to present expert testimony to prove that a person is dangerous because their mental disorder makes it more likely than not that they will reoffend in a sexually violent manner. The Court held that this element – regarding the likelihood the respondent will engage in future acts of sexual violence – is well within the province of the lay factfinder. Therefore, though expert testimony on the third element may inform the factfinder's decision, such testimony is not necessary to prove the element.

In State v. Alger, 2015 WI 3, 360 Wis.2d 193, 858 N.W.2d 346, the court addressed the applicability

of the Daubert standard for expert testimony to a discharge proceeding in a Chapter 980 case. The Daubert standard, as adopted in § 907.02(1), applies to "actions" or "special proceedings" commenced on or after February 1, 2011. In Alger (and in Knipfer, a companion case consolidated for appeal) the commitment proceedings took place before that effective date but the discharge proceedings began after the date. The court concluded that ". . . although Alger's and Knipfer's petitions seek relief from those original commitments, those filings do not constitute the 'commencement' of an 'action' or a 'special proceeding.'" ¶4. Therefore, the standard in § 907.02(1) does not apply.

1. Section 980.09(3) provides that at the hearing, the "state has the burden of proving by clear and convincing evidence that the petitioner meets the criteria for commitment as a sexually violent person."

2. In State v. Post, 197 Wis.2d 279, 328 29, 541 N.W.2d 115 (1995), the Wisconsin Supreme Court held that "equal protection demands that a right to a jury trial be made available at this important stage," referring to the discharge hearing. A jury of six is sufficient [§ 980.095(1)] and "the state has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person." See § 980.09(3). The required aspects of a "sexually violent person" finding are set forth in § 980.02(2):

(a) the person has been convicted of a sexually violent offense [or found delinquent for, or found not guilty by reason of mental disease or defect of such an offense];

(b) has a mental disorder;

(c) is dangerous to others because the person's mental disorder makes it more likely than not that he or she will engage in acts of sexual violence.

These three facts are defined in the instruction in the same manner as in the instruction for the original commitment. See Wis JI-Criminal 2502.

The clear and convincing evidence standard satisfies due process at a discharge proceeding. State v. Talley, 2015 WI App 4, 359 Wis.2d 521, 859 N.W.2d 155.

3. The instruction is drafted for a case alleging that the person has been "convicted of" a sexually violent offense. But persons may also be committed under Chapter 980 if they have been "found delinquent for a sexually violent offense" or "found not guilty of a sexually violent offense by reason of mental disease or defect." § 980.02(2)(a)2. and 3. If either of these other options is present, the appropriate term must be substituted for "convicted of" throughout the instruction.

4. Section 980.01(6)(a) provides that the following crimes are "sexually violent offenses":

- § 940.225(1) First Degree Sexual Assault
- § 940.225(2) Second Degree Sexual Assault
- § 948.225(3) Third Degree Sexual Assault
- § 948.02(1) First Degree Sexual Assault Of A Child
- § 948.02(2) Second Degree Sexual Assault Of A Child
- § 948.025 Repeated Acts Of Sexual Assault Of A Child
- § 948.06 Incest With A Child
- § 948.07 Child Enticement

- § 948.085 Sexual Assault Of A Child Placed In Substitute Care

In State v. Irish, 210 Wis.2d 107, 565 N.W.2d 161 (Ct. App. 1997), the court held that a conviction for child enticement under former § 944.12 can be the predicate for a sexual predator commitment. See note 4, Wis JI-Criminal 2502.

5. Section 980.01(6)(b), as amended by 2005 Wisconsin Act 434, provides that the following crimes are "sexually violent offenses" if they were sexually motivated:

- § 940.01 First Degree Intentional Homicide
- § 940.02 First Degree Reckless Homicide
- § 940.03 Felony murder
- § 940.05 Second Degree Intentional Homicide
- § 940.06 Second Degree Reckless Homicide
- § 940.19(2) Battery [Substantial Battery With Intent To Cause Bodily Harm]
- § 940.19(4) Battery [Causing Great Bodily Harm With Intent To Cause Bodily Harm]
- § 940.19(5) Battery [Causing Great Bodily Harm With Intent To Cause Great Bodily Harm]
- § 940.19(6) Battery [Substantial Risk Of Great Bodily Harm]
- § 940.195(4) Battery To An Unborn Child (Causing Great Bodily Harm With Intent To Cause Bodily Harm]
- § 940.195(5) Battery To An Unborn Child [Causing Great Bodily Harm With Intent To Cause Great Bodily Harm]
- § 940.30 False Imprisonment
- § 940.305 Taking Hostages
- § 940.31 Kidnapping
- § 941.32 Administering A Dangerous Or Stupefying Drug
- § 943.10 Burglary
- § 943.32 Robbery
- § 948.03 Physical Abuse Of A Child

2005 Wisconsin Act 434 also created subsection (6)(bm) to read:

> (6)(bm) An offense that, prior to June 2, 1994, was a crime under the law of this state and that is comparable to any crime specified in par. (b) and that is determined, in a proceeding under s. 980.05(3)(b), to have been sexually motivated.

Subsection 980.05(3)(b) provides that if the petition alleges one of these crimes, "the state is required to prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated."

6. This is the definition provided in § 980.01(5).

7. This is the definition provided in § 980.01(2). The Wisconsin Supreme Court found the definition "satisfies the mental condition component required by substantive due process for involuntary mental commitment." State v. Post, 197 Wis.2d 279, 303, 541 N.W.2d 115 (1995).

The Wisconsin definition of "mental disorder" is almost identical to the definition used in the state of Washington's Community Protection Act of 1990, which allows the commitment of "sexually violent

predators." The Washington law uses the term "mental abnormality" where Wisconsin uses "mental disorder," but defines it as follows: "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts." RCW 71.09.020(2). The Washington Supreme Court upheld the constitutionality of the predator provisions in In re Young, 857 P.2d 989 (Wash. 1993). A federal court in Washington found the definition to be inadequate because it created "an unacceptable tautology." Young v. Weston, 898 F. Supp. 744, 750 (D.C. Wash. 1995).

The Kansas Supreme Court has held that a similar definition of "mental abnormality" found in the Kansas Sexually Violent Predator Act failed to satisfy constitutional standards. In re Hendricks, 912 P.2d 129 (Kan. 1996). The United States Supreme Court reversed the state court decision. See Kansas v. Hendricks, 521 U.S. 346 (1997).

8. The phrase "and causes serious difficulty in controlling behavior" was added in February 2002 in response to the decision of the United States Supreme Court in Kansas v. Crane, 534 U.S. 407 (2002). Crane vacated a decision of the Kansas Supreme Court that held the Kansas "sexually violent predator" statute was unconstitutional because it did not require a finding that the individual could not control his dangerous behavior. The Kansas court concluded that Kansas v. Hendricks, 521 U.S. 346 (1997), required that finding. Crane held that Hendricks did not set forth a requirement of total or complete lack of control. "It is enough to say that there must be proof of serious difficulty in controlling behavior." Kansas v. Crane, 534 U.S. 407, 413. The provisions of Wisconsin's Chapter 980 are similar to, though not identical with, the Kansas statutes reviewed in Crane. The Committee concluded that adding reference to "serious difficulty in controlling behavior" to the definition of "mental disorder" was an appropriate response to Crane.

On July 1, 2002, the Wisconsin Supreme Court decided State v. Laxton, 2002 WI 82, 254 Wis.2d 185, 646 N.W.2d 784. The court reaffirmed that Wisconsin's Chapter 980 is constitutional, held that a separate finding on difficulty in controlling behavior is not required, and held that a jury instruction without reference to "difficulty . . ." was not error: "In summary, we have concluded that civil commitment under Wis. Stat. ch. 980 does not require a separate factual finding that an individual's mental disorder involves serious difficulty for such person in controlling his or her behavior. The requisite proof of lack of control is established by proving the nexus between the person's mental disorder and dangerousness." 2002 WI 82, ¶30.

The Laxton court acknowledged the February 2002 revision of Wis JI-Criminal 2502 in a footnote:

> 14. We recognize that after Crane, Wisconsin Jury Instruction Criminal 2502 was revised to add language linking the mental disorder to the person's difficulty in controlling behavior. The revised jury instruction reads, in part:
>
> > "Mental disorder" means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior. . . . Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior. Wis JI-Criminal 2502 (Special Release 2/2002) (footnotes omitted).
>
> The revised language was not used in Laxton's trial. Thus, we do not discuss the impact of the revised language, nor do we comment with either approval or disapproval of the revised language.

2002 WI 82, ¶24, footnote 14.

The Committee originally interpreted Crane as requiring that the "serious difficulty in controlling behavior" issue be communicated to the jury. Laxton clearly states that it need not be, because it is implicit in the other standards for a Chapter 980 commitment. Despite the decision in Laxton, the Committee decided to keep the Crane addition in Wis JI-Criminal 2502, concluding, in short, that it is prudent to make explicit what is implicit in the statutory standard.

The evidence was found to be sufficient in a post Laxton case in State v. Burgess, 2002 WI App 264, 258 Wis.2d 548, 654 N.W.2d 81. Also see State v. Tainter, 2002 WI App 296, 259 Wis.2d 389, 655 N.W.2d 538.

9. The 2011 revision changed the definition of "mental disorder" to make it more understandable to the jury and to address an inconsistency in the previously published version. In an unpublished decision, the Wisconsin Court of Appeals noted that the 2007 version of the instruction was "internally inconsistent" in its definition of "mental disorder," but concluded that the instruction as a whole properly conveyed the required elements. State v. Williams, No. 2010AP781, decided Nov. 18, 2010.

The source of the difficulty is that "mental disorder" is used as a term of art in Chapter 980 and has a specific definition – see § 980.01(2) – that is essential to the constitutionality of the sexually violent persons law. See State v. Post, 197 Wis.2d 279, 306, 541 N.W.2d 115 (1995). However, "mental disorder" is also the term used in a broader sense by mental health professionals to describe and categorize mental health-related symptoms. [See Diagnostic and Statistical Manual of Mental Disorders, 5th Edition, American Psychiatric Association (2013).] And, the term is one that lay persons, including jurors, may also use in a non-technical sense. The revised instruction acknowledges that the term "mental disorder" may have these other meanings in other contexts but emphasizes that "as used here" for purposes of Chapter 980 commitment, it must be given its specific Chapter 980 meaning.

In State v. Adams, 223 Wis.2d 60, 588 N.W.2d 336 (Ct. App. 1998), the court found the evidence sufficient to establish "mental disorder" and held that an antisocial personality disorder can qualify as a "mental disorder" if it predisposes the specific defendant to sexual violence. In State v. Zanelli, 223 Wis.2d 545, 589 N.W.2d 687 (Ct. App. 1998), the court found that the evidence was sufficient to show "mental disorder" based on pedophilia and held that proof is not limited to literal compliance with the DSM IV criteria for pedophilia – the ultimate issue is whether a "mental disorder" is established.

"[T]he jury must unanimously agree that [the person] suffers from a 'mental disorder' that predisposes him to commit acts of sexual violence . . . [U]nanimity requirements are satisfied, even if jurors disagree as to which mental disease predisposes the defendant to recidivism." State v. Pletz, 2000 WI App 221, ¶19, 239 Wis.2d 49, 619 N.W.2d 97.

10. This statement is based on the one included in Wis JI-Criminal 605, Instruction on the Issue of the Defendant's Criminal Responsibility (Mental Disease). A slightly different version of this statement was cited in Post as an "apt analogy illustrating the need for separation between legal and medical definitions" when "descriptions designed for clinical use are transplanted into the forensic setting." State v. Post, supra, 197 Wis.2d 279, 305.

11. In State v. Bush, 2005 WI 103, 283 Wis.2d 90, 699 N.W.2d 80, the court made several general comments about proof of the "dangerousness" requirement: due process does not require proof of a recent overt act while on parole [¶29]; ". . . chapter 980 is reserved for only the most dangerous offenders" [¶32];

"predicting an offender's dangerousness under chapter 980 is a complex evaluation" [¶33]; an offender's behavior while incarcerated can be relevant to a determination of current dangerousness [¶37]; and, ". . . the sexually violent offense for which Bush is incarcerated may be relevant evidence of current dangerousness." [¶38].

In State v. Sorenson, 2002 WI 78, 254 Wis.2d 54, 646 N.W.2d 354, the defendant contended it was error for the trial court to preclude him from introducing evidence relating to a prior conviction for a sexual offense in his Chapter 980 commitment trial. He sought to present evidence that the victim had recanted as part of a challenge to the claim that he suffered from a mental disorder and was dangerous. The Wisconsin Supreme Court remanded the case for a determination whether the recantation evidence "meets the test for newly discovered evidence sufficient to warrant a new trial." 2002 WI 78, ¶2. If it does, "any application of issue preclusion to exclude this evidence from Sorenson's ch. 980 trial would be fundamentally unfair. . ." 2002 WI 78, ¶25. [Note: Sorenson did not challenge the validity of the prior conviction. He sought to challenge its probative value as to the "mental disorder" and "dangerous to others" requirements.]

In State v. Olson, 2006 WI App 32, 290 Wis.2d 202, 712 N.W.2d 61, the court of appeals rejected a claim that the Chapter 980 definition "is unconstitutional because its definition of 'dangerousness' lacks a 'temporal context' limited to 'imminent danger.' . . . It is the propensity for sexual violence, not the precise point at which it may manifest itself, that makes the individual particularly threatening to society." ¶1.

Evidence of possible conditions of supervision is properly excluded from a commitment proceeding because it is not relevant to determining whether the person is a sexually violent person. State v. Mark, 2006 WI 78, ¶41, 292 Wis.2d 1, 718 N.W.2d 90.

12. 2003 Wisconsin Act 187 amended the definition of "sexually violent person" in § 980.01(7) by replacing "creates a substantial probability" that the person will engage in future acts of sexual violence with "makes it likely" that the person will do so. The Act also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instructions use "makes it more likely than not" throughout.

In State v. Smalley, 2007 WI App 219, 305 Wis.2d 709, 741 N.W.2d 286, the court of appeals concluded that it was error for an expert to testify at a Chapter 980 commitment hearing that his understanding of "more likely than not" meant "more than zero." However, the court determined that this "isolated misstep did not prevent the real controversy from being tried." ¶2. The court elaborated on the meaning of "more likely than not":

> ¶12. "More likely than not" is not an obscure or specialized term of art, but a commonly-used expression. It is hard to think of a clearer definition of the term than the term itself; though perhaps its expansion to "more likely to happen than not to happen" is more explicit. We find it difficult to imagine that any juror was without an understanding of the phrase's meaning before, during or after the trial, or that any juror thought the phrase meant something other than "more likely to happen than not to happen."

13. The 2007 revision added the reference to "one or more" acts. 2005 Wisconsin Act 434 amended the definition of "sexually dangerous person" in sub. (7) of § 980.01 as follows: ". . . and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." While the instruction does not directly use this definition, element 3. expresses the same concept, using the statement in § 980.02(2)(c): "The person is dangerous to others

because the person's mental disorder makes it likely that he or she will engage in acts of sexual violence." Act 434 did not amend sub. (2)(c) to add the reference to "one or more." However, Act 434 amended § 980.05(3)(a) to read:

> (3)(a) At a trial on a petition under this chapter, the petitioner has the burden of proving beyond a reasonable doubt that the person who is the subject of the petition is a sexually violent person.

The Committee concluded that this was a sufficient basis for adding the reference to "one or more" to the definition in the instruction.

14. This is the Committee's conclusion; it is not directly stated in the statutes. However, another provision of Chapter 980, which requires notice to victims, provides as follows: "'Act of sexual violence' means an act or attempted act that is a basis for an allegation made in a petition under s. 980.02(2)(a)." See § 980.11(1)(a). The acts alleged in the petition are those that qualify as "sexually violent offenses."

This interpretation results in having "sexually violent offense" as a part of each of three parts of the jury's determination. First, the person must have had a prior conviction for a "sexually violent offense." Second, the person's mental disorder must predispose the person to engage in acts of sexual violence, defined as "sexually violent offenses." Third, the person must be dangerous because he has mental disorder which creates a substantial probability that he will engage in acts of sexual violence, again defined as "sexually violent offenses."

15. The Committee assumes that most cases will involve reference to the same "acts of sexual violence" for the purposes of both the second and third factual determinations. See note 12, supra. If they differ, or if it is believed necessary to describe the offenses specifically, the instruction should be tailored to refer to the different offenses that apply in each situation.

16. See note 4, supra, for the offenses specified in § 980.01(6)(a). Since "mental disorder" is defined as a condition that predisposes a person to engage in "acts of sexual violence," it is apparently required that the predisposition go to one or more of the specific offenses that fit the statutory definition of "sexually violent offense." Thus, it may be necessary in some cases to refer to the elements of the offense.

17. See note 5, supra, for the offenses specified in § 980.01(6)(b). Since "mental disorder" is defined as a condition that predisposes a person to engage in "acts of sexual violence," it is apparently required that the predisposition go to one or more of the specific offenses that fit the statutory definition of "sexually violent offense." Thus, it may be necessary in some cases to refer to the elements of the offense.

18. This is the definition provided in § 980.01(5).

19. This sentence is based on § 980.05(4) which provides for the purposes of the original commitment, that "[e]vidence that the person . . . was convicted for or committed sexually violent offenses before committing the offense or act on which the petition is based is not sufficient to establish beyond a reasonable doubt that the person has a mental disorder."

20. The paragraphs defining the burden of persuasion were added to the instruction in 2014. They are adapted from Wis JI-Criminal 140A Burden Of Proof: Forfeiture Actions.

21. Section 980.095(3) provides for a five sixths verdict.

2590 MAKING A FALSE STATEMENT IN AN APPLICATION FOR A CERTIFICATE OF TITLE — § 342.06

Section 342.06(2) of the Wisconsin Statues is violated by one who knowingly makes a false statement in an application for certificate of title.

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

The first element requires that the defendant made a false statement in an application for a certificate of title.[1]

The second element requires that the defendant made the false statement knowingly. This requires that the defendant knew the statement was false.

If you are satisfied beyond a reasonable doubt that the defendant knowingly made a false statement in an application for a certificate of title, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 2600 in 1993. It was renumbered Wis JI-Criminal 2590 in 2004.

This instruction is for a violation of § 342.06(2), which provides as follows:

Any person who knowingly makes a false statement in an application for a certificate of title is guilty of a Class H felony.

1. The person who makes the false statement need not be the one who submits the application to the Department of Transportation. The statute applies to a person who makes a false statement in the

"Dealer's Statement of Sale" portion of the application form. State v. Williams, 156 Wis.2d 296, 299, 456 N.W.2d 864 (Ct. App. 1990).

2600 OPERATING WHILE INTOXICATED: INTRODUCTORY COMMENT

CONTENTS

Scope

Material describing issues relating to "drunk driving" offenses was first published as Wis JI-Criminal 2660-2665 Introductory Comment in 1982. It outlined the major changes in Wisconsin law made by Chapters 20 and 184, Laws of 1981. The most significant of those changes was the creation of offenses based on the alcohol concentration of the driver. The material was significantly revised in 1993 to emphasize the changes made by 1991 Wisconsin Act 277. The most significant of those changes, at least in terms of its effect on the jury instructions, was the creation of "0.08" as the level of prohibited alcohol concentration for offenders with two or more prior offenses.

In 2004, this material was republished as Wis JI-Criminal 2600 and substantially expanded to collect all explanatory material relating to "operating while intoxicated offenses" – those in the Motor Vehicle Code and in the Criminal Code. "Operating while intoxicated" is used as the general term to cover operating "while under the influence" and "with a prohibited alcohol concentration." Footnotes to instructions for specific offenses refer to material contained here.

I. Motor Vehicle Code Offenses Apply "On a highway."

Section 346.61 provides that statutes defining reckless driving and operating while intoxicated – §§ 346.62 to 346.64 – apply to "highways" and to "all premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof." Section 346.66 makes the same provision for violations relating to accidents and accident reporting – §§ 346.67 to 346.70. There is no similar restriction for Criminal Code offenses.

A. "Highway."

"Highway" is defined by sec. 340.01(22):

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in s. 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

Section 346.01(1m), as created by 2009 Wisconsin Act 129, provides:

> In this chapter, in addition to the meaning given in s. 340.01(22), "highway" includes a private road or driveway that is subject to an agreement for traffic regulation enforcement under s. 349.03(5).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983). That a vehicle was operated "on a highway" may be proved circumstantially. State v. Mertes, 2008 WI App 179, 315 Wis.2d 756, 762 N.W.2d 813.

B. "Premises held out for the public . . ."

The Committee Notes to the 1957 revision of the Motor Vehicle Code provide as follows with respect to § 346.61:

> Legislative Council Note, 1957: Most provisions of this chapter are applicable only upon highways. This section gives the sections relating to reckless and drunken driving somewhat broader applicability. They will apply in such areas as parking lots, filling stations and loading platforms. This is a change in the law, for the attorney general has ruled that the present law relating to drunken driving applies only to driving on highways. 38 Atty. Gen. 184 (1949). Broader applicability, however, is in the interest of public safety and also is consistent with § 11-101 of the UVC. [Bill 99-S]

The phrase "held out to the public" has been interpreted in three Wisconsin appellate decisions. In City of Kenosha v. Phillips, 142 Wis.2d 549, 419 N.W.2d 236 (1988), the supreme court held that the privately-owned American Motors parking lot was not "held out to the public" because it is the intent of the owner that governs. The owner's intent was to hold the lot open to its employees, but not to the general public. The statute was amended by 1995 Wisconsin Act 127 to specifically include employee parking lots.

In City of LaCrosse v. Richling, 178 Wis.2d 856, 505 N.W.2d 448 (Ct. App. 1993), the court held that the parking lot of a bar and restaurant was "held out to the public" because potential customers are part of "the public." "We believe the appropriate test is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the parking lot in an authorized manner." 178 Wis.2d 856, 860. The Richling test was applied in State v. Carter, 229 Wis.2d 200,

598 N.W.2d 619 (Ct. App. 1999), to hold that a parking lot of a closed gas station was also "held out to the public."

"The roadways of the Geneva National Community [a gated community] were 'held out to the public for use of their motor vehicles' because on any given day any licensed driver could enter the community unchallenged. . ." State v. Tecza, 2008 WI App 79, ¶22, 312 Wis.2d 395, 751 N.W.2d 896.

C. Instructing the jury.

The fact that the driving or operating took place on a highway or on "premises held out to the public . . ." is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for finding this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element.

In a case where the "highway" issue is contested, or if a case involves operating on "premises held out to the public . . .," the instruction should be modified to provide additional information to the jury. See Wis JI-Criminal 2605, PREMISES OTHER THAN HIGHWAYS, which is drafted for use with the following offenses:

- reckless driving in violation of § 346.62 [Wis JI-Criminal 2650-2654].
- operating under the influence in violation of § 346.63 [Wis JI-Criminal 2660-2669].
- failure to stop and render aid in violation of § 346.67 [Wis JI-Criminal 2670].

D. Criminal Code offenses are not limited to "highways."

Criminal Code offenses are not limited to incidents that occur on highways or any other designated premises.

II. "Motor Vehicle" and "Vehicle."

Motor Vehicle Code statutes refer to both "motor vehicles" and "vehicles" while the Criminal Code refers only to "vehicles." The definitions of the terms are slightly different.

A. Motor Vehicle Code offenses.

Most, but not all, Motor Vehicle Code offenses apply to the driving or operation of a "motor vehicle." The exceptions are offenses under § 346.63(2) involving causing injury. Those offenses apply to offenses committed by driving or operating a "vehicle." The Committee assumed that this difference was intentional on the part of the legislature, justified by the fact that offenses involving injury are considered to be more serious than simple operating offenses, thus leading to the inclusion of a broader category of conduct – namely, the operation of devices which do not fall within the definition of "motor vehicle." As to the use of "vehicle," this rationale was cited with approval in State v. Smits, 2001 WI App 45, ¶16, 241 Wis.2d 374, 626 N.W.2d 42.

There are differences in how the two terms are defined; compare the following.

Section 340.01(35) defines "motor vehicle" as follows:

> "Motor vehicle" means a vehicle, including a combination of 2 or more vehicles or an articulated vehicle, which is self-propelled, except a vehicle operated exclusively on a rail. "Motor vehicle" includes, without limitation, a commercial motor vehicle or a vehicle which is propelled by electric power obtained from overhead trolley wires but not operated on rails. A snowmobile and an all-terrain vehicle shall only be considered motor vehicles for purposes made specifically applicable by statute.

Section 340.01(74) defines "vehicle" as follows:

> "Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes made specifically applicable by statute.

B. Criminal Code offenses apply to "vehicles."

All Criminal Code offenses apply to operating a "vehicle." Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

This definition "clearly includes a tractor for purposes of . . . § 940.09." State v. Sohn, 193 Wis.2d 346, 360, 535 N.W.2d 1 (Ct. App. 1995).

III. "Drive" and "Operate."

Motor Vehicle Code statutes generally apply to persons who "drive or operate" while the Criminal Code generally refers to "operation or handling."

A. Motor Vehicle Code.

Most, but not all, Motor Vehicle Code offenses are defined to apply to any person who "drives" or "operates." The exceptions are offenses under § 346.63(2) involving causing injury. Those offenses apply to offenses committed by "operating."

Section 346.63(3)(a) defines "drive" as follows:

> "Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.

Section 346.63(3)(b) defines "operate" as follows:

> "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

The statutory definition of "operate" was originally based on case law. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955). The definition in § 346.63(3)(b) has been interpreted in Milwaukee County v. Proegler, 95 Wis.2d 614, 291 N.W.2d 608 (Ct. App. 1980); Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977); and, State v. Modory, 204 Wis.2d 538, 555 N.W.2d 399 (1996). "Operating" may be proved by circumstantial evidence – the presence of the vehicle at the gas station, the person's presence behind the wheel, his responses during questioning, the unlikelihood of the passenger's ability to operate due to his incoherent condition and the absence of any evidence the passenger was the driver. State v. Mertes, 2008 WI App 179, ¶17, 315 Wis.2d 756, 762 N.W.2d 813.

In Village of Cross Plains v. Haanstad, 2006 WI 16, ¶23, 288 Wis.2d 579, 709 N.W.2d 447, the court concluded that the defendant did not "operate" a vehicle where ". . . Haanstad was merely sitting in the driver's seat of a parked vehicle. Although the engine was running, the uncontested evidence shows that Haanstad was not the person

who left the engine running. She never physically manipulated or activated the controls necessary to put the vehicle in motion."

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

B. Criminal Code.

Criminal Code offense definitions also contain an anomaly. Section 940.09, Homicide by intoxicated use of vehicle or firearm, defines the offense to apply to causing death by "the operation or handling" of a vehicle or firearm. Section 940.25, Injury by intoxicated use of a vehicle, defines the offense to apply to causing great bodily harm by "the operation" of a vehicle. The instructions for all violations of §§ 940.09 and 940.25 involving vehicles use "operate" and use the definition provided in § 346.63(3)(b), because the Criminal Code does not include a definition of the term. The instructions for violations of § 940.09 involving firearms use "handling" because the Committee concluded that it is the term that fits best with types of instrumentalities involved with those offenses.

IV. Overview: The Significance of Prior Offenses.

A. "Prior offenses" defined.

"Prior offenses" is used here as a short reference to the full statement used in the statutes: "prior convictions, suspensions, or revocations, as counted under § 343.307(1)." This includes convictions for operating while intoxicated and suspensions or revocations for refusal to submit to a chemical test for alcohol. Prior offenses from other jurisdictions are counted if the statutes are "substantially similar" or "in conformity with" Wisconsin law. For example, § 343.307(1)(a) refers to violations of a local ordinance "in conformity with" § 346.63(1). Section 343.307(1)(d) refers to convictions under the law of another jurisdiction that prohibits, for example, use of a motor vehicle while intoxicated "as those or substantially similar terms are used in that jurisdiction's laws."

In State v. List, 2004 WI App 230, 277 Wis.2d 836, 691 N.W.2d 366, the defendant argued that a prior adjudication in Illinois should not count as a "conviction" under § 343.307(1)(d). His Illinois case resulted in placement on supervision which, if successfully completed, "shall be deemed without adjudication of guilt and shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime." The court of appeals disagreed, holding that § 343.307(1)(d)

applies to "convictions under the law of another jurisdiction that prohibits . . . use of a motor vehicle while intoxicated . . ." ¶7. It is not concerned with how the disposition is treated under the laws of that other jurisdiction. It is a conviction under the Wisconsin definition of that term: ". . . a determination that a person has violated . . . the law . . . regardless of whether or not the penalty is rebated, suspended, or probated, in this state or any other jurisdiction. Wis. Stat. § 340.01(9r)." ¶10. However, an administrative suspension following an OWI arrest (in Missouri) does not constitute a prior offense under § 343.307. State v. Machgan, 2007 WI App 263, 306 Wis.2d 752, 743 N.W.2d 832. Also see, State v. Puchacz, 2010 WI App 30, 323 Wis.2d 741, 780 N.W.2d 736. [Michigan convictions for operating while visibly impaired are priors under § 343.307.]

In State v. Carter, 2010 WI 132, 330 Wis.2d 1, ___ N.W.2d ___, the Wisconsin Supreme Court held that suspensions of a driver's operating privilege under the Illinois "zero tolerance" law are convictions under § 343.307(1)(d).

B. Motor Vehicle Code offenses: The civil-criminal distinction.

The first offense for operating while intoxicated under the Motor Vehicle Code is punished as a civil forfeiture. The same conduct is punished as a crime "if the number of convictions under ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations and convictions counted under s. 343.307(1) within a 10-year period equals 2 . . ." Section 346.65(2)(b). The ten-year period is "measured from the dates of the refusals or violations that resulted in the revocation or convictions." Section 346.65(2c).

Case law has resolved most of the issues raised by this penalty scheme. The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). A second offense must be charged as a crime; it may not be charged as a forfeiture offense. County of Walworth v. Rohner, 108 Wis.2d 713, 324 N.W.2d 682 (1982). An uncounseled first offense may be used as the basis for making the second offense a crime because there is no right to counsel in a forfeiture proceeding. State v. Novak, 107 Wis.2d 31, 318 N.W.2d 364 (1981).

C. As the basis for a reduced prohibited alcohol concentration [PAC].

The so-called per se offense of operating with a prohibited alcohol concentration was created by Chapter 20, Laws of 1981. After being referred to by several terms, including "blood alcohol concentration" or "breath alcohol concentration," the term

presently used in the statutes is "prohibited alcohol concentration" [PAC]. See §§ 340.01(1v) and 340.01(46m).

The prohibited level was originally set at "0.10 or more" for all offenders. In 1993, the level was changed to 0.08 for persons with two or more prior offenses. 1991 Wisconsin Act 277. 1999 Wisconsin Act 109 revised the level again, reducing it to 0.02 for persons with three or more prior offenses. 2003 Wisconsin Act 30 [effective date: September 30, 2003] reduced the generally applicable level to 0.08, retaining the 0.02 level for persons with three or more prior offenses.

The existence of the prior offenses is presented as an element of the crime for offenses involving the 0.02 level. See the discussion at Section VI, below.

It is the number of priors that the person had at the time he or she drove or operated the vehicle that determines the applicable PAC level. State v. Sowatzke, 2010 WI App 81, 326 Wis.2d 227, 784 N.W.2d 700.

D. As the basis for increased penalties.

Penalties for violations of § 346.63 increase with the number of prior offenses. See § 346.65(2). Felony penalties apply as follows:

- a fourth offense is a Class H felony if the person has a prior offense within the 5-year period preceding the current offense – § 346.65(2)(am)4m.
- a fifth or sixth offense is a Class H felony – § 346.65(2)(am)5.
- a seventh, eighth, or ninth offense is a Class G felony; the confinement portion of bifurcated sentence shall be not less than three years – § 346.65(2)(am)6.
- a tenth or subsequent offense is a Class F felony; the confinement portion of bifurcated sentence shall be not less than four years – § 346.65(2)(am)7.

Penalties for violations of § 940.09 increase if the person has a prior offense. See § 940.09(1)(c). A first offense is a Class D felony. If the person has a prior, the offense is a Class C felony.

In State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981), the court held that enhanced penalties apply when the required number of convictions have accumulated within the period specified "regardless of the order in which the offenses were committed and the convictions were entered." This standard was applied in State v. Matke, 2005 WI App 4,278 Wis.2d 403, 692 N.W.2d 265, where the court held that Matke was properly sentenced for 6th offense OWI even though he had only three priors at the time he

committed that offense. He was convicted of two additional OWI offenses before being sentenced on what is properly treated as a 6th offense. The court acknowledged that language in a prior decision, State v. Skibinski, 2001 WI App. 109, 244 Wis.2d 229, 629 N.W.2d 12, is arguably inconsistent with this conclusion. But the court held it was not bound by that language because it " was plainly not necessary to our disposition . . . and, indeed, was contrary to the result we reached. Moreover, because [it] . . . is inconsistent with controlling supreme court precedent, we are not obligated to apply it here." ¶16.

Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

E. Collateral attack on prior convictions.

Convictions used to provide the basis for the penalty for third and subsequent offenses are subject to collateral attack in the prosecution for the current offense. See, State v. Foust, 214 Wis.2d 567, 570 N.W.2d 605 (Ct. App. 1997). The same should be true for convictions used to support the application of the 0.02 level of alcohol concentration. The only defect that may be raised is denial of the right to counsel at the time of a prior criminal conviction. See SM-16, COLLATERAL ATTACK ON PRIOR CONVICTIONS.

V. Operating With a Prohibited Alcohol Concentration.

A. Changes in the prohibited level.

The so-called per se offense of operating with a prohibited alcohol concentration [PAC] was created by Chapter 20, Laws of 1981. After being referred to by several terms, including "blood alcohol concentration" or "breath alcohol concentration," the term presently used in the statutes is "prohibited alcohol concentration."

The level was originally set at 0.10 or more. In 1993, the level was changed to 0.08 for persons with two or more prior convictions, refusals, etc. 1991 Wisconsin Act 277. 1999 Wisconsin Act 109 revised the level again, reducing it to 0.02 for persons with three or more priors. 2003 Wisconsin Act 30 [effective date: September 30, 2003] reduced the generally applicable level to 0.08, retaining 0.02 for the person with three or more priors.

B. "Prohibited alcohol concentration" defined.

Section 340.01(46m), as amended by 2003 Wisconsin Act 30, reads as follows:

(46m) "Prohibited alcohol concentration" means one of the following:

(a) If the person has 2 or fewer prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of 0.08 or more.

[(b) – repealed]

(c) If the person is subject to an order under § 343.301 or if the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of more than 0.02.

The reference to a person "subject to an order under § 343.301" was added by 2009 Wisconsin Act 100. [Effective date: July 1, 2010.] It means that persons required to install an ignition interlock device under § 343.301 are subject to the reduced PAC level of 0.02.

Section 340.01(1v) defines "alcohol concentration" as follows:

(1v) "Alcohol concentration" means any of the following:
(a) The number of grams of alcohol per 100 milliliters of a person's blood.
(b) The number of grams of alcohol per 210 liters of a persons's breath.

C. The constitutionality of the "per se" offense.

The constitutionality of penalizing the "status" of having an alcohol concentration of 0.10% or more was upheld in State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984):

> . . . . [a] person of common intelligence can, with a fair degree of definiteness, believe himself or herself to be in jeopardy of violating the statute if a significant quantity of alcohol has been consumed. . . . That is the point at which they are on notice – they have "clear warning" that if they drive, they do so at their own risk. 118 Wis.2d 502, 508-09.

In State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989), the court held that § 346.63(1) defines a per se breath alcohol offense and is constitutional in doing so. Individuals are not free to litigate the "partition ratio" that is used to calculate the prohibited breath alcohol level.

D. PAC level and penalties for third and subsequent offenses.

Section 346.65(2)(g) provides for increased fines for OWI offenders with three, four, five, or six priors. The level of increase depends on the alcohol concentration level:

- 0.17 to 0.199 minimum and maximum fines are doubled.
- 0.20 to 0.249 minimum and maximum fines are tripled.
- 0.25 or more minimum and maximum fines are quadrupled.

Because the alcohol concentration level increases the maximum fine, which is part of the criminal penalty for the offense, the Committee concluded that it is a fact which must be submitted to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

The Committee recommends handling the penalty-increasing factors by submitting an additional question after the instruction on the operating under the influence or operating with a prohibited alcohol concentration offense is given. See Wis JI-Criminal 2663C ALCOHOL CONCENTRATION LEVEL.

VI. Prior Offenses/Being Subject To An Ignition Interlock Order as an Element of the 0.02 Offense.

Until the generally applicable PAC level was changed from 0.10 to 0.08, the level was reduced to 0.08 for those offenders with two or more priors. 2003 Wisconsin Act 30 [effective date: September 30, 2003] reduced the generally applicable level to 0.08 and retained 0.02 for the person with three or more priors. See § 340.01(46m)(c). Because priors reduce the applicable PAC level, the same issues arise under current law with respect to offenses involving the 0.02 level that applied under prior law to 0.08 offenses.

The most difficult issue originally posed to the Committee by the definition of "prohibited alcohol concentration" was whether the fact of prior offenses was a fact that must be submitted to the jury. The Committee concluded that it was a fact for the jury but recognized that this may create practical problems.

The Committee's conclusion was confirmed by the decision in State v. Ludeking, 195 Wis.2d 132, 138, 536 N.W.2d 119 (Ct. App. 1995), which held that the fact of prior convictions was an element of the "0.08" offense:

> The plain language of § 340.01(46m)(b), defines 'prohibited alcohol concentration' to include two separate components: (1) percentage of blood alcohol concentration . . . , and (2) number of prior convictions [or suspensions or revocations]. (Emphasis in original.)

The court also acknowledged the potential for prejudice that exists when the defendant's prior record is presented to the jury but pointed to the cautionary paragraph included in the standard instruction as a way to offset that prejudicial impact. See Section VI., C., below.

The Committee reached the same decision with respect to the person being subject to an ignition interlock order. See Wis JI-Criminal 2660D, where being subject to an order under § 343.301 is included as a bracketed third element. It is not to be submitted to the jury if the defendant admits being subject to the order.

A. State v. Alexander: Stipulation to the "status element."

The potential for prejudice was addressed, and eliminated in many cases, by the Wisconsin Supreme Court's decision in State v. Alexander, 214 Wis.2d 627, 571 N.W.2d 662 (1997). In Alexander, the court referred to the prior offenses element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions, or revocations, the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 627, 645. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 627, 650. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 627, 648-49.

The court gave explicit direction to the trial courts as to how to handle this situation:

> When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The "prohibited alcohol concentration" means 0.08 . . .
> 214 Wis.2d 627, 650-51.

The Committee originally implemented the approach approved in Alexander by placing the "status element" in brackets in the instructions for 0.08 offenses. If the defendant admitted the "status element," the instruction was to be given with two elements: driving or operating a motor vehicle; and having an alcohol concentration of more than 0.08. If the defendant did not admit the "status element," the instruction was to be given with a third element: having two or more prior convictions, suspensions, or revocations as counted under § 343.307(1).

The same approach is now recommended in the instructions for the 0.02 offenses. See, for example, Wis JI-Criminal 2660C.

Regarding stipulations, see Wis JI-Criminal 162A Law Note: Stipulations.

B. Defining the priors for the jury.

The jury instructions adopted the language of the statute by wording the applicable elements as follows:

> 3. The defendant had three or more convictions, suspensions, or revocations, as counted under § 343.307(1).
> [See, for example, Wis JI-Criminal 2660C.]

The reference to "as counted under § 343.307(1)" is not completely satisfactory, but the Committee could not develop a better alternative. Section 343.307(1) contains six subsections detailing the kind of prior convictions, suspensions, or revocations that are to be counted. Some of these subsections have their own cross-references to other statutes. Generally, what counts are prior convictions for operating while intoxicated and prior suspensions or revocations for refusal to take a chemical test for alcohol. Offenses in other jurisdictions may count if the laws of the jurisdiction are "substantially similar to" or "in conformity with" Wisconsin law. See Section IV.,A., above.

All of this is too technical to submit to the jury. The Committee concluded that a simple reference to § 343.307(1) was the best way to proceed. It is assumed that evidence will be presented that the person's driving record shows the requisite number of prior offenses "as counted under § 343.307(1)" and thus the reference to the statute will be familiar to the jury.

C. Minimizing prejudice to the defendant.

If the prior offenses are submitted to the jury, there is a risk of unfair prejudice to the defendant. The instructions suggest that at the defendant's request, a cautionary instruction be given that limits the jury's use of the potentially prejudicial evidence to its proper purpose. (See § 901.06 which requires that a cautionary instruction be given upon request whenever evidence is admitted for a limited purpose.) The suggested instruction is modeled after those used in similar situations and provides as follows:

> Evidence has been received that the defendant had prior convictions, suspensions, or revocations. This evidence was received as relevant to the status of the defendant's driving record, which is an issue in this case. It must not be used for any other purpose and, particularly, you should bear in mind that conviction, suspension, or revocation at some previous time is not proof that the defendant operated a motor vehicle with a prohibited alcohol concentration on this occasion.
>
> Wis JI-Criminal 2660C.

Of course, there are doubts about the efficacy of cautionary instructions like this. Defendants may prefer to keep the evidence from being admitted altogether. That option is now possible if there is an admission of the "status element" per the Alexander decision. See the discussion in VI.,A., above.

D. Being Subject To An Ignition Interlock Order

Like having three or more prior offenses, being subject to an ignition interlock order under § 343.301 reduces the PAC level to "more than 0.02." The Committee concluded that the fact of being subject to an order under § 343.301 should be handled in the same way as the facts of having three or more prior offenses. See Wis JI-Criminal 2660D.

VII. Alcohol Test Results; Evidence of Test Refusal.

A. Admissibility.

The basis for admissibility of alcohol test results is § 885.235(1g), which reads in part as follows:

> (1g) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration while operating or driving a

> motor vehicle . . . evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect: . . .

The instructions contain the following statement, intended to address the admissibility issue:

> The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).
> [See, for example, Wis JI-Criminal 2663.]

Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235.

Test results from a test taken more than three hours after operating may be admissible and may be accorded evidentiary significance if there is sufficient support from expert testimony. State v. Fonte, 2005 WI 77, 281 Wis.2d 654, 698 N.W.2d 594.

B. Instructing on evidentiary significance.

Section 885.235 provides the statutory authority for according evidentiary significance to alcohol test results. The subsection generally applicable to operating while intoxicated offenses is § 885.235(1g)(c), which reads as follows:

> The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.

There is a gap in the authority provided by the statute: it does not address the prima facie effect of test results of 0.02 or more, which would be relevant for offenders with three or more priors, or who are subject to an ignition interlock order, who are charged with the "more than 0.02" offense.

The instructions for more than 0.08 and under the influence offenses advise the jury that a test result showing a prohibited alcohol concentration is sufficient evidence upon which to base a finding that the person was under the influence or had that alcohol concentration at the time of the driving. But the jury is also advised that they are not required to make that finding and that they may do so only if they are so satisfied beyond a reasonable doubt from all the evidence in the case. In the Committee's judgment, this is the type of instruction required by Wis. Stat. § 903.03, which governs jury instructions on "presumptions" and "prima facie evidence."

Instructions for 0.02 offenses contain only the general reference to test results being admissible because § 885.235 does not accord test results showing more than 0.02 any prima facie effect.

C. The blood-alcohol curve.

The presence of a prohibited alcohol concentration at the time of operation is the significant issue. The relevance of a test result showing a prohibited alcohol concentration at some time after operation will vary, depending on many factors, including the person's physical condition, what the person had to eat, what the person drank, the length of time over which the drinks were consumed, etc. The problem of the so-called blood-alcohol curve is discussed in State v. Vick, 104 Wis.2d 678, 312 N.W.2d 489 (1981).

Vick presented a situation where the defendant claimed his blood was absorbing alcohol at the time he was arrested and that therefore the blood alcohol concentration had not reached the prohibited level at the time of driving but only reached that level later at the time of the test. If the evidence in a case presents this problem, the instruction on the prima facie effect of test results may not be appropriate since there may be no "rational connection" between the alcohol concentration at the time of the test and a prohibited alcohol concentration at the time of driving. (See Ulster Co. v. Allen, 442 U.S. 140 (1979), for a discussion of the "rational connection" requirement when instructing the jury on statutory presumptions.)

The Committee concluded that where there is a problem with the "blood-alcohol curve," it is preferable to treat the test result as relevant evidence rather than instruct the jury to give it "prima facie effect." The following is recommended:

> Evidence has been received that, within three hours after the defendant's alleged (driving) (operating) of a motor vehicle, a sample of the defendant's (breath) (blood) (urine) was taken. An analysis of the sample has also been received.

> This is relevant evidence that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating). Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider the evidence regarding the analysis of the (breath) (blood) (urine) sample and the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case, giving it just such weight as you determine it is entitled to receive.
> Wis JI-Criminal 234, BLOOD-ALCOHOL CURVE.

In State v. Fischer, 2010 WI 6, 322 Wis.2d 265, 778 N.W.2d 629, the defendant sought to introduce an expert's opinion testimony, based in part on the results of a preliminary breath test, to support a blood alcohol curve argument. The court held that the testimony was properly excluded:

> Wisconsin Stat. § 343.303 expressly bars PBT results in OWI cases, and to allow Wis. Stat. § 907.03 to trump that prohibition would simply nullify that provision and would consequently present a variety of needless obstacles to the investigation, prosecution, and defense of drunk driving cases. ¶4.

The court held that exclusion does not violate the defendant's constitutional right to present a defense because, even assuming the evidence is relevant and necessary, ". . . in an OWI prosecution, even if a defendant establishes a constitutional right to present an expert opinion that is based in part on PBT results, the right to do so is outweighed by the State's compelling interest to exclude that evidence." ¶5.

Fischer was granted relief as a result of his petition for habeas corpus relief in federal court. Fischer v. Ozaukee County Circuit Court, 10-C-553, E.D. Wis. Sept. 29, 2010. The federal magistrate judge concluded that "the Wisconsin Supreme Court's decision affirming the exclusion of Fischer's expert's testimony involved an unreasonable application of federal law." Slip opinion, page 18. The state's motion to alter or amend that judgment was denied. Fischer v. Van Hollen, 10-C-553, E.D. Wis. Jan. 7, 2011.

D. Reliability of testing devices.

The instructions include the following paragraph regarding the reliability of the standard devices used to test breath or blood samples for alcohol concentration:

> The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by

the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.
[See, for example, Wis JI-Criminal 2663.]

The intent of the paragraph is to advise the jury that the state need not prove the reliability of the underlying principles upon which the breath test is based. The reliability of those principles has been satisfactorily established so that evidence of test results is admissible without a preliminary establishment in every case that those principles are valid. The testing device involved must be one whose reliability has been established. See Chapter Trans. 311, Wis. Admin. Code.

This concept is sometimes referred to as a "prima facie presumption of reliability (or accuracy)," see, for example, City of Madison v. Bardwell, 83 Wis.2d 891, 900, 266 N.W.2d 618 (1978); State v. Trailer Service, Inc., 61 Wis.2d 400, 407, 212 N.W.2d 683 (1973); and State v. Neitzel, 95 Wis.2d 191, 203, 289 N.W.2d 828 (1980). The Committee concluded that the jury should not be instructed in terms of a "presumption" but should simply be advised that the validity of the underlying scientific principles need not be established. However, the jury must be satisfied that the test procedure was proper and that the operator was qualified, and the defendant may challenge the test results on those grounds. West Allis v. Rainey, 36 Wis.2d 489, 496, 153 N.W.2d 514 (1967).

The presumption of accuracy also applies to the test results of the "Intoximeter 3000." State v. Dwinnell, 119 Wis.2d 305, 349 N.W.2d 739 (Ct. App. 1984).

The state is not required affirmatively to prove compliance with the procedures spelled out in the Wisconsin Administrative Code (Trans. 311.05 - 311.09) as a foundation for the admission of breathalyzer test results. City of New Berlin v. Wertz, 105 Wis.2d 670, 314 N.W.2d 911 (Ct. App. 1981). However, the jury should be afforded the opportunity to weigh alleged failures to conform with standards and regulations in determining the weight to accord the breathalyzer results. Wertz, at 677. The required procedures for test device certification are discussed in County of Dane v. Winsand, 2004 WI App 86, 271 Wis.2d 786, 679 N.W.2d 885.

E. The alcohol concentration chart.

Challenges to the accuracy of test results sometimes involve reliance on the DOT-published chart estimating blood alcohol concentration by reference to the number of drinks consumed, adjusted for body weight and time. The chart is admissible in drunk driving cases. State v. Hinz, 121 Wis.2d 282, 360 N.W.2d 56 (Ct. App. 1984). For an

instruction on the use of the chart, see Wis JI-Criminal 237, ALCOHOL CONCENTRATION CHART.

F. Evidence of test refusal.

In State v. Albright, 98 Wis.2d 663, 298 N.W.2d 196 (Ct. App. 1980), the court of appeals reaffirmed that evidence of a defendant's refusal to take a chemical test was relevant and constitutionally admissible in a drunk driving prosecution. "A reasonable inference from refusal to take a mandatory breathalyzer test is consciousness of guilt. The person is confronted with a choice of the penalty for refusing a test, or taking a test which constitutes evidence of his sobriety or intoxication. Perhaps the most plausible reason for refusing the test is consciousness of guilt, especially in view of the option to taking an alternative test." 98 Wis.2d 663, 668-69. The evidence being relevant and there being no right to refuse to take a test, the court held there was no rationale for prohibiting comment on the refusal.

Previous decisions of the Wisconsin Supreme Court had reached the same conclusion, see State v. Draize, 88 Wis.2d 445, 276 N.W.2d 784 (1974); City of Waukesha v. Godfrey, 41 Wis.2d 401, 164 N.W.2d 314 (1969); State v. Kroening, 274 Wis. 266, 79 N.W.2d 810 (1956); and City of Barron v. Covey, 271 Wis. 10, 72 N.W.2d 387 (1955).

The defendant's explanation for the refusal is also admissible. Since the relevance of the refusal is that it tends to indicate a consciousness of guilt,

> [t]he corollary of that rule is that any evidence that tends to rebut or diminish the force of that permissible inference is also relevant, for it tends to make less probable the fact of intoxication – a fact of consequence in this action, and, therefore, equally admissible. Thus, evidence that would tend to show that the refusal was for reasons unrelated to a consciousness of guilt or the fear that the test would reveal the intoxication, tends to abrogate, or at least diminish, the reasonableness of the inference to be drawn from an unexplained refusal to take the alcohol test.

State v. Bolstad, 124 Wis.2d 576, 585-86, 370 N.W.2d 576 (1985).

In State v. Mallick, 210 Wis.2d 427, 565 N.W.2d 245 (Ct. App. 1997), the court held that evidence of refusal to perform field sobriety tests was admissible.

In South Dakota v. Neville, 459 U.S. 553 (1983), the U.S. Supreme Court upheld the admissibility of evidence of test refusal. The Court did not base its decision on the distinction that refusal is a physical, rather than a testimonial, act. Instead, the Court held that admissibility does not violate the 5th Amendment privilege against self-incrimination because no impermissible coercion is involved: ". . . a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and this is not protected by the privilege against self-incrimination." 459 U.S. 553, 564. The defendant in Neville also argued that the due process clause prohibited reference to the refusal because he was not specifically warned that his refusal could be used against him at trial. The Court rejected this argument as well, holding that the "failure to warn was not the sort of implicit promise to forego use of evidence that would unfairly 'trick' respondent if the evidence were later offered against him at trial," 459 U.S. 553, 566.

See Wis JI-Criminal 235, REFUSAL OF DEFENDANT TO FURNISH SAMPLE FOR ALCOHOL TEST.

VIII. Defining "Under the Influence."

A. Definition for Motor Vehicle Code offenses.

The presently published instructions for Motor Vehicle Code offenses use the following definition of "under the influence":

> "Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.
>
> Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.
>
> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.
>
> Wis JI-Criminal 2663.

Modifications of this definition are routinely requested and tend to focus on three related issues:

- adding the phrase ". . . to a degree which renders him or her incapable of safely driving";
- adding "materially" to modify the word "impaired"; and,
- restoring a longer, two-paragraph, explication of "under the influence" which is generally attributed to Fond du Lac v. Hernandez, a 1969 decision of the Wisconsin Supreme Court.

B. "Incapable of safely driving."

There is undeniably a reasonable basis for the argument that "incapable of safely driving" is an appropriate addition to the definition. It is seemingly supported by the statutory language as it now appears in § 346.63(1)(a) and by case law that quotes or restates the statute.

§ 346.63(1)(a) reads as follows:

(1) No person may drive or operate a motor vehicle while:
(a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or . . .

Despite this apparent textual basis, the Committee has concluded that "incapable of safely driving" does not apply to cases involving operating under the influence of "an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog."

The Committee has interpreted the statute as presenting three options, each represented by a clause in the statute that begins with "under the influence." The three separate options are:

- under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog;

- under the influence of any other drug to a degree which renders him or her incapable of safely driving;

- under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

Under this reading of the statute, the "incapable of safely driving" phrase applies only to offenses involving the second two options – those involving the influence of a drug or the combined influence of an intoxicant and a drug.

The Committee's grammatical construction is supported by the legislative history. The references to "incapable of safely driving" were added to § 346.63(1)(a) by 1983 Wisconsin Act 459. Before the 1983 revision, Wisconsin had a relatively simple statute:

> **346.63 Operating under influence of intoxicant. (1)** No person may drive or operate a motor vehicle while:
>
> (a) Under the influence of an intoxicant or a controlled substance or a combination of an intoxicant and a controlled substance; or
>
> (b) The person has blood alcohol concentration of .10% or more . . . . Section 346.63, 1981-82 Wis. Stats.

The amendment made to sub. (1)(a) by 1983 Wisconsin Act 459 is shown below, with the new language underscored:

> (a) Under the influence of an intoxicant or a controlled substance or a combination of an intoxicant and a controlled substance, <u>under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving</u>; or . . .

The Committee considered this to be strong support for its grammatical construction of the statute and reflected its conclusion in the published instructions by omitting "incapable of safely driving" from the regular under the influence instructions but including it in Wis JI-Criminal 2666, which is drafted for under the influence of a drug offenses. The conclusion was explained in a footnote to Wis JI-Criminal 2666, but was not referred to in the other instructions.

At least two appellate decisions have quoted the statute or paraphrased it in a way that suggests that "incapable of safely driving" applies to "under the influence of an intoxicant" cases. See, <u>State v. Waalen</u>, 130 Wis.2d 18, 27,386 N.W.2d 47 (1986); and, <u>County of Jefferson v. Renz</u>, 222 Wis.2d 424, 444, 588 N.W.2d 267 (Ct. App. 1998), reversed on other grounds, 231 Wis.2d 293, 603 N.W.2d 541 (1999). In neither of these cases was the specific statutory interpretation issue considered on its merits or necessary

to the decision. The Committee concluded that these two references were not a sufficient basis for changing the interpretation described above.

The Committee's conclusion that "incapable of safely driving" does not apply to the regular definition of "under the influence" was adopted in State v. Hubbard, 2008 WI 92, ¶52, 313 Wis.2d 1, 752 N.W.2d 389: "The phrase 'to a degree which renders him incapable of safely driving' does not affect the definition of 'under the influence' in the Criminal Code."

C. "Materially" impaired.

The presently published instructions present a seeming inconsistency. Those for Motor Vehicle Code offenses define "under the influence" by stating that "the defendant's ability to operate a vehicle was impaired . . ." Those for Criminal Code offenses define "under the influence" by stating that "the defendant's ability to operate a vehicle was materially impaired . . ." [Emphasis added]. This state of affairs has a long history; the basic steps are set forth below.

"Under the influence" is not defined in the Motor Vehicle Code, but is defined in the Criminal Code as "materially impaired". See § 939.22(42). Before 1978, the instructions for Motor Vehicle Code offenses used a definition based on case law from other states. [This definition was implicitly approved in Fond du Lac v. Hernandez. See Section VIII., D., below.] At that time, there was only one Criminal Code drunk driving crime (Homicide By Intoxicated Use . . .) and it used the § 939.22(42) definition.

In 1978, the Motor Vehicle Code instructions were revised, the Criminal Code instruction was revised, and a new Criminal Code instruction was added, for Injury [Great Bodily Harm] By Intoxicated Use . . . in violation of § 940.25. All the instructions used the same, case-law-based, definition previously used only in the Motor Vehicle Code instructions.

In 1982, a question was raised about the propriety of using the case law definition for Criminal Code offenses because it could be interpreted as stating a less demanding test than that required by the "materially impaired" standard set forth in § 939.22(42). This led the Committee to conclude that there was no reason to have different definitions for Motor Vehicle Code and Criminal Code offenses because crimes were defined in both Codes in identical language. The Committee decided that because "under the influence" was defined in the Criminal Code, that definition should also be used for Motor Vehicle Code offenses. [The Committee was aware that a Criminal Code definition does not

automatically apply outside the Criminal Code, but thought it was sensible to use it in this situation.]

So the Committee adopted a new definition of "under the influence" in 1982 applicable to all drunk driving offenses and including "materially impaired." In an attempt to provide some guidance to the jury on the meaning of that phrase, the new instruction included the following:

> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be materially, that is substantially, impaired.
> Wis JI-Criminal 2663, c. 1982.

The 1982 revision was not universally acclaimed. Several judges contacted the Committee to express dissatisfaction with it, but the Committee was not convinced that it should be changed. The issue reached the Wisconsin appellate courts when a trial judge declined to use the definition in the published instruction for a Motor Vehicle Code case, using instead the pre-1982 definition. The defendant appealed, claiming that it was error to fail to include "materially impaired." The Wisconsin Court of Appeals affirmed, holding that the definition used by the trial court correctly stated the law and that the Criminal Code definition did not apply to Motor Vehicle Code offenses. State v. Waalen, 125 Wis.2d 272, 371 N.W.2d 401 (Ct. App. 1985). The Wisconsin Supreme Court affirmed on slightly different grounds, holding that the definition for Motor Vehicle Code offenses is equivalent to the Criminal Code definition but that the Committee erred in equating "materially" with "substantially":

> Requiring "substantial impairment" of an individual's ability to operate a vehicle before that person could be found "under the influence" would be inconsistent with the expressed legislative intent because it would not provide maximum safety for all users of state highways. Rather, "material impairment" under sec. 939.22(42), Stats., exists when a person is incapable of driving safely, or "is without proper control of all those faculties . . . necessary to avoid danger to others."
> State v. Waalen, 130 Wis.2d 18, 27, 386 N.W.2d 47 (1986) (citations omitted)

In response to Waalen, the Committee revised the Motor Vehicle Code instructions to delete reference to "materially," with a footnote indicating that the decision appeared to approve the use of that term for Motor Vehicle Code offenses. The Committee concluded that use of "materially" invited definition but that it could not be helpfully defined without running afoul of the legislative intent recognized in Waalen. The

Criminal Code instructions continued to use "materially" because it is part of the Criminal Code definition of "under the influence," but deleted reference to "substantially."

In State v. Hubbard, 2008 WI 92, 313 Wis.2d 1, 752 N.W.2d 839, the court concluded that the trial court did not err in responding to a jury question about the meaning of "materially impaired." The trial court told the jury to give the words their plain and ordinary meaning and declined to respond with language from Waalen to which the prosecution had objected. The supreme court affirmed: ". . . Hubbard's argument that 'the Waalen language' defined 'materially impaired' to give the term a 'technical' or 'peculiar' meaning in the context of criminal law is untenable." 2008 WI 92, ¶54.

D. Fond du Lac v. Hernandez: Case law definition.

The third issue relates to two paragraphs that are attributed to Fond du Lac v. Hernandez, 42 Wis.2d 473, 167 N.W.2d 408 (1969). In fact, equivalent material appeared in the uniform instructions from 1966 until 1982 and it was that definition that was used in the Hernandez case. It read as follows:

> The expression "under the influence of an intoxicant" covers not only all the well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors (including beer) and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess.
>
> A person who is even to the slightest extent under the influence of an intoxicant in the common and well-understood acceptation of the term is – to some degree at least – less able either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle as powerful and dangerous a mechanism as a modern motor vehicle with safety to himself and the public. Not every man who has consumed alcoholic beverages falls within the ban of the (statute) (ordinance). If that consumption of alcoholic beverages does not cause him to be influenced in the ordinary and well-understood meaning of the term, he is not under the influence of an intoxicant within the meaning of the statute.
> Wis JI-Criminal 2663, c. 1966.

The instruction given by the trial court in the Waalen case was based on these two paragraphs, omitting only the first sentence of the second paragraph. In reviewing that

instruction, the supreme court quoted the full Hernandez version and stated that in Hernandez, "[w]e rejected Hernandez's challenge to the instruction, implicitly affirming the validity of the language of the instruction." State v. Waalen, 130 Wis.2d 18, 26, 386 N.W.2d 47 (1986).

[NOTE: At the risk of providing more detail than anyone needs, the apparent original source of the two paragraphs is Hasten v. State, 35 Ariz. 427, 280 Pac. 670 (1929), where they are part of a longer discussion of the meaning of "under the influence." Hasten was referred to on another issue in Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955), and was extensively quoted in the state's brief in that case.]

As mentioned above, the Committee made major changes in these two paragraphs in the 1982 version of the instruction at the same time that "materially" was added. The two changes influenced one another: the two paragraphs were believed to communicate a less stringent standard than that required by "materially impaired." They were edited and reorganized to yield the two paragraphs that are in the current instructions:

> Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.
>
> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.
> Wis JI-Criminal 2663, c. 1993.

The Criminal Code instructions use these paragraphs, but add "materially" before "impaired" in the last sentence.

IX. Operating With a Detectable Amount of a Restricted Controlled Substance.

2003 Wisconsin Act 97 created or amended nine statutes to provide that no person may drive or operate a motor vehicle while "[t]he person has a detectable amount of a restricted controlled substance in his or her blood." The statute applies to offenses committed on or after the Act's effective date: December 19, 2003.

A. Statutes affected.

The new or amended statutes are:

- § 346.63(1)(am): driving or operating
- § 346.63(2)(a)3.: causing injury
- § 940.09(1)(am): causing death
- § 940.09(1)(cm): causing death of an unborn child
- § 940.09(1g)(am): causing death by handling a firearm
- § 940.09(1g)(cm): causing death of an unborn child by handling a firearm
- § 940.25(1)(am): causing great bodily harm
- § 940.25(1)(cm): causing great bodily harm to an unborn child
- § 941.20(1)(bm): operating or going armed with a firearm

There are three published instructions for "detectable amount" cases:

- Wis JI-Criminal 2664B for violations of § 346.63(1)(am);
- Wis JI-Criminal 1266 for violations of § 940.25(1)(am); and,
- Wis JI-Criminal 1187 for violations of § 940.09(1)(am).

B. "Restricted controlled substance" defined.

"Restricted controlled substance" is defined as follows in § 340.01:

(50m) 'Restricted controlled substance' means any of the following:
(a) A controlled substance included in schedule I other than tetrahydrocannabinol.
(b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
(c) Cocaine or any of its metabolites.
(d) Methamphetamine.
(e) Delta-9-tetrahydrocannabinol.

[The same definition is found in several other statutes. See, for example, § 939.22(33).

C. Valid prescription defense.

All the statutes recognizing the "detectable amount . . ." offense also recognize a defense for cases involving "a detectable amount of methamphetamine, gamma-hydroxybutyric acid, or delta-9-tetrahydrocannabinol" that applies if the person proves,

by a preponderance of the evidence, that he or she had a valid prescription for the substance. See, for example, § 346.63(1)(d).

D. Constitutionality.

Two decisions of the Wisconsin Court of Appeals have upheld the constitutionality of the "detectable amount" statutes.

In State v. Smet, 2005 WI App 263, 288 Wis.2d 525, 709 N.W.2d 474, the court held that § 346.63(1)(am) does not overstep the state's police power by not requiring any showing of impairment. The "legislature reasonably and rationally could have determined that, as a class, those who drive with unprescribed illegal chemicals in their blood represent a threat to public safety." ¶16. Further, the statute is not fundamentally unfair and does not offend principles of equal protection.

In State v. Gardner, 2006 WI App 92, 292 Wis.2d 682, 715 N.W.2d 720, the court held that § 940.25(1)(am) is constitutional. It does not create a "presumption of guilt" or create a "status offense." The court noted that "cases across the country challenging this same issue are repeatedly resolved in favor of upholding the legislative action. . . . We join those jurisdictions in concluding that our legislature acted reasonably when it created an offense prohibiting operation of a vehicle with any amount of a controlled substance in one's system." ¶20.

X. Offenses Involving Injury or Death: The Affirmative Defense.

Both the Motor Vehicle Code and the Criminal Code define offenses involving causing harm by operating while intoxicated. See § 346.63(2), causing injury, § 940.09, causing death, and § 940.25, causing great bodily harm. Each of the statutes also provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the [harm] would have occurred even if he or she had been exercising due care and he or she had not been under the influence . . . or did not have a prohibited alcohol concentration . . ." The defense is addressed in the instructions by providing an alternative ending for use in cases where there is "some evidence" of the defense.

The 2004 revision of the instructions incorporated the defense into the offense instructions. It had formerly been addressed in separate instructions: Wis JI-Criminal 2662 for Motor Vehicle Code offenses and Wis JI-Criminal 1188 for Criminal Code offenses. Those instructions have been withdrawn.

A. Constitutionality.

The affirmative defense was added to the statutes by Chapter 20, Laws of 1981, which eliminated the requirement that "causal negligence" be established in addition to operating while under the influence. See, §§ 346.63(2), 940.09, and 940.25, 1979 Wis. Stats. The Committee concluded at that time that the intent of the legislature was to remove any required causal connection between the harm and any negligence by the defendant or the defendant's being under the influence. Thus, the instructions tried to make it clear that only simple operation must be causal, not operation under the influence, and not negligent operation. Trying to explain this concept to the jury without creating confusion is difficult. The following paragraph was included in the body of earlier versions of the instructions. Because some found the statement confusing, it was moved to the footnotes, to be used by those who believe it adds clarity.

> It is not required that the [harm] was caused by any drinking of alcohol or by any negligent or improper operation of the vehicle. What is required is that the [harm] was caused by the defendant's operation of the vehicle.

The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). [The U.S. District Court for the Western District of Wisconsin reached the same conclusion, using a slightly different analysis; see, Caibaiosai v. Barrington, 643 F.Supp. 1007 (W.D. Wis. 1986).] Caibaiosai involved § 940.09, but the other offenses are defined in an identical manner.

The defense is closely related to the cause element of these offenses but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of harm. If the defendant's operation caused the harm, the defense allows the defendant to avoid liability if it is established that the harm would have occurred even if the defendant had not been under the influence and had been exercising due care. This distinction is essential to the conclusion that the affirmative defense is constitutional: the defense must relate to an issue that is not covered by the offense definition. See, Caibaiosai, supra, and Patterson v. New York, 432 U.S. 197 (1977).

The phrase "had been exercising due care" was added to the defense by 1989 Wisconsin Act 275.

B. The substance of the defense.

The Caibaiosai decision held that the defense provided in § 940.09(2) "is meant to provide a defense for the situation where there is an intervening cause between the intoxicated operation of the automobile and the death of an individual." 122 Wis.2d 587, 596. A footnote to the quoted material cited the Black's Law Dictionary definition of "intervening cause": "In criminal law, a cause which comes between an antecedent and a consequence; it may be either independent or dependent, but in either case it is sufficient to negate criminal responsibility." 122 Wis.2d 587, 596, n. 4.

A different definition of "intervening cause," based on State v. Nester, 336 S.E.2d 187, 189 (W.Va. 1985), was adopted by the Wisconsin Court of Appeals in State v. Turk, 154 Wis.2d 294, 296, 453 N.W.2d 163 (Ct. App.):

> An intervening cause is a new and independent force which breaks the causal connection between the original act or omission and the injury, and itself becomes the direct and immediate cause of the injury. The fact that the victim did not take precautionary steps which may have prevented his eventual demise is not an intervening cause.

In the Turk case, a defendant charged with causing great bodily harm by operating a vehicle while under the influence of an intoxicant under § 940.25 claimed that the injury was caused by the victim's failure to wear seat belts. Turk upheld the trial court's determination that the failure to wear seat belts was irrelevant to the defense, relying on the above rule.

C. Burden of persuasion.

The statutes expressly place the burden on the defendant to prove the defense "by a preponderance of the evidence." The instructions describe the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

D. Conduct of the victim.

The instructions recognize that evidence of the conduct of the victim may be relevant to the affirmative defense and provide the following for use in that kind of case:

Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care does not by itself provide a defense to the crime charged against the defendant. Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the [harm] would have occurred even if the defendant had not been under the influence and had been exercising due care.

[See, for example, Wis JI-Criminal 1185.]

This was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to relate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense, to the affirmative defense. Although Lohmeier dealt with a Criminal Code case, the Committee concluded that its holding would also apply to Motor Vehicle Code offenses under § 346.63(2), so all offenses involving the causing of harm address the defense the same way.

The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the paragraph is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted.

XI. Two-Charge Cases.

Both Motor Vehicle Code and Criminal Code offenses apply to operating under the influence and with a prohibited alcohol concentration. In each instance, there is statutory authority for charging two counts based on the same incident and submitting those counts to the jury. For example, § 346.63(1)(c) provides:

> A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence. If the person is charged with violating any combination of par. (a), (am), or (b), the offenses shall be joined. If the person is found guilty of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under §§ 343.30(1q) and 343.305. Paragraphs (a), (am), and (b) each require proof of a fact for conviction which the others do not require.

The constitutionality of this two-charge procedure was upheld in State v. Bohacheff, 114 Wis.2d 402, 338 N.W.2d 446 (1983). The court held that the Double Jeopardy Clause is not offended because of the express limitation that there be only one conviction. Also see, State v. Raddeman, 2000 WI App 190, 238 Wis.2d 628, 618 N.W.2d 258.

Bohacheff dealt with a challenge to the criminal complaint, so it did not address the problems presented at a trial where both charges are submitted to the jury. The Committee concluded that § 346.63(1)(c) clearly suggests that both charges should be submitted and that the jury should make a finding as to each charge. If the jury returns a guilty verdict on both, judgment of conviction should be entered on the count on which the prosecutor moves for judgment. The remaining count should be dismissed.

Wis JI-Criminal 2668 is intended to serve as a model for forfeiture cases where two charges based on the same incident are submitted to the jury: one alleging operating under the influence in violation of § 346.63(1)(a); the other alleging operating with a prohibited alcohol concentration in violation of § 346.63(1)(b). It is a combination of Wis JI-Criminal 2660A and Wis JI-Criminal 2663A and attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge. Wis JI-Criminal 2669 provides a similar model for criminal charges under § 346.63.

A model is also published for violations of § 940.09 involving two charges. See Wis JI-Criminal 1189, which can be adapted for use for violations of § 940.25.

COMMENT

This Introductory Comment was originally published as Wis JI-Criminal 2660-2665 in 1982 and revised in 1986, 1993, 1998, and 2004. The 2004 revision renumbered it as Wis JI-Criminal 2600. This revision was approved by the Committee in February 2011.

This Introductory Comment was first published in 1982 to outline the major changes in Wisconsin's drunk driving law made by Chapters 20 and 184, Laws of 1981, and was revised periodically to outline additional statutory changes. The 2004 revision changed its approach, setting it up as a collection of all explanatory material relating to "operating while intoxicated offenses" – those in the Motor Vehicle Code and in the Criminal Code. Footnotes to instructions for specific offenses refer to material contained here.

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2605 PREMISES OTHER THAN HIGHWAYS — §§ 346.61, 346.66

[WHERE OPERATION ON PREMISES OTHER THAN A HIGHWAY IS INVOLVED, SUBSTITUTE THE FOLLOWING, AS APPROPRIATE, FOR THE FIRST ELEMENT OF THE INSTRUCTION][1]

1. The defendant (drove) (operated) a motor vehicle on

[premises held out to the public for use of their motor vehicles.][2]

[premises provided by employers to employees for the use of their motor vehicles.][3]

[premises provided to tenants of rental housing in buildings of four or more units for the use of their motor vehicles.][4]

[ADD WHEN SUPPORTED BY THE EVIDENCE][5]

[Operating a vehicle in a private parking area at a farm or single-family residence does not satisfy this element.]

COMMENT

Wis JI-Criminal 2605 was originally published in 1996 and amended in 2004. This revision updated the Comment and was approved by the Committee in February 2011.

This instruction is intended to address alternatives to "operation on a highway" for the following offenses:

- reckless driving in violation of § 346.62 [Wis JI-Criminal 2650-2654];
- operating under the influence in violation of § 346.63 [Wis JI-Criminal 2660-2669]; and,
- failure to stop and render aid in violation of § 346.67 [Wis JI-Criminal 2670].

The premises on which those offenses may be committed are specified in §§ 346.61 and 346.66, both of which were amended by 1995 Wisconsin Act 127. [Effective date: January 6, 1996]. The "on highway requirement" is also discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. I.

Section 346.01(1m), as created by 2009 Wisconsin Act 129, provides:

In this chapter, in addition to the meaning given in s. 340.01(22), "highway" includes a private road or driveway that is subject to an agreement for traffic regulation enforcement under s. 349.03(5).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983). That a vehicle was operated "on a highway" may be proved circumstantially. State v. Mertes, 2008 WI App 179, 315 Wis.2d 756, 762 N.W.2d 813.

1. Sections 346.61 and 346.66 define the applicability of sections relating to reckless and drunken driving [§§ 346.62 to 346.64] and relating to accidents and accident reporting [§§ 346.67 to 346.70]. The first element of instructions for those offenses typically includes the requirement that the operation take place "on a highway." This instruction provides alternatives for cases where the operation takes place on premises other than highways as defined in §§ 346.61 and 346.66. Care should be taken that the restatement of the first element includes any additional facts that may be in that element.

2. The phrase "held out to the public" has been interpreted in three Wisconsin appellate decisions. In City of Kenosha v. Phillips, 142 Wis.2d 549, 419 N.W.2d 236 (1988), the supreme court held that the privately-owned American Motors parking lot was not "held out to the public" because it is the intent of the owner that governs. The owner's intent was to hold the lot open to its employees, but not to the general public. The statute was amended by 1995 Wisconsin Act 127 to specifically include employee parking lots. See note 3, below.

In City of LaCrosse v. Richling, 178 Wis.2d 856, 505 N.W.2d 448 (Ct. App. 1993), the court held that the parking lot of a bar and restaurant was "held out to the public" because potential customers are part of "the public." "We believe the appropriate test is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the parking lot in an authorized manner." 178 Wis.2d 856, 860. The Richling test was applied in State v. Carter, 229 Wis.2d 200, 598 N.W.2d 619 (Ct. App. 1999), to hold that a parking lot of a closed gas station was also "held out to the public."

"The roadways of the Geneva National Community [a gated community] were 'held out to the public for use of their motor vehicles' because on any given day any licensed driver could enter the community unchallenged. . ." State v. Tecza, 2008 WI App 79, ¶22, 312 Wis.2d 395, 751 N.W.2d 896.

The Committee Notes to the 1957 revision of the Motor Vehicle Code provide as follows with respect to § 346.61:

> Legislative Council Note, 1957: Most provisions of this chapter are applicable only upon highways. This section gives the sections relating to reckless and drunken driving somewhat broader applicability. They will apply in such areas as parking lots, filling stations and loading platforms. This is a change in the law, for the attorney general has ruled that the present law relating to drunken driving applies only to driving on highways. 38 Att'y Gen. 184 (1949). Broader applicability, however, is in the interest of public safety and also is consistent with § 11-101 of the UVC. [Bill 99-S]

3. This alternative was added to both § 346.61 and § 346.66 by 1995 Wisconsin Act 127.

4. This alternative was added to both § 346.61 and § 346.66 by 1995 Wisconsin Act 127.

5. The Committee suggests adding this statement only in the case where there is a factual dispute about the area where the operating took place and evidence supports a finding that a private parking area was involved. The statement was added to both § 346.61 and § 346.66 by 1995 Wisconsin Act 127.

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2610 OPERATING A MOTOR VEHICLE WITHOUT A VALID OPERATOR'S LICENSE — CRIMINAL OFFENSE — § 343.05(3)(a)

Statutory Definition of the Crime

Section 343.05(3)(a) of the Wisconsin Statutes is violated by any person who operates a motor vehicle[1] upon a highway of this state when that person does not hold a valid operator's license.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[2] upon a highway.[3]

   A motor vehicle is operated when it is set in motion.[4]

2. The defendant did not hold a valid operator's license at the time the defendant operated the motor vehicle.

   [(A cancelled) (An expired) license is not a valid license. It makes no difference whether the defendant knew the license (had been cancelled) (had expired).][5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2610 was originally published in 1980 and revised in 1986, 1995, and 2007. This revision was approved by the Committee in March 2012; it made minor changes in the text and updated the Comment.

This instruction is for second or subsequent violations of § 343.05(3)(a), which are crimes. See § 343.05(5)(b)1. As with operating under the influence offenses, the fact of a prior conviction is not an element of the criminal offense. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

This instruction applies only to operating without a valid license. Subsection (6) of § 343.05 provides that § 343.44 applies to any person operating a motor vehicle upon a highway when the person's license has been revoked or suspended. See Wis JI-Criminal 2620 through 2623. Felony penalties apply to violations of § 343.05 causing great bodily harm or death. See Wis JI-Criminal 2612. The felony penalties were created by 2011 Wisconsin Act 113 [effective date: March 1, 2012]. Act 113 did not affect the penalties for this offense.

A first offense under § 343.05 is a civil forfeiture. To use this instruction for the forfeiture offense, modify the instruction by substituting "to a reasonable certainty by evidence which is clear, satisfactory, and convincing" for "beyond a reasonable doubt." It may also be necessary to change the reference from "the state" to the unit of government that is prosecuting the case. See Wis JI-Criminal 2680 for a model.

Operating a motorcycle without a motorcycle endorsement or operating a moped or motor bicycle without a license is always a forfeiture. Neither ever becomes a criminal violation. See § 343.05(3)(b) and (5)(c).

Section 343.05(4) provides for a number of exemptions to the licensing requirements of Chapter 343.

1. Section 343.05(3)(a) applies to a person who operates "a motor vehicle which is not a commercial motor vehicle." The exclusion for non-commercial vehicles is not included in the instruction because the Committee concluded that the vehicle's status would rarely be an issue in the case. Offenses involving commercial motor vehicles are covered by sub. (2) of § 343.05.

2. Section 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

3. Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

4. For the purposes of cases involving operating under the influence, § 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Also see Wis JI-Criminal 2600, Sec. III.

5. Use material in brackets only when the issue of a cancelled or expired license is in the case.

2612 OPERATING A MOTOR VEHICLE WITHOUT A VALID OPERATOR'S LICENSE: CAUSING GREAT BODILY HARM OR DEATH — CRIMINAL OFFENSE — § 343.05(3)(a)

Statutory Definition of the Crime

Section 343.05(3)(a) of the Wisconsin Statutes is violated by any person who operates a motor vehicle[1] upon a highway of this state when that person knows that (he) (she) does not hold a valid operator's license and causes (great bodily harm) (death).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[2] upon a highway.[3]

   A motor vehicle is operated when it is set in motion.[4]

2. The defendant knew that (he) (she) did not hold a valid operator's license at the time the defendant operated the motor vehicle.[5]

   [(A cancelled) (An expired) license is not a valid license.][6]

3. The defendant's operation of the vehicle caused (great bodily harm) (death) to (name of victim) .

   "Cause" means that the defendant's act was a substantial factor in producing the (great bodily harm) (death).[7]

["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.][8]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2612 was originally published in 2007. This revision was approved by the Committee in March 2012; it updated the Comment to reflect changes made by 2011 Wisconsin Act 113.

This instruction is for violations of §343.05(3)(a) causing great bodily harm or death, which are punished as felonies. See Wis JI-Criminal 2610 for violations of § 343.05 that are criminal because they are second or subsequent violations. The felony penalties were created by 2011 Wisconsin Act 113 [effective date: March 1, 2012]. Causing great bodily harm is a Class I felony; causing death is a Class H felony. See § 343.05(5)(b)4. and 5. Both offenses require that the "person knows at the time of operation that he or she does not possess a valid operator's license." If the person does not have the required knowledge, the offenses are punished as forfeitures.

Subsection (6) of § 343.05 provides that § 343.44 applies to any person operating a motor vehicle upon a highway when the person's license has been revoked or suspended. See Wis JI-Criminal 2620 through 2623.

1. Section 343.05(3)(a) applies to a person who operates "a motor vehicle which is not a commercial motor vehicle." The exclusion for non-commercial vehicles is not included in the instruction because the Committee concluded that the vehicle's status would rarely be an issue in the case. Offenses involving commercial motor vehicles are covered by sub. (2) of § 343.05.

2. Section 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

3. Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

4. For the purposes of cases involving operating under the influence, § 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Also see Wis JI-Criminal 2600, Sec. III.

5. Knowledge that the person does not possess a valid license is required by § 343.05(5)(b)4. and 5. In the absence of the required knowledge, the violations are punished as forfeitures.

6. Use material in brackets only when the issue of a cancelled or expired license is in the case.

7. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

8. See § 939.22(14) and Wis JI-Criminal 914.

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THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE JANUARY 1, 2010.

2620 OPERATING WHILE REVOKED: CRIMINAL OFFENSE: BASED ON PRIOR CONVICTION — § 343.44(1)(b)[1]

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who knowingly operates a motor vehicle upon any highway in this state while that person's operating privilege is duly revoked.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[2] on a highway.[3]

   A motor vehicle is operated when it is set in motion.[4]

2. The defendant's operating privilege[5] was duly revoked at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.][6]

3. The defendant knew (his) (her) operating privilege had been revoked.[7]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

IF THERE IS EVIDENCE THAT A NOTICE OF REVOCATION WAS PROPERLY MAILED, ADD THE FOLLOWING:[8]

[(Refusal to accept) (Failure to receive) an order of revocation is not, by itself, a defense, but it is relevant to whether the defendant knew (his) (her) operating privileges had been revoked. The State must prove beyond a reasonable doubt that the defendant knew (his) (her) operating privileges had been revoked regardless of whether the defendant received written notice of revocation.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2620 was originally published in 1978 and was revised in 1981, 1982, 1994, and 2006. This revision was approved by the Committee in October 2009.

This instruction applies to one type of criminal violation of § 343.44(1)(b) as amended by 2005 Wisconsin Act 25 [effective date: July 27, 2005]. Under Act 25, operating while revoked was a crime under two circumstances: when there was a prior conviction for operating while revoked, the offense addressed by this instruction; and, when the revocation "resulted from an offense that may be counted under s. 343.307(2)," [see Wis JI-Criminal 2621]. Section 343.44(1)(b) was amended again by 2009 Wisconsin Act 28 to eliminate the criminal penalty for second and subsequent OAR violations. The

effective date of the change is January 1, 2010. So this instruction is not to be used for offenses committed after that date. Those offenses will be forfeitures; see Wis JI-Criminal 2621A.

The fact of the prior conviction is not an "element" of this offense. That falls under the exception to the general rule that all facts that increase the statutory maximum penalty are for the jury. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

1. This instruction applies to operating while revoked offenses that were criminal because the defendant has a prior conviction for that offense. Second offenses were criminal violations until changes made by 2009 Wisconsin Act 28 took effect on January 1, 2010. From May 1, 2002, to July 26, 2005, all operating while revoked offenses were criminal, including first offenses. Under § 343.44(1)(b), as amended by 2005 Wisconsin Act 25, operating while revoked offenses were criminal if they were second offenses or if the revocation resulted from an OWI-related offense. [See Wis JI-Criminal 2621.] The effective date of Act 25 was July 27, 2005. 2009 Wisconsin Act 28 eliminated the criminal penalty for second and subsequent OAR violations.

2. Regarding the definition of "motor vehicle," see § 340.01(35) and Wis JI-Criminal 2600, Introductory Comment, Sec. II.

3. "Highway" is defined by subsec. 340.01(22):

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in § 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983).

4. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

6. Subsection 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

7. The requirement that the person "knowingly operate" while revoked was added to § 343.44 by 1997 Wisconsin Act 84. This appears to codify the more demanding of two alternative mental elements established for operating while revoked offenses by the Wisconsin Supreme Court in State v. Collova, 79 Wis.2d 473, 255 N.W.2d 581 (1977). Collova held that the offense required either that the person "knew" or "had cause to believe" that operating privileges had been revoked. The statute, as amended, codifies the more demanding requirement of actual knowledge of revocation, apparently eliminating "had cause to believe" as an alternative.

8. While the amendment of § 343.44 by 1997 Wisconsin Act 84 added "knowingly" to the definition of the offense, see note 7, supra, the act did not affect the provision regarding failure to receive mailed notice of revocation. Subsection (3) of § 343.44 continues to provide that "[r]efusal to accept or failure to receive an order of revocation . . . mailed by 1st class mail to such person's last-known address shall not be a defense to the charge of driving after revocation. . . ." The Committee concluded that the proper way to address the mailed notice issue is to advise the jury that failure to receive a properly mailed notice is not by itself a defense, but that the state must prove, by whatever evidence is relevant to the issue, that the defendant did knowingly operate while revoked. This may be accomplished by showing any source of actual knowledge, such as notice given by a judge, receipt of a mailed notice, etc.

2620A OPERATING WHILE REVOKED: CRIMINAL OFFENSE[1]: REVOCATION RESULTED FROM AN OWI-RELATED OFFENSE — § 343.44(1)(b) and (2)(ar)2.

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who operates a motor vehicle upon any highway in this state while that person's operating privilege is duly revoked.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following (two) (three)[2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[3] on a highway.[4]

   A motor vehicle is operated when it is set in motion.[5]

2. The defendant's operating privilege[6] was duly revoked at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.][7]

NOTE: THE DEFENDANT'S ADMISSION THAT THE REVOCATION WAS BASED ON AN OWI-RELATED OFFENSE DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THE THIRD ELEMENT.[8]

[3. The revocation resulted from an offense that may be counted under section 343.307(2).][9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that (both) (all three) elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2620A was approved by the Committee in April 2018; it reflects changes to § 343.44(1)(b) made by 2017 Wisconsin Act 127. [Note: A previously-published instruction also numbered Wis JI-Criminal 2620A was withdrawn in 2006.]

This instruction is to be used for offenses committed on or after December 10, 2017. That date is the effective date for 2017 Wisconsin Act 127, which deleted the knowledge requirement from § 343.44(1)(b). For offenses committed before that date see Wis JI-Criminal 2621.

Under section 343.44(1)(b) as amended by 2005 Wisconsin Act 25 [effective date: July 27, 2005], operating while revoked was a crime under two circumstances: when there was a prior conviction for operating while revoked [see Wis JI-Criminal 2620]; and, when the revocation "resulted from an offense that may be counted under s. 343.307(2)," the offense addressed by this instruction. [The captions in the instruction and the Comment refer to this as revocation "for an OWI-related offense."] Section 343.44(1)(b) was amended again by 2009 Wisconsin Act 28 to eliminate the criminal penalty for second and subsequent OAR violations. The effective date of the change is January 1, 2010.

The Committee concluded that the fact that the revocation "resulted from an offense that may be counted under s. 343.307(2)" is a fact that must be decided by the jury. It is the sole fact that makes this offense criminal and thus is subject to the general rule that it must go to the jury. The only exception is the fact of a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

This requirement is reflected in the third element of the instruction. That element is in brackets because it is not to be submitted to the jury if the defendant admits that the revocation is OWI-related. The Committee concluded that a defendant may wish to admit this fact to avoid possible prejudice if the fact is elicited before the jury. This is the procedure used for OWI offenses involved the .02 level of prohibited alcohol concentration, which applies where the defendant has three or more priors. See, Wis JI-Criminal 2660C and Wis JI-Criminal 2600, Sec. IX.

1. This instruction applies to operating while revoked offenses that are criminal because the revocation "resulted from an offense that may be counted under s. 343.307(2)." The Committee has concluded that this is a fact for the jury, unless admitted by the defendant. See note 8, below. From May 1, 2002, to July 26, 2005, all operating while revoked offenses were criminal, including first offenses. Under § 343.44(1)(b), as amended by 2005 Wisconsin Act 25, operating while revoked offenses were criminal if the revocation resulted from an OWI-related offense, addressed by this

instruction, or if they were second offenses. [See Wis JI-Criminal 2620.] The effective date of Act 25 was July 27, 2005. Section 343.44(1)(b) was amended again by 2009 Wisconsin Act 28 to eliminate the criminal penalty for second and subsequent OAR violations. The effective date of the change is January 1, 2010.

2. The instruction is drafted to allow for use with either two or three elements, depending on whether the third element, relating to the cause of the revocation, is submitted to the jury. See note 8, below.

3. Regarding the definition of "motor vehicle," § 340.01(35) and Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. "Highway" is defined by subsec. 340.01(22):

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in § 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983).

5. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such

> person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

7. Subsection 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

8. The third element has been placed in brackets because it is not to be submitted to the jury if the defendant admits that the revocation is OWI-related. The Committee concluded that the fact that the revocation "resulted from an offense that may be counted under s. 343.307(2)" is a fact that must be decided by the jury. It is the sole fact that makes this offense criminal and thus is subject to the general rule that it must go to the jury. The only exception is the fact of a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

The element is in brackets because the Committee concluded that a defendant may wish to admit this fact to avoid possible prejudice if the fact is elicited before the jury. This is the procedure used for OWI offenses involved the .02 level of prohibited alcohol concentration, which applies where the defendant has three or more priors. See, Wis JI-Criminal 2660C, and State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997).

9. This element is not to be included if the defendant admits that the revocation was OWI-related. See note 8, supra.

The text of the third element is based on the text of s. 343.44(2)(ar)2. The types of convictions, suspensions, and revocations that are counted under s. 343.307(2) are convictions for operating while intoxicated or suspensions or revocations for refusal to submit to chemical tests for alcohol. The priors may include offenses in other jurisdictions.

The Committee concluded that the instruction should use the statutory language "may be counted under s. 343.307(2)" because evidence of the cause of the revocation will usually be submitted with testimony that the cause is one that is counted under that statute.

2620A Operating A Motor Vehicle After Revocation or Suspension — Civil Forfeiture [© 1994]

2620B Reason To Know Privileges Were Revoked: Notice Mailed [© 1994]

2620C Reason To Know Privileges Were Revoked: Duty To Exercise Due Care [© 1994]

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 2620A, -B, and -C were most recently published in 1994. Their withdrawal was approved by the Committee in February 2006.

These instructions addressed Operating After Revocation offenses under §343.44 as it existed before being revised by 1997 Wisconsin Act 84. The instructions applied to offenses committed before August 1, 2000.

Section 343.44 was revised again by 2005 Wisconsin Act 25, which had an effective date of July 27, 2005. For instructions for violations of §343.44 committed on or after that date, see Wis JI-Criminal 2620-2622:

2620 Operating While Revoked – Criminal Offense: Based on Prior Conviction – §343.44(1)(b)

2621 Operating While Revoked – Criminal Offense: Revocation Resulted From an OWI-Related Offense – §343.44(1)(b)

2621A Operating While Revoked – Civil Forfeiture – §343.44(1)(b)

2622 Operating While Suspended – Civil Forfeiture – §343.44(1)(a)

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THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED AFTER JANUARY 1, 2010 AND BEFORE DECEMBER 10, 2017.

2621 OPERATING WHILE REVOKED: CRIMINAL OFFENSE[1]: REVOCATION RESULTED FROM AN OWI-RELATED OFFENSE — § 343.44(1)(b)

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who knowingly operates a motor vehicle upon any highway in this state while that person's operating privilege is duly revoked.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following (three) (four)[2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[3] on a highway.[4]

   A motor vehicle is operated when it is set in motion.[5]

2. The defendant's operating privilege[6] was duly revoked at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.][7]

3. The defendant knew (his) (her) operating privilege had been revoked.[8]

NOTE: THE DEFENDANT'S ADMISSION THAT THE REVOCATION WAS BASED ON AN OWI-RELATED OFFENSE DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THE FOURTH ELEMENT AND PROCEED TO THE PARAGRAPH CAPTIONED "DECIDING ABOUT KNOWLEDGE."[9]

[4. The revocation resulted from an offense that may be counted under section 343.307(2).][10]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

IF THERE IS EVIDENCE THAT A NOTICE OF REVOCATION WAS PROPERLY MAILED, ADD THE FOLLOWING:[11]

[(Refusal to accept) (Failure to receive) an order of revocation is not, by itself, a defense, but it is relevant to whether the defendant knew (his) (her) operating privileges had been revoked. The State must prove beyond a reasonable doubt that the defendant knew (his) (her) operating privileges had been revoked regardless of whether the defendant received written notice of revocation.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all (three) (four) elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2621 was originally published in 2001 and revised in 2006, 2010, and 2013. This revision was approved by the Committee in April 2018.

The 2018 revision added the caution at the top of page one to make it clear that this instruction should only be used for offenses committed before December 10, 2017. That date is the effective date for 2017 Wisconsin Act 127, which deleted the knowledge requirement from § 343.44(1)(b). For offenses committed on or after that date see Wis JI-Criminal 2620A.

This instruction is drafted for a criminal violation of § 343.44(1)(b) as amended by 2005 Wisconsin Act 25 [effective date: July 27, 2005]. Under Act 25, operating while revoked was a crime under two circumstances: when there was a prior conviction for operating while revoked [see Wis JI-Criminal 2620]; and, when the revocation "resulted from an offense that may be counted under s. 343.307(2)," the offense addressed by this instruction. [The captions in the instruction and the Comment refer to this as revocation "for an OWI-related offense."] Section 343.44(1)(b) was amended again by 2009 Wisconsin Act 28 to eliminate the criminal penalty for second and subsequent OAR violations. The effective date of the change is January 1, 2010.

The Committee concluded that the fact that the revocation "resulted from an offense that may be counted under s. 343.307(2)" is a fact that must be decided by the jury. It is the sole fact that makes this offense criminal and thus is subject to the general rule that it must go to the jury. The only exception is the fact of a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

This requirement is reflected in the fourth element of the instruction. That element is in brackets because it is not to be submitted to the jury if the defendant admits that the revocation is OWI-related. The Committee concluded that a defendant may wish to admit this fact to avoid possible prejudice if the fact is elicited before the jury. This is the procedure used for OWI offenses involved the .02 level of prohibited alcohol concentration, which applies where the defendant has three or more priors. See, Wis JI-Criminal 2660C and Wis JI-Criminal 2600, Sec. IX.

1. This instruction applies to operating while revoked offenses that are criminal because the revocation "resulted from an offense that may be counted under s. 343.307(2)." The Committee has concluded that this is a fact for the jury, unless admitted by the defendant. See note 9, below. From May 1, 2002, to July 26, 2005, all operating while revoked offenses were criminal, including first offenses. Under § 343.44(1)(b), as amended by 2005 Wisconsin Act 25, operating while revoked offenses were criminal if the revocation resulted from an OWI-related offense, addressed by this instruction, or if they were second offenses. [See Wis JI-Criminal 2620.] The effective date of Act 25 was July 27, 2005. Section 343.44(1)(b) was amended again by 2009 Wisconsin Act 28 to eliminate the criminal penalty for second and subsequent OAR violations. The effective date of the change is January 1, 2010.

2. The instruction is drafted to allow for use with either three or four elements, depending on whether the fourth element, relating to the cause of the revocation, is submitted to the jury. See note 9, below.

3. Regarding the definition of "motor vehicle," § 340.01(35) and Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. "Highway" is defined by subsec. 340.01(22):

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in § 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983).

5. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

7. Subsection 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license

issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

8. The requirement that the person "knowingly operate" while revoked was added to § 343.44 by 1997 Wisconsin Act 84. This appears to codify the more demanding of two alternative mental elements established for operating while revoked offenses by the Wisconsin Supreme Court in State v. Collova, 79 Wis.2d 473, 255 N.W.2d 581 (1977). Collova held that the offense required either that the person "knew" or "had cause to believe" that operating privileges had been revoked. The statute, as amended, codifies the more demanding requirement of actual knowledge of revocation, apparently eliminating "had cause to believe" as an alternative.

9. The fourth element has been placed in brackets because it is not to be submitted to the jury if the defendant admits that the revocation is OWI-related. The Committee concluded that the fact that the revocation "resulted from an offense that may be counted under s. 343.307(2)" is a fact that must be decided by the jury. It is the sole fact that makes this offense criminal and thus is subject to the general rule that it must go to the jury. The only exception is the fact of a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

The element is in brackets because the Committee concluded that a defendant may wish to admit this fact to avoid possible prejudice if the fact is elicited before the jury. This is the procedure used for OWI offenses involved the .02 level of prohibited alcohol concentration, which applies where the defendant has three or more priors. See, Wis JI-Criminal 2660C, and State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997).

10. This element is not to be included if the defendant admits that the revocation was OWI-related. See note 9, supra.

The text of the fourth element is based on the text of s. 343.44(2)(ar)2. The types of convictions, suspensions, and revocations that are counted under s. 343.307(2) are convictions for operating while intoxicated or suspensions or revocations for refusal to submit to chemical tests for alcohol. The priors may include offenses in other jurisdictions.

The Committee concluded that the instruction should use the statutory language "may be counted under s. 343.307(2)" because evidence of the cause of the revocation will usually be submitted with testimony that the cause is one that is counted under that statute.

11. While the amendment of § 343.44 by 1997 Wisconsin Act 84 added "knowingly" to the definition of the offense, see note 8, supra, the act did not affect the provision regarding failure to receive mailed notice of revocation. Subsection (3) of § 343.44 continues to provide that "[r]efusal to accept or failure to receive an order of revocation . . . mailed by 1st class mail to such person's last-known address shall not be a defense to the charge of driving after revocation. . . ." The Committee concluded that the proper way to address the mailed notice issue is to advise the jury that failure to receive a properly mailed notice is not by itself a defense, but that the state must prove, by whatever evidence is relevant to the

issue, that the defendant did knowingly operate while revoked. This may be accomplished by showing any source of actual knowledge, such as notice given by a judge, receipt of a mailed notice, etc.

2621A OPERATING WHILE REVOKED: CIVIL FORFEITURE[1] — § 343.44(1)(b) and (2)(ar)1.

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who operates a motor vehicle upon any highway in this state while that person's operating privilege is duly revoked.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[2] must prove by evidence which satisfies you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That the State Must Prove

1. The defendant operated a motor vehicle[3] on a highway.[4]

   A motor vehicle is operated when it is set in motion.[5]

2. The defendant's operating privilege[6] was duly revoked at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.][7]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2621A was originally published in 2001 and revised in 2006 and 2010. This revision was approved by the Committee in April 2018.

The 2018 revision modified the instruction to be used for offenses committed on or after December 10, 2017. That date is the effective date for 2017 Wisconsin Act 127, which deleted the knowledge requirement from § 343.44(1)(b).

1. This instruction applies to first offense operating while revoked offenses committed after July 27, 2005, if the revocation was not based on an operating while intoxicated-related offense.

2. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

3. Regarding the definition of "motor vehicle," see § 340.01(35) and Wis JI-Criminal 2600, Introductory Comment, Sec. II.

4. "Highway" is defined by subsec. 340.01(22):

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in § 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983).

5. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. Section 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

7. Section 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

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2622 OPERATING WHILE SUSPENDED: CIVIL FORFEITURE — § 343.44(1)(a)

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who operates a motor vehicle upon any highway in this state while that person's operating privilege is duly suspended.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency) [1] must prove by evidence which satisfies you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That the State Must Prove

1. The defendant operated a motor vehicle[2] on a highway.[3]

   A motor vehicle is operated when it is set in motion.[4]

2. The defendant's operating privilege[5] was duly suspended at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains suspended until it is reinstated.][6]

Proof that the defendant knew (his) (her) operating privilege had been suspended is not required.[7]

IF THERE IS EVIDENCE THAT A NOTICE OF SUSPENSION WAS PROPERLY MAILED, ADD THE FOLLOWING:[8]

[Refusal to accept) (Failure to receive) an order of suspension is not a defense.]

Jury's Decision

If you are satisfied beyond a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE DEFENDANT IS CHARGED WITH CAUSING GREAT BODILY HARM OR DEATH[9]

If you find the defendant guilty, answer the following question:

"Did the defendant's operation of the vehicle cause (great bodily harm) (death) to (name of victim) ?

"Cause" means that the defendant's act was a substantial factor in producing the (great bodily harm) (death).[10]

["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.][11]

Before you may answer "yes," you must be satisfied to a reasonable certainty by evidence which is clear, satisfactory and convincing that the answer is "yes."

COMMENT

Wis JI-Criminal 2622 was originally published in 2001 and revised in 2006. This revision was approved by the Committee in March 2012; it was revised to reflect changes in penalties made by 2011 Wisconsin Act 113.

The 2001 version of this instruction replaced Wis JI-Criminal 2620A for violations of § 343.44(1)(a) committed after August 1, 2000, when changes made by 1997 Wisconsin Act 84 took effect. After that date, all operating after suspension violations were punished as forfeitures.

The 2012 revision added a special question for offenses resulting in great bodily harm or death. 2011 Wisconsin Act 113 [effective date: March 1, 2012] created new forfeitures for those offenses: $5,000 to $7,500 forfeiture if great bodily harm is caused; $7,500 to $10,000 forfeiture if death is caused. See § 343.44(2)(ag)2. and 3. If the actor knew his or her operating privilege was suspended, the offenses are punished as felonies. See Wis JI-Criminal 2623A.

1. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

2. Subsection 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

3. Subsection 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

4. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

5. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

6. Subsection 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

7. Subsection (1)(a) of § 343.44 includes the following:

> A person's knowledge that his or her operating privilege is suspended is not an element of the offense under this paragraph.

8. See § 343.44(3). Because the offense definition does not require that the person "knowingly" operate while suspended, the jury may be told that failure to receive a mailed notice is not a defense. Compare note 8, Wis JI-Criminal 2621, discussing this issue with respect to operating while revoked offenses, which do have "knowingly" as an element.

9. 2011 Wisconsin Act 113 [effective date: March 1, 2012] created new forfeitures for offenses resulting in great bodily harm or death: $5,000 to $7,500 forfeiture if great bodily harm is caused; $7,500 to $10,000 forfeiture if death is caused. See § 343.44(2)(ag)2. and 3. The Committee recommends submitting the degree of harm caused as a special question. The following should be added to the standard verdict form:

> If you find the defendant guilty, answer the following question "yes" or "no":
>
> "Did the defendant's operation of the vehicle cause (great bodily harm) (death) to (name of victim) ?

10. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

11. See § 939.22(14) and Wis JI-Criminal 914.

2623 OPERATING WHILE REVOKED OR SUSPENDED: CRIMINAL OFFENSE: CAUSING GREAT BODILY HARM OR DEATH — § 343.44(2)(g) or (h)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 2623 was originally published in 2007. It was withdrawn in 2013 and replaced with Wis JI-Criminal 2623A and 2623B.

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2623A OPERATING WHILE SUSPENDED: CRIMINAL OFFENSE: CAUSING GREAT BODILY HARM OR DEATH — § 343.44(1)(a) and (2)(ag)2. and 3.

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who knowingly operates a motor vehicle upon any highway in this state while that person's operating privilege is duly suspended and causes (great bodily harm) (death).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[1] on a highway.[2]

   A motor vehicle is operated when it is set in motion.[3]

2. The defendant's operating privilege[4] was duly suspended at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains suspended until it is reinstated.][5]

3. The defendant knew (his) (her) operating privilege had been suspended.[6]

4. The defendant's operation of the vehicle caused (great bodily harm) (death) to (name of victim) .

"Cause" means that the defendant's act was a substantial factor in producing the (great bodily harm) (death).[7]

["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.][8]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

IF THERE IS EVIDENCE THAT A NOTICE OF SUSPENSION WAS PROPERLY MAILED, ADD THE FOLLOWING:[9]

[(Refusal to accept) (Failure to receive) an order of suspension is not, by itself, a defense, but it is relevant to whether the defendant knew (his) (her) operating privileges had been suspended. The State must prove beyond a reasonable doubt that the defendant knew (his) (her) operating privileges had been suspended regardless of whether the defendant received written notice of suspension.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2623 was originally published in 2007. It was separated into two instructions in 2012: this instruction for operating while suspended offenses and Wis JI-Criminal 2623B for operating while revoked offenses. This instruction was approved by the Committee in June 2012; the Comment was also updated to reflect changes in penalties made by 2011 Wisconsin Act 113.

This instruction is for violations of § 343.44(1)(a) – operating while suspended – where great bodily harm or death is caused. These violations are punished as felonies pursuant to provisions created by 2011 Wisconsin Act 113 [effective date: March 1, 2012] if the person knew at the time of operation that his or her operating privilege had been suspended. Causing great bodily harm is a Class I felony; causing death is a Class H felony. See §343.44(2)(ag)2. and 3. for the penalties for operating while suspended offenses.

1. Subsection 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

2. Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

3. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

4. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

5. Subsection 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license

> issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

6. Knowledge that the person's operating privilege has been suspended is required by the penalty provisions in § 343.44(2)(ag)2. and 3. If the knowledge element is lacking, offenses resulting in death or great bodily harm are forfeitures.

7. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

8. See § 939.22(14) and Wis JI-Criminal 914.

9. While the statutes require knowledge that privileges had been suspended, see note 6, supra, there has been no change in the provision regarding failure to receive mailed notice of suspension or revocation. Subsection (3) of § 343.44 continues to provide that "[r]efusal to accept or failure to receive an order of revocation, suspension or disqualification mailed by 1st class mail to such person's last-known address shall not be a defense to the charge of driving after revocation, suspension or disqualification." The Committee concluded that the proper way to address the mailed notice issue is to advise the jury that failure to receive a properly mailed notice is not by itself a defense, but that the state must prove, by whatever evidence is relevant to the issue, that the defendant did knowingly operate while suspended. This may be accomplished by showing any source of actual knowledge, such as notice given by a judge, receipt of a mailed notice, etc.

THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE DECEMBER 10, 2017.

2623B OPERATING WHILE REVOKED: CRIMINAL OFFENSE: CAUSING GREAT BODILY HARM OR DEATH — § 343.44(1)(b) and (2)(ar)3. and 4.

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who knowingly operates a motor vehicle upon any highway in this state while that person's operating privilege is duly revoked and causes (great bodily harm) (death).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[1] on a highway. [2]

   A motor vehicle is operated when it is set in motion. [3]

2. The defendant's operating privilege[4] was duly revoked at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.] [5]

3. The defendant knew (his) (her) operating privilege had been revoked. [6]

4. The defendant's operation of the vehicle caused (great bodily harm) (death) to (name of victim) .

"Cause" means that the defendant's act was a substantial factor in producing the (great bodily harm) (death). [7]

["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.] [8]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

IF THERE IS EVIDENCE THAT A NOTICE OF REVOCATION WAS PROPERLY MAILED, ADD THE FOLLOWING: [9]

[(Refusal to accept) (Failure to receive) an order of revocation is not, by itself, a defense, but it is relevant to whether the defendant knew (his) (her) operating privileges had been revoked. The State must prove beyond a reasonable doubt that the defendant knew (his) (her) operating privileges had been revoked regardless of whether the defendant received written notice of revocation suspension.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2623 was originally published in 2007. It was separated into two instructions in 2012: this instruction for operating while revoked offenses and JI 2623A for operating while suspended offenses. The Comment was updated in 2013 to reflect changes in penalties made by 2011 Wisconsin Act 113. The 2017 revision was approved by the Committee in August 2017; it added the reference to State v. Villamil, 2017 WI 74 to the Comment.

The 2018 revision was approved by the Committee in April 2018; it added the caution at the top of page one to make it clear that this instruction should only be used for offenses committed before December 10, 2017. That date is the effective date for 2017 Wisconsin Act 127, which deleted the knowledge requirement from § 343.44(1)(b). For offenses committed on or after that date see Wis JI-Criminal 2623C.

This instruction is for violations of § 343.44(1)(b) – operating while revoked – where great bodily harm or death is caused. These violations may be punished as either misdemeanors or felonies pursuant to provisions created by 2011 Wisconsin Act 113 [effective date: March 1, 2012]. See § 343.44(2)(ar)3. and 4. This penalty anomaly apparently resulted from inadvertence.

The anomaly is that the penalty provisions purport to increase the penalty from a misdemeanor to a felony based on the fact that the defendant knew his or her operating privilege was revoked. However, the offense definition already requires that the defendant "knowingly operated"; the Committee has concluded that "knowingly operated" can only mean "knowledge that the privilege was revoked." Thus, subsections § 343.44(2)(ar)3. and 4. provide for both a misdemeanor and a felony penalty for offenses that have the same elements. The United States and Wisconsin supreme courts have held that there is no constitutional violation where crimes have the same elements but different penalties. In State v. Cissell, 127 Wis.2d 205, 378 N.W.2d 691 (1985), the court dealt with two 1983 statutes relating to nonsupport, one with a misdemeanor penalty and one with a felony penalty. The trial court dismissed felony charges against Cissell, concluding that the crimes had identical elements and that charging the defendant with a felony deprived him of his rights to due process and equal protection. The Wisconsin Supreme Court reversed, agreeing that the two crimes had identical elements, but concluding that ". . . identical element crimes with different penalties do not violate due process or equal protection." 127 Wis.2d 205, 215. The court relied on United States v. Batchelder, 442 U.S. 114 (1979), which addressed two federal statutes prohibiting felons from receiving firearms. One statute had a five year maximum penalty and the other a two year maximum. The court held that there was no constitutional violation: the statutes were clear and thus gave notice; a prosecutor's choice under these statutes is no different from the regular choice exercised in deciding what to charge; being influenced by the penalties does not give rise to a

constitutional issue. Prosecutors can choose to prosecute under either statute as long as there is no discrimination against any class of defendants as prohibited by selective enforcement principles.

The situation under the current operating while revoked penalty provisions appears to the Committee to be indistinguishable from the situations addressed in the Cissell and Batchelder cases.

The Committee's conclusion is consistent with the decision reached in State v. Villamil, 2017 WI 74, 371 Wis.2d 519, 885 N.W.2d 381:

> ¶49 Whether there is one criminal statute or two, both this case and Cissell involve criminal statutes with substantially identical elements where prosecutors have discretion to decide whether they will charge a defendant with a misdemeanor or a felony. Although a defendant could be charged with a misdemeanor instead of a felony for a knowing violation of OAR-causing death, the public is on notice that this offense may be punished as a Class H felony pursuant to Wis. Stat. §§ 343.44(1)(b) and (2)(ar)4. Because Villamil knew he was operating after his license was revoked, the statutes provide sufficient notice that this violation could be charged as a felony.

1. Subsection 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

2. Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

3. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

4. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

5. Subsection 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

6. Knowledge that the person's operating privilege has been revoked is part of the offense definition in § 343.44(1)(b), which requires that the person "knowingly operate." The knowledge requirement is also part of the penalty provisions for operating while revoked offenses in § 343.44(2)(ar)3. and 4. The Committee concluded that this redundancy is inadvertent. See discussion in the Comment preceding footnote 1.

7. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

8. See § 939.22(14) and Wis JI-Criminal 914.

9. While the statutes require knowledge that privileges had been revoked, see note 6, supra, there has been no change in the provision regarding failure to receive mailed notice of suspension or revocation. Subsection (3) of § 343.44 continues to provide that "[r]efusal to accept or failure to receive an order of revocation, suspension or disqualification mailed by 1st class mail to such person's last-known address shall not be a defense to the charge of driving after revocation, suspension or disqualification." The Committee concluded that the proper way to address the mailed notice issue is to advise the jury that failure to receive a properly mailed notice is not by itself a defense, but that the state must prove, by whatever evidence is relevant to the issue, that the defendant did knowingly operate while revoked. This may be accomplished by showing any source of actual knowledge, such as notice given by a judge, receipt of a mailed notice, etc.

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2623C OPERATING WHILE REVOKED: CRIMINAL OFFENSE: CAUSING GREAT BODILY HARM OR DEATH — § 343.44(1)(b) and (2)(ar)3. and 4.

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who operates a motor vehicle upon any highway in this state while that person's operating privilege is duly revoked and causes (great bodily harm) (death).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[1] on a highway.[2]

   A motor vehicle is operated when it is set in motion.[3]

2. The defendant's operating privilege[4] was duly revoked at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.][5]

3. The defendant's operation of the vehicle caused (great bodily harm) (death) to (name of victim) .

   "Cause" means that the defendant's act was a substantial factor in producing the (great bodily harm) (death).[6]

["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.][7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I OR H FELONY AND THERE IS EVIDENCE THAT THE PENALTY-INCREASING FACT IS PRESENT.[8]

If you find the defendant guilty, you must answer the following question:

Did the defendant know at the time of the violation that (his) (her) operating privilege was revoked?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2623C was approved by the Committee in April 2018; it reflects changes to § 343.44(1)(b) made by 2017 Wisconsin Act 127.

This instruction is for violations of § 343.44(1)(b) – operating while revoked – where great bodily harm or death is caused. It is to be used for offenses committed on or after December 10, 2017. That date is the effective date for 2017 Wisconsin Act 127, which deleted the knowledge requirement from § 343.44(1)(b). For offenses committed before that date see Wis JI-Criminal 2623B.

While Act 127 deleted the knowledge requirement from the offense definition, it retained it in the penalty section. An offense resulting in great bodily harm is punishable by a fine and up to a year in the county jail **unless the defendant knows** his or her privilege was revoked – then it is a Class I felony. See § 343.44(2)(ar)3. An offense resulting in death is punishable by a fine and up to a year in the county jail **unless the defendant knows** his or her privilege was revoked – then it is a Class H felony. See § 343.44(2)(ar)4. This instruction may be used for either misdemeanor or felony charges; it includes a special question for felonies regarding the knowledge requirement.

Note: Deleting the knowledge requirement from the offense definition eliminated the penalty anomaly under prior law whereby misdemeanor and felony violations had the same elements. See the Comment to Wis JI-Criminal 2663B.

1. Subsection 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

2. Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

3. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

4. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

5. Subsection 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license

> issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

6. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

7. See § 939.22(14) and Wis JI-Criminal 914.

8. The special question addresses the penalty-increasing facts in § 353.44(2)(ar)3. and 4. A violation of § 343.44(1)(b) resulting in great bodily harm is punishable by a fine and up to a year in the county jail **unless the defendant knows** his or her privilege was revoked – then it is a Class I felony. See § 343.44(2)(ar)3. An offense resulting in death is punishable by a fine and up to a year in the county jail **unless the defendant knows** his or her privilege was revoked – then it is a Class H felony. See § 343.44(2)(ar)4.

2626 OPERATING WHILE REVOKED: CRIMINAL OFFENSE: PERMANENT REVOCATION — § 343.44(1)(b) and (2)(ar)2m.

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who operates a motor vehicle upon any highway in this state while that person's operating privilege is permanently revoked.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[1] on a highway.[2]

   A motor vehicle is operated when it is set in motion.[3]

2. The defendant's operating privilege[4] was permanently revoked[5] at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.][6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2626 was approved by the Committee in July 2018.

This instruction is to be used for offenses committed on or after December 1, 2018. That date is the effective date for 2017 Wisconsin Act 172, which created the crime of operating after permanent revocation. It applies only where the person has a previous conviction for this offense. The penalty is a fine of not more than $10,000 or imprisonment for not more than one year or both. § 343.44(2)(ar)2m.

The instruction refers to "permanent revocation" in place of the statutory reference to a revocation "under s. 343.31(1m)." That statute identifies "qualifying convictions" and other facts that provide the basis for the department of transportation to revoke the person's operating privilege permanently.

The Committee concluded that the fact that the revocation was permanent is a fact that must be decided by the jury. It is the sole fact that makes this offense criminal and thus is subject to the general rule that it must go to the jury. The only exception is the fact of a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D. The fact that the defendant has a prior conviction for the offense need not be submitted to the jury. See Apprendi..

1. Regarding the definition of "motor vehicle," § 340.01(35) and Wis JI-Criminal 2600 Introductory Comment, Sec. II.

2. "Highway" is defined by subsec. 340.01(22):

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in § 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983).

3. Instructions for operating after revocation have always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

4. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

5. The instruction refers to "permanent revocation" in place of the statutory reference to a revocation "under s. 343.31(1m)." That statute identifies bases for the department of transportation to revoke the person's operating privilege permanently. The Committee concluded that the jury must find that the privilege was permanently revoked but that it need not make a finding of the basis for that permanent revocation.

6. Subsection 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

Despite the revocation being "permanent," a person is eligible to apply for reinstatement after 10 years have elapsed." § 343.31(1m)(b) and (c).

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2630 OPERATING A MOTOR VEHICLE TO FLEE OR IN AN ATTEMPT TO ELUDE AN OFFICER — § 346.04(3)

Statutory Definition of the Crime

Section 346.04(3) of the Wisconsin Statutes is violated by a person who operates a motor vehicle[1] on a highway[2] after receiving a visual or audible signal from a (traffic officer) (federal law enforcement officer) (marked police vehicle) (unmarked police vehicle that the person knows or reasonably should know is being operated by a law enforcement officer) and knowingly (flees) (attempts to elude) any officer.

CHOOSE THE ALTERNATIVE SUPPORTED BY THE EVIDENCE. IF MORE THAN ONE ALTERNATIVE IS SUBMITTED, CONNECT THEM WITH "OR" AND SEE WIS-JI CRIMINAL 517, JURY AGREEMENT...[3]

[by willful[4] disregard of such signal so as to interfere with or endanger (the operation of the police vehicle) (the traffic officer) (other vehicles) (pedestrians)].

[by increasing the speed of the vehicle (in an attempt to elude) (to flee)].

[by extinguishing the lights of the vehicle (in an attempt to elude) (to flee)].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle on a highway[5] after receiving a (visual) (audible) signal from a (traffic officer) (federal law enforcement officer) (marked

police vehicle) (unmarked police vehicle that the person knows or reasonably should know is being operated by a law enforcement officer).[6]

("Traffic officer" means every officer authorized by law to direct or regulate traffic or to make arrests for violation of traffic regulations.)[7]

2. The defendant knowingly[8] (fled) (attempted to elude) an officer[9]

[by willful[10] disregard of the visual or audible signal so as to (interfere with) (endanger) (the operation of the police vehicle) (the traffic officer) (other vehicles) (pedestrians)].

[by increasing the speed of the vehicle (in an attempt to elude) (to flee)].

[by extinguishing the lights of the vehicle (in an attempt to elude) (to flee)].

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. What a person knows or has reason to know must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF ONE OF THE MORE SERIOUS OFFENSES IDENTIFIED IN SEC. 346.17(3)(b), (c), OR (d) IS CHARGED AND THE

EVIDENCE WOULD SUPPORT A FINDING THAT THE FACT INCREASING THE PENALTY WAS PRESENT:[11]

[If you find the defendant guilty, you must answer the following question(s):

["Did the defendant's operating a vehicle (to flee) (in an attempt to elude) an officer result in[12] (bodily harm to[13]) (damage to the property of[14]) another?"

("Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.)]

["Did the defendant's operating a vehicle (to flee) (in an attempt to elude) an officer result in[15] great bodily harm[16] to another?"

"Great bodily harm" means serious bodily injury.]

["Did the defendant's operating a vehicle (to flee) (in an attempt to elude) an officer result in[17] death to another?"]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."].

COMMENT

Wis JI-Criminal 2630 was originally published in 1979 and revised in 1986, 1989, 1995, 1997, 2003, 2012, and 2014. This revision was approved by the Committee in December 2018; it revised the instruction to reflect changes in the statute made by 2017 Wisconsin Act 347.

2017 Wisconsin Act 347 [effective date: April 18, 2018, revised § 346.04(3) to add reference to "federal law enforcement officer" and further revised the offense definition to refer to "marked or unmarked police vehicle that the operator knows or reasonably should know is being operated by a law enforcement officer."

For violations of § 346.04(2t), a misdemeanor offense, see Wis JI-Criminal 2632.

The penalties for violation of § 346.04(3) are found in § 346.17(3) and read as follows as amended by 2001 Wisconsin Act 109:

346.17(3)(a) Except as provided in par. (b), (c) or (d), any person violating s. 346.04(3) is guilty of a Class I felony.

(b) If the violation results in bodily harm, as defined in s. 939.22(4), to another, or causes damage to the property of another, as defined in s. 939.22(28), the person is guilty of a Class H felony.

(c) If the violation results in great bodily harm, as defined in s. 939.22(14), to another, the person is guilty of a Class F felony.

(d) If the violation results in the death of another, the person is guilty of a Class E felony.

Wis JI-Criminal 2630 is designed to be used for offenses involving any of the penalties. The fact increasing the penalty is to be handled as an extra question to be submitted to the jury. See text of the instruction at note 11. The following form is suggested for the verdict:

"We, the jury, find the defendant guilty of operating a motor vehicle to flee or in an attempt to elude an officer under Wis. Stat. § 346.04, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

[Add the appropriate question.]"

1. Section 346.04(3) applies to all vehicles and is not restricted to "motor" vehicles. ["Vehicle" is defined in § 340.01(74); "motor vehicle" is defined in § 340.01(35).] Since the majority of cases will involve motor vehicles, the instruction has been drafted for those cases. "Motor" should be omitted where a motor vehicle is not involved.

2. Offenses defined in chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. Sec. 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in secs. 346.62 and 346.63; sec. 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element.

3. Choose the alternative supported by the evidence. Any one of the alternatives is sufficient to establish the second element – that the defendant knowingly fled or attempted to elude the officers. See State v. Beamon, 2013 WI 47, ¶35, 347 Wis.2d 559, 830 N.W.2d 681, discussed in footnote 9, below. Make the same choice in defining the second element.

If more than one alternative is submitted, connect them with "or" and consider giving an instruction on jury agreement. See Wis JI-Criminal 517 JURY AGREEMENT: EVIDENCE OF MORE THAN ONE ACT INTRODUCED TO PROVE ONE CHARGE.

4. Section 346.04(3) reads "willful or wanton" (emphasis added). The Committee omitted "or wanton," concluding that the phrase does not add anything substantial to the offense. If it appears that "or wanton" is appropriate to a given case, it should be added.

The Wisconsin Supreme Court discussed the meaning of "willful" in State v. Hanson, 2012 WI 4, 338 Wis.2d 243, 808 N.W.2d 390. Hanson claimed that he fled from the scene of a traffic stop because he feared for his safety. He argued that "willful" should be interpreted to require an evil intent. The court disagreed:

> . . . we decline to read Wis. Stat. § 346.04(3) as providing a good faith exception to compliance. The statute requires: a subjective understanding by the defendant that a person known by the defendant to be a traffic officer has directed the defendant to take a particular action, and with that understanding, the defendant chose to act in contravention of the officer's direction. This requirement does not include a showing that the defendant had an evil or scornful state of mind. 2012 WI 4, ¶27.

5. See note 2, supra.

6. The phrase "marked police vehicle" is not defined by statute or in case law. Where there is a dispute as to a vehicle's status as "marked," it is a factual question for the jury to determine under all the circumstances of the case.

In State v. Opperman, 156 N.W.2d 241, 456 N.W.2d 625 (Ct. App. 1990), the court held that facts showing a vehicle was equipped with red lights and siren were not sufficient by themselves to prove that a vehicle is a "marked vehicle."

The question of whether a person may be charged under § 346.04(3) for fleeing or attempting to elude an unmarked police vehicle was considered in a 1976 opinion of the attorney general, which follows.

> You state that a person in a motor vehicle attempted to elude an unmarked police car equipped with a red light on the dashboard or within the grillwork and a siren under the hood. The police car was driven by a traffic officer who turned on both the red light and the siren. You ask whether this violates sec. 346.04(3), Stats.,
>
> . . . (statute omitted)

> The intention of the legislature to exclude signals received from vehicles which are not marked as police vehicles is apparent. Many automobiles, some privately owned, which are not police vehicles, qualify as authorized emergency vehicles under the definition in sec. 340.01(3), Stats., and operators of other vehicles can hardly be expected to know whether the operators of such authorized emergency vehicles are traffic officers or not. The statute here involved requires that the offense be knowingly committed. It is, therefore, my opinion that sec. 346.04(3), Stats., was not violated under the circumstances you have presented unless the eluder knew that the signal from the unmarked vehicle was given by a traffic officer. This, of course, is a matter of proof.
>
> However, Sec. 346.19, Stats., requires that upon the approach of an authorized emergency vehicle giving audible signal by siren, the operator of a motor vehicle shall yield the right of way, drive to the right and stop. I conclude that this is the proper statute to invoke in the case of a driver who flees from an unmarked police vehicle.

65 Op. Att'y Gen. 27 (1976)..

7. This is the definition provided in § 340.01(70).

8. The "knowingly" element was discussed in State v. Sterzinger, 2002 WI App 171, 256 Wis.2d 925, 649 N.W.2d 677. The court concluded that "the scienter requirement of Wis. Stat. § 346.04(3) applies only to the first element of the offense, that a driver 'knowingly flee or attempt to elude' an officer. We also conclude that the statute does not require the operator of a fleeing vehicle to actually interfere with or endanger identifiable vehicles or persons; he or she need only drive in a manner that creates a risk or likelihood of that occurring." 2002 WI App 171, ¶2. The court stated that this interpretation is consistent with Wis JI-Criminal 2630, but the instruction does not actually make the clear distinction articulated in the decision.

9. "[T]he second element of Wis Stat. § 346.04(3) – that the defendant knowingly fled or attempted to elude an officer – may be demonstrated in one of three ways: (1) willful disregard of the signal so as to interfere with or endanger the officer, vehicles, or pedestrians; (2) increasing the speed of the vehicle; or (3) extinguishing the lights of the vehicle." State v. Beamon, 2013 WI 47, ¶35, 347 Wis.2d 559, 830 N.W.2d 681. (Citing State v. Sterzinger, 2002 WI App 171, 256 Wis.2d 925, ¶9, 649 N.W.2d 677.).

10. See note 4, supra.

11. 2001 Wisconsin Act 109 (effective date: February 1, 2003) revised § 346.17, which identifies the penalty for a violation of § 346.04(3). See the Comment preceding note 1, supra. The Committee concluded that the best way to handle the facts which increase the penalty is to submit a special question to the jury, asking whether the fact has been established beyond a reasonable doubt. This is the same way the question of value is handled in a theft case. See Wis JI-Criminal 1441.

12. Section 346.17(3) does not use the word "cause" but rather uses "results in." In State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), the court held that § 346.17(3) was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant's conduct was a substantial factor in causing the death. The court

noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

If definition of the causal requirement is necessary, something like the following might be added:

This requires that the defendant's operation of the vehicle (to flee) (in an attempt to elude) an officer was a substantial factor in producing (specify the harm that occurred).

13. Section 346.17(3)(b) provides that the definition of "bodily harm" in § 939.22(4) applies. That is the definition used in the instruction.

14. Section 346.17(3)(b) provides that the definition of "property of another" in § 939.22(28) applies: "'Property of another' means property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property."

15. See note 12, supra.

16. Section 346.17(3)(c) provides that the definition of "great bodily harm" in § 939.22(14) applies. The Committee recommends defining the term in the manner used in the instruction. See Wis JI-Criminal 914 for a more complete discussion of issues relating to "great bodily harm."

17. See note 12, supra.

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2632 RESISTING A TRAFFIC OFFICER BY FAILING TO STOP — § 346.04(2t)

Statutory Definition of the Crime

Section 346.04(2t) of the Wisconsin Statutes is violated by a person who operates a motor vehicle[1] on a highway,[2] and after receiving a visual or audible signal to stop his or her vehicle from a (traffic officer) (federal law enforcement officer) (marked police vehicle) (unmarked police vehicle that the person knows or reasonably should know is being operated by a law enforcement officer), knowingly resists the officer by failing to stop his or her vehicle as promptly as safety reasonably permits.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle on a highway.[3]
2. The defendant received a visual or audible signal to stop (his) (her) vehicle from a (traffic officer) (federal law enforcement officer) (marked police vehicle) (unmarked police vehicle that the defendant knew or reasonably should have known was being operated by a law enforcement officer).

   ("Traffic officer" means every officer authorized by law to direct or regulate traffic or to make arrests for violation of traffic regulations.)[4]

3. The defendant knowingly resisted an officer by failing to stop (his) (her) vehicle as promptly as safety reasonably permits.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. What a person knows or has reason to know must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2632 was originally published in 2003. This revision was approved by the Committee in December 2018; it revised the instruction to reflect changes in the statute made by 2017 Wisconsin Act 347.

2017 Wisconsin Act 347 [effective date: April 18, 2018, revised § 346.04(2t) to add reference to "federal law enforcement officer" and further revised the offense definition to refer to "marked or unmarked police vehicle that the operator knows or reasonably should know is being operated by a law enforcement officer."

Section 346.04(2t) was created by 2001 Wisconsin Act 109 which changed the penalties and created a misdemeanor offense. For offenses under § 346.04(3), see Wis JI-Criminal 2630.

This offense was created by the legislation that implemented the recommendations of the Criminal Penalties Study Committee. That Committee recommended that a misdemeanor fleeing offense be restored "for use in those cases when the defendant's behavior is appropriately addressed with a conviction other than at the felony level." Criminal Penalties Study Committee Final Report, p. 57 (Wisconsin Department of Administration, August 31, 1999.) [This report is available online at http://www.doa.state.wi.us/secy/index.asp.]

Section 346.04(4) provides: "Subsection (2t) is not an included offense of sub. (3), but a person may not be convicted of violating both subs. (2t) and (3) for acts arising out of the same incident or occurrence."

1. Section 346.04 applies to all vehicles and is not restricted to "motor" vehicles. ["Vehicle" is defined in § 340.01(74); "motor vehicle" is defined in § 340.01(35).] Since the majority of cases will involve motor vehicles, the instruction has been drafted for those cases. "Motor" should be omitted where a motor vehicle is not involved.

2. Offenses defined in chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. Sec. 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in secs. 346.62 and 346.63; sec. 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

"Highway" is defined in sec. 340.01(22) as:

> All public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools as defined in s. 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

This definition of "highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 334 N.W.2d 77 (1983).

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element

3. See note 2, supra.

4. This is the definition provided in § 340.01(70).

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2650 RECKLESS DRIVING: ENDANGERING SAFETY (CRIMINAL OFFENSE) — § 346.62(2)

Statutory Definition of the Crime

Reckless driving, as defined in § 346.62(2) of the Wisconsin Statutes, is committed by one who endangers the safety of any person or property by the negligent operation of a vehicle on a highway.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle[3] on a highway[4].
2. The defendant operated a vehicle in a manner constituting criminal negligence.[5]

   "Criminal negligence" means:[6]

   - the defendant's operation of a vehicle created a risk of death or great bodily harm; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant should have been aware that (his) (her) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.

   IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY, SEE WIS JI CRIMINAL 925.[7]

IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED, ADD THE FOLLOWING:[8]

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that (summarize the statute). Violating this statute does not necessarily constitute criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

3. The defendant's criminal negligence endangered the safety of any person or property.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

If you find the defendant guilty, you must answer the following questions "yes" or "no":[9]

Did the violation result in bodily harm to another?

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[10]

Did the violation occur in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) where workers are at risk from

traffic?

["Highway maintenance or construction area" means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION" sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.][11]

["Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.][12]

["Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).][13]

COMMENT

Wis JI-Criminal 2650 was originally published in 1967 and revised in 1978, 1985, 1988, 1995, 2010, and 2023. The 2023 revision added to the comment to reflect changes made by 2021 Wisconsin Act 115 [effective date: December 8, 2021]. This revision was approved by the Committee in August 2023; it

reflects changes made by 2023 Wisconsin Act 9 [effective date: May 12, 2023].

Section 346.62(2) was modified by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. It was affected by the homicide revision because the same definition of "criminal negligence" is used for this offense as for homicide under the revision. The effective date of the change is January 1, 1989, and this instruction is to be used in place of Wis JI-Criminal 2650 (1986) for offenses committed on or after that date. The revised statute reads as follows:

> (2) No person may endanger the safety of any person or property by the negligent operation of a vehicle.

The Judicial Council explained the change as follows:

> The revisions contained in subs. (2) and (3) are intended as editorial, not substantive, as is the substitution of a cross-reference to s. 939.25(2), stats., for the prior definition of a high degree of negligence. New sub. (4) carries forward the crime created by 1985 Wisconsin Act 293.

Judicial Council Note to § 346.62, 1987 Senate Bill 181.

The first offense under § 346.62(2) is punishable only by forfeiture of not less than $50 nor more than $400 [see § 346.65(1)(a)]; therefore, the burden of proof is to a reasonable certainty by evidence which is "clear, satisfactory, and convincing," (see § 345.45). The second and subsequent violations are punishable as crimes: a fine of $100 to $1,000 or one year in the county jail or both [see § 346.65(1)(b)]. Therefore, for second and subsequent offenses, the burden of proof must be beyond a reasonable doubt.

The instruction is drafted for the criminal offense. To adapt it for a forfeiture case, substitute "satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing" for "prove by evidence which satisfies you beyond a reasonable doubt." If the "clear, satisfactory, and convincing" standard of proof applies, an instruction for a 5/6 verdict should also be given. See Wis JI-Criminal 2055, Five-Sixths Verdict: Forfeiture Actions.

Section 346.62(5m)(a) provides for doubling the forfeiture or fine for certain violations:

> Except as provided in par. (b), if an operator of a vehicle violates s. 346.62 (2) to (4) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic or where sanitation workers are at risk from traffic and the operator knows or should know that sanitation workers are present, any applicable minimum and maximum forfeiture or fine specified in sub. (1), (3), (4m), or (5) for the violation shall be doubled.

Section 346.65(5m)(b) was created pursuant to 2021 Wisconsin Act 115. This section further increases penalties for violations of § 346.62(2) to (3) that occur in a highway maintenance or construction area, utility work area, or emergency or roadside response area where workers are at risk from traffic, and bodily harm occurs. Upon conviction, a driver is subject to a fine of up to $10,000 or imprisonment of up to nine months, or both, an order to perform between 100 and 200 hours of community service work, and an order to attend traffic safety school.

A similar offense is defined in § 941.01, which prohibits "endangering another's safety by a high

degree of negligence in the operation of a vehicle, not upon a highway." (Emphasis added.) See Wis JI-Criminal 1300.

1. Section 346.61 provides that § 346.62 applies to "highways" and to "all premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof." The instruction is drafted for a case involving operating on a highway. If a case involves operating on "premises held out to the public. . . ," the instruction must be modified. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

2. For the purposes of cases involving operating under the influence, § 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." See Wis JI-Criminal 2600 Introductory Comment, Sec. III.

3. The definition of "vehicle" provided in § 939.22(44), applies to violations of § 346.62. See § 346.62(1)(d). It provides:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

4. If a case involves operating on "premises held out for the public" rather than on a "highway," see discussion in note 2 above. Also see Wis JI-Criminal 2600 Introductory Comment, Sec. I. and Wis JI-Criminal 2605.

5. Section 346.62(1) provides: "'Negligent' has the meaning designated in s. 939.25(2)." This is a reference to the Criminal Code definition of "criminal negligence."

6. The definition of "criminal negligence" is the one provided in § 939.25, which applies to this offense. See § 346.62(1)(c).

7. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

8. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). See note 6, Wis JI-Criminal 1170.

9. The Committee determined that facts that increase the range of penalties be submitted to the jury in the form of two questions concerning whether the violation resulted in bodily harm to another and whether the violation occurred in a highway maintenance or construction area, utility work area, or emergency or roadside response area where workers are at risk from traffic.

10. This is the definition of "bodily harm" provided in § 939.22(4).

11. The definition of "Highway maintenance or construction area" is the one provided in § 340.01(22e), which applies to this offense.

12. The definition of "Utility work area" is the one provided in § 340.01(73m), which applies

to this offense.

13. The definition of "Emergency or roadside response area" is the one provided in § 340.01(15pu), which applies to this offense.

2652 RECKLESS DRIVING: CAUSING BODILY HARM — § 346.62(3)

Statutory Definition of the Crime

Reckless driving, as defined in § 346.62(3) of the Wisconsin Statutes, is committed by one who causes bodily harm to another by the negligent operation of a vehicle on a highway.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle[3] on a highway.[4]
2. The defendant operated a vehicle in a manner constituting criminal negligence.[5]

   "Criminal negligence" means:[6]

   - the defendant's operation of a vehicle created a risk of death or great bodily harm; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant should have been aware that (his) (her) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.

   IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI CRIMINAL 925.[7]

IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED, ADD THE FOLLOWING:[8]

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that (summarize the statute). Violating this statute does not necessarily constitute criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

3. The defendant's criminal negligence caused bodily harm to (name of victim).

This requires that the defendant's conduct was a substantial factor in producing bodily harm.[9]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

If you find the defendant guilty, you must answer the following question "yes" or "no".[11]

Did the violation occur in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) where workers are at risk from

traffic?

["Highway maintenance or construction area" means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION" sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.][12]

["Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.][13]

["Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).][14]

COMMENT

Wis JI-Criminal 2652 was originally published in 1967 and revised in 1978, 1985, 1988, 1995, and 2010. This revision was approved by the Committee in August 2022; it added to the comment to reflect changes made by 2021 Wisconsin Act 115 [effective date: December 8, 2021].

Section 346.62(3) was modified by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. It was affected by the homicide revision because the same definition of "criminal negligence" is used for this offense as for homicide under the revision. The effective date of the change is January 1, 1989, and this instruction is to be used in place of Wis JI-Criminal 2652 (© 1986) for offenses committed on or after that date. The revised statute reads as follows:

(2) No person may cause bodily harm to another by the negligent operation of a vehicle.

The Judicial Council explanation of the change is provided in the Comment to Wis JI-Criminal 2650.

A violation of § 346.62(3) is a crime, punishable by a fine of not less than $300 nor more than $2,000 or imprisonment of not less than 30 days or more than one year in the county jail. § 346.65(3).

Section 346.62(5m)(a) provides for doubling the forfeiture or fine for certain violations:

> Except as provided in par. (b), if an operator of a vehicle violates s. 346.62 (2) to (4) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic or where sanitation workers are at risk from traffic and the operator knows or should know that sanitation workers are present, any applicable minimum and maximum forfeiture or fine specified in sub. (1), (3), (4m), or (5) for the violation shall be doubled.

Section 346.65 (5m)(b) was created pursuant to 2021 Wisconsin Act 115. This section further increases penalties for violations of § 346.62 (2) to (3) that occur in a highway maintenance or construction area, utility work area, or emergency or roadside response area where workers are at risk from traffic, and bodily harm occurs. Upon conviction, a driver is subject to a fine of up to $10,000 or imprisonment of up to nine months, or both, an order to perform between 100 and 200 hours of community service work, and an order to attend traffic safety school.

1. Section 346.61 provides that § 346.62 applies to "highways" and to "all premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof." The instruction is drafted for a case involving operating on a highway. If a case involves operating on "premises held out to the public. . . ," the instruction must be modified. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

2. For the purposes of cases involving operating under the influence, § 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." See Wis JI-Criminal 2600 Introductory Comment, Sec. III.

3. The definition of "vehicle" provided in § 939.22(44), applies to violations of § 346.62. See § 346.62(1)(d). It provides:

> "Vehicle" means any self propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water or in the air.

4. If a case involves operating on "premises held out for the public" rather than on a "highway," see discussion in note 1, above. Also see, Wis JI-Criminal 2600 Introductory Comment, Sec. I. and Wis JI Criminal 2605.

5. Section 346.62(1) provides: "'Negligent' has the meaning designated in s. 939.25(2)." This is a reference to the Criminal Code definition of "criminal negligence."

6. The definition of "criminal negligence" is the one provided in § 939.25, which applies to this offense. See § 346.62(1)(c).

7. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

8. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). See note 6, Wis JI-Criminal 1170.

9. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient in most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

See Wis JI-Criminal 910 for a more complete discussion of "cause."

10. This is the definition of "bodily harm" provided by § 939.22(4), which applies to reckless driving offenses. § 346.62(1)(a).

11. The Committee determined that facts which increase the range of penalties be submitted to the jury in the form of a question concerning whether the violation occurred in a highway maintenance or construction area, utility work area, or emergency or roadside response area where workers are at risk from traffic.

12. The definition of "Highway maintenance or construction area" is the one provided in § 340.01(22e), which applies to this offense.

13. The definition of "Utility work area" is the one provided in § 340.01(73m), which applies to this offense.

14. The definition of "Emergency or roadside response area" is the one provided in § 340.01(15pu), which applies to this offense.

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2654 RECKLESS DRIVING: CAUSING GREAT BODILY HARM — § 346.62(4)

Statutory Definition of the Crime

Reckless driving, as defined in § 346.62(4) of the Wisconsin Statutes, is committed by one who causes great bodily harm to another by the negligent operation of a vehicle on a highway.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle[3] on a highway.[4]
2. The defendant operated a vehicle in a manner constituting criminal negligence.[5]

"Criminal negligence" means:[6]

- the defendant's operation of a vehicle created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO

BE HELPFUL OR NECESSARY SEE WIS JI CRIMINAL 925.[7]

IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED, ADD THE FOLLOWING:[8]

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that (summarize the statute). Violating this statute does not necessarily constitute criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

3. The defendant's criminal negligence caused great bodily harm to (name of victim).

This requires that the defendant's conduct was a substantial factor in producing great bodily harm.[9]

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2654 was originally published in 1988 and revised in 1995, 2009, and 2018. The 2009 revision involved adoption of a new format and nonsubstantive changes to the text. This revision was approved by the Committee in August 2022; it added to the comment to reflect changes made by 2021 Wisconsin Act 115 [effective date: December 8, 2021].

Section 346.62(4) was created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. It is former § 940.25, moved to line up with the closely related offenses defined in § 346.62(2) and (3). The effective date of the change is January 1, 1989, and this instruction is to be used in place of Wis JI Criminal 1261 (© 1986) for offenses committed on or after that date. The revised statute reads as follows:

(4) No person may cause great bodily harm to another by the negligent operation of a vehicle.

The Judicial Council explanation of the change is provided in the Comment to Wis JI-Criminal 2650.

A violation of § 346.62(4) is a Class I felony. § 346.65(5).

Section 346.62(5m)(a) provides for doubling the forfeiture or fine for certain violations:

> If an operator of a vehicle violates s. 346.62 (2) to (4) where persons engaged in work in a highway maintenance or construction, utility work area, or emergency or roadside response area are at risk from traffic or where sanitation workers are at risk from traffic and the operator knows or should know that sanitation workers are present, any applicable minimum and maximum forfeiture or fine specified in sub. (1), (3), (4m), or (5) for the violation shall be doubled.

The definition of "Highway maintenance or construction area" is the one provided in § 340.01(22e), which applies to this offense.

The definition of "Utility work area" is the one provided in § 340.01(73m), which applies to this offense.

The definition of "Emergency or roadside response area" is the one provided in § 340.01(15pu), which applies to this offense.

The definition of "Sanitation worker" is the one provided in § 340.01(55u), which applies to this offense.

1. Section 346.61 provides that § 346.62 applies to "highways" and to "all premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof." The instruction is drafted for a case involving operating on a highway. If a case involves operating on "premises held out to the public. . . ," the instruction must be modified. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

2. For the purposes of cases involving operating under the influence, § 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle

necessary to put it in motion." See Wis JI-Criminal 2600 Introductory Comment, Sec. III.

3. The definition of "vehicle" provided in § 939.22(44), applies to violations of § 346.62. See § 346.62(1)(d). It provides:

> "Vehicle" means any self propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water or in the air.

4. If a case involves operating on "premises held out for the public" rather than on a "highway," see discussion in note 1, above. Also see, Wis JI-Criminal 2600 Introductory Comment, Sec. I. and Wis JI-Criminal 2605.

5. Section 346.62(1) provides: "'Negligent' has the meaning designated in s. 939.25(2)." This is a reference to the Criminal Code definition of "criminal negligence."

6. The definition of "criminal negligence" is the one provided in § 939.25, which applies to this offense. See § 346.62(1)(c).

7. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

8. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). See note 6, Wis JI-Criminal 1170.

9. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient in most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of great bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

See Wis JI-Criminal 910 for a more complete discussion of "cause."

10. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

Section 346.62(1)b) provides: "'Great bodily harm' has the meaning designated in s. 93.22(14)."

OFFICE OF JUDICIAL EDUCATION
1/2024

WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME IV

Wisconsin Criminal Jury Instructions Committee

[Cite as Wis JI-Criminal]

- Includes 1/2024 Supplement (Release No. 63)

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2660 OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — CRIMINAL OFFENSE — 0.08 GRAMS OR MORE — § 346.63(1)(b)

Statutory Definition of the Crime

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while that person has a prohibited alcohol concentration.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[3] on a highway.[4]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][5]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][6]

2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[7]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[8]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[9] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[10] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[11]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2660 was originally published in 1982 and revised in 1985, 1993, 2004, and 2006. This revision was approved by the Committee in June 2020; it added to the Comment.

The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with two or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

The 2020 revision of the Comment reflected changes to the felony classes of fourth and subsequent offenses made by 2015 Wisconsin Act 371 [effective date: April 27, 2016]. The revision also reflected changes made by 2019 Wisconsin Act 106 [effective date: March 1, 2020] to the penalty provision of § 346.65(2)(am)5. This amendment increased the mandatory minimum confinement period of fifth and sixth offenses to not less than eighteen months, unless the court finds that a lesser term of confinement would be in the best interests of the community.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

The prohibited alcohol concentration is 0.02 for persons who have three or more prior convictions, suspension or revocations, as counted under § 343.307(1). See § 340.01(46m)(c) and Wis JI-Criminal 2660C.

This instruction is for a criminal offense under § 346.63(1)(b), which applies if "the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals two . . ." Section 346.65(2)(b). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

The penalty for criminal violations of § 346.63(1) increases with the number of prior convictions the defendant has. See § 346.65(2).). Fourth offenses are Class H felonies. § 346.65(2)(am)4. Fifth and sixth offenses are Class G felonies. § 346.65(2)(am)5. Seventh, eighth, and ninth offenses are Class F felonies. § 346.65(2)(am)6. Tenth and subsequent offenses are Class E felonies. § 346.65(2)(am)7. This instruction may be used without change for all criminal violations. Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

The maximum penalty for these offenses is doubled if there was a child under the age of 16 years in the defendant's vehicle. See § 346.65(2)(f) and Wis JI-Criminal 999.

First violations of the statute are forfeitures, see Wis JI-Criminal 2660A. For instructions for cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of driving, see Wis JI-Criminal 2668 [forfeitures] and Wis JI-Criminal 2669 [criminal charges].

The constitutionality of penalizing the "status" of having a prohibited level of alcohol concentration has been upheld. State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984); State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989). Defendants may not litigate the validity of the "partition ratio" that is used to calculate the prohibited breath alcohol level. McManus, 152 Wis.2d 113, 123.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. See Wis JI-Criminal 2600 Introductory Comment, Sec. V., regarding the amendment of the definition of "prohibited alcohol concentration" by 2003 Wisconsin Act 30 [effective date: September 30, 2003].

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the second element. It then provides for using the appropriate measure of alcohol concentration – blood alcohol or alcohol in the breath – in the definition of the second element. For cases involving the 0.02 level, see Wis JI-Criminal 2660C.

3. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

6. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600, Introductory Comment, Sec. V.

8. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of defendants with 3 or more priors any prima facie effect. So there is no statutory authority for the typical statement that discusses the evidentiary value of test results.

9. Regarding instructions on test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2660-2665 INTRODUCTORY COMMENT

[WITHDRAWN AND REPLACED BY WIS JI CRIMINAL 2600]

COMMENT

Material describing issues relating to "drunk driving" offenses was first published as Wis JI Criminal 2660-2665 Introductory Comment in 1982. It outlined the major changes in Wisconsin law made by Chapters 20 and 184, Laws of 1981. The most significant of those changes was the creation of offenses based on the alcohol concentration of the driver. The material was significantly revised in 1993 to emphasize the changes made by 1991 Wisconsin Act 277. The most significant of those changes, at least in terms of its effect on the jury instructions, was the creation of "0.08" as the level of prohibited alcohol concentration for offenders with two or more prior offenders.

In 2004, this material was withdrawn and replaced by Wis JI Criminal 2600. The discussion was substantially expanded to collect all explanatory material relating to "operating while intoxicated offenses" – those in the Motor Vehicle Code and in the Criminal Code.

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2660A OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — CIVIL FORFEITURE — 0.08 GRAMS OR MORE — § 346.63(1)(b)

Statutory Definition of the Crime

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while that person has a prohibited alcohol concentration.[2]

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle[4] on a highway.[5]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][6]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][7]

2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[8]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[9] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[10] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), unless you are satisfied of that fact to a reasonable certainty by evidence which is clear, satisfactory, and convincing.

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[11]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The (identify

prosecuting agency is not required to prove the underlying scientific reliability of the method used by the testing device. However, the (identify prosecuting agency is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2660A was originally published in 1982 and revised in 1985, 1993, 2004, 2006, and 2014. The 2014 revision added to the Comment to refer to the finding required for installation of an ignition interlock device. The 2015 revision made a nonsubstantive correction in the Comment.

The 2004 revision reflected the change in the prohibited alcohol concentration [PAC] level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

This instruction is for a first offense under § 346.63(1)(b), which is punished as a forfeiture. For criminal violations, see Wis JI-Criminal 2660. For instructions for cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of driving, see Wis JI-Criminal 2668 [forfeitures] and Wis JI-Criminal 2669 [criminal charges].

For first offenses under § 346.63(1) where the defendant has a prohibited alcohol concentration of 0.15 or more, "[a] court shall order a person's operating privilege . . . be restricted to operating vehicles that are equipped with an ignition interlock device and . . . shall order that each motor vehicle for which the person's name appears on the vehicle's certificate of title or registration be equipped with an ignition interlock device . . . "See § 343.301(1g) intro. and (b)1. The Committee concluded that whether the

alcohol concentration was 0.15 or more is not an issue that must be submitted to the jury. Installation of the device is not a penalty and thus is not subject to the rule of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), which requires that all facts that increase the penalty for a crime be submitted to the jury. Thus, the judge makes the necessary finding when it is alleged that the 0.15 level is an issue.

The constitutionality of penalizing the "status" of having a prohibited level of alcohol concentration has been upheld. State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984); State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989). Defendants may not litigate the validity of the "partition ratio" that is used to calculate the prohibited breath alcohol level. McManus, 152 Wis.2d 113, 123.

In City of Omro v. Brooks, 104 Wis.2d 352, 311 N.W.2d 620 (1981), the Wisconsin Supreme Court discussed the propriety of directing a verdict against the defendant in a forfeiture action for operating under the influence. The court held that the trial court erred not directing a verdict of guilty on the facts of that case. Brooks dealt with a charge of operating under the influence under a municipal ordinance in conformity with the state statutes, which at that time did not include a prohibited alcohol concentration offense. And, the evidence showing that the defendant in Brooks was under the influence was completely uncontradicted – the defendant testified and admitted the fact.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. See Wis JI-Criminal 2600 Introductory Comment, Sec. V., regarding the amendment of the definition of "prohibited alcohol concentration" by 2003 Wisconsin Act 30 [effective date: September 30, 2003].

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the second element. It then provides for using the appropriate measure of alcohol concentration – blood alcohol or alcohol in the breath – in the definition of the second element.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

6. This is the definition of "drive" provided in § 346.63(3)(a).

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The definitions are provided in § 340.01(46m) and (1v). See note 2, supra.

9. Regarding instructions on test results, see Wis JI-Criminal 2600 Introductory Comment,

Sec. VII.

10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2660B OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — CIVIL FORFEITURE — 0.08 GRAMS OR MORE — § 346.63(1)(b)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 2660B was originally published as Wis JI-Criminal 2660.1 in 1992. It was renumbered Wis JI-Criminal 2660B in 1995 and revised in 1998. It was withdrawn in 2003 when the generally applicable prohibited alcohol concentration was reduced from 0.10 to 0.08. Offenses involving the 0.08 level are now covered by Wis JI-Criminal 2660.

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2660C OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — CRIMINAL OFFENSE — MORE THAN 0.02 GRAMS — § 346.63(1)(b)

Statutory Definition of the Crime

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while that person has a prohibited alcohol concentration.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [two] [three][3] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[4] on a highway.[5]

Definition of "Drive" or "Operate"

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][6]

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][7]

2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[8]

[more than .02 grams of alcohol in 210 liters of the person's breath].

[more than .02 grams of alcohol in 100 milliliters of the person's blood].

NOTE: THE DEFENDANT'S ADMISSION OF THREE OR MORE PRIOR CONVICTIONS DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THIS ELEMENT AND PROCEED TO THE PARAGRAPH CAPTIONED "HOW TO USE THE TEST RESULT EVIDENCE."[9]

[3. The defendant had three or more convictions, suspensions, or revocations, as counted under § 343.307(1).][10]

IF THE THIRD ELEMENT IS INCLUDED AND IF REQUESTED BY THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:[11]

[Evidence has been received that the defendant had prior convictions, suspensions, or revocations. This evidence was received as relevant to the status of the defendant's driving record, which is an issue in this case. It must not be used for any other purpose and, particularly, you should bear in mind that conviction, suspension, or revocation at some previous time is not proof that the defendant drove or operated a motor vehicle with a prohibited alcohol concentration on this occasion.]

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[12]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[13]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2660C was originally published in 2002 and revised in 2004. This revision was approved by the Committee in March 2007; it corrected the reference to the prohibited alcohol concentration.

This instruction is drafted for offenses involving a prohibited alcohol concentration level [PAC] of more than .02, which applies to persons with three or more priors. See § 340.01(46m)(c), created by 1999 Wisconsin Act 109. [Effective date: January 1, 2001.]

Note that § 340.01(46m)(c) defines the prohibited alcohol concentration for persons with three or more priors as "more than 0.02." This differs from the generally applicable level, referred to as "an alcohol concentration of 0.08 or more." See § 340.01(46m)(a).

The fact of having three or more priors is included as a bracketed third element in this instruction. It is an element because the existence of priors changes the substantive definition of the crime from an alcohol concentration of .08 or more to one of more than .02. It is in brackets because it is not to be submitted to the jury if the defendant admits having the priors. See footnotes 3 and 9, below. When priors change the offense from a forfeiture to a crime or increase the criminal penalty, they need not be submitted to the jury. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

The constitutionality of penalizing the "status" of having a prohibited level of alcohol concentration has been upheld. State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984); State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989). Defendants may not litigate the validity of the "partition ratio" that is used to calculate the prohibited breath alcohol level. McManus, 152 Wis.2d 113, 123.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. See Wis JI-Criminal 2600 Introductory Comment, Sec. V., regarding the amendment of the definition of "prohibited alcohol concentration" by 2003 Wisconsin Act 30 [effective date: September 30, 2003].

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the second element. It then provides for using the appropriate measure of alcohol concentration – blood alcohol or alcohol in the breath – in the definition of the second element. For cases involving the 0.08 level, see Wis JI-Criminal 2660.

3. The instruction is drafted to allow for use with either two or three elements, depending on whether the third element, relating to the defendant having three or more prior convictions, suspensions or revocations, is submitted to the jury. See discussion at note 9, below.

4. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

6. This is the definition of "drive" provided in § 346.63(3)(a).

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

9. The third element has been placed in brackets because the Committee concluded that the "status element" of this offense must be addressed in the same manner as for .08 offenses under the version of the law addressed in State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997). In Alexander, the Wisconsin Supreme Court referred to this element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions or revocations [the relevant number under prior law], the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 628, 646. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 628, 651. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 628, 649-50.

The court gave explicit direction to the trial courts as to how to handle this situation:

> "When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The 'prohibited alcohol concentration' means 0.08 . . ."
> 214 Wis.2d 628, 651-52.

By placing the "status element" in brackets, the Committee intends to implement the approach approved in Alexander. If the defendant admits the "status element," the instruction should be given with two elements: causing death, by operating a vehicle, and, having an alcohol concentration of more than .02. If the defendant does not admit the "status element," the instruction should be given with a third element: having three or more prior convictions, suspensions or revocations as counted under § 343.307(1).

Because the defendant's admission removes an element from the jury's consideration, the record should reflect the defendant's acknowledgment that a jury determination is, in effect, being waived on the "status element."

10. This element is not to be included if the defendant admits the priors. See note 9, supra.

The text of the third element is based on the definition of "prohibited alcohol concentration" in § 340.01(46m)(b). The types of convictions, suspensions, and revocations that are counted under § 343.307(1) are convictions for operating while intoxicated or suspensions or revocations for refusal to submit to chemical tests for alcohol. The priors may include offenses in other jurisdictions. The text of § 343.307(1) is provided in Wis JI-Criminal 2600 Introductory Comment.

The Committee concluded that the instruction should use the statutory language "as counted under § 343.307(1)" because evidence of the defendant's driving record will usually be submitted with testimony that the prior offenses are those that are counted under the statute.

11. Making the fact of prior convictions, etc., an issue for the jury creates the possibility that a jury may make improper use of the evidence relating to the defendant's driving record. Therefore, upon

request, an instruction should be given on the limited use to be made of the driving record evidence. In State v. Ludeking, 195 Wis.2d 132, 536 N.W.2d 119 (Ct. App. 1995), the court pointed to this cautionary paragraph as a way to offset the inevitable prejudicial impact of presenting this evidence to the jury.

12. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of .02 or more any prima facie effect. So there is no statutory authority for the typical statement that discusses test results like the ones included in the instructions for .08 offenses. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

2660D OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — CRIMINAL OFFENSE — MORE THAN 0.02 GRAMS — SUBJECT TO AN IGNITION INTERLOCK ORDER — § 346.63(1)(b)

Statutory Definition of the Crime

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while that person has a prohibited alcohol concentration.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [two] [three][3] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[4] on a highway.[5]

Definition of "Drive" or "Operate"

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][6]

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][7]

2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[8]

[more than .02 grams of alcohol in 210 liters of the person's breath].

[more than .02 grams of alcohol in 100 milliliters of the person's blood].

NOTE: THE DEFENDANT'S ADMISSION THAT HE OR SHE IS SUBJECT TO AN ORDER UNDER § 343.301 DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THIS ELEMENT AND PROCEED TO THE PARAGRAPH CAPTIONED "HOW TO USE THE TEST RESULT EVIDENCE."[9]

[3. The defendant was subject to a court order under § 343.301 requiring the installation of an ignition interlock device.][10]

IF THE THIRD ELEMENT IS INCLUDED AND IF REQUESTED BY THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:[11]

[Evidence has been received that the defendant was subject to a court order requiring the installation of an ignition interlock device. This evidence was received as relevant to this element only. It must not be used for any other purpose and, particularly, it is not proof that the defendant drove or operated a motor vehicle with a prohibited alcohol concentration on this occasion.]

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[12]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[13]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2660D was approved by the Committee in December 2010.

This instruction is drafted for offenses involving a prohibited alcohol concentration level [PAC] of more than 0.02, which applies to persons subject to an order under § 343.301 requiring the installation of an ignition interlock device. See § 340.01(46m)(c), as amended by 2009 Wisconsin Act 100. [Effective date: July 1, 2010.]

Note that § 340.01(46m)(c) defines the prohibited alcohol concentration as "more than 0.02." This differs from the generally applicable level, referred to as "an alcohol concentration of 0.08 or more." See § 340.01(46m)(a).

The "more than 0.02" PAC level also applies to persons who have 3 or more prior convictions, suspensions, or refusals as counted under § 343.307(1)." See Wis JI-Criminal 2660C.

The fact of being subject to an order under § 343.301 is included as a bracketed third element in this instruction. It is an element because the existence of that fact changes the substantive definition of the crime from an alcohol concentration of 0.08 or more to one of more than 0.02. It is in brackets because, by analogy to the case where prior offenses reduce the level to 0.02, it is not to be submitted to the jury if the defendant admits being subject to the order. See footnotes 3 and 9, below. When priors change the

offense from a forfeiture to a crime or increase the criminal penalty, they need not be submitted to the jury. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

The constitutionality of penalizing the "status" of having a prohibited level of alcohol concentration has been upheld. State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984); State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989). Defendants may not litigate the validity of the "partition ratio" that is used to calculate the prohibited breath alcohol level. McManus, 152 Wis.2d 113, 123.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. See Wis JI-Criminal 2600 Introductory Comment, Sec. V., regarding the definition of "prohibited alcohol concentration."

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the second element. It then provides for using the appropriate measure of alcohol concentration – blood alcohol or alcohol in the breath – in the definition of the second element.

3. The instruction is drafted to allow for use with either two or three elements, depending on whether the third element, relating to the defendant being subject to an order under § 343.301, is submitted to the jury. See discussion at note 9, below.

4. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

6. This is the definition of "drive" provided in § 346.63(3)(a).

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

9. The third element has been placed in brackets because the Committee concluded that the "status element" of this offense must be addressed in the same manner as for 0.02 offenses involving prior convictions. See Wis JI-Criminal 2660C. State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997) addressed an earlier version of the OWI law which reduced the PAC level to 0.08 if the defendant had prior convictions. In Alexander, the Wisconsin Supreme Court referred to this element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions or

revocations [the relevant number under prior law], the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 628, 646. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 628, 651. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 628, 649-50.

The court gave explicit direction to the trial courts as to how to handle this situation:

> "When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The 'prohibited alcohol concentration' means 0.08 . . ."
> 214 Wis.2d 628, 651-52.

By placing the "status element" in brackets, the Committee intends to implement the approach approved in Alexander. The existence of an ignition interlock order implies the existence of a prior OWI offense, creating the same risk of unfair prejudice that concerned the court in Alexander. If the defendant admits the "status element," the instruction should be given with two elements: by operating a vehicle, and, having an alcohol concentration of more than 0.02. If the defendant does not admit the "status element," the instruction should be given with a third element: being subject to an order under § 343.301.

Because the defendant's admission removes an element from the jury's consideration, the record should reflect the defendant's acknowledgment that a jury determination is, in effect, being waived on the "status element." See Wis JI-Criminal 162A Law Note: Stipulations.

10. This element is not to be included if the defendant admits being subject to the order. See note 9, supra.

11. Making the fact of being subject to an order under § 343.301 an issue for the jury creates the possibility that a jury may make improper use of the evidence relating to the defendant's driving record. Therefore, upon request, an instruction should be given on the limited use to be made of the driving record evidence. In State v. Ludeking, 195 Wis.2d 132, 536 N.W.2d 119 (Ct. App. 1995), the court pointed to this cautionary paragraph as a way to offset the inevitable prejudicial impact of presenting this evidence to the jury.

12. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of .02 or more any prima facie effect. So there is no statutory authority for the typical statement that discusses test results like the ones included in the instructions for 0.08 offenses. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2661 OPERATING A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION AND CAUSING INJURY — 0.08 GRAMS OR MORE — § 346.63(2)(a)2.

Statutory Definition of the Crime

Section 346.63(2)(a) of the Wisconsin Statutes is violated by one who causes injury to another by the operation of a vehicle[1] on a highway[2] while that person has a prohibited alcohol concentration.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a vehicle[4] on a highway.[5]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[6]

2. The defendant's operation of a vehicle caused injury[7] to (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[8] in producing the injury.

3. The defendant had a prohibited alcohol concentration at the time the defendant operated a vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[9]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[10]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[11] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[12] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[13]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device.

However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 346.63(2)(b), USE THE FOLLOWING CLOSING:[14]

Jury's Decision

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 346.63(2)(b), USE THE FOLLOWING CLOSING:[15]

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the injury would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[16] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[17]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[18] does not by itself provide a defense to the crime charged against the defendant.[19] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the injury would have occurred even if the defendant had not had a prohibited alcohol concentration and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[20]].

COMMENT

Wis JI-Criminal 2661 was originally published in 1982 and revised in 1985, 2004, 2006, and 2015. This revision was approved by the Committee in August 2017; it added footnote 7.

This instruction is drafted for violations of § 346.63(2)(a)2. involving a prohibited alcohol concentration [PAC] of .08 or more. The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003. For persons with three or more priors, the PAC level is .02.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

See Wis JI-Criminal 2665 for the related offense of causing injury while operating under the influence, as defined in § 346.63(2)(a)1. For cases involving two charges – operating under the influence and with a PAC – Wis JI-Criminal 1189 can be used as a model.

Section 346.65(2)(b) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the injury would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 15 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 2662, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

The penalty for violations of § 346.62(2)(a) doubles if a child was in the vehicle at the time of the offense. See § 346.65(3m) and Wis JI-Criminal 999. A similar provision in the Criminal Code was repealed by 2001 Wisconsin Act 109 and recreated as a sentencing factor, but § 346.65(3m) was not affected.

In State v. Smits, 2001 WI App 45, 241 Wis.2d 374, 626 N.W.2d 42, the court held that operating while intoxicated offenses are not lesser included offenses of the "causing injury" offenses defined in § 346.63(2).

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Note that § 346.63(2)(a) uses the phrase "operation of a vehicle." This differs in two respects from the way other offenses under § 346.63 are defined. First, it refers to "operate," not "drive or operate." Second, it refers to "vehicle" not "motor vehicle." The Committee assumed that these differences were intentional on the part of the legislature. The use of "vehicle" may be justified by the fact that offenses involving injury are considered to be more serious than simple operating offenses, thus leading to the inclusion of a broader category of conduct – namely, the operation of devices which do not fall within the definition of "motor vehicle." As to the use of "vehicle," this rationale was cited with approval in State v. Smits, 2001 WI App 45, ¶16, 241 Wis.2d 374, 626 N.W.2d 42.

2. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

3. See Wis JI-Criminal 2600 Introductory Comment, Sec. V., regarding the amendment of the definition of "prohibited alcohol concentration" by 2003 Wisconsin Act 30 [effective date: September 30, 2003].

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the second element. It then provides for using the appropriate measure of alcohol

concentration – blood alcohol or alcohol in the breath – in the definition of the second element. For cases involving the 0.02 level, see Wis JI-Criminal 2660C.

4. See note 1, supra. Section 340.01(74) defines "vehicle" as follows:

> "Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes made specifically applicable by statute.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

6. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. "Injury" was undefined by statute until 2013 Wisconsin Act 224 [effective date: April 10, 2014] created § 346.63(2)(c) to define it as "substantial bodily harm," cross-referencing the definition of that term in § 939.22(38). Section 346.63(2)(c) was repealed by 2015 Wisconsin Act 371 [effective date: April 27, 2016], again leaving "injury" undefined. The version of this instruction published before the 2014 statutory change did not define injury, but included the footnote that follows. There have been no directly applicable developments since then.

> The instruction does not define "injury" because it is not defined in the statutes or by a published court decision. While the Criminal Code uses the closely related term "bodily harm," caution should be used in equating the two because unpublished decisions of the Wisconsin Court of Appeals have reached conflicting results, regarding whether "pain" is sufficient to constitute "injury." In a prosecution under § 346.63(2)(a), the court held that the word "injury" encompasses physical pain. State v. Maddox, No. 03-0227-CR, July 8, 2003. [Ordered not published, August 27, 2003.] However, in a prosecution under § 940.225(2)(b), where "injury" is also used, the court held that the trial court erred in defining "injury" using the Criminal Code definition of "bodily harm" [see § 939.22(4)] because "injury" does not include "pain." State v. Gonzalez, No. 2006AP2977-CR, March 20, 2008. [Ordered not published, April 30, 2008.] Neither of these decisions may be cited as authority because they were not published. See § 809.23(3). But they indicate the need for caution in equating "injury" with "bodily harm." [Originally published as footnote 8, Wis JI-Criminal 2661 © 2006.]

8. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of injury. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 14, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of injury as required by the second element. If the defendant's operation caused the injury, the defense allows the defendant to avoid liability if it is established that the injury would have occurred even if the defendant had not been under the

influence and had been exercising due care. The constitutionality of eliminating causal negligence as an element of § 940.09 and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

9. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600, Introductory Comment, Sec. V.

10. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of defendants with 3 or more priors any prima facie effect. So there is no statutory authority for the typical statement that discusses the evidentiary value of test results.

11. Regarding instructions on test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the reliability of the testing device, see Wis JI-Criminal 2690 Introductory Comment, Sec. VII.

14. Section 346.63(2)(b) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the injury would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

15. See note 14, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

16. Section 346.65(2)(b) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

17. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense**. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

18. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

19. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 346.63(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 17, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

20. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

2661A OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION AND CAUSING INJURY — 0.08 GRAMS OR MORE — § 346.63(2)(a)2.

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 2661A was originally published as Wis JI-Criminal 2661.1 in 1992. It was renumbered Wis JI-Criminal 2661A in 1995 and revised in 1998. It was withdrawn in 2003 when the generally applicable prohibited alcohol concentration was reduced from 0.10 to 0.08. Offenses involving the 0.08 level are now covered by Wis JI Criminal 2661.

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2662 OPERATING A VEHICLE WHILE INTOXICATED AND CAUSING INJURY: AFFIRMATIVE DEFENSE UNDER § 346.65(2)(b)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 2662 was originally published in 1993 and revised in 1997, and 1998. It was withdrawn in 2004.

This instruction provided material describing the affirmative defense that applies to violations of § 346.63(2)(a). The material was to be added to the instructions to the instructions for the applicable offenses. In 2004, the instructions for violations of § 346.63(2)(a) were revised to incorporate instruction on the defense. See Wis JI Criminal 2661 and 2665.

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2663 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT — CRIMINAL OFFENSE — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of an intoxicant.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[3] on a highway.[4]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][5]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][6]

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[7]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[8]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[9]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[10] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[11] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to

decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[12]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2663 was originally published in 1966 and revised in 1978, 1981, 1982, 1986, 1993, 2004, and 2006. This revision was approved by the Committee in June 2020; it added to the Comment.

The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with two or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. For persons with two or fewer priors, a test showing 0.08 grams or more is prima facie evidence of being "under the influence of an intoxicant." § 885.235(1)(c). The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

The 2020 revision to the Comment reflected changes to the felony classes of fourth and subsequent offenses made by 2015 Wisconsin Act 371 [effective date: April 27, 2016]. The revision also reflected changes made by 2019 Wisconsin Act 106 [effective date: March 1, 2020] to the penalty provision of § 346.65(2)(am)5. This amendment increased the mandatory minimum confinement period of fifth and sixth offenses to not less than eighteen months, unless the court finds that a lesser term of confinement would be in the best interests of the community.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

This instruction is for a criminal offense under § 346.63(1)(a), which applies if "the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals two . . ." Section 346.65(2)(b). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

The penalty for criminal violations of § 346.63(1) increases with the number of prior convictions the defendant has. See § 346.65(2). Fourth offenses are Class H felonies. § 346.65(2)(am)4. Fifth and sixth offenses are Class G felonies. § 346.65(2)(am)5. Seventh, eighth, and ninth offenses are Class F felonies. § 346.65(2)(am)6. Tenth and subsequent offenses are Class E felonies. § 346.65(2)(am)7. This instruction may be used without change for all criminal violations. Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

The maximum penalty for these offenses is doubled if there was a child under the age of 16 years in the defendant's vehicle. See § 346.65(2)(f) and Wis JI-Criminal 999.

First violations of the statute are forfeitures, see Wis JI-Criminal 2663A. For instructions for cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of driving, see Wis JI-Criminal 2668 [forfeitures] and Wis JI-Criminal 2669 [criminal charges].

For offenses involving operating under the influence of a controlled substance, see Wis JI-Criminal 2664.

For offenses involving operating under the influence of "any other drugs," see Wis JI-Criminal 2666.

For offenses involving operating under the influence of "any combination of an intoxicant and any other drug," see Wis JI-Criminal 2666A.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

3. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

6. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. The instruction is drafted for cases involving the influence of an intoxicant. See note 2, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

8. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

10. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the "blood alcohol curve," see Wis JI-Criminal JI 2600 Introductory Comment, Sec. VII.

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2663A OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT — CIVIL FORFEITURE — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of an intoxicant.[2]

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency) [3] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle[4] on a highway.[5]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][6]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][7]

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[8]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[9]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[10] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[11] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence

of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied of that fact to a reasonable certainty by evidence which is clear, satisfactory, and convincing.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[12]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The (identify prosecuting agency is not required to prove the underlying scientific reliability of the method used by the testing device. However, the (identify prosecuting agency is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2663A was originally published in 1981 and revised in 1982, 1986, 1992, and 2004. This revision was approved by the Committee in October 2005.

The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

This instruction is for a first offense under § 346.63(1)(a), which is punished as a forfeiture. For criminal violations, see Wis JI-Criminal 2663. For instructions for cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of driving, see Wis JI-Criminal 2668 [forfeitures] and Wis JI-Criminal 2669 [criminal charges].

In City of Omro v. Brooks, 104 Wis.2d 352, 311 N.W.2d 620 (1981), the Wisconsin Supreme Court discussed the propriety of directing a verdict against the defendant in a forfeiture action for operating under the influence. The court held that the trial court erred not directing a verdict of guilty on the facts of that case. Brooks dealt with a charge of operating under the influence under a municipal ordinance in conformity with the state statutes, which at that time did not include a prohibited alcohol concentration offense. And, the evidence showing that the defendant in Brooks was under the influence was completely uncontradicted – the defendant testified and admitted the fact.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

6. This is the definition of "drive" provided in § 346.63(3)(a).

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The instruction is drafted for cases involving the influence of an intoxicant. See note 2, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

9. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

10. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2663B OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT — CIVIL FORFEITURE — NO ALCOHOL CONCENTRATION TEST — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of an intoxicant.[2]

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle[4] on a highway.[5]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][6]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][7]

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[8]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

IF THE CASE INVOLVES A TEST REFUSAL, ADD THE FOLLOWING:[9]

[Testimony has been received that the defendant refused to furnish a (breath) (urine) sample for chemical analysis. You should consider this evidence along with all the other evidence in the case, giving to it the weight you decide it is entitled to receive.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2663B was originally published in 1986 and revised in 1992, 2004, and 2006. This revision was approved by the Committee in October 2018; it removed reference to "blood" in the paragraph relating to test refusal. See footnote 9.

This instruction is an adaptation of Wis JI-Criminal 2663A for a case where no evidence of an alcohol concentration test has been admitted. In place of the paragraphs relating to evidence of test

results, the text of Wis JI-Criminal 235, dealing with a test refusal, is substituted, based on the assumption that in most "no-test" cases, the defendant has refused to take one.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

6. This is the definition of "drive" provided in § 346.63(3)(a).

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The instruction is drafted for cases involving the influence of an intoxicant. See note 2, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

9. The material in brackets is the text of Wis JI-Criminal 235. The leading case affirming the admissibility of test refusal evidence is State v. Albright, 98 Wis.2d 663, 298 N.W.2d 196 (Ct. App. 1980). The defendant's explanation for the refusal is also admissible. State v. Bolstad, 124 Wis.2d 576, 370 N.W.2d 576 (Ct. App. 1985).

The 2018 revision removed reference to a blood test in light of recent decisions from the United States and Wisconsin Supreme Courts. In Birchfield v. North Dakota, 579 U.S. —, 136 S.Ct. 2160 (2016), the court held that it is unconstitutional to make it a crime to refuse a warrantless blood test after being lawfully arrested for OWI – where exigent circumstances were not shown. However, the court also stated:

> "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.

> Petitioners do not question the constitutionality of those laws and nothing we say here should be read to cast doubt on them." 136 S.Ct. 2160, 2185-86.

In State v. Dalton, 2018 WI 85, 383 Wis.2d 147, 914 N.W.2d 120, the defendant was subjected to a warrantless blood draw that was justified by exigent circumstances. The Wisconsin Supreme Court held that a trial court erred by expressly relying on the defendant's refusal to consent to the blood draw to increase his sentence within the allowed statutory range:

> Dalton was criminally punished for exercising his constitutional right. Established case law indicates that this is impermissible. ¶61.
>
> . . . the circuit court violated Birchfield by explicitly subjecting Dalton to a more severe criminal penalty because he refused to provide a blood sample absent a warrant. ¶67.

Neither Birchfield nor Dalton holds that commenting on a blood test refusal is improper, but the Committee decided to remove reference to a blood test from the text of the instruction to avoid possible issues as this area of the law continues to develop.

NOTE: In State v. Hawley, 2014 AP 1113-CR, the Wisconsin Court of Appeals certified the case to the Wisconsin Supreme Court for a "final resolution" whether implied consent applies to blood draws of unconscious individuals. The certification is being held in abeyance pending the decision of the U.S. Supreme Court in Mitchell v. Wisconsin, U.S. Case No. 18-6210, where the issue presented is "whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the 4th Amendment warrant requirement." Oral argument in Mitchell was held April 23, 2019.

For a more complete discussion of the case law, see the Comment to Wis JI-Criminal 235.

2663C ALCOHOL CONCENTRATION LEVEL — § 346.65(2)(g)

[ADD ONE OR MORE OF THE FOLLOWING QUESTIONS IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.][1]

If you find the defendant guilty, you must answer the following question[2] "yes" or "no":

["Did the defendant have an alcohol concentration of 0.25 or above?"]

[Answer the following question only if you answer the above question "no."]

["Did the defendant have an alcohol concentration of 0.20 or above?"]

[Answer the following question only if you answer the above question "no."]

["Did the defendant have an alcohol concentration of 0.17 or above?"]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the alcohol concentration stated in the question was proved.

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2663C was originally published in 2001. This revision was approved by the Committee in December 2003.

1999 Wisconsin Act 109 created § 346.65(2)(g) which provides for increased fines for OWI offenders with three, four, or five or more priors. The increases will apply to offenses committed after the effective date: January 1, 2001. [Subsection (2)(g) was not affected by the changes made in laws relating to operating while intoxicated by 2003 Wisconsin Act 30.] The level of increase depends on the alcohol concentration level:

- 0.17 to 0.199 minimum and maximum fines are doubled
- 0.20 to 0.249 minimum and maximum fines are tripled
- 0.25 or more minimum and maximum fines are quadrupled

Because the alcohol concentration level increases the maximum fine, which is part of the criminal penalty for the offense, the Committee concluded that it is a fact which must be submitted to the jury.

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)

The Committee recommends handling the penalty-increasing factors by submitting an additional question after the instruction on the operating under the influence or operating with a prohibited alcohol concentration offense is given.

The following form is suggested for the guilty verdict:

We, the jury, find the defendant guilty of (describe offense), as defined in § 346.63___, Wis. Stats., at the time and place charged in the complaint.

If you find the defendant guilty, answer the following question(s) "yes" or "no":

Did the defendant have an alcohol concentration of ____ or above?

[ADD QUESTIONS FOR ADDITIONAL LEVELS AS REQUIRED.]

1. The Committee recommends submitting the question in the form indicated, without the upper limit of the range in the second and third questions. For example, in place of the statute's "0.17 to 0.199," the third question uses "0.17 or above." The criminal charge should indicate the level of alcohol concentration involved and it should be sufficient to ask the jury whether the applicable level is exceeded.

2. The instruction is drafted to allow for submitting one, two, or all three of the questions regarding the level of alcohol concentration. More than one question would be appropriate when reasonable, though conflicting, views of the evidence would support findings of different alcohol concentration levels.

2663D OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT WITH A CHILD UNDER 16 YEARS OF AGE IN THE MOTOR VEHICLE — § 346.63(1)(a) and § 346.65(2)(f)1.

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of an intoxicant while there is a minor passenger under 16 years of age in the vehicle.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[3] on a highway.[4]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][5]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][6]

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

3. There was a minor passenger under 16 years of age in the vehicle.

Knowledge of the passenger's age is not required and mistake regarding the

passenger's age is not a defense.[7]

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[8]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[9]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[10]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[11] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[12] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[13]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2663D was approved by the Committee in June 2010. This revision was approved by the Committee in December 2022; it updated the comment.

This instruction is drafted for first offense OWI violations that are criminal because there was a minor passenger under 16 years of age in the vehicle. See § 346.65(2)(f)1., created by 2009 Wisconsin Act 100. Because the presence of the minor passenger makes conduct criminal that would otherwise be a forfeiture, the Committee concluded that it becomes an element of the crime. The Wisconsin Court of Appeals agreed in State v. Gahart, --Wis.2d--, --N.W.2d-- (Ct. App. 2022). In that decision, the court cited the Committee's conclusion with approval and observed that "the Legislature explicitly and unambiguously recognized the presence of a minor passenger as an element of operating while intoxicated."

This instruction is based on a violation for operating under the influence. For violations involving a prohibited alcohol concentration, combine Wis JI-Criminal 2660 with this instruction. For violations involving a controlled substance, combine Wis JI-Criminal 2664 with this instruction. For offenses involving drugs, combine Wis JI-Criminal 2666 with this instruction. For offenses involving the combination of alcohol and a controlled substance, combine Wis JI-Criminal 2664A with this instruction. For offenses involving a detectable amount of a restricted controlled substance, combine Wis JI-Criminal 2664B with this instruction.

1. Regarding the "on a highway" requirement, see Wis JI Criminal 2600 Introductory Comment, Sec. I, and Wis JI Criminal 2605.

2. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI Criminal 2666.

3. Regarding the definition of "motor vehicle," see Wis JI Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the "on a highway" requirement, see Wis JI Criminal 2600 Introductory Comment, Sec. I., and Wis JI Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

6. Regarding the definition of "operate," see Wis JI Criminal 2600 Introductory Comment, Sec. III.

7. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.22(6) and 939.43(2).

8. The instruction is drafted for cases involving the influence of an intoxicant. See note 2, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI Criminal 2600 Introductory Comment, Sec. VIII.

9. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary

significance depends on the applicability of other provisions in § 885.235. See Wis JI Criminal 2600 Introductory Comment, Sec. VII.

10. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI Criminal 232 provides an instruction for this situation.

11. Regarding the evidentiary significance of test results, see Wis JI Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the "blood alcohol curve," see Wis JI Criminal JI 2600 Introductory Comment, Sec. VII.

13. Regarding the reliability of the testing device, see Wis JI Criminal 2600 Introductory Comment, Sec. VII.

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2664 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE — CRIMINAL OFFENSE — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[2] on a highway.[3]

Definition of "Drive" or "Operate"

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][4]

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][5]

2. The defendant was under the influence of <u>(name controlled substance)</u>[6] at the time the defendant (drove) (operated) a motor vehicle.

[<u>(Name controlled substance)</u> is a controlled substance.][7]

The Definition of "Under the Influence"

"Under the influence" means that the defendant's ability to operate a vehicle was impaired because of consumption of a controlled substance.[8]

[Not every person who has consumed (name controlled substance) is "under the influence" as that term is used here.][9] What must be established is that the person has consumed a sufficient amount of (name controlled substance) to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2664 was originally published in 1979 and revised in 1982, 1986, 1993, and 2003. This revision was approved by the Committee in June 2020; it added to the Comment. See footnotes 6 and 7 below.

This instruction is for a criminal offense under § 346.63(1)(a), which applies if "the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals two . . ." Section 346.65(2)(b). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

First violations of the statute are forfeitures. See Wis JI-Criminal 2664A for an instruction for a forfeiture offense involving operating while under the influence of a combination of an intoxicant and a controlled substance.

For offenses involving operating under the influence of "any other drugs," see Wis JI-Criminal 2666.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes of individual instructions. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

3. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

4. This is the definition of "drive" provided in § 346.63(3)(a).

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. To avoid confusion, the Committee strongly suggests that only the name of the statutorily listed controlled substance be used throughout the instruction, even if the specific substance alleged to have been in the defendant's blood is not listed in Chapter 961. For example, if the substance is heroin, "heroin," should be used throughout. Conversely, if the substance is a synthetic cannabinoid not listed by name in Section 961.14(4)(tb), "synthetic cannabinoid" should be used throughout the instruction, not the specific variation alleged to have been in the defendant's blood. Section 340.01(9m) provides that for purpose of the Vehicle Code, "controlled substance" has the meaning specified in § 961.01(4), which provides: "'Controlled substance' means a drug, substance or immediate precursor included in schedules I to V of sub. II." The schedules are found in §§ 961.14, 961.16, 961.18, 961.20, and 961.22.

7. It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the defendant's blood tested positive for cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the defendant's blood tested positive for "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," *not* that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

8. This definition of "under the influence" is adapted from the one used for offenses involving alcoholic beverages. See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

9. The sentence in brackets is appropriate for cases involving the consumption of substances which are roughly similar in their effect on a person as alcohol. That is, a person could use some substances in a limited degree and, like the person who consumes a limited amount of alcohol, not be "under the influence" as that term is used here.

Some controlled substances, however, have such extreme effects that the sentence in brackets should not be used.

2664A OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF A COMBINATION OF AN INTOXICANT AND A CONTROLLED SUBSTANCE — CIVIL FORFEITURE — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of a combination of an intoxicant and a controlled substance.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[2] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle[3] on a highway.[4]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][5]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][6]

2. The defendant was under the influence of a combination of an intoxicant and (name controlled substance)[7] at the time the defendant (drove) (operated) a motor vehicle.

   [(Name controlled substance) is a controlled substance.][8]

The Definition of "Under the Influence"

"Under the influence" means that the defendant's ability to operate a vehicle was impaired because of consumption of a combination of an alcoholic beverage and a controlled substance.[9]

[Not every person who has consumed alcoholic beverages and controlled substances is "under the influence" as that term is used here.][10] What must be established is that the person has consumed a sufficient amount of alcohol or of a controlled substance or both to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, ADD THE FOLLOWING.[11]

[The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). An analysis showing that there was [.04 grams or more but less than .08 grams of alcohol in 100 milliliters of the defendant's blood] [.04 grams or more but less than .08 grams of alcohol in 210 liters of the defendant's breath] at the time the test was taken may be considered by

you in determining whether the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating). However, by itself it is not a sufficient basis for finding that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating).

Therefore, you may consider this evidence regarding an alcohol concentration test along with all of the other credible evidence in the case, giving to it the weight you believe it is entitled to receive.]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[12] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[13] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[14]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2664A was originally published in 1986 and revised in 1993, 2004, 2005, and 2020. This 2020 revision added to the Comment. See footnotes 7 and 8 below. This revision was approved by the Committee in December 2021; it added suggested language concerning test results showing 0.08 grams or more in the defendant's blood.

This instruction is for a first offense under § 346.63(1)(a), involving the combined influence of an intoxicant a controlled substance. For offenses involving operating under the influence of a controlled substance alone, see Wis JI-Criminal 2664. For offenses involving operating under the influence of "any other drugs," see Wis JI-Criminal 2666.

Wisconsin case law interpreted earlier versions of the drunk driving statutes in a way that would seem to cover situations involving the combined influence of alcohol and controlled substances or drug. Waukesha v. Godfrey, 41 Wis.2d 401, 406, 164 N.W.2d 314 (1960), cited with approval a Pennsylvania case holding that:

If liquor shares its influence with another influence and is still the activating cause of the condition

which the statute denounces it can be truthfully said that the driver was under the influence of liquor. Commonwealth v. Rex (1951), 168 Pa. Super. 628, 632, 82 Atl.2d 315.

The Godfrey rule also applies to situations where an intoxicant combines its influence with medication or where a person's poor health or physical condition reduces tolerance to alcohol. 41 Wis.2d 401, 407.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes of individual instructions. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

3. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

6. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. To avoid confusion, the Committee strongly suggests that only the name of the statutorily listed controlled substance be used throughout the instruction, even if the specific substance alleged to have been in the defendant's blood is not listed in Chapter 961. For example, if the substance is heroin, "heroin," should be used throughout. Conversely, if the substance is a synthetic cannabinoid not listed by name in Section 961.14(4)(tb), "synthetic cannabinoid" should be used throughout the instruction, not the specific variation alleged to have been in the defendant's blood. Section 340.01(9m) provides that for purpose of the Vehicle Code, "controlled substance" has the meaning specified in § 961.01(4), which provides: "'Controlled substance' means a drug, substance or immediate precursor included in schedules I to V of sub. II." The schedules are found in §§ 961.14, 961.16, 961.18, 961.20, and 961.22.

8. It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the defendant's blood tested positive for cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the defendant's blood tested positive for "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," not that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

9. This definition of "under the influence" is adapted from the one used for offenses involving alcoholic beverages. See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The sentence in brackets is appropriate for cases involving the consumption of substances which are roughly similar in their effect on a person as alcohol. That is, a person could use some substances in a limited degree and, like the person who consumes a limited amount of alcohol, not be "under the influence" as that term is used here.

Some controlled substances, however, have such extreme effects that the sentence in brackets should not be used.

11. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect."

12. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII., C.

14. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

2664B OPERATING A MOTOR VEHICLE WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE — § 346.63(1)(am)

Statutory Definition of the Crime

Section 346.63(1)(am) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while the person has a detectable amount of a restricted controlled substance in his or her blood.

Burden of Proof

Before you may find the defendant guilty of this offense, the [(identify prosecuting agency) [2]] [State] must prove by evidence which satisfies you [to a reasonable certainty by evidence which is clear, satisfactory, and convincing] [beyond a reasonable doubt][3] that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle[4] on a highway.[5]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][6]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][7]

2. The defendant had a detectable amount of a restricted controlled substance in his or her blood at the time the defendant (drove) (operated) a motor vehicle.

   [(Name restricted controlled substance) is a restricted controlled substance.][8]

GIVE THE FOLLOWING IF DELTA-9-TETRAHYDROCANNABINOL IS THE ALLEGED RESTRICTED CONTROLLED SUBSTANCE.

[Delta 9 tetrahydrocannabinol is considered a restricted controlled substance if it is at a concentration of one or more nanograms per milliliter of a person's blood.]

How to Use the Test Result Evidence

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the (driving) (operating).[9]

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied (to a reasonable certainty by evidence which is clear, satisfactory, and convincing) (beyond a reasonable doubt) that there was a detectable amount of a restricted controlled substance in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of a restricted controlled substance in (his) (her) blood at the time of the (driving) (operating) but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a detectable amount of a restricted controlled substance in (his) (her) blood at the time of the alleged (driving) (operating) unless you are satisfied of that fact (to a reasonable certainty by evidence which is clear, satisfactory, and convincing) (beyond a reasonable doubt).]

Jury's Decision

If you are satisfied [to a reasonable certainty by evidence which is clear, satisfactory, and convincing] [beyond a reasonable doubt] that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2664B was originally published in 2004 and revised in 2005, 2006, 2007 and 2010. This revision was approve by the Committee in August 2020; it added an alternative element to the instruction and to footnotes 8 and 9 based on 2019 Wisconsin Act 68.

This instruction is for a violation of § 346.63(1)(am), which was created by 2003 Wisconsin Act 97. Subsection (1)(am) provides that no person may drive or operate a motor vehicle while "[t]he person has a detectable amount of a restricted controlled substance in his or her blood." The statute applies to offenses committed on or after the Act's effective date: December 19, 2003. For a general discussion of Act 97, see Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

The penalties for this offense are the same as those for operating under the influence offenses: a first offense is a civil forfeiture; second and subsequent violations are criminal. The instruction is drafted for both types of cases with the different burdens of proof in brackets; the applicable alternative should be selected.

Section 346.63(1)(d) recognizes a defense for cases involving "a detectable amount of methamphetamine, gamma-hydroxybutyric acid, or delta 9 tetrahydrocannabinol" that applies if the person proves that he or she had a valid prescription for the substance.

This instruction can also be used as a model for violations of other statutes that have been amended to prohibit operating with a "detectable amount . . ." See Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

The Wisconsin Court of Appeals has found the "detectable amount" provision to be constitutional. See State v. Smet, 2005 WI App 263, 288 Wis.2d 525, 709 N.W.2d 474; and, State v. Gardner, 2006 WI App 92, 292 Wis.2d 682, 715 N.W.2d 720. Also see, Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

See Wis JI-Criminal 2664 and 2664A for instructions involving operating while under the influence of a controlled substance and a combination of an intoxicant and a controlled substance. For offenses involving operating under the influence of "any other drugs," see Wis JI-Criminal 2666.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. They are cross-referenced by section number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I.

2. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

3. This instruction is drafted to be used for both civil forfeiture and criminal offenses. Use the first bracketed phrase for civil forfeitures and the second for crimes.

4. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

5. Regarding the definition of "highway," see Wis JI-Criminal 2600 Introductory Comment, Sec. I.

6. This is the definition of "drive" provided in § 346.63(3)(a).

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a restricted controlled substance in his or her blood remains a jury question. Section 340.01(50m) defines "restricted controlled substance" as follows:

(50m) 'Restricted controlled substance' means any of the following:

(a) A controlled substance included in schedule I other than tetrahydrocannabinol.
(b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
(c) Cocaine or any of its metabolites.
(d) Methamphetamine.
(e) Delta 9 tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person's blood.

2019 Act 68 amended the definition of delta-9-tetrahydrocannabinol to require that delta-9-tetrahydrocannabinol be at a concentration of one or more nanograms per milliliter of a person's blood. Prior to Act 68, the statute required only a detectable amount of delta-9-tetrahydrocannabinol.

9. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI-Criminal 2663. [The Committee's general approach to instructing on test results is discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper for tests in "restricted controlled substance" cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for "detectable amount of a restricted controlled substance" cases is

not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

> 885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

As for the admissibility of evidence concerning the concentration of delta-9- tetrahydrocannabinol in a person's blood, sec. 885.235(5), created by 2019 Wisconsin Act 68, reads as follows:

> [t]he only form of chemical analysis of a sample of human biological material that is admissible as evidence bearing on the question of whether or not the person had delta-9-tetrahydrocannabinol at a concentration of one or more nanograms per milliliter of the person's blood is a chemical analysis of a sample of the person's blood.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests, reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of driving;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of driving.

As to the second difference – admissibility – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence" strongly implies that the analysis is admissible. As to the third difference – connection with the time of driving – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence on the issue of the person having . . ." may express a legislative intent that the analysis be admissible to prove the material issue "that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . ." as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the "prima facie" effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue which it is offered to prove.

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2665 OPERATING A VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT AND CAUSING INJURY — § 346.63(2)(a)1.

Statutory Definition of the Crime

Section 346.63(2)(a) of the Wisconsin Statutes is violated by one who causes injury to another by the operation of a vehicle[1] on a highway[2] while under the influence of an intoxicant.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a vehicle[4] on a highway.[5]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[6]

2. The defendant's operation of a vehicle caused injury[7] to (name of victim) .

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[8] in producing the injury.

3. The defendant was under the influence of an intoxicant at the time the defendant operated a vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[9]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[10]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[11]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[12] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[13] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[14]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 346.63(2)(b), USE THE FOLLOWING CLOSING:[15]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 346.63(2)(b), USE THE FOLLOWING CLOSING:[16]

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the injury would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[17] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[18]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[19] does not by itself provide a defense to the crime charged against the defendant.[20] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the injury would have occurred even if the defendant had not been under the influence of an intoxicant.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[21]]

COMMENT

Wis JI-Criminal 2665 was originally published in 1978 and revised in 1980, 1982, 1986, 1993, 2004, 2006, 2009, and 2015. This revision was approved by the Committee in August 2017; it added footnote 7.

This instruction is drafted for violations of § 346.63(2)(a)1., which prohibits causing injury by the operation of a vehicle while under the influence. The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. For persons with two or fewer priors, a test showing 0.08 grams or more is prima facie evidence of being "under the influence of an intoxicant." § 885.235(1)(c). The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

See Wis JI-Criminal 2661 for the related offense of causing injury while having a prohibited alcohol concentration, as defined in § 346.63(2)(a)2. For cases involving two charges – operating under the influence and with a PAC – Wis JI-Criminal 1189 can be used as a model.

Section 346.63(2)(b) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the injury would have occurred even if he or she had been exercising due care and he or she . . . had not been under the influence . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 16 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 2662, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

The penalty for violations of § 346.62(2)(a) doubles if a child was in the vehicle at the time of the offense. See § 346.65(3m) and Wis JI-Criminal 999. A similar provision in the Criminal Code was repealed by 2001 Wisconsin Act 109 and recreated as a sentencing factor, but § 346.65(3m) was not affected.

In State v. Smits, 2001 WI App 45, 241 Wis.2d 374, 626 N.W.2d 42, the court held that operating while intoxicated offenses are not lesser included offenses of the "causing injury" offenses defined in § 346.63(2).

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Note that § 346.63(2)(a) uses the phrase "operation of a vehicle." This differs in two respects from the way other offenses under § 346.63 are defined. First, it refers to "operate," not "drive or operate." Second, it refers to "vehicle" not "motor vehicle." The Committee assumed that these differences were intentional on the part of the legislature. The use of "vehicle" may be justified by the fact that offenses involving injury are considered to be more serious than simple operating offenses, thus leading to the inclusion of a broader category of conduct – namely, the operation of devices which do not fall within the definition of "motor vehicle." As to the use of "vehicle," this rationale was cited with approval in State v. Smits, 2001 WI App 45, ¶16, 241 Wis.2d 374, 626 N.W.2d 42.

2. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

3. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

4. See note 1, supra. Section 340.01(74) defines "vehicle" as follows:

> "Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes made specifically applicable by statute.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

6. Regarding the definition of "operate," see § 346.63(3)(b) and Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. "Injury" was undefined by statute until 2013 Wisconsin Act 224 [effective date: April 10, 2014] created § 346.63(2)(c) to define it as "substantial bodily harm," cross-referencing the definition of that term in § 939.22(38). Section 346.63(2)(c) was repealed by 2015 Wisconsin Act 371 [effective date:

April 27, 2016], again leaving "injury" undefined. The version of this instruction published before the 2014 statutory change did not define injury, but included the footnote that follows. There have been no directly applicable developments since then.

> The instruction does not define "injury" because it is not defined in the statutes or by a published court decision. While the Criminal Code uses the closely related term "bodily harm," caution should be used in equating the two because unpublished decisions of the Wisconsin Court of Appeals have reached conflicting results, regarding whether "pain" is sufficient to constitute "injury." In a prosecution under § 346.63(2)(a), the court held that the word "injury" encompasses physical pain. State v. Maddox, No. 03-0227-CR, July 8, 2003. [Ordered not published, August 27, 2003.] However, in a prosecution under § 940.225(2)(b), where "injury" is also used, the court held that the trial court erred in defining "injury" using the Criminal Code definition of "bodily harm" [see § 939.22(4)] because "injury" does not include "pain." State v. Gonzalez, No. 2006AP2977-CR, March 20, 2008. [Ordered not published, April 30, 2008.] Neither of these decisions may be cited as authority because they were not published. See § 809.23(3). But they indicate the need for caution in equating "injury" with "bodily harm." [Originally published as footnote 8, Wis JI-Criminal 2665 © 2009.

8. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of injury. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 15, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of injury as required by the second element. If the defendant's operation caused the injury, the defense allows the defendant to avoid liability if it is established that the injury would have occurred even if the defendant had not been under the influence and had been exercising due care. The constitutionality of eliminating causal negligence as an element of § 940.09 and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

9. The instruction is drafted for cases involving the influence of an intoxicant. See note 3, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. It may be that cases will be charged under § 346.63(2)(a)1. where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a

test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

12. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

14. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

15. Section 346.63(2)(b) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the injury would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

16. See note 15, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

17. Section 346.65(2)(b) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

18. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

19. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

20. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 346.63(2). The third

sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 18, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

21. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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2666 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF A DRUG — CRIMINAL OFFENSE — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of a drug to a degree which renders him or her incapable of safely driving.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[2] on a highway.[3]

Definition of "Drive" or "Operate"

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][4]

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][5]

2. The defendant was under the influence of (name drug)[6] to a degree which renders him or her incapable of safely driving at the time the defendant (drove) (operated) a motor vehicle.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2666 was originally published in 1985 and revised in 1993. This revision was approved by the Committee in August 2003.

This instruction is for a criminal offense under § 346.63(1)(a), which applies if "the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals 2 . . ." Section 346.65(2)(b). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

First violations of the statute are forfeitures. There is no uniform instruction for the forfeiture violation of this offense. See Wis JI-Criminal 2664A for an instruction for a forfeiture offense involving operating while under the influence of a combination of an intoxicant and a controlled substance. See Wis JI-Criminal 2664 for an instruction for a criminal offense involving operating while under the influence of a controlled substance.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of JI 2600 are cross-referenced in the footnotes of individual instructions. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

3. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

4. This is the definition of "drive" provided in § 346.63(3)(a).

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. This instruction assumes that the identity of the drug is known. If the identity of the drug is not known, proving that a drug is involved may be extremely difficult in light of the statutory definition of "drug" that applies. Section 340.01(15mm) provides that the applicable definition is the one found in

§ 450.01(10), which reads as follows:

> "Drug" means:
>
> (a) Any substance recognized as a drug in the official U.S. pharmacopoeia and national formulary or official homeopathic pharmacopoeia of the United States or any supplement to either of them;
>
> (b) Any substance intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease or other conditions in persons or other animals;
>
> (c) Any substance other than a device or food intended to affect the structure or any function of the body of persons or other animals; or
>
> (d) Any substance intended for use as a component of any article specified in pars. (a) to (c) but does not include gases or devices or articles intended for use or consumption in or for mechanical, industrial, manufacturing or scientific applications or purposes.

Some of the difficulty of incorporating the "drug" definition into an instruction might be avoided by charging the case as one involving "under the influence of an intoxicant." If the intoxicant shares its influence with another substance, the person may still be considered to be "under the influence of an intoxicant." Waukesha v. Godfrey, 41 Wis. 2d 401, 406, 164 N.W.2d 314 (1965).

7. The statute requires not only operating while "under the influence" but also that the defendant be under the influence "to a degree which renders him or her incapable of safely driving." The "incapable of safely driving" requirement appears to be more restrictive than the "ability to operate is impaired" standard that is part of the uniform definition of "under the influence." See, for example, Wis JI-Criminal 2663. Since this requirement of the statute supersedes the usual "under the influence" definition, no definition is included in the instruction.

See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

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2666A OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ANY COMBINATION OF AN INTOXICANT AND ANY OTHER DRUG TO A DEGREE THAT RENDERS HIM OR HER INCAPABLE OF SAFELY DRIVING – § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[2] on a highway.[3]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][4]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][5]

2. The defendant was under the combined influence of an intoxicant and (name of drug) to a degree which rendered (him) (her) incapable of safely driving at the

time the defendant (drove) (operated) a motor vehicle.[7]

[(Name of drug) is a drug.][8]

Definition of "Under the Influence"

"Under the influence" means that the defendant's ability to operate a vehicle was impaired because of consumption of a combination of an alcoholic beverage and any other drug.[9]

[Not every person who has consumed alcoholic beverages and any other drug is "under the influence" as that term is used here.][10] What must be established is that the person has consumed a sufficient amount of alcohol or of any other drug or both to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, ADD THE FOLLOWING.[11]

[The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). An analysis showing that there was [.04 grams or more but less than .08 grams of alcohol in 100

milliliters of the defendant's blood] [.04 grams or more but less than .08 grams of alcohol in 210 liters of the defendant's breath] at the time the test was taken may be considered by you in determining whether the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating). However, by itself it is not a sufficient basis for finding that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating).

Therefore, you may consider this evidence regarding an alcohol concertation test along with all of the other credible evidence in the case, giving to it the weight you believe it is entitled to receive.]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[12] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[13] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[14]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2666A was approved by the Committee in 2019 and revised in 2021. This revision was approved by the Committee in June 2023; it amended the "Jury's Decision" paragraph to accurately reflect the burden of proof as "beyond a reasonable doubt."

This instruction is for a criminal offense under § 346.63(1)(a), involving the combined influence of an intoxicant and any other drug. For offenses involving operating under the influence of a drug alone, see Wis JI-Criminal 2666. For offenses involving operating under the influence of a controlled substance, see Wis JI-Criminal 2664.

Wisconsin case law interpreted earlier versions of the drunk driving statutes in a way that would seem to cover situations involving the combined influence of alcohol and a controlled substance or drug. Waukesha v. Godfrey, 41 Wis.2d 401, 406, 164 N.W.2d 314 (1960), cited with approval a Pennsylvania case holding that:

> If liquor shares the influence with another influence and is still the activating cause of the condition which the statute denounces it can be truthfully said that the driver was under the influence of liquor. Commonwealth v. Rex (1951), 168 Pa. Super. 628, 632, 82 Atl.2d 315.

The Godfrey rule also applies to situations where the intoxicant combines its influence with medication or where a person's poor health or physical condition reduces tolerance to alcohol. 41 Wis.2d 401, 407.

Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes of individual instructions. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

3. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

4. This is the definition of "drive" provided in § 346.63(3)(a).

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. The Committee suggests that the name of the drug, if known, be used throughout the instruction. Section 340.01(15mm) provides that for the purpose of the Vehicle Code, "drug" has the meaning specific in § 450.01(10).

This instruction assumes that the identity of the drug is known. If the identity of the drug is not known, proving that a drug is involved may be extremely difficult in light of the statutory definition of "drug" that applies. Section 340.01(15mm) provides that the applicable definition is the one found in § 450.01(10), which reads as follows:

"Drug" means:

(a) Any substance recognized as a drug in the official U.S. pharmacopoeia and national formulary or official homeopathic pharmacopoeia of the United States or any supplement to either of them;
(b) Any substance intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease or other conditions in persons or animals;
(c) Any substance other than a device or food intended to affect the structure or any function of the body or persons or other animals; or
(d) Any substance intended for use as a component if any article specified in pars. (a) to (c) but does not include gases or devices or articles intended for use or consumption in or for mechanical, industrial, manufacturing or scientific applications or purposes.

7. The statute requires not only operating while "under the influence" but also that the defendant be under the influence "to a degree which renders him or her incapable of safely driving." The "incapable of safely driving" requirement appears to be more restrictive than the "ability to operate is impaired" standard that is part of the uniform definition of "under the influence." See, for example, Wis JI-Criminal 2663. Since this requirement of the statute supersedes the usual "under the influence" definition, no definition is

included in the instruction.

See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

8. The Committee concluded that it adds clarity to refer to the name of the alleged drug, if known. See note 6, supra. Whether the defendant was actually under the combined influence of an intoxicant and the drug named remains a jury question.

9. This definition of "under the influence" is adapted from the one used for offenses involving alcoholic beverages. See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The sentence in brackets is appropriate for cases involving the consumption of a drugs which are roughly similar in their effect on a person as alcohol. That is, a person could use some drug in a limited degree and, like the person who consumes a limited amount of alcohol, not be "under the influence" as that term is used here.

Some drugs, however, have such extreme effects that the sentence in brackets should not be used.

11. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect."

12. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII., C.

14. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

2667 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT: HAZARDOUS INHALANT — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of a hazardous inhalant.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[3] on a highway.[4]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][5]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][6]

2. The defendant was under the influence of a hazardous inhalant at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Hazardous Inhalant"

"Hazardous inhalant" means a substance that is ingested, inhaled, or otherwise introduced into the human body in a manner that is not intended by the manufacturer of the substance, and that is intended to induce intoxication or elation.[7]

Definition of "Under the Influence of a Hazardous Inhalant"

"Under the influence of a hazardous inhalant" means that the defendant's ability to operate a vehicle was impaired because the defendant ingested, inhaled, or otherwise introduced a hazardous inhalant into (his) (her) body.[8]

Not every person who has introduced a hazardous inhalant into (his) (her) body[9] is "under the influence" as that term is used here. What must be established is that the person has introduced a sufficient amount of a hazardous inhalant into (his) (her) body to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2667 was approved by the Committee in June 2014.

This instruction is drafted for a criminal operating under the influence offense where the intoxicant involved is a hazardous inhalant. 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013] created § 340.01(25d), which provides: "'Intoxicant' includes a hazardous inhalant." Act 83 also created § 340.01(20r), which defines "hazardous inhalant."

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. This instruction is drafted for cases involving the influence of an intoxicant, where the intoxicant is a hazardous inhalant. The basic offense definition in § 346.63(1)(a) refers to "operating under the influence of an intoxicant." 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013] created § 340.01(25d), which provides: "'Intoxicant' includes a hazardous inhalant."

Act 83 also created § 340.01(20r), which defines "hazardous inhalant" as follows:

> "Hazardous inhalant" means a substance that is ingested, inhaled, or otherwise introduced into the human body in a manner that does not comply with any cautionary labeling that is required for the substance under s. 100.37 or under federal law, or in a manner that is not intended by the manufacturer of the substance, and that is intended to induce intoxication or elation, to stupefy the central nervous system, or to change the human audio, visual, or mental processes.

3. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

6. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. This is based on the definition of "hazardous inhalant" provided in § 340.01(20r). The Committee concluded that the phrase "in a manner not intended by the manufacturer" would be likely to apply to most cases. If the facts require, substitute "in a manner that does not comply with any cautionary labeling that is required for the substance under s. 100.37 or under federal law." The Committee also concluded that the phrase "is intended to induce intoxication or elation" would be sufficient to cover most cases. If the facts require, substitute "intended to stupefy the central nervous system" or "intended to change the human audio, visual, or mental processes."

8. This sentence adapts the standard definition of "under the influence" of an alcohol beverage for use in "hazardous inhalant" cases. For a discussion of issues relating to defining "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

9. The instructions uses the phrase "introduced . . . into the body" as a simpler statement than the full statutory phrase: "ingest, inhale, or otherwise introduce . . ." "Introduce" includes "ingest" and

"inhale."

2668 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT / OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION OF 0.08 GRAMS OR MORE — CIVIL FORFEITURE — §§ 346.63(1)(a) and 346.63(1)(b)

Description of the Charges

The first citation in this case charges that the defendant drove or operated a motor vehicle on a highway while under the influence of an intoxicant in violation of § 346.63(1)(a) of the Wisconsin Statutes.

The second citation in this case charges that the defendant drove or operated a motor vehicle on a highway while the defendant had a prohibited alcohol concentration in violation of § 346.63(1)(b) of the Wisconsin Statutes.

To these charges, the defendant has entered pleas of not guilty which means the (identify prosecuting agency [1] must prove every element of each offense charged to a reasonable certainty by evidence which is clear, satisfactory, and convincing.[2]

It is for you to determine whether the defendant is guilty of one, both, or neither of the offenses charged. You must make a finding of guilty or not guilty for each offense charged.[3]

Each citation charges a separate offense, and you must consider each one separately.

Definition of Citation 1 – Operating Under The Influence

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway while under the influence of an intoxicant.[4]

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of Citation 1 – Operating Under The Influence

1. The defendant (drove) (operated) a motor vehicle[5] on a highway.[6]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][7]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][8]

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[9]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

Definition of Citation 2 – Operating With A Prohibited Alcohol Concentration

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway with a prohibited alcohol concentration.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of Citation 2 – Prohibited Alcohol Concentration

1. The defendant (drove) (operated) a motor vehicle on a highway.
2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

"Prohibited alcohol concentration" means[10]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[11] AND THERE IS NO ISSUE RELATING TO THE

DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[12] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). If you are satisfied that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating) or that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), or both, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), unless you are satisfied of that fact to a reasonable certainty by evidence which is clear, satisfactory, and convincing.

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[13]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The (identify prosecuting agency is not required to prove the underlying scientific reliability of the method used by the testing device. However, the (identify prosecuting agency is

required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the defendant (drove) (operated) a motor vehicle on a highway while under the influence of an intoxicant, you should find the defendant guilty of the offense charged in Citation 1.

If you are not so satisfied, you must find the defendant not guilty of the offense charged in Citation 1.

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the defendant (drove) (operated) a motor vehicle on a highway while the defendant had a prohibited alcohol concentration, you should find the defendant guilty of the offense charged in Citation 2.

If you are not so satisfied, you must find the defendant not guilty of the offense charged in Citation 2.

COMMENT

Wis JI-Criminal 2668 was originally published in 1986 and revised in 1993, 2003 and 2005. This revision was approved by the Committee in December 2014; it deleted material relating to finding that the alcohol concentration was more than 0.10, a fact that formerly made a difference in applicable fees and costs.

The 2003 revision reflected the change in the prohibited alcohol concentration [PAC] level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

This instruction is drafted for the case where two counts based on the same incident are submitted to the jury: one alleging operating while under the influence in violation of 346.63(1)(a); and, one alleging operating with a prohibited alcohol concentration of 0.08 or more. It is a combination of Wis JI-Criminal 2660A and 2663A and is intended to implement the procedure set forth in § 346.63(1)(c). It attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge. This instruction is for a first offense under § 346.63(1)(a) and (b), which are punished as forfeitures. For a combined instruction for criminal violations, see Wis JI-Criminal 2669.

The constitutionality of the two-charge procedure was upheld in State v. Bohacheff, 114 Wis.2d 402, 338 N.W.2d 446 (1983). The court held that the Double Jeopardy Clause is not offended because of the express limitation in § 346.63(1)(c) that there be only one conviction. Bohacheff dealt with a challenge to the criminal complaint, so it did not address the problems presented at a trial where both charges are submitted to the jury. The Committee concluded that § 346.63(1)(c) clearly suggests that both charges should be submitted and that the jury should make a finding as to each charge. If the jury returns a guilty verdict on both, judgment of conviction should be entered on the count on which the prosecutor moves for judgment. The remaining count should be dismissed. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

2. This statement is the equivalent of Wis JI-Criminal 115, One Defendant: Two Counts, adapted for a forfeiture case. If the equivalent of Wis JI-Criminal 115 is also given, the statement need not be repeated here.

3. This statement is the equivalent of Wis JI-Criminal 484, . . . One Defendant: Two Counts . . . , adapted for a forfeiture case. If the equivalent of Wis JI-Criminal 484 is also given, the statement need not be repeated here.

4. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

5. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

6. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

7. This is the definition of "drive" provided in § 346.63(3)(a).

8. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment,

Sec. III.

9. The instruction is drafted for cases involving the influence of an intoxicant. See note 4, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

11. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, sec. VII.

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2669 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT / OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION OF 0.08 GRAMS OR MORE — CRIMINAL CHARGE — §§ 346.63(1)(a) and 346.63(1)(b)

NOT RECOMMENDED FOR USE FOR CASES INVOLVING A CHARGE OF A PAC OF MORE THAN 0.02[1]

Description of the Charges

The first count in the criminal complaint charges that the defendant drove or operated a motor vehicle on a highway while under the influence of an intoxicant in violation of § 346.63(1)(a) of the Wisconsin Statutes.

The second count in the criminal complaint charges that the defendant drove or operated a motor vehicle on a highway while the defendant had a prohibited alcohol concentration in violation of § 346.63(1)(b) of the Wisconsin Statutes.

To these charges, the defendant has entered pleas of not guilty which means the State must prove every element of each offense charged beyond a reasonable doubt.[2]

It is for you to determine whether the defendant is guilty of one, both, or neither of the offenses charged. You must make a finding of guilty or not guilty for each offense charged.[3]

Each count charges a separate offense, and you must consider each one separately.

Definition of Count 1 – Operating Under The Influence

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway while under the influence of an intoxicant.[4]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of Count 1 – Operating Under The Influence

1. The defendant (drove) (operated) a motor vehicle[5] on a highway.[6]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][7]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][8]

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[9]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able

to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

Definition of Count 2 – Operating With A Prohibited Alcohol Concentration

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway with a prohibited alcohol concentration.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must satisfy you beyond a reasonable doubt that the following two elements were present.

Elements of Count 2 – Prohibited Alcohol Concentration

1. The defendant (drove) (operated) a motor vehicle on a highway.
2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

"Prohibited alcohol concentration" means[10]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[11]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[12] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[13] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating) or that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), or both, but you are not required to do so. You the jury are here to decide these questions on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating) or that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), or both, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[14]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not

required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant (drove) (operated) a motor vehicle on a highway while under the influence of an intoxicant, you should find the defendant guilty of Count 1.

If you are not so satisfied, you must find the defendant not guilty of Count 1.

If you are satisfied beyond a reasonable doubt that the defendant (drove) (operated) a motor vehicle on a highway while the defendant had a prohibited alcohol concentration, you should find the defendant guilty of Count 2.

If you are not so satisfied, you must find the defendant not guilty of Count 2.

COMMENT

Wis JI-Criminal 2669 was originally published in 1989 and revised in 1992, 1995, 2004, and 2006. This revision was approved by the Committee in July 2014; it added a recommendation for cases involving a PAC of more than 0.02.

The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. For persons with two or fewer priors, a test showing 0.08 grams or more is prima facie evidence of being "under the influence of an intoxicant." § 885.235(1)(c). The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

This instruction is drafted for the case where two counts based on the same incident are submitted to the jury: one alleging operating while under the influence in violation of 346.63(1)(a); and, one alleging

operating with a prohibited alcohol concentration of 0.08 or more. It is a combination of Wis JI-Criminal 2660 and 2663 and is intended to implement the procedure set forth in § 346.63(1)(c). It attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge. This instruction is drafted for criminal charges; for two civil forfeiture offenses, see Wis JI-Criminal 2668.

The constitutionality of the two-charge procedure was upheld in State v. Bohacheff, 114 Wis.2d 402, 338 N.W.2d 446 (1983). The court held that the Double Jeopardy Clause is not offended because of the express limitation in § 346.63(1)(c) that there be only one conviction. Bohacheff dealt with a challenge to the criminal complaint, so it did not address the problems presented at a trial where both charges are submitted to the jury. The Committee concluded that § 346.63(1)(c) clearly suggests that both charges should be submitted and that the jury should make a finding as to each charge. If the jury returns a guilty verdict on both, judgment of conviction should be entered on the count on which the prosecutor moves for judgment. The remaining count should be dismissed. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. A two-count case could involve the combination of an under-the-influence charge with a charge of operating with a PAC of more than 0.02. The Committee recommends that a combined instruction not be given for that kind of case, because the standard paragraphs on the evidentiary effect of test results could be confusing. Rather, Wis JI-Criminal 2663 Operating Under The Influence should be used for the under-the-influence count; Wis JI-Criminal 2660C Operating With A Prohibited Alcohol Concentration – More Than 0.02 Grams should be used for the 0.02 count. Those instructions will have references to the test results that are appropriate for each offense. The instructions should identify the charges as "Count One" and "Count Two" as reflected in the charging document.

2. This statement is the equivalent of Wis JI-Criminal 115, One Defendant: Two Counts. If Wis JI-Criminal is also given, the statement need not be repeated here.

3. This statement is the equivalent of Wis JI-Criminal 484, . . . One Defendant: Two Counts . . . If Wis JI-Criminal 484 is also given, the statement need not be repeated here.

4. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

5. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

6. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

7. This is the definition of "drive" provided in § 346.63(3)(a).

8. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

9. The instruction is drafted for cases involving the influence of an intoxicant. See note 3, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

11. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

14. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2670 FAILURE TO GIVE INFORMATION OR RENDER AID FOLLOWING AN ACCIDENT — § 346.67

Statutory Definition of the Crime

Section 346.67 of the Wisconsin Statutes is violated when the operator of any vehicle involved in an accident on a highway[1] fails to reasonably investigate what was struck and if the operator knows or has reason to know that the accident resulted in (injury to a person) (death of a person) (damage to a vehicle driven or attended by a person) fails to stop the vehicle he or she is operating as close to the scene of the accident as possible and remain at the scene of the accident until the operator has given information (and rendered reasonable assistance to any person injured in the accident).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a vehicle involved in an accident[2] on a highway.[3]

   A vehicle[4] is operated when it is set in motion.[5]

2. The defendant knew that the vehicle (he) (she) operated was involved in an accident on a highway.[6]

3. The defendant violated a duty after being involved in an accident. A driver who is involved in an accident has two duties.[7]

The State is required to satisfy you beyond a reasonable doubt that the defendant violated at least one of the two duties but you are not required to agree as to which duty was violated.

The first duty is to reasonably investigate what was struck.

The second duty is that a driver involved in an accident involving a person or an attended vehicle must stop and provide information and render aid. To prove a violation of this duty, the State must prove the following beyond a reasonable doubt:

- that the defendant knew or had reason to know that the vehicle (he) (she) was operating was involved in an accident involving (a person) (an attended vehicle) and that the accident resulted in (injury[8] to a person) (death of a person) (damage to a vehicle driven or attended by a person); and,
- that the defendant did not immediately stop (his) (her) vehicle as close to the scene of the accident as possible and remain at the scene until (he) (she) had done all the following:

  (a) Gave (his) (her) name, address, and the registration number of the vehicle (he) (she) was driving to (the person struck) (the operator or occupant of or person attending any vehicle collided with);[9] and

(b) If it was requested and was available, exhibited (his) (her) operator's license to (the person struck) (the operator or occupant of or person attending any vehicle collided with)[; and[10]

(c) Rendered reasonable assistance to any person[11] injured in the accident including the transporting or making arrangements to transport the person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that medical or surgical treatment is necessary or is requested by the injured person].

4. The defendant was physically capable of complying with these requirements.[12]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. What a person knows or has reason to know must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF ONE OF THE MORE SERIOUS OFFENSES IDENTIFIED IN SEC. 346.74(5)(b),(c), OR (d) IS CHARGED AND THE

EVIDENCE WOULD SUPPORT A FINDING THAT THE FACT INCREASING THE PENALTY WAS PRESENT:[13]

[If you find the defendant guilty, you must answer the following question(s):

("Did the accident involve injury to a person?")[14]

(Did the accident involve injury to a person and did the person suffer great bodily harm?"

"Great bodily harm" means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.)[15]

("Did the accident involve death to a person?")[16]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."]

COMMENT

Wis JI-Criminal 2670 was originally published in 1969 and revised in 1979, 1980, 1982, 1983, 1985, 1993, 1994, 2003, 2004, 2008, 2009, and 2014. This revision was approved by the Committee in June 2018; it reflects changes made to § 346.67 by 2015 Wisconsin Act 319 [effective date: April 1, 2016].

The Committee concluded that § 346.67, as amended by 2015 Wisconsin Act 319, defines two ways to violate the statute. First, the offense is committed by one who is involved in an accident and fails to reasonably investigate. Second, the offense is committed by one who may have reasonably investigated but failed to fulfill other duties imposed by the statute. The instruction addresses this by requiring in the third element that the "defendant violated a duty" and specifying the nature of the two duties that may be involved.

Section 346.74(5), which provides the penalties for violations of § 346.67, was amended by 2003 Wisconsin Act 74 to read as follows:

346.74(5) Any person violating any provision of s. 346.67(1):

(a) Shall be fined not less than $300 nor more than $1,000 or imprisoned not more than 6 months or both if the accident did not involve death or injury to a person.

(b) May be fined not more than $10,000 or imprisoned for not more than 9 months or both if the accident involved injury to a person but the person did not suffer great bodily harm.

(c) Is guilty of a Class E felony if the accident involved injury to a person and the person suffered great bodily harm.

(d) Is guilty of a Class D felony if the accident involved death to a person.

(e) Is guilty of a felony if the accident involved death or injury to a person.

Act 74 increased the penalties in subs. (c) and (d); the effective date is November 27, 2003.

Wis JI-Criminal 2670 is designed to be used for offenses involving any of the penalties. If the base penalty under sub. (5)(a) is involved, no additional questions need be asked. The facts specified in subs. (5)(b)-(d) that increase the penalty are to be handled by submitting extra questions to the jury. See the text of the instruction at note 13. The following form is suggested for the verdict:

"We, the jury, find the defendant guilty of failure to stop and give information or render aid at the scene of an accident under Wis. Stat. § 346.04, at the time and place charged in the [complaint] [information].

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question 'yes' or 'no.'"

[Add the appropriate question.]"

The nature of this offense is discussed in two decisions which focused on the sufficiency of the charging document. See State v. Lloyd, 104 Wis.2d 49, 310 N.W.2d 617 (Ct. App. 1981), and State v. Mann, 123 Wis.2d 375, 367 N.W.2d 209 (1985) [reversing 120 Wis.2d 629, 357 N.W.2d 9 (Ct. App. 1984)]. Also see State v. Mann, 135 Wis.2d 420, 400 N.W.2d 489 (Ct. App. 1986), which discusses the meaning of "attended" and finds that the term "reasonable assistance" is not impermissibly vague.

In State v. Hartnek, 146 Wis.2d 188, 430 N.W.2d 361 (Ct. App. 1988), the court held that a single event of failing to stop and render aid following an accident may give rise to multiple charges under § 346.67 when there are multiple victims. The supreme court declined the defendant's request to overrule Hartnek in State v. Pal, 2017 WI 44, 374 Wis.2d 759, 893 N.W.2d 848, concluding that "the legislature authorized the State to charge multiple counts of the offense of hit and run resulting in death in cases involving multiple victims." ¶28.

The reporting requirement of § 346.67 does not infringe a person's Fifth Amendment privilege against self-incrimination. State v. Harmon, 2006 WI App 214 ¶29, 296 Wis.2d 861, 723 N.W.2d 732. Also see, California v. Byers, 420 U.S. 426 (1971).

1. Section 346.66 provides that § 346.67 applies to "highways" and to "all premises held out to the public for use of their motor vehicles, all premises provided by employers to employees for the use of their motor vehicles and all premises provided to tenants of rental housing in buildings of 4 or more units for the use of their motor vehicles, whether such premises are publicly or privately owned and whether or

not a fee is charged for the use thereof." The instruction is drafted for a case involving operating on a highway. If a case involves operating on "premises held out to the public . . . ," the instruction must be modified.

See Wis JI-Criminal 2600 Operating While Intoxicated Introductory Comment Sec. I, for discussion of the "on a highway" element.

2. "'Accident' in § 346.67(1) means 'an unexpected, undesirable event' and may encompass intentional conduct." State v. Harmon, 2006 WI App 214 ¶1, 296 Wis.2d 861, 723 N.W.2d 732. Thus, the statute applies to a case where one view of the facts was that the defendant intentionally ran over the victim.

3. The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element.

"Highway" is defined by § 340.01(22). Also see Wis JI-Criminal 2600 Introductory Comment Sec. I, for discussion of the "on a highway" element.

The statute applies to a case where the defendant lost control of the vehicle and crashed into a house. "Because Dartez's loss of control of the vehicle occurred on the highway, even though the resulting collision occurred off the highway, we conclude she was 'involved in an accident' 'upon a highway' within the meaning of § 346.67(1). . ." State v. Dartez, 2007 WI App 126 ¶2, 301 Wis.2d 499, 731 N.W.2d 340.

2009 Wisconsin Act 62 [effective date: March 1, 2010] created § 346.66(2) to read as follows:

> Sections 346.67, 346.68, and 346.69 apply to the operator of a vehicle that, whether by operator intention or lack of control, departs a highway or premises described in sub. (1)(a) immediately prior to an accident if the accident does not occur on real property owned or leased by the operator.

4. Section 340.01(74) defines "vehicle."

Section 346.66 provides that § 346.67 does "not apply to accidents involving only snowmobiles, all terrain vehicles, or vehicles propelled by human power or drawn by animals."

5. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

For purposes of cases involving operating under the influence, § 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion."

See Wis JI-Criminal 2600 Operating While Intoxicated Introductory Comment Sec. III, for discussion of the "operating" element.

6. Wis JI-Criminal 2670 was originally published in 1969 and had an element requiring that "the defendant knew that he had been involved in accident which resulted in (injury to) (death of) any person" or "damage to a vehicle . . ." The element was reviewed many times and eventually revised to require that the "defendant knew that the vehicle he was operating was involved in an accident ..." Two published court of appeals decisions supported the conclusion. In State v. Hartnek, 146 Wis.2d 188, 195, 430 N.W.2d 361 (Ct. App. 1988), the court stated:

> . . . Hartnek argues that sec. 346.67 does not require proof of scienter; therefore, it should be strictly construed so as not to authorize severe criminal penalties under [Collova]. However, as the state correctly notes, the standard jury instruction requires a finding that the defendant knew he or she had struck a person or an attended vehicle. Wis JI-Criminal 2670, *approved in State v. Mann*, 135 Wis.2d 420, 426, 400 N.W.2d 489, 491-92 (Ct. App. 1986). We therefore do not find Hartnek's argument particularly persuasive in this regard.

State v. Mann did state that "[t]he instruction [JI 2670] fairly and adequately informs the jury of the elements of the offense" but it did not focus on any particular part of the instruction or element of the crime.

The knowledge requirement was changed again in 2014 to read: "This requires that the defendant knew the accident involved (a person) (an attended vehicle) before (he) (she) left the scene of the accident." The second sentence was added after the Committee reviewed State v. Sperber, an unpublished Court of Appeals decision [No. 2013AP358-CR, Oct. 15, 2013]. Sperber involved a driver who struck a person in a wheelchair and drove off without stopping. The driver claimed he did not know he struck a person; he thought it was a garbage can. At trial, the jury asked about when the defendant's knowledge must exist: ". . . does the defendant have to be aware that he hit a person at the time of the accident or in the days following the incident in order to fulfill the requirements of the second item?" The trial judge referred the jury to the instruction and did not directly answer the question. Three hours later, the jury asked a similar question and was told to "Read 2670 in its entirety." Sperber was convicted and alleged on appeal that defense counsel was ineffective for failing to request that the jury be instructed that knowledge was to be considered as of the time he departed the accident scene. The court of appeals agreed and, also concluding that the real controversy was not fully tried, reversed the conviction. The Committee found Sperber persuasive and decided that a specific statement should be added to the instruction to clarify that knowledge that the accident involved a person or attended vehicle must exist before the defendant left the scene.

The changes in § 367.67 made by 2015 Wisconsin Act 319 are believed to be in reaction to the Sperber decision, with the focus being on eliminating the requirement of knowledge that the accident involved a person or attended vehicle. See sec. 346.67(3) which provides: "A prosecutor is not required to allege or prove that an operator knew that he or she collided with a person or a vehicle driven or attended by a person in a prosecution under this section." {Emphasis added.} The Committee concluded that only a limited knowledge requirement remains – knowledge that the person was involved in an accident. This is consistent with one of the basic requirements of omission liability: knowledge of facts giving rise to the duty. See Wis JI-Criminal 905 Liability For Failure To Act: Criminal Omissions.

Liability for violating § 367.67 is in essence liability for an omission – failure to fulfill a legal duty imposed as a result of being involved in an accident.

7. The third element reflects the Committee's conclusion that § 346.67, as amended by 2015 Wisconsin Act 319, creates two duties, violation of either of which can be the basis for a conviction. First, the offense is committed by one who is involved in an accident and fails to reasonably investigate. Second, the offense is committed by one who may have reasonably investigated but failed to fulfill other duties imposed by the statute. The instruction addresses this by requiring in the third element that the "defendant violated a duty" and specifying the nature of the two duties that may be involved.

8. The instruction does not define "injury" because it is not defined in the statutes or by a published court decision. While the Criminal Code uses the closely related term "bodily harm," caution should be used in equating the two because unpublished decisions of the Wisconsin Court of Appeals have reached conflicting results, focusing on whether "pain" is sufficient to constitute "injury." In a prosecution under § 346.63(2)(a), the court held that the word "injury" encompasses physical pain. State v. Maddox, No. 03-0227-CR, July 8, 2003. [Ordered not published, August 27, 2003.] However, in a prosecution under § 940.225(2)(b), where "injury" is also used, the court held that the trial court erred in defining "injury" using the Criminal Code definition of "bodily harm" [see § 939.22(4)] because "injury" does not include "pain." State v. Gonzalez, No. 2006AP2977-CR, March 20, 2008. [Ordered not published, April 30, 2008.] Neither of these decisions may cited as authority because they were not published. See § 809.23(3). But they indicate the need for caution in equating "injury" with "bodily harm."

9. "§ 346.67(1) requires an operator of a vehicle to identify him or herself as the operator of the vehicle." State v. Wuteska, 2007 WI App 157 ¶1, 303 Wis.2d 646, 795 N.W.2d 574. Wuteska involved a driver who provided the information required but did not identify herself as the driver of the vehicle. The court of appeals reversed the dismissal of the complaint. In a Wuteska-type situation, element 3. should be modified to address the issue directly.

10. The paragraph in brackets, preceded by "(c)," should be given when there is evidence that a person was injured in the accident. The statute does cover cases where there has been no personal injury – those involving "damage to a vehicle which is driven or attended by any person." § 346.67(1).

11. The duty to stop and render aid applies even though the only other "person injured" in the accident died at the scene. State v. Swatek, 178 Wis.2d 1, 7-8, 502 N.W.2d 909 (Ct. App. 1993): "Thus, the duty under sec. 346.67(1)(c), Stats., does not turn on whether a person's injuries are immediately fatal, but on whether the operator rendered that amount of assistance which an ordinary, reasonable person would render under the same or similar circumstances. We also conclude that whether an operator has fulfilled this duty will, in most instances, present a question for the jury."

The reference to "any person" was discussed in State v. Lloyd, 104 Wis.2d 49, 310 N.W.2d 617 (Ct. App. 1981). The defendant in Lloyd argued that the reference meant he had fulfilled his duty under the statute by rendering aid to one of several persons injured in the accident. The court rejected this interpretation, holding that "any" does not mean "at least one." (The court's discussion suggests that what is meant by "any" is really "any and all" persons injured.) 104 Wis.2d 49, 62-63.

The extent of the duty to render aid was discussed in State v. Mann, 120 Wis.2d 629, 357 N.W.2d 9 (Ct. App. 1984). However, this decision was reversed by the Wisconsin Supreme Court in a decision that focused on the sufficiency of the complaint rather than the requirements of the statute. State v. Mann, 123 Wis.2d 375, 367 N.W.2d 209 (1985).

12. Section 346.67 expressly bases criminal liability on the person's omission or failure to act. The physical ability to perform the required act is a basic requirement of omission liability. See Wis JI-Criminal 905 Liability For Failure To Act: Criminal Omissions. Also see LaFave and Scott, Substantive Criminal Law, § 3.3(c) (West 1986), an earlier version of which was cited with approval in State v. Williquette, 129 Wis.2d 239, 251, 385 N.W.2d 145 (1986).

13. 2003 Wisconsin Act 74 (effective date: November 27, 2003) revised § 346.74, which identifies the penalties for violations of § 346.67. See the Comment preceding note 1, supra. The Committee concluded that the best way to handle the facts which increase the penalty is to submit a special question to the jury, asking whether the fact has been established beyond a reasonable doubt. This is the same way the question of value is handled in a theft case. See Wis JI-Criminal 1441.

14. This question need not be added to the instruction if the "injury to any person" alternative was selected in element 3.

15. Section 346.74 does not provide a definition of "great bodily harm" but the Committee concluded that the definition in § 939.22(14) should apply. The Committee recommends defining the term in the manner used in the instruction. See Wis JI-Criminal 914 for a more complete discussion of issues relating to "great bodily harm."

16. This question need not be added to the instruction if the "death of any person" alternative was selected in element 3.

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2672 SPEEDING: EXCEEDING A REASONABLE AND PRUDENT SPEED UNDER § 346.57(2) OR AN ORDINANCE ADOPTING § 346.57(2)

Statutory Definition of the Crime

[Section 346.57(2)] [Ordinance _____, adopting § 346.57(2)][1] of the Wisconsin Statutes, is violated by one who drives a vehicle on a highway[2] at a speed greater than is reasonable and prudent under the circumstances.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[4] on a highway.[5]
2. The defendant drove the vehicle at a speed[6] greater than was reasonable and prudent under the conditions, taking into consideration the actual and potential hazards then existing.

   [This element requires that the speed of the vehicle be controlled as necessary to avoid colliding with any (object) (person) (vehicle) (other conveyance) on or entering the highway in compliance with legal requirements and using due care.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory,

and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2672 was originally published in 1980 and revised in 1985, 1987, 1995, and 2010. This revision was approved by the Committee in June 2022; it added to the comment to reflect changes made by 2021 Wisconsin Act 115 [effective date: December 8, 2021].

This instruction is drafted for violations of § 346.57(2) where the penalty of forfeiture or fine applies. For violations of § 346.57(2) where criminal penalties may apply, see Wis JI-Criminal 2672A.

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

Section 346.60 (3m) (a) 1. provides for doubling the forfeiture or fine for certain violations:

Except as provided in subd. 2., if an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic or where sanitation workers are at risk from traffic and the operator knows or should know that sanitation workers are present, any applicable minimum and maximum forfeiture specified in sub. (2) or (3) for the violation shall be doubled.

Section 340.01(22e) provides that "Highway maintenance or construction area" means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION" sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.

Section 340.01(73m) provides that "Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.

Section 340.01(15pu) provides that "Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).

1. The use of brackets is intended to allow use of this instruction for cases charged either as

violations of the state statutes or as violations of local ordinances in conformity with the statutes. Since ordinances may be adopted by a variety of governmental entities – county, city, town, etc. – the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

If a statutory violation was charged, the instruction would begin: "Section 346.57(2) of the Wisconsin Statutes is violated . . ."

If an ordinance violation was charged, the instruction would begin: "Ordinance _____, adopting section 346.57(2) of the Wisconsin Statutes, is violated . . ."

2. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

> "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

5. See note 2, supra.

6. Regarding the measurement and estimation of speed, see note 7, Wis JI-Criminal 2676, and Wis JI-Criminal 2679, Radar Speed Measurement.

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2672A LAW NOTE: THE "JUSTIFICATION" DEFENSE

The Wisconsin Supreme Court has recognized that the defense of "justification" is available to excuse what would otherwise be a speeding violation. In State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982), the defendant was convicted of the civil forfeiture offense of speeding under § 346.57(4)(h). He claimed the trial court erred when it refused to submit an instruction on the defendant's claim of legal justification, that is, that his conduct was excusable on the grounds of self-defense, necessity, coercion, or entrapment. The supreme court held "that where a violation of § 346.57(4)(h) occurs, the actor may claim the defense of legal justification if the conduct of a law enforcement officer causes the actor reasonably to believe that violating the law is the only means of preventing bodily harm to the actor or another and causes the actor to violate the law." 107 Wis.2d at 56.

The court noted that the defense of justification is available even though speeding is considered to be a "strict liability" offense in the sense that a culpable state of mind is not an element of the offense. In deciding whether to extend defenses to strict liability traffic offenses, the court said it must weigh the public interest in efficient enforcement of the traffic law against other public interests which are protected by the possible defenses. The court found that "[w]here the violation of the speeding law is caused by the state itself through the actions of a law enforcement officer, . . . the public interest in allowing the violator to claim a defense outweighs the public interest in ease of prosecution." 107 Wis.2d 44 at 55.

The court made specific note that it was not deciding whether the defense of justification might be available to a defendant in a case where the alleged causative force is someone or something other than a law enforcement officer. In Brown, the defendant's testimony was that the traffic officer operated his own vehicle in such an erratic and harassing manner that the defendant felt compelled to increase his own speed in order to get away from the officer.

COMMENT

Wis JI-Criminal 2672A was originally published in 1985 as part of the Comment to Wis JI-Criminal 2676. It was republished as JI 2672A Law Note in 2009.

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2672B SPEEDING: EXCEEDING A REASONABLE AND PRUDENT SPEED – CRIMINAL OFFENSE – § 346.57(2); § 346.60 (3m)(a)2

Statutory Definition of the Crime

Section 346.60(3m)(a)2 of the Wisconsin Statutes, is violated by one who drives a vehicle on a highway[1] at a speed greater than is reasonable and prudent under the circumstances in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) which results in bodily harm to another.

Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[2] on a highway.[3]
2. The defendant drove the vehicle at a speed[4] greater than was reasonable and prudent under the conditions, taking into consideration the actual and potential hazards then existing.

   [This element requires that the speed of the vehicle be controlled as necessary to avoid colliding with any (object) (person) (vehicle) (other conveyance) on or entering the highway in compliance with legal requirements and using due care.]
3. The defendant drove in (a highway maintenance or construction area) (a utility

work area) (an emergency or roadside response area) where workers are at risk from traffic.

["Highway maintenance or construction area" means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION" sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.][5]

["Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.][6]

["Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).][7]

4. The defendant's driving resulted in bodily harm to another.

This requires that the defendant's driving was a substantial factor in causing

bodily harm to another.[8]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2672B was approved by the Committee in October 2022.

This instruction is drafted for violations of § 346.57(2) where criminal penalties may apply. For violations of § 346.57(2) that concern forfeiture or fine, see Wis JI-Criminal 2672.

§ 346.60(3m)(a)2, created by 2021 Wisconsin Act 115 [effective date: December 8, 2021], which provides the following:

If an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic and the violation results in bodily harm, as defined in s. 939.22 (4), to another, the operator may be fined not more than $10,000 or imprisoned for not more than 9 months, or both. In addition to the penalties specified under this subdivision, a court may also order a person convicted under this subdivision to perform not fewer than 100 nor more than 200 hours of community service work and attend traffic safety school, as provided under s. 345.60.

Section 346.60(3m)(a)2 provides for doubling the forfeiture "If an operator of a vehicle violates s. 346.57 (2) to (5) when children are present in a zone designated by 'school' warning signs as provided in s. 118.08 (1).

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

1. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless

otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

2. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

> "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

3. See note 1, supra.

4. Regarding the measurement and estimation of speed, see note 7, Wis JI-Criminal 2676, and Wis JI-Criminal 2679, Radar Speed Measurement.

5. The definition of "Highway maintenance or construction area" is the one provided in § 340.01(22e), which applies to this offense.

6. The definition of "Utility work area" is the one provided in § 340.01(73m), which applies to this offense.

7. The definition of "Emergency or roadside response area" is the one provided in § 340.01(15pu), which applies to this offense.

8. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

See Wis JI-Criminal 910 for a more complete discussion of "cause."

Section 346.60 (3m)(a)2 states the causal requirement differently. It requires that the defendant's violation of s. 346.57(2) "results in bodily harm." The statute is one of several criminal statutes using "results in" to establish the causal connection between the actor's conduct and the prohibited result. The Committee has concluded that "results in" should be interpreted to mean "cause," traditionally defined in terms of "substantial factor." This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court construed "results in" as used in § 346.17(3).

The court held that the statute was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant's conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

9. This is the definition of "bodily harm" provided in § 939.22(4).

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2674 SPEEDING: DRIVING TOO FAST FOR CONDITIONS UNDER § 346.57(3) OR AN ORDINANCE ADOPTING § 346.57(3)

Statutory Definition of the Crime

[Section 346.57(3)] [Ordinance _____, adopting § 346.57(3)][1] of the Wisconsin Statutes, provides that no person shall drive a vehicle on a highway[2] at a speed greater than is reasonable and prudent under the circumstances and that a person shall drive at an appropriate reduced speed when

[approaching and crossing (an intersection) (a railway grade crossing).]

[approaching and going around a curve.]

[approaching a hillcrest.]

[traveling upon any narrow or winding roadway.]

[passing (school children) (highway construction or maintenance workers) (pedestrians).]

[special hazard exists with regard to other traffic or by reason of highway or weather conditions.]

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following three elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[4] on a highway.[5]

2. The defendant drove the vehicle at a speed[6] greater than was reasonable and prudent under the conditions, taking into consideration the actual and potential hazards then existing.

[This element requires that the speed of the vehicle be controlled as necessary to avoid colliding with any (object) (person) (vehicle) (other conveyance) on or entering the highway in compliance with legal requirements and using due care.]

3. The defendant failed to drive at an appropriate reduced speed when

[approaching and crossing (an intersection) (a railway grade crossing).]

[approaching and going around a curve.]

[approaching a hillcrest.]

[traveling upon any narrow or winding roadway.]

[passing (school children) (highway construction or maintenance workers) (pedestrians).]

[special hazard exists with regard to other traffic or by reason of highway or weather conditions.][7]

Appropriate reduced speed is a relative term and means less than the otherwise lawful speed. An appropriate reduced speed is that speed at which a person of ordinary intelligence and prudence would drive under the same or similar

circumstances.[8]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2674 was originally published in 1980 and revised in 1985, 1987, 1995, and 2010. This revision was approved by the Committee in June 2022; it added to the comment to reflect changes made by 2021 Wisconsin Act 115 [effective date: December 8, 2021].

This instruction is drafted for violations of § 346.57(3) where the penalty of forfeiture or fine applies. For violations of § 346.57(3) where criminal penalties may apply, see Wis JI-Criminal 2674A.

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

Section 346.60 (3m) (a) 1. provides for doubling the forfeiture or fine for certain violations:

Except as provided in subd. 2., if an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic or where sanitation workers are at risk from traffic and the operator knows or should know that sanitation workers are present, any applicable minimum and maximum forfeiture specified in sub. (2) or (3) for the violation shall be doubled.

Section 340.01(22e) provides that "Highway maintenance or construction area" means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION" sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.

Section 340.01(73m) provides that "Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are

placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.

Section 340.01(15pu) provides that "Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).

1. The use of brackets is intended to allow use of this instruction for cases charged either as violations of the state statutes or as violations of local ordinances in conformity with the statutes. Since ordinances may be adopted by a variety of governmental entities – county, city, town, etc. – the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

If a statutory violation was charged, the instruction would begin: "Section 346.57(3) of the Wisconsin Statutes is violated . . ."

If an ordinance violation was charged, the instruction would begin: "Ordinance _____, adopting section 346.57(3) of the Wisconsin Statutes, is violated . . ."

2. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

> "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

5. See note 2, supra.

6. Regarding the measurement and estimation of speed, see note 7, Wis JI-Criminal 2676, and Wis JI-Criminal 2679, Radar Speed Measurement.

7. See Wis. Stat. § 346.57(3).

8. See Wis JI-Civil 1285.

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2674A SPEEDING: DRIVING TOO FAST FOR CONDITIONS – CRIMINAL OFFENSE – § 346.57(3)); § 346.60 (3m)(a)2

Statutory Definition of the Crime

Section 346.60(3m)(a)2 of the Wisconsin Statutes, provides that no person shall drive a vehicle on a highway[1] at a speed greater than is reasonable and prudent under the circumstances in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) which results in bodily harm to another, and that a person shall drive at an appropriate reduced speed when

[approaching and crossing (an intersection) (a railway grade crossing).]

[approaching and going around a curve.]

[approaching a hillcrest.]

[traveling upon any narrow or winding roadway.]

[passing (school children) (highway construction or maintenance workers) (pedestrians).]

[special hazard exists with regard to other traffic or by reason of highway or weather conditions.]

Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[2] on a highway.[3]

2. The defendant drove the vehicle at a speed[4] greater than was reasonable and prudent under the conditions, taking into consideration the actual and potential hazards then existing.

[This element requires that the speed of the vehicle be controlled as necessary to avoid colliding with any (object) (person) (vehicle) (other conveyance) on or entering the highway in compliance with legal requirements and using due care.]

3. The defendant failed to drive at an appropriate reduced speed when

[approaching and crossing (an intersection) (a railway grade crossing).]

[approaching and going around a curve.]

[approaching a hillcrest.]

[traveling upon any narrow or winding roadway.]

[passing (school children) (highway construction or maintenance workers) (pedestrians).]

[special hazard exists with regard to other traffic or by reason of highway or weather conditions.][5]

Appropriate reduced speed is a relative term and means less than the otherwise lawful speed. An appropriate reduced speed is that speed at which a person of ordinary intelligence and prudence would drive under the same or similar

circumstances.[6]

4. The defendant drove in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) where workers are at risk from traffic.

["Highway maintenance or construction area" means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION" sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.][7]

["Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.][8]

["Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).][9]

5. The defendant's driving resulted in bodily harm to another.

This requires that the defendant's driving was a substantial factor in causing bodily harm to another.[10]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[11]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2672A was approved by the Committee in October 2022.

This instruction is drafted for violations of § 346.57(3) where criminal penalties may apply. For violations of § 346.57(3) that concern forfeiture or fine, see Wis JI-Criminal 2674.

§ 346.60(3m)(a)2, created by 2021 Wisconsin Act 115 [effective date: December 8, 2021], which provides the following:

If an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic and the violation results in bodily harm, as defined in s. 939.22 (4), to another, the operator may be fined not more than $10,000 or imprisoned for not more than 9 months, or both. In addition to the penalties specified under this subdivision, a court may also order a person convicted under this subdivision to perform not fewer than 100 nor more than 200 hours of community service work and attend traffic safety school, as provided under s. 345.60.

Section 346.60 (3m) (a) 1. provides for doubling the forfeiture or fine for certain violations:

If an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic or where sanitation workers are at risk from traffic and the operator knows or

should know that sanitation workers are present, any applicable minimum and maximum forfeiture specified in sub. (2) or (3) for the violation shall be doubled.

Section 346.60(3m)(a)2 provides for doubling the forfeiture "If an operator of a vehicle violates s. 346.57 (2) to (5) when children are present in a zone designated by 'school' warning signs as provided in s. 118.08 (1).

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

1. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

2. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

> "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

3. See note 1, supra.

4. Regarding the measurement and estimation of speed, see note 7, Wis JI-Criminal 2676, and Wis JI-Criminal 2679, Radar Speed Measurement.

5. See Wis. Stat. § 346.57(3).

6. See Wis JI-Civil 1285.

7. The definition of "Highway maintenance or construction area" is the one provided in § 340.01(22e), which applies to this offense.

8. The definition of "Utility work area" is the one provided in § 340.01(73m), which applies to this offense.

9. The definition of "Emergency or roadside response area" is the one provided in § 340.01(15pu), which applies to this offense.

10. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

See Wis JI-Criminal 910 for a more complete discussion of "cause."

Section 346.60 (3m)(a)2 states the causal requirement differently. It requires that the defendant's violation of s. 346.57(3) "results in bodily harm." The statute is one of several criminal statutes using "results in" to establish the causal connection between the actor's conduct and the prohibited result. The Committee has concluded that "results in" should be interpreted to mean "cause," traditionally defined in terms of "substantial factor." This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court construed "results in" as used in § 346.17(3).

The court held that the statute was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant's conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

11. This is the definition of "bodily harm" provided in § 939.22(4).

2676 SPEEDING: EXCEEDING FIXED LIMITS UNDER § 346.57(4)(e) OR AN ORDINANCE ADOPTING § 346.57(4)(e)

Statutory Definition of the Crime

[Section 346.57(4)(e)] [_____, adopting § 346.57(4)(e)][1] of the Wisconsin Statutes, is violated by one who drives a vehicle at a speed in excess of 25 miles per hour on any highway[2] within the corporate limits of a city or village, provided that no different limit was indicated by an official traffic sign.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following four elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle.[4]
2. The defendant drove the vehicle on a highway[5] located within the (city) (village) limits of (name city or village).

   [This element further requires that the highway was not located in an outlying district of (name city or village). "Outlying district" means the territory contiguous to and including any highway within the corporate limits of a city or village where on each side of the highway within any 1,000 feet along such highway the buildings in use for business, industrial, or residential purposes

fronting thereon average more than 200 feet apart.][6]

3. The defendant drove a vehicle at a speed in excess of 25 miles per hour.[7]

4. No speed limit different than 25 miles per hour was indicated by an official traffic sign.

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that all four elements of this offense have been proved, you should find the defendant guilty [and you should also find the speed the defendant's vehicle was traveling and insert the same into the verdict.][8]

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2676 was originally published in 1980 and revised in 1985, 1987, 1988, 1995, and 2010. This revision was approved by the Committee in June 2022; it added to the comment to reflect changes made by 2021 Wisconsin Act 115 [effective date: December 8, 2021].

This instruction is drafted for violations of § 346.57(4)(e) where the penalty of forfeiture or fine applies. For violations of § 346.57(4)(e) where criminal penalties may apply, see Wis JI-Criminal 2676C.

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

Section 346.60 (3m) (a) 1. provides for doubling the forfeiture or fine for certain violations:

Except as provided in subd. 2., if an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic or where sanitation workers are at risk from traffic and the operator knows or should know that sanitation workers are present, any applicable minimum and maximum forfeiture specified in sub. (2) or (3) for the violation shall be doubled.

Section 340.01(22e) provides that "Highway maintenance or construction area" means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION" sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.

Section 340.01(73m) provides that "Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.

Section 340.01(15pu) provides that "Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).

1. The use of brackets is intended to allow use of this instruction for cases charged either as violations of the state statutes or as violations of local ordinances in conformity with the statutes. Since ordinances may be adopted by a variety of governmental entities – county, city, town, etc. – the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

If a statutory violation was charged, the instruction would begin: "Section 346.57(4)(e) of the Wisconsin Statutes is violated . . ."

If an ordinance violation was charged, the instruction would begin: "Ordinance _____, adopting section 346.57(4)(e) of the Wisconsin Statutes, is violated . . ."

2. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

"Vehicle" means every device in, upon or by which any person or property is or may be

transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

5. See note 2, supra.

6. See § 346.57(1)(ar). The bracketed material need be included only when the location of the highway in an "outlying district" is raised by the evidence.

7. A witness' personal estimate of vehicle speed is admissible if the witness was in a position to judge the speed and the length of the observation period was not too short. The estimate must be definite and objective (e.g., "in excess of 50 miles per hour"), as opposed to indefinite and subjective (e.g., "too fast"). If there is a reasonable basis for the estimate, the weight it is to be given is up to the jury. See Milwaukee v. Berry, 44 Wis.2d 321, 171 N.W.2d 305 (1969), and cases cited therein.

For discussion of radar speed measurement, see Wis JI-Criminal 2679 and Comment.

8. The jury should be instructed to find the speed whenever the defendant is charged with exceeding the speed limit by 10 or more miles per hour. Such violations carry an increased penalty in terms of loss of points. See § 343.32(2)(b). Also see note 7, Wis JI-Criminal 2677 for further discussion of the required finding on speed.

2676A SPEEDING: EXCEEDING 65 MILES PER HOUR UNDER § 346.57(4)(gm) OR AN ORDINANCE ADOPTING § 346.57(4)(gm)

Statutory Definition of the Crime

[Section 346.57(4)(gm)] [Ordinance _____, adopting § 346.57(4)(gm)][1] of the Wisconsin Statutes, is violated by one who drives a vehicle at a speed in excess of 65 miles per hour on any freeway or expressway for which a limit of 65 miles per hour is indicated by an official traffic sign.[2]

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must prove by evidence which satisfies you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following three elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[4] on a freeway or expressway.[5]
2. The defendant drove the vehicle at a speed in excess of 65 miles per hour.[6]
3. A speed limit of 65 miles per hour was indicated by an official traffic sign.[7]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that all three elements of this offense have been proved, you should find the defendant guilty [and you should also find the speed the defendant's vehicle was traveling and insert the same into the verdict.][8]

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2676A was originally published in 1988 and revised in 1995 and 2010. This revision was approved by the Committee in June 2022; it added to the comment to reflect changes made by 2021 Wisconsin Act 115 [effective date: December 8, 2021].

This instruction is drafted for violations of § 346.57(4)(gm) where the penalty of forfeiture or fine applies. For violations of § 346.57(4)(gm) where criminal penalties may apply, see Wis JI-Criminal 2676B.

Section 346.57(4)(gm), provides for the speed limit of 65 miles per hour "on any freeway or expressway."

Section 346.57(6)(b) provides:

> The limit specified under sub. (4)(gm) is not effective unless official signs giving notice of the limit have been erected by the department.

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

Section 346.60 (3m) (a) 1. provides for doubling the forfeiture or fine for certain violations:

Except as provided in subd. 2., if an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic or where sanitation workers are at risk from traffic and the operator knows or should know that sanitation workers are present, any applicable minimum and maximum forfeiture specified in sub. (2) or (3) for the violation shall be doubled.

Section 340.01(22e) provides that "Highway maintenance or construction area" means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION" sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.

Section 340.01(73m) provides that "Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.

Section 340.01(15pu) provides that "Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).

1. The use of brackets is intended to allow use of this instruction for cases charged either as violations of the state statutes or as violations of local ordinances in conformity with the statutes. Since ordinances may be adopted by a variety of governmental entities C county, city, town, etc. C the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

If a statutory violation was charged, the instruction would begin: "Section 346.57(4)(gm) of the Wisconsin Statutes is violated . . ."

If an ordinance violation was charged, the instruction would begin: "Ordinance _____, adopting section 346.57(4)(gm) of the Wisconsin Statutes, is violated . . ."

2. The phrase "indicated by an official traffic sign" is added to the definition of the offense because § 346.57(6)(b) provides that the 65 miles per hour limit "is not effective" unless official signs give notice. (See text of subsec. (6)(b) preceding note 1, supra. The Committee concluded that while it could be argued that proof of the posting of signs is not a fact the prosecution is required to prove, it was more efficient to add this fact to the instruction in all cases rather than use a more complicated approach that would try to treat it as an "affirmative defense."

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

> "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

5. "Freeway" is defined in § 346.57(1)(am); "expressway" is defined in § 346.57(1)(ag).

6. A witness' personal estimate of vehicle speed is admissible if the witness was in a position to judge the speed and the length of the observation period was not too short. The estimate must be definite and objective (e.g., "in excess of 50 miles per hour"), as opposed to indefinite and subjective (e.g., "too fast"). If there is a reasonable basis for the estimate, the weight it is to be given is up to the jury. See Milwaukee v. Berry, 44 Wis.2d 321, 171 N.W.2d 305 (1969), and cases cited therein.

For discussion of radar speed measurement, see Wis JI-Criminal 2679 and comment.

7. See note 2, supra.

8. The jury should be instructed to find the speed whenever the defendant is charged with exceeding the speed limit by 10 or more miles per hour. Such violations carry an increased penalty in terms of loss of points. See § 343.32(2)(b). Also see note 7, Wis JI-Criminal 2677 for further discussion of the required

finding on speed.

2676B SPEEDING: EXCEEDING 65 MILES PER HOUR – CRIMINAL OFFENSE – § 346.57(4)(gm); § 346.60 (3m)(a)2

Statutory Definition of the Crime

Section 346.60 (3m)(a)2 of the Wisconsin Statutes, is violated by one who drives a vehicle at a speed in excess of 65 miles per hour, on any freeway or expressway for which a limit of 65 miles per hour is indicated by an official traffic sign,[1] in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) which results in bodily harm to another.

Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[2] on a freeway or expressway.[3]
2. The defendant drove the vehicle at a speed in excess of 65 miles per hour.[4]
3. A speed limit of 65 miles per hour was indicated by an official traffic sign.[5]
4. The defendant drove in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) where workers are at risk from traffic.

["Highway maintenance or construction area" means the entire section of

roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION" sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.][6]

["Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.][7]

["Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).][8]

5. The defendant's driving resulted in bodily harm to another.

This requires that the defendant's driving was a substantial factor in causing bodily harm to another.[9]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty [and you should also find the speed the defendant's vehicle was traveling and insert the same into the verdict.][11]

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2672B was approved by the Committee in October 2022.

This instruction is drafted for violations of § 346.57(4)(gm) where criminal penalties may apply. For violations of § 346.57(4)(m) that concern forfeiture or fine, see Wis JI-Criminal 2676A.

Section 346.57(4)(gm), provides for the speed limit of 65 miles per hour "on any freeway or expressway."

Section 346.57(6)(b) provides:

> The limit specified under sub. (4)(gm) is not effective unless official signs giving notice of the limit have been erected by the department.

§ 346.60(3m)(a)2, created by 2021 Wisconsin Act 115 [effective date: December 8, 2021], which provides the following:

> If an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic and the violation results in bodily harm, as defined in s. 939.22 (4), to another, the operator may be fined not more than $10,000 or imprisoned for not more than 9 months, or both. In addition to the penalties specified under this subdivision, a court may also order a person convicted under this subdivision to perform not fewer than 100 nor more than 200 hours of community service work and attend traffic safety school, as provided under s. 345.60.

Section 346.60(3m)(a)2 provides for doubling the forfeiture "If an operator of a vehicle violates s. 346.57 (2) to (5) when children are present in a zone designated by 'school' warning signs as provided in s. 118.08 (1).

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d

370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

1. The phrase "indicated by an official traffic sign" is added to the definition of the offense because § 346.57(6)(b) provides that the 65 miles per hour limit "is not effective" unless official signs give notice. (See text of subsec. (6)(b) preceding note 1, supra. The Committee concluded that while it could be argued that proof of the posting of signs is not a fact the prosecution is required to prove, it was more efficient to add this fact to the instruction in all cases rather than use a more complicated approach that would try to treat it as an "affirmative defense."

2. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

> "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

3. "Freeway" is defined in § 346.57(1)(am); "expressway" is defined in § 346.57(1)(ag).

4. A witness' personal estimate of vehicle speed is admissible if the witness was in a position to judge the speed and the length of the observation period was not too short. The estimate must be definite and objective (e.g., "in excess of 50 miles per hour"), as opposed to indefinite and subjective (e.g., "too fast"). If there is a reasonable basis for the estimate, the weight it is to be given is up to the jury. See Milwaukee v. Berry, 44 Wis.2d 321, 171 N.W.2d 305 (1969), and cases cited therein.

For discussion of radar speed measurement, see Wis JI-Criminal 2679 and comment.

5. See note 1, supra.

6. The definition of "Highway maintenance or construction area" is the one provided in § 340.01(22e), which applies to this offense.

7. The definition of "Utility work area" is the one provided in § 340.01(73m), which applies to this offense.

8. The definition of "Emergency or roadside response area" is the one provided in § 340.01(15pu), which applies to this offense.

9. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

See Wis JI-Criminal 910 for a more complete discussion of "cause."

Section 346.60 (3m)(a)2 states the causal requirement differently. It requires that the defendant's violation of s. 346.57(4)(gm) "results in bodily harm." The statute is one of several criminal statutes using

"results in" to establish the causal connection between the actor's conduct and the prohibited result. The Committee has concluded that "results in" should be interpreted to mean "cause," traditionally defined in terms of "substantial factor." This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court construed "results in" as used in § 346.17(3).

The court held that the statute was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant's conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

10. This is the definition of "bodily harm" provided in § 939.22(4).

11. The jury should be instructed to find the speed whenever the defendant is charged with exceeding the speed limit by 10 or more miles per hour. Such violations carry an increased penalty in terms of loss of points. See § 343.32(2)(b). Also see note 7, Wis JI-Criminal 2677 for further discussion of the required finding on speed.

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2676C SPEEDING: EXCEEDING FIXED LIMITS – CRIMINAL OFFENSE – § 346.57(4)(e); § 346.60 (3m)(a)2

Statutory Definition of the Crime

Section 346.60 (3m)(a)2 of the Wisconsin Statutes, is violated by one who drives a vehicle at a speed in excess of 25 miles per hour on any highway[1] within the corporate limits of a city or village, provided that no different limit was indicated by an official traffic sign, in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) which results in bodily harm to another.

Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle.[2]
2. The defendant drove the vehicle on a highway[3] located within the (city) (village) limits of (name city or village).

   [This element further requires that the highway was not located in an outlying district of (name city or village). "Outlying district" means the territory contiguous to and including any highway within the corporate limits of a city or village where on each side of the highway within any 1,000 feet along such

highway the buildings in use for business, industrial, or residential purposes fronting thereon average more than 200 feet apart.][4]

3. The defendant drove a vehicle at a speed in excess of 25 miles per hour.[5]

4. No speed limit different than 25 miles per hour was indicated by an official traffic sign.

5. The defendant drove in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) where workers are at risk from traffic.

["Highway maintenance or construction area" means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION" sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.][6]

["Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic

may return to its normal flow without impeding such work.][7]

["Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).][8]

6. The defendant's driving resulted in bodily harm to another.

This requires that the defendant's driving was a substantial factor in causing bodily harm to another.[9]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty [and you should also find the speed the defendant's vehicle was traveling and insert the same into the verdict.][11]

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2672A was approved by the Committee in October 2022.

This instruction is drafted for violations of § 346.57(4)(e) where criminal penalties may apply. For violations of § 346.57(4)(e) that concern forfeiture or fine, see Wis JI-Criminal 2676.

§ 346.60(3m)(a)2, created by 2021 Wisconsin Act 115 [effective date: December 8, 2021], which provides the following:

If an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic and the violation results in bodily harm, as defined in s. 939.22 (4), to another, the operator may be fined not more than $10,000 or imprisoned for not more than 9 months, or both. In addition to the penalties specified under this subdivision, a court may also order a person convicted under this subdivision to perform not fewer than 100 nor more than 200 hours of community service work and attend traffic safety school, as provided under s. 345.60.

Section 346.60 (3m) (a) 1. provides for doubling the forfeiture or fine for certain violations:

If an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic or where sanitation workers are at risk from traffic and the operator knows or should know that sanitation workers are present, any applicable minimum and maximum forfeiture specified in sub. (2) or (3) for the violation shall be doubled.

Section 346.60(3m)(a)2 provides for doubling the forfeiture "If an operator of a vehicle violates s. 346.57 (2) to (5) when children are present in a zone designated by 'school' warning signs as provided in s. 118.08 (1).

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

1. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

2. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

> "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

3. See note 1, supra.

4. See § 346.57(1)(ar). The bracketed material need be included only when the location of the highway in an "outlying district" is raised by the evidence.

5. A witness' personal estimate of vehicle speed is admissible if the witness was in a position to judge the speed and the length of the observation period was not too short. The estimate must be definite and objective (e.g., "in excess of 50 miles per hour"), as opposed to indefinite and subjective (e.g., "too fast"). If there is a reasonable basis for the estimate, the weight it is to be given is up to the jury. See Milwaukee v. Berry, 44 Wis.2d 321, 171 N.W.2d 305 (1969), and cases cited therein.

For discussion of radar speed measurement, see Wis JI-Criminal 2679 and Comment.

6. The definition of "Highway maintenance or construction area" is the one provided in § 340.01(22e), which applies to this offense.

7. The definition of "Utility work area" is the one provided in § 340.01(73m), which applies to this offense.

8. The definition of "Emergency or roadside response area" is the one provided in § 340.01(15pu), which applies to this offense.

9. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

See Wis JI-Criminal 910 for a more complete discussion of "cause."

Section 346.60 (3m)(a)2 states the causal requirement differently. It requires that the defendant's violation of s. 346.57(4)(e) "results in bodily harm." The statute is one of several criminal statutes using "results in" to establish the causal connection between the actor's conduct and the prohibited result. The Committee has concluded that "results in" should be interpreted to mean "cause," traditionally defined in terms of "substantial factor." This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court construed "results in" as used in § 346.17(3).

> The court held that the statute was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant's conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

10. This is the definition of "bodily harm" provided in § 939.22(4).

11. The jury should be instructed to find the speed whenever the defendant is charged with exceeding the speed limit by 10 or more miles per hour. Such violations carry an increased penalty in terms of loss of points. See § 343.32(2)(b). Also see note 7, Wis JI-Criminal 2677 for further discussion of the required finding on speed.

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2677 SPEEDING: EXCEEDING 55 MILES PER HOUR IN THE ABSENCE OF POSTED LIMITS UNDER § 346.57(4)(h) OR AN ORDINANCE ADOPTING § 346.57(4)(h)

Statutory Definition of the Crime

[Section 346.57(4)(h)] [Ordinance _____, adopting § 346.57(4)(h)][1] of the Wisconsin Statutes, is violated by one who drives a vehicle on a highway[2] in excess of 55 miles per hour in the absence of any other posted limit.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must prove by evidence which satisfies you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[4] on a highway.[5]

2. The defendant drove the vehicle at a speed which exceeded 55 miles per hour.[6]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty [and you should also find the speed the defendant's vehicle was traveling and insert the same into the verdict].[7]

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2677 was originally published in 1987 and revised in 1988, 1995, and 2010. This revision was approved by the Committee in June 2022; it added to the comment to reflect changes made by 2021 Wisconsin Act 115 [effective date: December 8, 2021].

This instruction is drafted for violations of § 346.57(4)(h) where the penalty of forfeiture or fine applies. For violations of § 346.57(4)(h) where criminal penalties may apply, see Wis JI-Criminal 2677A.

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

Section 346.60 (3m) (a) 1. provides for doubling the forfeiture or fine for certain violations:

Except as provided in subd. 2., if an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic or where sanitation workers are at risk from traffic and the operator knows or should know that sanitation workers are present, any applicable minimum and maximum forfeiture specified in sub. (2) or (3) for the violation shall be doubled.

Section 340.01(22e) provides that "Highway maintenance or construction area" means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION" sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.

Section 340.01(73m) provides that "Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.

Section 340.01(15pu) provides that "Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).

1. The use of brackets is intended to allow use of this instruction for cases charged either as violations of the state statutes or as violations of local ordinances in conformity with the statutes. Since ordinances may be adopted by a variety of governmental entities – county, city, town, etc. – the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

If a statutory violation was charged, the instruction would begin: "Section 346.57(4)(h) of the Wisconsin Statutes is violated . . ."

If an ordinance violation was charged, the instruction would begin: "Ordinance _____, adopting section 346.57(4)(h) of the Wisconsin Statutes, is violated . . ."

2. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

> "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

5. See note 2, supra.

6. A witness' personal estimate of vehicle speed is admissible if the witness was in a position to judge the speed and the length of the observation period was not too short. The estimate must be definite and objective (e.g., "in excess of 50 miles per hour"), as opposed to indefinite and subjective (e.g., "too fast"). If there is a reasonable basis for the estimate, the weight it is to be given is up to the jury. See Milwaukee v. Berry, 44 Wis.2d 321, 171 N.W.2d 305 (1969), and cases cited therein.

For discussion of radar speed measurement, see Wis JI-Criminal 2679 and comment.

7. The jury should be instructed to find the speed whenever the defendant is charged with exceeding the speed limit by 10 or more miles per hour. Such violations carry an increased penalty in terms of loss of points. See § 343.32(2)(b). A jury finding of the actual speed should also be made when suspension of operating privileges is sought under § 343.30(1n), which requires suspension for 15 days when the person has been convicted under § 346.57(4)(h) (as opposed to city or county ordinance adopting § 346.57(4)(h)) for exceeding the posted speed limit by 25 or more miles per hour.

In State v. Zick, 44 Wis.2d 546, 550, 171 N.W.2d 430 (1969), the Wisconsin Supreme Court held:

> Under this section [§ 346.57(5)] we hold the state may charge a defendant with speeding and also state the excess rate of speed and such charge maybe sustained by proof of any speed in excess of the maximum permissible speed. Although the exact rate of speed found need not conform to the rate of speed stated in the ticket it is important in determining the punishment and points and must be proved beyond a reasonable doubt.

(Although the Zick case identifies the burden of proof as "beyond a reasonable doubt," where the penalty for the offense is only a forfeiture, the proper burden is "to a reasonable certainty by evidence which is clear, satisfactory, and convincing.")

The Zick decision approved the use of a verdict which provided in part:

We, the Jury, find the defendant, ((name of defendant)), guilty of speeding at the time and place charged in the Complaint and find the speed at which he drove was _____ miles per hour.

(Although the approved verdict in the Zick case referred to "the complaint," the proper reference would usually be to the "citation.")

2677A SPEEDING: EXCEEDING 55 MILES PER HOUR IN THE ABSENCE OF POSTED LIMITS – CRIMINAL OFFENSE – § 346.57(4)(h); § 346.60 (3m)(a)2

Statutory Definition of the Crime

Section 346.60(3m)(a)2 of the Wisconsin Statutes, is violated by one who drives a vehicle on a highway[1] in excess of 55 miles per hour in the absence of any other posted limit in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) which results in bodily harm to another.

Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[2] on a highway.[3]
2. The defendant drove the vehicle at a speed which exceeded 55 miles per hour.[4]
3. The defendant drove in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) where workers are at risk from traffic.

   ["Highway maintenance or construction area" means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION"

sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.][5]

["Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.][6]

["Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).][7]

4. The defendant's driving resulted in bodily harm to another.

This requires that the defendant's driving was a substantial factor in causing bodily harm to another.[8]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense

have been proved, you should find the defendant guilty [and you should also find the speed the defendant's vehicle was traveling and insert the same into the verdict].[10]

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2677A was approved by the Committee in October 2022.

This instruction is drafted for violations of § 346.57(4)(h) where criminal penalties may apply. For violations of § 346.57(4)(h) that concern forfeiture or fine, see Wis JI-Criminal 2677.

§ 346.60(3m)(a)2, created by 2021 Wisconsin Act 115 [effective date: December 8, 2021], which provides the following:

If an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic and the violation results in bodily harm, as defined in s. 939.22 (4), to another, the operator may be fined not more than $10,000 or imprisoned for not more than 9 months, or both. In addition to the penalties specified under this subdivision, a court may also order a person convicted under this subdivision to perform not fewer than 100 nor more than 200 hours of community service work and attend traffic safety school, as provided under s. 345.60.

Section 346.60(3m)(a)2 provides for doubling the forfeiture "If an operator of a vehicle violates s. 346.57 (2) to (5) when children are present in a zone designated by 'school' warning signs as provided in s. 118.08 (1).

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

1. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

2. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

> "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

3. See note 1, supra.

4. A witness' personal estimate of vehicle speed is admissible if the witness was in a position to judge the speed and the length of the observation period was not too short. The estimate must be definite and objective (e.g., "in excess of 50 miles per hour"), as opposed to indefinite and subjective (e.g., "too fast"). If there is a reasonable basis for the estimate, the weight it is to be given is up to the jury. See Milwaukee v. Berry, 44 Wis.2d 321, 171 N.W.2d 305 (1969), and cases cited therein.

For discussion of radar speed measurement, see Wis JI-Criminal 2679 and comment.

5. The definition of "Highway maintenance or construction area" is the one provided in § 340.01(22e), which applies to this offense.

6. The definition of "Utility work area" is the one provided in § 340.01(73m), which applies to this offense.

7. The definition of "Emergency or roadside response area" is the one provided in § 340.01(15pu), which applies to this offense.

8. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

See Wis JI-Criminal 910 for a more complete discussion of "cause."

Section 346.60 (3m)(a)2 states the causal requirement differently. It requires that the defendant's violation of s. 346.57(4)(h) "results in bodily harm." The statute is one of several criminal statutes using "results in" to establish the causal connection between the actor's conduct and the prohibited result. The Committee has concluded that "results in" should be interpreted to mean "cause," traditionally defined in terms of "substantial factor." This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court construed "results in" as used in § 346.17(3).

> The court held that the statute was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant's conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence

of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

9. This is the definition of "bodily harm" provided in § 939.22(4).

10. The jury should be instructed to find the speed whenever the defendant is charged with exceeding the speed limit by 10 or more miles per hour. Such violations carry an increased penalty in terms of loss of points. See § 343.32(2)(b). A jury finding of the actual speed should also be made when suspension of operating privileges is sought under § 343.30(1n), which requires suspension for 15 days when the person has been convicted under § 346.57(4)(h) (as opposed to city or county ordinance adopting § 346.57(4)(h)) for exceeding the posted speed limit by 25 or more miles per hour.

In State v. Zick, 44 Wis.2d 546, 550, 171 N.W.2d 430 (1969), the Wisconsin Supreme Court held:

Under this section [§ 346.57(5)] we hold the state may charge a defendant with speeding and also state the excess rate of speed and such charge maybe sustained by proof of any speed in excess of the maximum permissible speed. Although the exact rate of speed found need not conform to the rate of speed stated in the ticket it is important in determining the punishment and points and must be proved beyond a reasonable doubt.

(Although the Zick case identifies the burden of proof as "beyond a reasonable doubt," where the penalty for the offense is only a forfeiture, the proper burden is "to a reasonable certainty by evidence which is clear, satisfactory, and convincing.")

The Zick decision approved the use of a verdict which provided in part:

We, the Jury, find the defendant, ((name of defendant)), guilty of speeding at the time and place charged in the Complaint and find the speed at which he drove was _____ miles per hour.

(Although the approved verdict in the Zick case referred to "the complaint," the proper reference would usually be to the "citation.")

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2678 SPEEDING: EXCEEDING POSTED LIMITS UNDER § 346.57(5) OR AN ORDINANCE ADOPTING § 346.57(5)

Statutory Definition of the Crime

[Section 346.57(5)] [Ordinance_____, adopting § 346.57(5)][1] of the Wisconsin Statutes, is violated by one who drives a vehicle on a highway[2] in excess of any speed limit established pursuant to law by state or local authorities and indicated by official signs.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[3] must prove by evidence which satisfies you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following three elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[4] on a highway.[5]
2. The defendant drove the vehicle at a speed which exceeded the speed limit established by law.[6]
3. The established speed limit was indicated by official signs.

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that all three elements of this offense have been proved, you should find the defendant guilty [and you should also find the speed the defendant's vehicle was traveling and insert the same into the verdict].[7]

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2678 was originally published in 1980 and revised in 1985, 1987, 1988, 1995, and 2010. This revision was approved by the Committee in June 2022; it added to the comment to reflect changes made by 2021 Wisconsin Act 115 [effective date: December 8, 2021].

This instruction is drafted for violations of § 346.57(5) where the penalty of forfeiture or fine applies. For violations of § 346.57(5) where criminal penalties may apply, see Wis JI-Criminal 2678A.

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

Section 346.60 (3m) (a) 1. provides for doubling the forfeiture or fine for certain violations:

Except as provided in subd. 2., if an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic or where sanitation workers are at risk from traffic and the operator knows or should know that sanitation workers are present, any applicable minimum and maximum forfeiture specified in sub. (2) or (3) for the violation shall be doubled.

Section 340.01(22e) provides that "Highway maintenance or construction area" means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION" sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.

Section 340.01(73m) provides that "Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.

Section 340.01(15pu) provides that "Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).

1. The use of brackets is intended to allow use of this instruction for cases charged either as violations of the state statutes or as violations of local ordinances in conformity with the statutes. Since ordinances may be adopted by a variety of governmental entities – county, city, town, etc. – the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

If a statutory violation was charged, the instruction would begin: "Section 346.57(5) of the Wisconsin Statutes is violated . . ."

If an ordinance violation was charged, the instruction would begin: "Ordinance____, adopting section 346.57(5) of the Wisconsin Statutes, is violated . . ."

2. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

"Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

5. See note 2, supra.

6. Regarding the measurement and estimation of speed, see note 7, Wis JI-Criminal 2676, and Wis JI-Criminal 2679, Radar Speed Measurement.

7. The jury should be instructed to find the speed whenever the defendant is charged with exceeding the speed limit by 10 or more miles per hour. Such violations carry an increased penalty in terms of loss of points. See note 7, Wis JI-Criminal 2677, for further discussion of the required finding of speed and a suggested form of verdict.

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2678A SPEEDING: EXCEEDING POSTED LIMITS – CRIMINAL OFFENSE – § 346.57(5); § 346.60 (3m)(a)2

Statutory Definition of the Crime

Section § 346.60 (3m)(a)2 of the Wisconsin Statutes, is violated by one who drives a vehicle on a highway[1] in excess of any speed limit established pursuant to law by state or local authorities and indicated by official signs in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) which results in bodily harm to another.

Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle[2] on a highway.[3]
2. The defendant drove the vehicle at a speed which exceeded the speed limit established by law.[4]
3. The established speed limit was indicated by official signs.
4. The defendant drove in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) where workers are at risk from traffic.

["Highway maintenance or construction area" means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION" sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.][5]

["Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.][6]

["Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).][7]

5. The defendant's driving resulted in bodily harm to another.

This requires that the defendant's driving was a substantial factor in causing bodily harm to another.[8]

"Bodily harm" means physical pain or injury, illness, or any impairment of

physical condition.[9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty [and you should also find the speed the defendant's vehicle was traveling and insert the same into the verdict.][10]

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2672A was approved by the Committee in October 2022.

This instruction is drafted for violations of § 346.57(5) where criminal penalties may apply. For violations of § 346.57(5) that concern forfeiture or fine, see Wis JI-Criminal 2678.

§ 346.60(3m)(a)2, created by 2021 Wisconsin Act 115 [effective date: December 8, 2021], which provides the following:

If an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic and the violation results in bodily harm, as defined in s. 939.22 (4), to another, the operator may be fined not more than $10,000 or imprisoned for not more than 9 months, or both. In addition to the penalties specified under this subdivision, a court may also order a person convicted under this subdivision to perform not fewer than 100 nor more than 200 hours of community service work and attend traffic safety school, as provided under s. 345.60.

If an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic or where sanitation workers are at risk from traffic and the operator knows or should know that sanitation workers are present, any applicable minimum and maximum forfeiture specified in sub. (2) or (3) for the violation shall be doubled.

Section 346.60(3m)(a)2 provides for doubling the forfeiture "If an operator of a vehicle violates s. 346.57 (2) to (5) when children are present in a zone designated by 'school' warning signs as provided in s. 118.08 (1).

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

1. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

2. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

"Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

3. See note 1, supra.

4. Regarding the measurement and estimation of speed, see note 7, Wis JI-Criminal 2676, and Wis JI-Criminal 2679, Radar Speed Measurement.

5. The definition of "Highway maintenance or construction area" is the one provided in § 340.01(22e), which applies to this offense.

6. The definition of "Utility work area" is the one provided in § 340.01(73m), which applies to this offense.

7. The definition of "Emergency or roadside response area" is the one provided in § 340.01(15pu), which applies to this offense.

8. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

See Wis JI-Criminal 910 for a more complete discussion of "cause."

Section 346.60 (3m)(a)2 states the causal requirement differently. It requires that the defendant's violation of s. 346.57(5)) "results in bodily harm." The statute is one of several criminal statutes using "results in" to establish the causal connection between the actor's conduct and the prohibited result. The Committee has concluded that "results in" should be interpreted to mean "cause," traditionally defined in terms of "substantial factor." This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court construed "results in" as used in § 346.17(3).

> The court held that the statute was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant's conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

9. This is the definition of "bodily harm" provided in § 939.22(4).

10. The jury should be instructed to find the speed whenever the defendant is charged with exceeding the speed limit by 10 or more miles per hour. Such violations carry an increased penalty in terms of loss of points. See note 7, Wis JI-Criminal 2677, for further discussion of the required finding of speed and a suggested form of verdict.

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2679 RADAR SPEED MEASUREMENT)

This court recognizes that the speed measurement device used in this case uses a scientifically sound method of measuring the speed of motor vehicles. The (identify prosecuting agency) [1] is not required to prove the underlying scientific reliability of the method used by the measurement device.

The (identify prosecuting agency) is required to prove that the device was in proper working order and that it was properly operated by a qualified person.[2]

The weight to be given to the speed measurement in this case is for you, the jury, to determine.

COMMENT

Wis JI-Criminal 2679 was originally published in 1986. The comment was revised in 1987 and 1988 and republished without change in 1995 and 2010.

This instruction may be used in cases involving both moving and stationary radar. Regarding stationary radar see note 1, below.

The reliability of speed measurement by moving radar devices was considered by the Wisconsin Supreme Court in State v. Hanson, 85 Wis.2d 233, 270 N.W.2d 212 (1978). The court held that courts "may take judicial notice of the reliability of the underlying principles of speed radar detection that employs the Doppler effect as a means of determining the speed of moving objects. To this end, expert testimony is not needed to determine the initial admissibility of speed radar readings. The radar reading may be introduced by the operating law enforcement official, if he is qualified in its use and operation." 85 Wis.2d 233, 244-45. The court emphasized that the accuracy of a given speed reading is another matter – it depends on the particular conditions surrounding the reading.

A moving radar speed reading is admissible upon testimony of a competent, operating police officer that:

1. the officer operating the device had adequate training and experience in its operations;

2. the device was in proper working condition at the time of the alleged offense;

3. the road conditions at the site of the alleged offense were such that there was a minimum possibility of distortion;

4. the input speed of the patrol car was verified;

5. the patrol car's speed meter was expertly tested within a reasonable time following the arrest by means which did not rely on the radar device's own internal calibrations.

Regarding the verification of the speed of the patrol car, see Washington County v. Luedtke, 135 Wis.2d 131, 399 N.W.2d 906 (1987):

> We hold that the fourth criterion of Hanson/Kramer is met by testimony that verification has been accomplished by a visual comparison of the speedometer with the radar read-out. It is unnecessary, indeed irrelevant to the prosecution's proof, to establish that the patrol car's speedometer has been separately checked and certified to be correct.

135 Wis.2d 131, 141-42.

The Hanson criteria, particularly those relating to testing the radar device, are discussed in State v. Kramer, 99 Wis.2d 700, 299 N.W.2d 882 (1981).

The VASCAR method of radar speed detection is also entitled to "a prima facie presumption of accuracy." Expert testimony is not required to establish a foundation for its admissibility. State v. Frankenthal, 113 Wis.2d 269, 335 N.W.2d 890 (Ct. App. 1983).

1. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

2. This sentence is not necessary in stationary radar cases. "Whether the test was properly conducted or the instruments used were in good working order is a matter of defense." City of Wauwatosa v. Collett, 99 Wis.2d 522, 299 N.W.2d 620 (Ct. App. 1980).

Collett held that the Hanson criteria apply only to moving radar devices and stationary radar devices are entitled to a presumption of accuracy without Hanson-type testimony.

2680 NONCRIMINAL TRAFFIC VIOLATIONS: PROHIBITED BY STATE LAW OR AN ORDINANCE ADOPTING STATE LAW

[THE FOLLOWING IS A MODEL TO BE USED IN DEVELOPING AN INSTRUCTION FOR A NONCRIMINAL TRAFFIC VIOLATION FOR WHICH THERE IS NO UNIFORM INSTRUCTION]

Statutory Definition of the Offense

[Ordinance _____, adopting][1] Section _____ of the Wisconsin Statutes, provides that (read the statute or ordinance) .

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency) [2] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following _____ elements were present.

Elements That the State Must Prove

1. LIST EACH ELEMENT, INCLUDING DEFINITIONS WHEN NECESSARY

2.

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that _____ elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2680 was originally published in 1985 and revised in 1994 and 2010. This revision involved a nonsubstantive correction to a caption in the text.

This instruction is intended to serve as a model for the many noncriminal traffic violations that may occasionally be tried to a jury but which arise too infrequently to warrant the publication of a separate uniform instruction.

There are two general instructions for forfeiture actions: Wis JI-Criminal 140.1, Burden of Proof: Forfeiture Actions; and Wis JI-Criminal 515.1, Five-Sixths Verdict and Selection of Presiding Juror: Forfeiture Actions.

There are uniform criminal instructions for some of the common noncriminal violations, see 2620A Operating After Revocation (Forfeiture), 2650 Reckless Driving, 2660A Operating With 10% Or More BAC (Forfeiture), 2663A Operating Under The Influence (Forfeiture), and 2672-78 Speeding.

For some violations, there are uniform civil jury instructions which may be helpfully incorporated into the model.

	Offense	Wis JI-Civil
346.13(1)	Deviating In Traffic	1355
346.14(1)	Distance Between Vehicles (Tailgating)	1112
346.37(1)	Vehicle Passing Through Red Or Yellow Signal	1192, 1193
346.46(1)	Stopping At Stop Signs	1325, 1325A
346.59	Minimum Speed Regulations	1300, 1305

Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. Sec. 346.02(1). (There are two such provisions: § 346.61 which applies to reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; and § 346.66 which applies to offenses defined in §§ 346.67 to 346.70. Both § 346.61 and § 346.66 provide that those statutes listed are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of a motor vehicle offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

1. Since ordinances may be adopted by a variety of governmental entities – county, city, town, etc. – the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

2. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

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2682A TAMPERING WITH AN IGNITION INTERLOCK DEVICE — § 347.413

Statutory Definition of the Crime

Section 347.413(1) of the Wisconsin Statutes is violated by one who removes, disconnects, tampers with, or otherwise circumvents the operation of an ignition interlock device installed on a motor vehicle in response to a court order and that motor vehicle is operated on or occupies a highway.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was subject to a court order under § 343.301 requiring the installation of an ignition interlock device on a motor vehicle.[1]
2. The defendant (removed) (disconnected) (tampered with) (or) (otherwise circumvented the operation of) the ignition interlock device installed in response to the court order.
3. The motor vehicle (was operated on) (occupied) a highway.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2682A was originally published in 2010 and revised in 2012. This revision was approved by the Committee in February 2014; it amended the third element.

This instruction is drafted for one of the two types of criminal violations under § 347.413, Ignition interlock device tampering; failure to install. This instruction addresses removing, disconnecting, tampering with, or otherwise circumventing the operation of an ignition interlock device installed in response to the court order under § 346.65(6), 1999 stats., or § 343.301(1), 2007 stats., or § 343.301(1g). Penalties are set forth in § 347.50.

See Wis JI-Criminal 2682B for the other type of violation: failing to have the ignition interlock device installed as ordered by the court.

1. Section 347.413 applies to ignition interlock installation ordered under three different statutes. Section 343.301 (1g) is the authority under current [2009-10] statutes. Also covered are orders issued under § 346.65(6), 1999 stats., and § 343.301(1), 2007 stats. The statute under which the order was issued should be accurately identified in the instruction. The Committee concluded that a reference to "§ 343.301" is sufficient for orders under current statutes and the 2007 statutes; for the other option, the reference should be to "§ 346.65 of the 1999 Wisconsin Statutes."

Section 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

2. This element was added to the instruction as part of the 2012 based on § 347.02(2) which provides: "No provision of this chapter requiring or prohibiting certain types of equipment on a vehicle is applicable when such vehicle is not operated upon or occupying a highway." As originally published, the element required that "the defendant operated that motor vehicle on a highway." The 2014 revision changed the element to require that the vehicle must be operated on or occupy the highway. The Committee concluded that the defendant need not be the individual who operated it.

Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

2682B FAILING TO INSTALL AN IGNITION INTERLOCK DEVICE OR VIOLATING A COURT ORDER RESTRICTING OPERATING PRIVILEGE — § 347.413

Statutory Definition of the Crime

Section 347.413(1) of the Wisconsin Statutes is violated by one who (fails to install an ignition interlock device on a motor vehicle as ordered by a court) (violates a court order restricting their operating privilege by operating a motor vehicle not equipped with an ignition interlock device)[1] and that motor vehicle is operated on or occupies a highway.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was subject to (a court order under § 343.301 requiring the installation of an ignition interlock device on a motor vehicle) (a court order under § 343.301(1g)[2] restricting their operating privilege).[3]
2. The defendant (failed to install the ignition interlock device as ordered) (violated a court order restricting their operating privilege).[4]
3. The motor vehicle (was operated on) (occupied) a highway.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 2682B was originally published in 2010 and revised in 2012 and 2014. The 2014 revision amended the third element. This revision was approved by the Committee in June 2021; it amended the first element to reflect changes made by 2017 Wisconsin Act 98.

This instruction is drafted for one of the two types of criminal violations under § 347.413, Ignition interlock device tampering; failure to install. This instruction addresses failing to have the ignition interlock device installed as ordered by the court under § 346.65 (6), 1999 stats., or § 343.301(1), 2007 stats., or § 343.301(1g), and violating a court order under § 343.301 (1g) restricting the person's operating privilege. Penalties are set forth in § 347.50.

See Wis JI Criminal 2682A for the other type of violation: removing, disconnecting, tampering with, or otherwise circumventing the operation of an ignition interlock device installed in response to the court order.

2017 Wisconsin Act 98 [effective date: December 10, 2017] amended § 347.413(1) to include individuals who "violate a court order under § 343.301 (1g) restricting the person's operating privilege."

Note: The violation addressed by this instruction only applies to vehicles registered in the convicted person's name. This is because the authority to issue an order under § 343.301(1g) applies only to "each motor vehicle for which the person's name appears on the vehicle's certificate of title or registration." If, for example, a person subject to an order is found operating a vehicle registered to his girlfriend and no interlock device has been installed on that vehicle, there is no violation of § 347.413.

1. Section 343.30(1g)(am) provides that "A court shall order one or more of the following:

> 1. That the person's operating privilege for the operation of "Class D" vehicles be restricted to operating vehicles that are equipped with an ignition interlock device and, except as provided in sub. (1m), shall order that each motor vehicle for which the person's name appears on the vehicle's certificate of title or registration be equipped with an ignition interlock device.
> 2. That the person participate in a program described in s. 165.957 or that meets the definition of a 24-7 sobriety program under 23 USC 405 (d) (7) (A) and regulations adopted thereunder. If the court enters an order under this subdivision, when the person completes or otherwise does not participate in the program, the court shall order that the person's operating privilege for the operation of "Class D" vehicles be restricted to operating vehicles

> that are equipped with an ignition interlock device, shall specify the duration of the order, shall, except as provided in sub. (1m), order that each motor vehicle for which the person's name appears on the vehicle's certificate of title or registration be equipped with an ignition interlock device, and shall notify the department of such order."

2. Wis. Stat § 343.301(1g)(am)1. requires a court to order that a person's operating privilege be restricted to operating motor vehicles that are equipped with an ignition interlock device if that person commits particular operating while intoxicated offenses. The court may specify the date by which the device must be installed, and the operating privilege restriction takes effect immediately upon the issuance of the order. The operating privilege restriction remains in place for not less than one year after the Department of Transportation issues an operator's license nor more than the maximum operating privilege revocation period after the Department issues an operator's license.

3. Section 347.413 applies to ignition interlock installation ordered under three different statutes. Section 343.301 (1g) is the authority under current [2019-20] statutes. Also covered are orders issued under § 346.65(6), 1999 stats., and § 343.301(1), 2007 stats. The statute under which the order was issued should be accurately identified in the instruction. The Committee concluded that a reference to "§ 343.301" is sufficient for orders under current statutes and the 2007 statutes; for the other option, the reference should be to "§ 346.65 of the 1999 Wisconsin Statutes."

4. The Committee did not include a mental element in the instruction – such as "intentionally" or "knowingly" failed to install the device – because the statute defining the offense does not expressly provide for a mental element. The Committee's approach, for both Criminal Code offense and offenses found outside the Criminal Code, is to include a mental element only where the statute uses one of the intent-indicating words as set forth in sec. 939.23(1). Wisconsin courts generally follow the same rule, with one notable exception. See State v. Collova, 79 Wis.2d 473, 255 N.W.2d 581 (1977), where the Wisconsin Supreme Court added a mental element for operating after revocation offenses where the statute did not include it. [Note: The statute has since been amended to add "knowingly" to the offense definition. See 1997 Wisconsin Act 84.]

5. This element was added to the instruction as part of the 2012 based on § 347.02(2) which provides: "No provision of this chapter requiring or prohibiting certain types of equipment on a vehicle is applicable when such vehicle is not operated upon or occupying a highway." As originally published, the element required that "the defendant operated that motor vehicle on a highway." The 2014 revision changed the element to require that the vehicle must be operated on or occupy the highway. The Committee concluded that the defendant need not be the individual who operated it.

Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

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2690 OPERATING A COMMERCIAL MOTOR VEHICLE WITH AN ALCOHOL CONCENTRATION OF 0.04 GRAMS OR MORE BUT LESS THAN 0.08 GRAMS — CRIMINAL OFFENSE — § 346.63(5)(a)

Statutory Definition of the Crime

Section 346.63(5)(a) of the Wisconsin Statutes is violated by one who drives or operates a commercial motor vehicle on a highway[1] while that person has an alcohol concentration of .04 or more but less than .08.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a commercial motor vehicle[2] on a highway.[3]

Definition of "Drive" or "Operate"

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][4]

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][5]

2. The defendant had an alcohol concentration of .04 or more but less than .08[6] at the time the defendant (drove) (operated) a commercial motor vehicle.

How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING 0.04 GRAMS OR MORE HAVE BEEN ADMITTED[7] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[8] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). If you are satisfied beyond a reasonable doubt that there was [.04 grams or more of alcohol in 100 milliliters of the defendant's blood] [.04 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had an alcohol concentration of .04 or more at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had an alcohol concentration of .04 or more at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[9]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing

device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2690 was originally published in 1993. This revision was approved by the Committee in August 2003.

This revision reflects the change in the prohibited alcohol concentration level for this offense from "more than 0.04 but less than 0.10" to "more than 0.04 but less than 0.08" made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

This instruction is for a criminal offense under § 346.63(5)(a), which applies if "the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals 2 . . ." Section 346.65(2j). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

First violations of the statute are forfeitures. There is not a uniform instruction for the forfeiture offense, but see Wis JI-Criminal 2660A for an instruction for a forfeiture offense involving a non-commercial motor vehicle.

The maximum penalty for this offense is doubled if there was a child under the age of 16 years in the defendant's vehicle. See § 346.65(2j)(d) and Wis JI-Criminal 999.

The constitutionality of penalizing the "status" of having a prohibited level of alcohol concentration has been upheld. State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984); State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989). Defendants may not litigate the validity of the "partition ratio" that is used to calculate the prohibited breath alcohol level. McManus, 152 Wis.2d 113, 123.

Note that § 346.63(7)(a) imposes an absolute sobriety requirement on commercial motor vehicle operators during on duty time. Violations are punished by a forfeiture of $10; any refusal to take a chemical test is a separate violation. § 346.65(2u).

The implied consent law requires that notice of commercial motor vehicle license sanctions be included in the implied consent warnings given to suspects. See § 343.305(4)(b) and (c). These warnings must be given to drivers whenever the officer knows that the suspect holds a commercial motor vehicle license. State v. Geraldson, 176 Wis.2d 487, 500 N.W.2d 415 (Ct. App. 1993). The commercial motor vehicle warnings need not to be given to suspects who are not licensed as a commercial motor vehicle operator. State v. Piskula, 168 Wis.2d 135, 483 N.W.2d 250 (Ct. App. 1992).

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. If definition of "commercial motor vehicle" is necessary, see § 340.01(8), which provides as follows:

> (8) "Commercial motor vehicle" means a motor vehicle designed or used to transport passengers or property and having one or more of the following characteristics:
> (a) The vehicle is a single vehicle with a gross vehicle weight rating of 26,001 or more pounds or the vehicle's registered weight or actual gross weight is more than 26,000 pounds.
> (b) The vehicle is a combination vehicle with a gross combination weight rating, registered weight or actual gross weight of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating, registered weight or actual gross weight of more than 10,000 pounds.
> (c) The vehicle is designed to transport or is actually transporting the driver and 15 or more passengers. If the vehicle is equipped with bench type seats intended to seat more than one person, the passenger carrying capacity shall be determined under s. 340.01(31) or, if the vehicle is a school buss, by dividing the total seating space measured in inches by 13.
> (d) The vehicle is transporting hazardous materials requiring placarding.

3. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

4. This is the definition of "drive" provided in § 346.63(3)(a).

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. Section 340.01(1v) provides that "alcohol concentration" means the number of grams of alcohol per 100 milliliters of a person's blood or the number of grams of alcohol per 210 liters of a person's breath. For this offense the prohibited range is more than 0.04 grams but less than 0.08 grams.

7. Section 885.235(1)(d) provides that test results in this range are "prima facie evidence" of an alcohol concentration of .04 or more at the time of the driving.

This instruction, therefore, advises the jury that a test result showing an alcohol concentration of .04

or more is sufficient evidence upon which to base a finding that the person had such a concentration at the time of the driving. But the jury is also advised that they are not required to make such a finding and that they may only find that the defendant had an alcohol concentration of .04 or more at the time of the driving if they are so satisfied beyond a reasonable doubt from all the evidence in the case. In the Committee's judgment, this is the type of instruction required by Wis. Stat. § 903.03.

8. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2695 OPERATING A MOTORBOAT WHILE UNDER THE INFLUENCE OF AN INTOXICANT: CRIMINAL OFFENSE — § 30.681(1)(a) and § 30.80(6)(a)2.

Statutory Definition of the Crime

Section 30.681(1)(a) of the Wisconsin Statutes is violated by one who operates a motorboat while under the influence of an intoxicant to a degree which renders that person incapable of safe motorboat operation.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motorboat.

   "Operate" means to control the speed or direction of a motorboat.[1]

   "Motorboat" means any boat equipped with propulsion machinery, whether or not the machinery is the principal source of propulsion.[2]

2. At the time the defendant operated a motorboat, the defendant was under the influence of an intoxicant to a degree which rendered (him) (her) incapable of safe motorboat operation.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a motorboat was impaired because of consumption of an alcoholic beverage.

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motorboat.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe operation. What is required is that the person's ability to safely control the motorboat be impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a motorboat is evidence of the defendant's alcohol concentration at the time of the operating.[3]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[4]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[5] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[6] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210

liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[7]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2695 was approved by the Committee in March 2012.

This instruction is drafted for second or subsequent violations of § 30.681(1)(a), which are crimes. See § 30.80(6)(a)2. As with regular operating under the influence offenses, the fact of a prior conviction is not an element of the criminal offense. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury,

and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

A first offense under § 30.681(1) is a civil forfeiture. To use this instruction for the forfeiture offense, modify the instruction by substituting "to a reasonable certainty by evidence which is clear, satisfactory, and convincing" for "beyond a reasonable doubt." It may also be necessary to change the reference from "the state" to the unit of government that is prosecuting the case. See Wis JI-Criminal 2680 for a model.

This instruction is based on a violation for operating under the influence. For violations involving a prohibited alcohol concentration under § 30.681(1)(b)1., see Wis JI-Criminal 2660 for a model. For cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of operation, see Wis JI-Criminal 2696. For violations involving a detectable amount of a restricted controlled substance under § 30.681(1)(b)1m., Wis JI-Criminal 2664B for a model.

1. This is based on the definition provided in § 30.50(8g): "'Operation of a motorboat' means controlling the speed or direction of a motorboat, except a sailboat operating under sail alone."

2. This is the definition of "motorboat" provided in § 30.50(6). Also see § 30.50(9d) which defines "personal watercraft" as a "motorboat."

3. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. The statute specifically includes offenses involving operation of a motorboat. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

4. It may be that cases will be charged under § 30.681(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

5. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

6. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

7. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

2696 OPERATING A MOTORBOAT WHILE UNDER THE INFLUENCE OF AN INTOXICANT / OPERATING A MOTORBOAT WITH A PROHIBITED ALCOHOL CONCENTRATION OF 0.08 GRAMS OR MORE — CRIMINAL CHARGE — §§ 30.681(1)(a) and 30.681(1)(b)1.

Statutory Definition of the Crime

The first count in the criminal complaint charges that the defendant operated a motorboat while under the influence of an intoxicant to a degree which renders that person incapable of safe motorboat operation in violation of § 30.681(1)(a) of the Wisconsin Statutes.

The second count in the criminal complaint charges that the defendant operated a motorboat while the defendant had a prohibited alcohol concentration in violation of § 30.681(1)(b)1. of the Wisconsin Statutes.

To these charges, the defendant has entered pleas of not guilty which means the State must prove every element of each offense charged beyond a reasonable doubt.[1]

It is for you to determine whether the defendant is guilty of one, both, or neither of the offenses charged. You must make a finding of guilty or not guilty for each offense charged.[2]

Each count charges a separate offense, and you must consider each one separately.

Definition of Count 1 – Operating Under The Influence

Section 30.681(1)(a) of the Wisconsin Statutes is violated by one who operates a motorboat while under the influence of an intoxicant to a degree which renders that person incapable of safe motorboat operation.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of Count 1 – Operating Under The Influence

1. The defendant operated a motorboat.

   "Operate" means to control the speed or direction of a motorboat.[3]

   "Motorboat" means any boat equipped with propulsion machinery, whether or not the machinery is the principal source of propulsion.[4]

2. At the time the defendant operated a motorboat, the defendant was under the influence of an intoxicant to a degree which rendered (him) (her) incapable of safe motorboat operation.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a motorboat was impaired because of consumption of an alcoholic beverage.[5]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able

to exercise the clear judgment and steady hand necessary to handle and control a motorboat.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe operation. What is required is that the person's ability to safely control the motorboat be impaired.

Definition of Count 2 – Operating With A Prohibited Alcohol Concentration

Section 30.681(1)(b)1. of the Wisconsin Statutes is violated by one who operates a motorboat with a prohibited alcohol concentration.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must satisfy you beyond a reasonable doubt that the following two elements were present.

Elements of Count 2 – Prohibited Alcohol Concentration

1. The defendant operated a motorboat.
2. The defendant had a prohibited alcohol concentration at the time the defendant operated a motorboat.

"Prohibited alcohol concentration" means[6]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a motorboat is evidence of the defendant's alcohol concentration at the time of the operating.[7]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[8]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[9] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[10] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, but you are not required to do so. You the jury are here to decide these questions on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[11]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant operated a motorboat while under the influence of an intoxicant, you should find the defendant guilty of Count 1.

If you are not so satisfied, you must find the defendant not guilty of Count 1.

If you are satisfied beyond a reasonable doubt that the defendant operated a motorboat while the defendant had a prohibited alcohol concentration, you should find the defendant guilty of Count 2.

If you are not so satisfied, you must find the defendant not guilty of Count 2.

COMMENT

Wis JI-Criminal 2696 was approved by the Committee in June 2012.

This instruction is drafted for the case where two counts based on the same incident are submitted to the jury: one alleging operating while under the influence in violation of § 30.681(1)(a); and, one alleging operating with a prohibited alcohol concentration of 0.08 or more in violation of § 30.681(1)(b)1. It is based on Wis JI-Criminal 2669 and is intended to implement the procedure set forth in § 30.681(1)(c). It attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge. This instruction is drafted for criminal charges; for two civil forfeiture offenses, see Wis JI-Criminal 2668 for a model.

The constitutionality of the two-charge procedure for operating a motor vehicle under the influence was upheld in State v. Bohacheff, 114 Wis.2d 402, 338 N.W.2d 446 (1983). The court held that the Double Jeopardy Clause is not offended because of the express limitation in § 346.63(1)(c) that there be only one conviction. Bohacheff dealt with a challenge to the criminal complaint, so it did not address the problems presented at a trial where both charges are submitted to the jury. The Committee concluded that § 346.63(1)(c) clearly suggests that both charges should be submitted and that the jury should make a finding as to each charge. If the jury returns a guilty verdict on both, judgment of conviction should be entered on the count on which the prosecutor moves for judgment. The remaining count should be dismissed. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

1. This statement is the equivalent of Wis JI-Criminal 115, One Defendant: Two Counts. If Wis JI-Criminal 115 is also given, the statement need not be repeated here.

2. This statement is the equivalent of Wis JI-Criminal 484, . . . One Defendant: Two Counts . . . If Wis JI-Criminal 484 is also given, the statement need not be repeated here.

3. This is based on the definition provided in § 30.50(8g): "'Operation of a motorboat' means controlling the speed or direction of a motorboat, except a sailboat operating under sail alone."

4. This is the definition of "motorboat" provided in § 30.50(6). Also see § 30.50(9d) which defines "personal watercraft" as a "motorboat."

5. The instruction is drafted for cases involving the influence of an intoxicant. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

6. The definitions are those provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V. Section 30.50(1g) provides that "alcohol concentration" has the meaning given in s. 340.01(1v).

7. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

8. It may be that cases will be charged under § 30.681(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

9. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

2902 OFFERING OR SELLING AN UNREGISTERED SECURITY — §§ 551.301 and 551.508

Statutory Definition of the Crime

Section 551.301 of the Wisconsin Statutes is violated by a person who willfully offers or sells any security in this state unless the security is registered or the security or transaction is exempt from registration.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The item [offered] [sold] was a security as defined by Wisconsin law.

   A [insert applicable term from § 551.102(28)] is a security.[1]

2. The defendant [offered] [sold] the security in this state.[2]

   ["Offered" includes every attempt or offer to sell or dispose of a security or interest in a security for value.][3]

   ["Sold" includes every sale, disposition or exchange, and every contract of sale of, or contract to sell, a security or interest in a security for value.][4]

3. The item [offered] [sold] was not registered under the Wisconsin Uniform Securities Law and was not exempt from registration.

If no order of registration was issued by the Commissioner of Securities for the State of Wisconsin, the security has not been registered under the Wisconsin Uniform Securities Law.

IF THERE IS EVIDENCE TENDING SHOW THE BASIS FOR AN EXEMPTION FROM REGISTRATION, THE INSTRUCTION SHOULD DEFINE THE APPLICABLE EXEMPTION – SEE §§ 551.201, 551.202, AND 551.203.[5]

4. The defendant [offered] [sold] the unregistered and non-exempt security willfully.

"Willfully" requires that the defendant knowingly committed the acts charged.

"Willfully" also requires that the defendant knew that (describe the security) was a security and knew that it was not registered and not exempt from registration.[6] Proof of intent to violate the law or knowledge that the law was being violated is not required.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING[7] IF THE DEFENDANT HAS BEEN CHARGED UNDER § 551.508(1m): THE VICTIM WAS AT LEAST 65 YEARS OF AGE WHEN THE CRIME WAS COMMITTED:

If you find the defendant guilty, you must consider the following question:

Was (name of victim) at least 65 years of age when the crime was committed?

Before you may answer the question "yes," the State must satisfy you beyond a reasonable doubt that (name of victim) was at least 65 years of age when the crime was committed.

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 2902 was originally published in 1998 and revised in 2004, 2009, and 2010. The 2009 revision reflected changes made in Chapter 551 by 2007 Wisconsin Act 196. The 2010 revision added the special question for cases involving victims over 65 years of age. The 2014 revision made a correction in footnote 1.

This instruction is for violations of § 551.301. Section 551.508 provides that persons who willfully violate the provisions of Chapter 551 are guilty of a Class H felony. 2009 Wisconsin Act 196 created § 551.508(1m) which provides for a penalty increase if the crime is committed against a person who is at least 65 years of age when the crime is committed. A special question has been added for cases where the penalty increase applies.

1. Section 551.102(28) provides an extensive definition of "security." If the item involved in the case is alleged to be an item specified in that definition, the Committee recommends that the jury simply be told, for example, that "common stock is a security." It is for the jury to determine whether the item involved in the case is in fact common stock.

Until the 2014 revision, this footnote referred to a definition of "investment contract" in the Wisconsin Administrative Code – DCF 1.02(6)(a). That definition was deleted from the Administrative Code when the securities law statutes were revised effective January 1, 2009, but the revision incorporated the equivalent of the former Code definition into the statutory definition of "security" – see

§ 551.102(208). This process is explained in State v. Hudson, 2013 WI App 120, 351 Wis.2d 73, 839 N.W.2d 147, ¶¶ 14 and 15.

In State v. Johnson, 2002 WI App 224, 257 Wis.2d 736, 652 N.W.2d 642, the court held that offers involving promises to repay loans at above market rates were offers to sell "securities." The court adopted the "family resemblance" test articulated in Reves v. Ernst & Young, 494 U.S. (1990), previously applied in State v. Mueller, 201 Wis.2d 121, 549 N.W.2d 455 (Ct. App. 1996).

In State v. LaCount, 2008 WI 59, 310 Wis.2d 85, 750 N.W.2d 780, the court held that it was not error to allow a lawyer to testify as an expert regarding what an "investment contract" is. Further, the evidence was sufficient to establish that the investment in this case was a security.

A promissory note issued to a sold investor is "security" under the securities fraud statute. State v. McGuire, 2007 WI App 139, 302 Wis.2d 688, 735 N.W.2d 555.

2. Section 551.613 describes situations that are covered by the "in this state" requirement but where not all of the aspects of the transactions or the participants are present in Wisconsin. If a particular situation raises a factual issue in the case, it may be necessary to provide instruction on that situation.

3. The definition of "offer" is based on the one provided in § 551.102(26).

"[B]y its plain terms, Wis. Stat. § 551.21(1) [now 551.301] is violated through an offer to sell an unregistered security, even if no sale actually occurs. Therefore, the issuance of a promissory note, debenture or other evidence of indebtedness containing the terms agreed upon when the loan was made is not a necessary element . . ." State v. Johnson, 2002 WI App 224, ¶11, 257 Wis.2d 736, 652 N.W.2d 642.

4. The definition of "sold" is based on the one provided in § 551.102(26).

5. Section 551.301(2) provides: "It is unlawful to offer or sell any security in state unless it is registered . . . or the security or transaction, or offer is exempted under this chapter." Section 551.201 provides an extensive list of exempt securities; section 551.202 provides an extensive list of exempt transactions, and section 551.203 refers to "additional exemptions and waivers."

Because the reference to exemption is contained in the definition of the offense, the Committee concluded that it is a fact the State must prove to support a finding of guilt. However, consistent with the general rule that is applied to exceptions in criminal statutes, proof of the absence of specific exemptions is not required until the basis therefor is raised by the evidence. See, for example, State v. Williamson, 58 Wis.2d 514, 206 N.W.2d 613 (1973), addressing § 941.23 which prohibits carrying a concealed weapon by persons other than a peace officer. Williamson has been interpreted to mean that the state need not prove that the defendant is not one of the many officials who qualify as "peace officers" until there is evidence in the case that the defendant may be one of those officials. See Wis JI-Criminal 1335.

6. The Committee carefully reconsidered the "willfully" element in 2003. The origin of the "willfully" requirement is § 551.508(1), which provides that "a person who willfully violates any provision of this chapter . . . is guilty of a Class H felony." The Committee concluded that "willfully" as applied to violations of § 551.301 required knowledge that the item was a security and knowledge that it

was not registered and not exempt. The Wisconsin Supreme Court has held that "willfully" has the same meaning as "intentionally." State v. Cissell, 127 Wis.2d 205, 211-12, 378 N.W.2d 691 (1985). Section 939.23(3) provides that, when used in the Criminal Code, "intentionally" has the following meaning:

> 'Intentionally' means that the actor either has purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'

In State v. Williams, 179 Wis.2d 80, 88-89, 505 N.W.2d 468 (Ct. App. 1993), the court cited Cissell with approval in connection with the offense of willfully making a false statement on an application for a medical assistance benefit or payment, though the court fell short of completely applying the § 939.23(3) definition to the elements of the crime.

Applying the Criminal Code definition of "intentionally" to the offense defined in § 551.301 yields the requirement that the defendant know that the item was a security and know that it was not registered and not exempt. This results in a more demanding mental state than other states require under statutes based on the same model act as Wisconsin's. While § 551.615 requires that the Wisconsin securities statutes be construed to be uniform with the law of other states that have adopted the Uniform Securities Act, the Committee concluded that in the absence of direct Wisconsin authority, the Cissell holding that "willfully" has the same meaning as "intentionally" could not be ignored.

Two Wisconsin appellate decisions have addressed the mental element required for securities fraud offenses. In State v. Ross, 2003 WI App 27, ¶27, 260 Wis.2d 291, 659 N.W.2d 122, the court of appeals affirmed a conviction based on violations of § 551.21 [now § 551.301]. The court upheld the trial court's denial of a requested instruction on the "advice of counsel" defense, holding that "Ross's specific state of mind was not relevant to any of the elements of the crimes with which he had been charged." However, the defense request was apparently not targeted to a specific knowledge requirement, since the court began the discussion with the statement that "under neither the securities fraud statutes nor WOCCA is the State required to prove that the accused acted with intent to defraud or with knowledge that the law was violated." 2003 WI App 27, ¶27.

As to violations of § 551.501, Wisconsin courts have also held that "willfully" does not require proof of intent to defraud or knowledge that the law was violated; it is sufficient that the defendant "knowingly committed the act charged." State v. Mueller, 201 Wis.2d 121, 549 N.W.2d 455 (Ct. App. 1996). See Wis JI-Criminal 2904, which is drafted for violations of § 551.501. The Committee concluded that the result in Mueller does not require a more limited mental state for violations of § 551.301. Under the Mueller decision, violations of § 551.501 still require a culpable mental state: knowingly making an untrue statement or knowingly omitting a material fact necessary to make statements made not misleading. Under § 551.301 no culpable mental state would remain if "willfully" was limited to knowingly offering or selling an item.

The 2003 revision added the sentence: "Proof of intent to violate the law or knowledge that the law was being violated is not required." This is not inconsistent with requiring knowledge that the item was an unregistered security. Under the standard in the instruction, the defendant must know that the item

was a security and that it was not registered or exempt from registration. The defendant need not intend to violate the securities law or know that it is against the law to sell or offer an unregistered security.

7. Section 551.508(1m) provides that if a securities fraud offense "is committed against another person who is at least 65 years of age when the crime is committed, . . . the maximum fine . . . may be increased by not more than $5000 and the maximum term of imprisonment . . . may be increased by not more than 5 years." Where the offense involving the penalty increase is charged, the Committee recommends that a separate question be submitted to the jury if the jury finds the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Was (name of victim) at least 65 years of age when the crime was committed?

2904 SECURITIES FRAUD: MAKING AN UNTRUE STATEMENT OF MATERIAL FACT IN CONNECTION WITH THE SALE OF A SECURITY — §§ 551.501(2) and 551.508

Statutory Definition of the Crime

Section 551.501(2) of the Wisconsin Statutes is violated by a person who willfully makes an untrue statement of material fact, or omits to state a material fact necessary to make the statements made not misleading, in connection with the offer, sale or purchase of any security in this state.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The item [offered] [sold] was a security as defined by Wisconsin law.

   A [insert applicable term from § 551.102(28)] is a security.[1]

2. The defendant [made an untrue statement of material fact] [omitted to state a material fact necessary to make the statements made not misleading] in connection with the offer, sale or purchase of a security in this state.[2]

   ["Offered" includes every attempt or offer to sell or dispose of a security or interest in a security for value.][3]

["Sold" includes every sale, disposition or exchange, and every contract of sale of, or contract to sell, a security or interest in a security for value.][4]

A fact is a "material fact" if it could be expected to influence a reasonable investor in making a decision whether to purchase an investment.[5]

[A fact is also a "material fact" if the maker of the representation knows that the investor regards the matter as important in making a decision whether to purchase an investment, even though a reasonable investor would not regard it as important.][6]

3. The defendant acted willfully.

"Wilfully" requires that the defendant knowingly [made an untrue statement of material fact] [omitted to state a material fact necessary to make the statements made not misleading] in connection with the offer, sale or purchase of a security. Proof of intent to violate the law or knowledge that the law was being violated is not required.[7]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING[8] IF THE DEFENDANT HAS BEEN CHARGED UNDER § 551.508(1m): THE VICTIM WAS AT LEAST 65 YEARS OF AGE WHEN THE CRIME WAS COMMITTED:

If you find the defendant guilty, you must consider the following question:

Was (name of victim) at least 65 years of age when the crime was committed?

Before you may answer the question "yes," the State must satisfy you beyond a reasonable doubt that (name of victim) was at least 65 years of age when the crime was committed.

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 2904 was originally published in 1998 and revised in 2004, 2009 and 2010. The 2010 revision added the special question for cases involving victims over 65 years of age. The 2014 revision made a correction in footnote 1.

This instruction is for violations of § 551.501(2). Section 551.508 provides that persons who violate the provisions of Chapter 551 are guilty of a Class H felony. 2009 Wisconsin Act 196 created § 551.508(1m) which provides for a penalty increase if the crime is committed against a person who is at least 65 years of age when the crime is committed. A special question has been added for cases where the penalty increase applies.

1. Section 551.102(28) provides an extensive definition of "security." If the item involved in the case is alleged to be an item specified in that definition, the Committee recommends that the jury simply be told, for example, that "common stock is a security." It is for the jury to determine whether the item involved in the case is in fact common stock.

Until the 2014 revision, this footnote referred to a definition of "investment contract" in the Wisconsin Administrative Code – DCF 1.02(6)(a). That definition was deleted from the Administrative Code when the securities law statutes were revised effective January 1, 2009, but the revision incorporated the equivalent of the former Code definition into the statutory definition of "security" – see § 551.102(208). This process is explained in State v. Hudson, 2013 WI App 120, 351 Wis.2d 73, 839 N.W.2d 147, ¶¶14 and 15.

In State v. Johnson, 2002 WI App 224, 257 Wis.2d 736, 652 N.W.2d 642, the court held that offers involving promises to repay loans at above market rates were offers to sell "securities." The court adopted the "family resemblance" test articulated in Reves v. Ernst & Young, 494 U.S. (1990), previously applied in State v. Mueller, 201 Wis.2d 121, 549 N.W.2d 455 (Ct. App. 1996).

In State v. LaCount, 2008 WI 59, 310 Wis.2d 85, 750 N.W.2d 780, the court held that it was not error to allow a lawyer to testify as an expert regarding what an "investment contract" is. Further, the evidence was sufficient to establish that the investment in this case was a security.

A promissory note issued to a sold investor is "security" under the securities fraud statute. State v. McGuire, 2007 WI App 139, 302 Wis.2d 688, 735 N.W.2d 555.

2. Section 551.613 describes situations that are covered by the "in this state" requirement but where not all of the aspects of the transactions or the participants are present in Wisconsin. If a particular situation raises a factual issue in the case, it may be necessary to provide instruction on that situation.

3. The definition of "offer" is based on the one provided in § 551.102(26).

4. The definition of "sale" is based on the definition of "offer to sell" provided in § 551.102(26).

5. The definition of "material fact" is based on the definition used in 23.06 Materiality, Federal Criminal Jury Instructions, Potuto, Saltzburg and Perlman (2d edition) Michie 1993. The Comment to that instruction indicates that the definition is taken from the test in SEC v. Texas Gulf Sulphur, 401 F.2d 833, 849 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969). The Texas Gulf Sulphur test is based on § 538(2)(a), Restatement of Torts 2d. The test is an objective one, asking whether a reasonable person would attach importance to a particular fact. The actual importance accorded a fact by the investor in any particular case is not determinative if the hypothetical reasonable investor would have considered the fact to be material.

This definition is consistent with the standard adopted in State v. Johnson, 2002 WI App 224, ¶21, 257 Wis.2d 736, 652 N.W.2d 642: ". . . an objective standard, wherein the fact finder assesses whether the omitted or misrepresented fact would have made a difference to a reasonable investor's decision to invest. See Ollerman v. O'Rourke Co., 94 Wis.2d 17, 42, 288 N.W.2d 95 (1980); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976)."

6. This is based on § 538 (2)(b) of the Restatement of Torts, 2d. The full text of that provision reads as follows:

(2) The matter is material if
. . .

(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

The Committee concluded this should be included in brackets in the instruction, for use in a case where it is supported by the facts.

7. The origin of the "willfully" requirement is § 551.508(1), which provides that "[a]ny person who willfully violates any provision of this chapter . . . may be fined not more than $5,000 or imprisoned not more than 5 years or both." Wisconsin courts have held that for violations of § 551.4 [now 551.501], "willfully" does not require proof of intent to defraud or knowledge that the law was violated; it is sufficient that the defendant "knowingly committed the act charged." State v. Mueller, 201 Wis.2d 121, 549 N.W.2d 455 (Ct. App. 1996).

8. Section 551.508(1m) provides that if a securities fraud offense "is committed against another person who is at least 65 years of age when the crime is committed, . . . the maximum fine . . . may be increased by not more than $5000 and the maximum term of imprisonment . . . may be increased by not more than 5 years." Where the offense involving the penalty increase is charged, the Committee recommends that a separate question be submitted to the jury if the jury finds the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Was (name of victim) at least 65 years of age when the crime was committed?

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5000 POSSESSION OF UNTAGGED DEER — § 29.40(2)

Statutory Definition of the Crime

Possession of untagged deer, as defined in § 29.347(2) of the Wisconsin Statutes, is committed by one who possesses, controls, stores, or transports a deer carcass that is not tagged as required by law.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a deer carcass.[1]

   "Possessed" means that the defendant knowingly had actual physical control of a carcass.[2]

2. The deer carcass was not tagged as required by law.

   Wisconsin law requires that any person who kills a deer shall immediately attach to the ear or antler of the deer a current validated deer carcass tag which is authorized for use on the type of deer killed.[3]

   "Validated" means marked with specified information in the manner required by the department.[4]

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5000 was originally published in 1992. This revision was approved by the Committee in December 2002 and involved adoption of a new format.

Violations of § 29.347 are punished "by a fine of not less than $1,000 nor more than $2,000 or by imprisonment for not more than 6 months or both." § 29.971(11). If a fine is imposed, "the court shall impose a natural resources assessment equal to 75% of the amount of the fine. . ." § 29.987(1)(a).

1. Section 29.001(18) provides the following definition of "carcass":

> "Carcass" means the dead body of any wild animal, including any part of the wild animal or the eggs of the wild animal.

2. This is the basic definition of "possession" provided in Wis JI-Criminal 920. See that instruction for optional paragraphs for possible use where an item is not in "the actual physical control" of the person or where possession is shared with another.

The statute applies not only to "possesses" but also to "controls, stores, or transports." The instruction does not include the other alternatives because the Committee concluded that they are covered by the more general term.

3. This standard is found in the first sentence of § 29.347(2). Exceptions to the tagging requirement are specifically set forth in the statute: "car kills" under § 29.347(5); and group hunting permits under § 29.324(3) where someone other than the killer of the deer may attach the tag.

4. This is the definition provided in § 29.347(1)(b).

5010 FAILURE TO FILE AN INDIVIDUAL[1] INCOME TAX RETURN — § 71.83(2)

Statutory Definition of the Crime

Failure to file an income tax return, as defined by § 71.83(2) of the Wisconsin Statutes, is committed by a person who is required by law to file[2] a return and who willfully fails to file a return at the time required by law.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a person required by law to file a return of (his) (her) income for the taxable year ending _____.

   A person is required to file a state income tax return for any calendar year in which the person has a gross income of _____.[3]

   The term "gross income" means all income derived from any source and in any form, whether in money, property, or services. The term "gross income" includes compensation for services, including salaries, wages and fees, commissions, and similar items.[4]

   A person is required to file a return whether or not a tax is due.

2. The defendant failed to file the return at the time required by law, which was on or before April 15, _____.[5]

Individual income tax returns are required to be filed on or before April 15 following the year of the earning of the gross income and must be filed [by mailing them to the Department of Revenue in Madison, Dane County, Wisconsin.] [in the manner specified by the Department of Revenue.[6]]

3. The defendant's failure to file the return was willful.

The failure to file a timely return is willful if the defendant knew (he) (she) was required to file and deliberately did not file a return.[7]

This does not require the State to prove that the defendant had a purpose to evade a tax or to defraud the State of Wisconsin.[8]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5010 was originally published in 1983 and revised in 1991. This revision was approved by the Committee in October 2009 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is drafted for the misdemeanor offenses of willfully failing to file an income tax return as defined in § 71.83(2)(a)1. See the text of the statute in note 1, below.

Wis JI-Criminal 5012 is drafted for the felony offense of filing a false or fraudulent return under § 71.83(2)(b).

1. This instruction is drafted for the failure to file an individual return, which is prohibited by § 71.83(2)(a)1. The statute also covers returns other than individual returns:

> (2) Criminal (a) Misdemeanor. 1. 'All persons.' If any person, including an officer of a corporation or a manager of a limited liability company required by law to make, render, sign or verify any return, willfully fails or refuses to make a return at the time required in § 71.03, 71.24, or 71.44, or willfully fails or refuses to make deposits or payments as required by § 71.65(3) or willfully renders a false or fraudulent statement required by § 71.65(1) and (2) or deposit report or withholding report required by § 71.65(3), such person shall be guilty of a misdemeanor and may be fined not more than $10,000 or imprisoned for not to exceed 9 months or both, together with the cost of prosecution.

2. Section 71.83(2)(a)1 (see note 1, above) uses the phrase "make, render, sign, or verify" a return. The Committee concluded that simply using the word "file" throughout the instruction would be easier to understand and would be legally correct – it is the failure to file when required to do so that is the essence of this offense.

3. Here specify the requirement that applies in the case. Section 71.03(2) provides:

> (2) PERSONS REQUIRED TO FILE; OTHER REQUIREMENTS. The following shall report in accordance with this section:
>
> (a) Natural persons. Except as provided in sub. (6)(b):
>
> 1. Every individual domiciled in this state during the entire taxable year who has a gross income at or above a threshold amount which shall be determined annually by the department of revenue. The threshold amounts shall be determined for categories of individuals based on filing status and age, and shall include categories for single individuals; individuals who file as a head of household; married couples who file jointly; and married persons who file separately. . .

4. This definition is adapted from the lengthy one found in § 71.03(1).

5. The usual time limit for filing an individual return will be April 15 of the year following the earning of the income which is the subject of the return – § 71.03(6)(a). However, a different limit may occasionally apply, as where an extension of time has been granted. In those cases, the correct date should be included in the instruction.

6. See s. TAX 2.08(3), Wisconsin Administrative Code.

7. This definition of "willful" was approved as a correct statement of the law in State v. Olexa, 136 Wis.2d 475, 402 N.W.2d 733 (Ct. App. 1987). The definition was developed in part by relying on United States v. Pomponio, 429 U.S. 10 (1976), where the United States Supreme Court held that under the Internal Revenue Code, "willful" was to be defined as a "voluntary, intentional violation of a known legal duty." The Pomponio definition was reapproved in United States v. Cheek, 111 S.Ct. 604 (1990).

Both Olexa and Cheek reviewed the "willful" requirement in light of "tax protester" defenses. In Olexa, the court rejected the defendant's claims that she was not required to file tax returns because she was exempt from the filing requirements, that she was not a "person," and that federal reserve notes were not income. These claims were characterized as legal interpretations "not recognized by the mistake statute as valid defenses." 136 Wis.2d 475, 485.

In Cheek, the United States Supreme Court held that it was error for the trial court to instruct the jury that in order for a good-faith belief that one is not violating the law to negate willfulness, it must be objectively reasonable. Rather, it was for the jury to decide

> . . . whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.
>
> In this case, if Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief.

Cheek rejected the claim that a good faith belief that the income tax is unconstitutional constitutes a defense. The court held that such claims are not inconsistent with the "willfulness" requirement:

> Rather, they reveal full knowledge of the provisions at issue. . . .
>
> We thus hold that in a case like this, a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness, need not be heard by the jury, and if they are, an instruction to disregard them would be proper.

In Olexa, the court held that "willful" was the equivalent of "intentionally" as defined in § 939.23(3). The court said that one of Olexa's defenses was essentially one of mistake: an honest error negativing the state of mind essential to the crime. § 939.43(1). The mistake defense does not apply to mistaken legal interpretations, such as Olexa's claim that she was not a "person" under the tax statutes.

The results in Olexa and Cheek are very close to being inconsistent – at the heart of both cases is the defendant's claimed belief that he or she was not required to file returns under the tax statutes and therefore lacked the mental element required. To the extent that the decisions are inconsistent, the rule in Olexa governs in Wisconsin. Cheek was not based on constitutional grounds; it was only interpretation of a federal statute.

For a discussion of "willful" in the context of Department of Transportation rules, see Department of Transportation v. Transportation Comm'n, 111 Wis.2d 80, 330 N.W.2d 159 (1983).

8. Intent to defraud is not an element of this offense. It is the willful failure to file that is punished, thus intent to file and pay all taxes due at some future time is not a defense.

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5012 FILING A FALSE OR FRAUDULENT RETURN — § 71.83(2)(b)

Statutory Definition of the Crime

Filing a false or fraudulent income tax return, as defined in § 71.83(2)(b) of the Wisconsin Statutes, is committed by a person who files[1] a false[2] income tax return with intent to evade[3] payment of any tax required to be paid by the law.[4]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant filed an income tax return.
2. The return filed by the defendant was false.

   False means that one or more statements in the tax return were materially untrue. The state alleges that _____.[5]
3. The defendant filed a false income tax return with intent to evade payment of income taxes.

   The term "intent to evade payment of income taxes" means that the defendant had the mental purpose to evade[6] the payment of income taxes which were due.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5012 was originally published in 1983 and revised in 1991. This revision was approved by the Committee in October 2009 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is drafted for the felony offense of filing a false or fraudulent income tax return as defined in § 71.83(2)(b)1. See the text of the statute below.

Wis JI-Criminal 5010 is drafted for the misdemeanor offense of failing to file a return under § 71.83(1)(b).

Section 71.83(2)(b)1. reads as follows:

> (b) Felony 1. 'False Income Tax Return; Fraud.' Any person, other than a corporation or limited liability company, who renders a false or fraudulent income tax return with intent to defeat or evade any assessment required by this chapter is guilty of a Class H felony and may be assessed the cost of prosecution. . . .

The statutory statement of the offense is substantially paraphrased in the first paragraph of the instruction. See notes 1 through 4, below.

1. Although § 71.83(2)(b)1. uses "renders" a return, the Committee concluded it was more clear to use "files" rather than "renders." The words have the same meaning in this context and "files" ought to be substantially less confusing to the jury.

2. The Committee concluded it was less confusing and more accurate to use "false" rather than the statutory phrase "false or fraudulent." The return must contain false statements; if it did not, it could not be "fraudulent." A false return made with intent to evade payment of taxes is a "fraudulent" return.

3. Section 71.83(2)(b)1. uses "intent to evade or defeat" while the instruction uses only "evade." The meaning of "defeat" and the sufficiency of the evidence to show "intent to defeat" is discussed in the context of civil tax "doomage" penalties in State v. Van Sustern, 154 Wis.2d 595, 453 N.W.2d 889 (1990). Also see McKinnon v. Dept. of Taxation, 261 Wis. 564, 53 N.W.2d 169 (1952).

4. The Committee believes the phrase "any tax required to be paid by the law" is the equivalent of "any assessment required by this chapter" used in § 71.83(2)(b)1.

5. Here specify the way in which the return was alleged to be false. The most common problem will be showing less gross income than was actually received. Other problems could include claiming excessive deductions, claiming tax credits to which the person was not entitled, etc.

6. See note 3, supra.

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5024 THEFT OF ANHYDROUS AMMONIA — § 101.10(3)(e)

Statutory Definition of the Crime

Section 101.10(3)(e) of the Wisconsin Statutes is violated by one who intentionally (takes) (carries away) (uses) (conceals) (retains possession of)[1] anhydrous ammonia or anhydrous ammonia equipment belonging to another, without consent and with intent to deprive the owner permanently of possession of the anhydrous ammonia or anhydrous ammonia equipment.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally took (anhydrous ammonia) (anhydrous ammonia equipment) belonging to another.

   The term "intentionally" requires that the defendant had the mental purpose to take property.[2]

   ["Anhydrous ammonia equipment" means any equipment that is used in the application of anhydrous ammonia for an agricultural purpose or that is used to store, hold, transport or transfer anhydrous ammonia.][3]

2. The owner of the (anhydrous ammonia) (anhydrous ammonia equipment) did not consent[4] to the taking.

3. The defendant knew that the owner did not consent.[5]

4. The defendant intended to deprive the owner permanently of the possession of the (anhydrous ammonia) (anhydrous ammonia equipment).

Deciding About Intent and Knowledge

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5024 was approved by the Committee in October 2002.

This instruction is for violations of § 101.10(3)(e), which was created by 2001 Wisconsin Act 3, effective date: April 18, 2001.

1. One of the five alternatives in parentheses should be selected. The rest of the instruction is drafted for a case where the act is alleged to be "takes," which, in the Committee's judgment, is the most commonly charged alternative. Note that unlike theft under § 943.20, this statute establishes separate alternatives for "takes" and "carries." Theft has "takes and carries away" as one alternative.

Selection of an alternative is base on State v. Genova, 77 Wis.2d 141, 252 N.W.2d 380 (1977), where the Wisconsin Supreme Court approved a similar construction of the theft statute. A theft charge

under § 943.20 had been dismissed on the basis that the complaint charged only that the defendant had transferred property and not that he had taken the property and transferred it. The supreme court held that the complaint had been sufficient in charging only "transfer." The statute should be read as though the following "ors" appeared in it: takes and carries away, or uses, or transfers, or conceals, or retains. A violation of the statute need not include a taking from the owner.

2. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

3. This is the definition provided in § 101.10(1)(b). "Agricultural activity" is defined in § 101.10(1)(a).

4. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

5. Knowledge that the taking was without consent is required because the definition of this offense begins with the word "intentionally." Section 939.23(3) provides that the word "intentionally" requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally'" in the statute.

6. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

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5030 SALE OF INTOXICATING LIQUORS TO A MINOR BY A TAVERN KEEPER — § 176.01(2) 1965 WIS. STATS.

5040 SALE TO OR PROCUREMENT FOR ANY MINOR OF INTOXICATING LIQUORS BY ANY PERSON — § 176.01(2) 1965 WIS. STATS.

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 5030 and 5040 were originally published in 1967. The withdrawal of the instructions was approved by the Committee in 1984. The withdrawal note was republished without change in 2009.

Wis JI-Criminal 5030 and 5040 are withdrawn because the statutes defining the offenses covered by the instructions were repealed. Chapter 79, Laws of 1981, repealed Chapter 176 of the Statutes and consolidated most alcohol beverage offenses in a new chapter of the Wisconsin Statutes, Chapter 125.

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5035 SELLING FERMENTED MALT BEVERAGE WITHOUT A LICENSE — §125.04(1)

Statutory Definition of the Crime

Section 125.04(1) of the Wisconsin Statutes makes it a crime for a person to sell a fermented malt beverage without holding the appropriate license.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Charged Crime That the State Must Prove

1. The defendant sold[1] a fermented malt beverage containing 0.5% or more of alcohol by volume.[2]
2. The defendant did not hold an appropriate license for the sale of fermented malt beverage.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5035 was originally published in 1992. This revision was approved by the Committee in April 2005 and involved adoption of a new format.

This instruction is drafted for violations of § 125.04(1), which provides as follows:

> General licensing requirements. (1) License or permit; when required. No person may sell, manufacture, rectify, brew or engage in any other activity for which this chapter provides a license, permit, or other type of authorization without holding the appropriate license, permit or authorization issued under this chapter.
> . . .

Subsection (13) provides the penalty: "Any person who violates sub. (1) may be fined not more than $10,000 or imprisoned for not more than 9 months or both."

1. "Sell" is defined in § 125.02(20) as "any transfer of alcohol beverages with consideration" and as "any transfer without consideration if knowingly made for purposes of evading the law relating to the sale of alcohol beverages. . ." The Committee concluded that a jury would be likely to understand "sell" without including the statutory definition in the instruction.

Because "sell" is broadly defined to include transfers without consideration if made with intent to evade the laws, a variety of situations could be presented that would not be adequately addressed by the instruction as drafted. Common schemes to avoid restrictions on selling beer – selling the cup, for example – would appear to be covered by broader definition of "sale." The instruction should be modified to include the statutory definition or its equivalent in such cases.

2. "Fermented malt beverage" is defined as follows in § 125.02(6):

> "Fermented malt beverages" means any beverage made by the alcohol fermentation of an infusion in potable water of barley malt and hops, with or without unmalted grains of decorticated and degerminated grains or sugar containing 0.5% or more of alcohol by volume.

The Committee concluded that defining the first element to require selling a fermented malt beverage containing 0.5% or more alcohol captured the significant aspects of the statutory definition.

5050 CAUSING INJURY OR DEATH TO AN UNDERAGE PERSON BY PROVIDING ALCOHOL BEVERAGES — § 125.075

Statutory Definition of the Crime

Section 125.075 of the Wisconsin Statutes is violated by a person who provides alcohol beverages to a person under 18 years of age and knows or should know that the person was under the legal drinking age, where the underage person (dies) (suffers great bodily harm)[1] as a result of consuming the alcohol beverages provided.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Charged Crime That the State Must Prove

1. The defendant provided alcohol beverages to (name of victim) .

   "Provided," as used here, means selling, dispensing, or giving away alcohol beverages.[2]

   "Alcohol beverages" means fermented malt beverages and intoxicating liquor.[3]

2. The defendant provided alcohol beverages to (name of victim) at a time when (name of victim) was under 18 years of age and was not accompanied by a parent.[4]

3. The defendant knew or should have known that (name of victim) was under the legal drinking age.

The legal drinking age is 21 years of age.[5]

In deciding whether the defendant knew or should have known that (name of victim) was under the legal drinking age, you should consider all the circumstances relating to the alleged providing of alcohol beverages, including any representations about age made by (name of victim).[6]

4. (Name of victim) (died) (suffered great bodily harm) as a result of consuming alcohol beverages provided by the defendant.

This requires that the consumption of such alcohol beverages was a substantial factor[7] in causing (death) (great bodily harm) to (name of victim).

("Great bodily harm" means serious bodily injury.)[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5050 was originally published in 1989 and revised in 1995 and 2005. This revision was approved by the Committee in February 2007.

This instruction is drafted for violations of § 125.075, which was created by 1987 Wisconsin Act 335 (effective date: April 28, 1988).

1. Section 125.075(2) provides that the penalty for a violation of this statute varies depending on the harm suffered by the underage person:

- if the underage person suffers great bodily harm, the defendant is guilty of a Class H felony.

- if the underage person dies, the defendant is guilty of a Class G felony.

2. The actual words used in statute are: "procures for . . . or sells, dispenses or gives away to. . . ." § 125.075(1). The instruction uses the broader term "provides," which is used in the title of the statute, and then defines it by reference to the statutory language.

3. This is the definition of "alcohol beverage" provided in § 125.02(1).

"Fermented malt beverage" is defined in § 125.02(6) as follows:

"Fermented malt beverages" means any beverage made by the alcohol fermentation of an infusion in potable water of barley malt and hops, with or without unmalted grains or decorticated and degerminated grains or sugar containing 0.5% or more of alcohol by volume.

"Intoxicating liquor" is defined in § 125.02(8) as follows:

"Intoxicating liquor" means all ardent, spirituous, distilled or vinous liquors, liquids or compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing 0.5% or more alcohol by volume, which are beverages, but does not include "fermented malt beverages."

4. Section 125.075 prohibits providing alcohol beverages "to a person under 18 years of age in violation of s. 125.07(1)(a) 1 or 2. . . ." The statutory cross-reference is to provisions prohibiting the dispensing of alcohol beverages to an "underaged person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age." Thus, it is the source of the requirement in the second element that the underaged person was not accompanied by a parent. The complete statement would be as set forth in the quotation above.

In State v. Wille, 2007 WI App 27, ___ Wis.2d ___, ___ N.W.2d ___ [No. 2005AP2839-CR, publication recommended], the court rejected the defendant's contention that § 125.075(1) applies "only when a defendant has had direct contact with a particular victim or otherwise knows of the specific victim for whom alcohol beverages are procured." ¶9. The court concluded that "a violation of § 125.075(1) is proven when a defendant is shown to have 'procure[d] alcohol beverages for . . . [one or more persons who are] under 18 years of age,' if the defendant 'knew or should have known that the underage person[s were] under the legal drinking age' and an 'underage person [who was under eighteen when provided the beverages] dies . . . as a result.'" ¶15.

5. Section 125.02(8m) provides that "'legal drinking age' means 21 years of age."

6. With respect to the "knew or should have known" requirement, § 125.075(1m) provides as follows:

> (1m) In determining under sub. (l)(a) whether a person knew or should have known that the underage person was under the legal drinking age, all relevant circumstances surrounding the procuring, selling, dispensing or giving away of the alcohol beverages may be considered, including any circumstance under pars. (a) to (d). In addition, a person has a defense to criminal liability under sub. (1) if all of the following occur:
>
> (a) The underage person falsely represents that he or she has attained the legal drinking age.
>
> (b) The underage person supports the representation under par. (a) with documentation that he or she has attained the legal drinking age.
>
> (c) The alcohol beverages are provided in good faith reliance on the underage person's representation that he or she has attained the legal drinking age.
>
> (d) The appearance of the underage person is such that an ordinary and prudent person would believe that he or she had attained the legal drinking age.

The instruction suggests a statement that calls the jury's attention to the general caveat of subsection (1m) and to the specific concern to which subsections (a) through (d) relateCrepresentations as to age made by the underage person. Because the definition of the crime includes a "knew or should have known" element, any evidence tending to show the absence of that element must be considered by the jury. In addition, a more specific defense is provided by subsections (a) through (d). If the defendant presents evidence of each of the matters set forth in subsection (a) through (d), the Committee recommends that the jury be instructed that the state must prove that the defense does not apply. This can be done by proving that any one of the four matters is not present. See City of Oshkosh v. Abitz, 187 Wis.2d 202, 522 N.W.2d 258 (Ct. App. 1994), holding that a similar provision found in § 125.07 provided "two lines of defense": introducing any evidence believed relevant to challenging the element of the offense; and, providing evidence of all four aspects of the specific defense.

7. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

The Committee has treated this offense as one involving the traditional "substantial factor" causal relationship employed for criminal offenses. However, it should be noted that § 125.075 does not directly refer to the defendant's conduct causing the harm. Rather, the statute refers to the harm occurring "as a result of consuming the alcohol beverages provided" in violation of the statute § 125.075(1)(b). Since it

is not clear whether this approach was intended to indicate a different causal requirement, the Committee concluded that the regular "substantial factor" test should be used.

This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court construed "results in" as used in § 346.17(3). The court held that the statute was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant's conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

In State v. Wille, 2007 WI App 27, ___Wis.2d ___, ___ N.W.2d ___ [No. 2005AP2839-CR, publication recommended], the court concluded that the instruction was correct in adopting the "substantial factor" standard for the cause element. ¶26. The court also concluded that the trial court did not err in denying a request to add that the death must have been a "natural and probable consequence" of the defendant's conduct. "[I]t is not an erroneous exercise of discretion for a trial court to decline to provide jurors with alternative language that communicates the same concept as other language already included in the instruction." ¶27.

8. For additional definition and discussion of "great bodily harm," see Wis JI-Criminal 914.

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5200 STORING, TREATING, TRANSPORTING, OR DISPOSING OF HAZARDOUS WASTE WITHOUT A LICENSE — § 291.97(2)(b)

Statutory Definition of the Crime

Section 291.97(2)(b) of the Wisconsin Statutes is violated by one who willfully stores, treats, transports, or disposes of any hazardous waste without a license required under section 291.23 or 291.25.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (stored) (treated) (transported) (disposed of) hazardous waste.

   (Name of substance) is a hazardous waste.[2]

   ["Stored" means the containment of hazardous waste for a temporary period in a manner that does not constitute disposal.][3]

   ["Treated" means using any method, technique or process, including neutralization, which follows generation and which is designed to change the physical, chemical or biological character or composition of any hazardous waste so as to neutralize the hazardous waste or so as to render the waste nonhazardous, safer for transport, amenable for recovery, amenable for storage or reduced in volume. It includes incineration.][4]

["Transported" means moving hazardous wastes by air, rail, highway, water or other means (except for the movement of hazardous waste within the site at which the hazardous waste is generated or within a facility that is licensed)].[5]

["Disposed of" means the discharging, depositing, injecting, dumping, spilling, leaking or placing of any hazardous waste into or on any land or water in a manner which may permit the hazardous waste or any hazardous constituent to be emitted into the air, to be discharged into any waters of the state or otherwise to enter the environment. It does not include the generation, transportation, storage or treatment of hazardous waste.][6]

2. The defendant did not have a license[7] for the (storage) (treatment) (transportation) (disposal) of hazardous waste as required by section (291.23) (291.25).

[Storage of hazardous waste at the generation site by the generator of that waste for a period less than 90 days does not require a license.][8]

[Storage of hazardous waste for a period of less than 10 days in connection with the transporting or movement of the hazardous waste does not require a license.][9]

3. The defendant (stored) (treated) (transported) (disposed of) hazardous waste willfully.

"Willfully" requires that the defendant intentionally (stored) (treated) (transported) (disposed of) hazardous waste[10] and knew that the material had the potential to be harmful to others or to the environment.[11]

[USE ANY OF THE FOLLOWING IF RAISED BY THE EVIDENCE.]

["Willfully" does not require that the defendant (knew that a license was required to carry on those activities)[12] (or) (knew that (he) (she) was violating any particular law) (or) (knew that the material was defined by law to be a hazardous waste)].[13]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5200 was originally published in 1993. This revision was approved by the Committee in October 2009 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is drafted for violations of § 291.97(2)(b), which are Class H felonies and subject to a fine of not more than $100,000. For a second or subsequent violation, the penalty increases to that for a Class F felony and a fine of not more than $150,000. § 291.97(2)(c)2.

The maximum penalties double "[i]f a person commits a violation in connection with an enterprise, as defined under s. 948.82(2)." § 291.97(2)(e). The reference is to the definition of "enterprise" in the Wisconsin Organized Crime Control Act (the Wisconsin version of the federal "RICO" statute). Note that the § 946.82(2) definition does not require that there be any illegal purpose for the enterprise.

Each day of a continuing violation constitutes a separate offense. § 291.97(2)(d).

1. This instruction is drafted for one type of violation under § 291.97(b)2. That subsection applies not only to committing a prohibited act "without a license," but also to doing so "in violation of a rule promulgated or special order, plan approval or term or condition of a license or variance issued under s. 291.23, 291.25, 291.29, 291.31 or 291.87."

2. Section 291.01(7) provides that "'hazardous waste' or 'waste' means any solid waste identified by the department as hazardous under s. 291.05(1), (2), or (4)." Section 291.05(2) requires the Department of Natural Resources to promulgate by rule a list of hazardous wastes. The administrative rules relating to hazardous wastes are contained in Wis. Adm. Code sec. NR 661. Section 661.03 provides an extensive and highly detailed definition of "hazardous waste." To summarize, something is a "hazardous waste" if it is so labelled by the rules promulgated by the Department of Natural Resources. Further, whether a substance is a "hazardous waste" is a legal conclusion which the court may pass along to the jury. Whether the substance in the case actually was the substance defined by law as a "hazardous waste" is the factual issue that the jury must determine.

3. This is based on the definition of "storage" provided in § 291.01(18).

4. This is based on the definition of "treatment" provided in § 291.01(21).

5. This is based on the definition of "transport" provided in § 291.01(20).

6. This is based on the definition of "disposal" provided in § 291.01(3).

7. As described in note 1, supra, the instruction is drafted for the "without a license" violations covered by § 291.97(2)(b)2. Section 291.27(2)(b)2. refers to acts performed "without a license required under s. 291.23 or 291.25." Section 291.23 addresses licensing for the transportation of hazardous waste; § 291.25 addresses licensing for the treatment, storage or disposal of hazardous waste.

8. Section 291.25(1).

9. Section 291.25(1).

10. The mental element required for violations of § 291.97 [then § 144.72(2)(b)] was considered by the Wisconsin Court of Appeals in State v. Fettig, 172 Wis.2d 428, 493 N.W.2d 254 (Ct. App. 1992). The court concluded that the statute

> . . . does not require proof that one who wilfully stores or disposes of hazardous wastes also must know that a license is required to carry on those activities. We hold that the word 'wilfully' reaches only to '[s]tores, treats, transports or disposes of;' consequently, the state need

prove only that any of those activities was done wilfully and that the person so acted without a license.

172 Wis.2d 428, 433.

11. This statement is based on the instruction used by the trial court in the Fettig case. See 172 Wis.2d 428, 435.

12. See State v. Fettig, note 10, supra.

13. The last two statements in brackets are based on the instruction used by the trial court in the Fettig case. See 172 Wis.2d 428, 435.

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5301 ELECTION FRAUD — UNQUALIFIED ELECTOR — §§ 12.13(1)(a) and 12.60(1)(a)

Statutory Definition of the Crime

Section 12.13(1)(a) is violated by a person who intentionally votes at any election if the person does not have the necessary elector qualifications and residence requirements.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant voted at an election.
2. The defendant did not have the necessary (elector qualifications) (residency requirements).

   In this case, it is alleged that the defendant did not (identify the qualification or requirement that the defendant allegedly lacked) .[1]
3. The defendant acted intentionally.[2]

   This requires that the defendant knew (he) (she) did not have the necessary (elector qualifications) (residency requirements).

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5301 was approved by the Committee in October 2008.

Election fraud offenses are defined in § 12.13. Penalties are set forth in § 12.60. Violations of § 12.13(1) are Class I felonies.

1. The following statutes provide general qualifications and requirements for electors: § 6.02 Qualifications, general; § 6.02 Disqualification of electors; and, § 6.10 Elector residence.

2. Sec. 12.02 Construction, provides: "In this chapter, criminal intent shall be construed in accordance with s. 939.23." As applied to this offense, the s. 939.23(3) definition of "intentionally" requires that the defendant had the mental purpose to vote and knew that he or she lacked the necessary elector qualifications or residence requirements.

6000 NOTE ON THE KNOWLEDGE REQUIREMENT IN CONTROLLED SUBSTANCE CASES

The statutes defining controlled substance offenses typically do not contain a mental element. For example, § 961.41(1) provides simply that "it is unlawful for any person to manufacture, distribute or deliver a controlled substance . . ." In interpreting these statutes, courts have held that it must be proved that persons charged "knew or believed" that the substance they delivered, manufactured, or possessed was a controlled substance. This note discusses some of the issues that arise in trying to apply this knowledge requirement.

The Source of the Knowledge Requirement

The source of the knowledge requirement in Wisconsin is State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973). The court held that under § 161.30(12)(d) (1969 Wis. Stats.) [now § 961.30(12)(d)], "the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. The 1969 statute under which Christel was charged contained no specific knowledge requirement, but the court cited two authorities in a footnote to the phrase quoted above: Wis JI-Criminal 6030 (and cases cited therein); and a federal case, Wright v. Edwards, 470 F.2d 980 (5th Cir. 1972).

Wis JI-Criminal 6030, as it existed in 1973, required that the defendant "knew or believed that the substance he possessed was (name controlled substance)." The cited authorities for this conclusion were other instructions where "possession" was an element: Wis JI-Criminal 1481 Receiving Stolen Property; and Wis JI-Criminal 1417 Possession Of A Firebomb. Note 2 to Wis JI-Criminal 1417 is especially relevant: "[The offense] . . . appears to be strict liability, but 'possession' carries with it a connotation of 'knowing or conscious possession.'"

In Wright v. Edwards, cited above, the issue was whether a state statute simply prohibiting the "possession of marijuana" included an element of criminal intent or guilty knowledge. The court held that while intent in the traditional common law sense of a guilty mind is not a constitutional requisite under a statute of this type, due process demands that the State show a specific intent to possess the prohibited substance, that is, that the act was purposely, not accidentally done.

Wisconsin cases since Christel have reaffirmed the knowledge requirement without discussing it in detail. See, for example, Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978); Kabat v. State, 76 Wis.2d 224, 251 N.W.2d 38 (1977); State v. Smallwood, 97

Wis.2d 673, 294 N.W.2d 51 (Ct. App. 1980); and, State v. Poellinger, 153 Wis.2d 493, 451 N.W.2d 752 (1990).

The Wisconsin Supreme Court revisited the issue in State v. Sartin, 200 Wis.2d 47, 546 N.W.2d 499 (1996). Sartin was a passenger in a car in which bags of cocaine and cocaine base were found. He admitted accepting money to transport the bags and knowing that what they contained was "probably illegal," but denied knowing they contained cocaine. He claimed that the trial court erred in not instructing the jury that the state must prove he knew the bags contained cocaine. The Wisconsin Supreme Court summarized the history of the knowledge requirement as described above and reaffirmed the rule expressed in the cited cases:

> . . . [t]he only knowledge that the State must prove . . . is the defendant's knowledge or belief that the substance was a controlled or prohibited substance. The State is not required to prove the defendant knew the exact nature or precise chemical name of the substance. . . The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. People v. James, 348 N.E.2d 295, 298 (Ill. App. 1976). We find that it would be unreasonable to assume that the legislature intended that the State prove that the accused knew the exact nature or chemical name of the controlled substance. 200 Wis.2d 47, 61.

The court in Sartin also addressed some of the potential problems that have been outlined in this note. See the discussion below.

Two Aspects To The Knowledge Requirement

The cases from Christel through Sartin suggest some of the potential problems that arise in trying to apply the knowledge requirement. The requirement appears to have two different aspects: 1) knowing, conscious possession as opposed to accidental, unknowing possession; and, 2) knowing the nature of the substance knowingly possessed or delivered. [This analysis, contained in an earlier version of this Note, was cited with apparent approval in State v. Sartin, 200 Wis.2d 47, 54 (at note 3), 546 N.W.2d 449 (1996).]

1) Knowing, conscious, possession or delivery

This aspect of the problem appears to be straightforward and is most clearly raised in possession cases. It may arise where the amount of substance possessed is so small that there may be doubt whether the defendant knew it was in his possession at all. The Kabat

case, cited above, is an illustration of this problem. Kabat's conviction for possession of marijuana rested on the presence of marijuana ash and residue in a pipe. The Wisconsin Supreme Court reversed the conviction on the ground that the presence of such a small amount of material was not a sufficient basis upon which to base a finding that the defendant was in "knowing possession."

[Note: Kabat does not require that there be a "usable amount" as a basis for a possession conviction. Possession of any amount is sufficient to support a conviction as long as that possession is "knowing." See Fletcher v. State, 68 Wis.2d 381, 228 N.W.2d 708 (1975), and State v. Dodd, 28 Wis.2d 643, 137 N.W.2d 465 (1965). Also see, Peasley v. State, 83 Wis.2d 224, 265 N.W.2d 506 (1978): possession of 1/3 gram of cocaine was sufficient, in light of all the evidence, to support a finding of possession with intent to deliver.]

Other examples which illustrate this aspect of the problem are the person with flakes of marijuana in a pants cuff; the person who has been set up by the concealment of narcotics in his or her clothing; or the person who has received an unsolicited and unexpected package or marijuana in the mail. It is the same issue addressed by the previously cited footnote to Wis JI-Criminal 1417: the use of the word "possession" carries with it a connotation of "knowing or conscious possession." [See Wis JI-Criminal 920 for discussion of cases reaffirming this interpretation.]

The same type of reasoning applies in delivery cases with even greater force – implicit in the word "delivery" is knowledge of the material being transferred. In the judgment of the Committee, "delivery" is used in the sense of "intentional transfer of knowing possession."

2) Knowledge of the nature of the substance (knowingly) possessed

The second aspect of the knowledge problem is more troublesome. When the defendant John Smith knows he has a substance in his pocket, what must he know about the identity of that substance? State v. Sartin, cited above, confirmed the basic rule of the Christel-Kabat-Lunde-Smallwood line of cases that defendants need not know the scientific name or the precise nature of the substance as long as they know the substance is a "controlled substance."

Unlike most definitions of terms used in the criminal law, the definition of "controlled substance" does not use general or descriptive terms. "Controlled substance" is defined in § 961.01(4) as ". . . a drug, substance or immediate precursor included in schedules I to V of subch. II." The definition simply says that a "controlled substance" is

any substance listed in the statutory schedules. Literal application of the knowledge requirement to the statutory definition would seem to require knowledge that the substance was listed in the schedules, yet few people are likely to be familiar with the complicated chemical names that appear in those schedules. And the cases (see, for example, Lunde and Smallwood, cited above) hold that knowledge of the chemical name is not required.

In many cases, there will be no dispute about the defendant's knowledge of the nature of the substance, as in cases involving sales to an undercover officer where the defendant has offered to sell a particular substance to the officer. In other cases, the State may undertake to prove the defendant knew the precise nature of the substance. In such situations, the uniform instructions provide for using the name of the substance in the instructions.

In other cases, the facts may be unclear whether the defendant knew the nature of the substance possessed or delivered. One possible case is where the defendant believes he or she possesses one substance (for example, heroin) but actually possesses another (for example, morphine). In that case, the defendant may be found guilty since both substances are controlled.

If the defendant is honestly mistaken about the controlled or illegal nature of the substance, a different result may follow. For example, where the defendant honestly believes the substance to be caffeine, not a controlled substance, and it is actually heroin, the mistake can be a defense because it negatives the state of mind required for the crime – knowledge or belief that the person possessed a controlled substance.

Knowing a Substance by a "Street Name"

Another common situation is one where the defendant knows the substance by a slang or street name and does not know its proper or chemical name. The uniform instructions provide that knowledge of the street name is sufficient if there is proof that the substance was in fact a controlled substance, that the name known to the defendant was the street name for that substance, and that the defendant did know the substance by the street name.

Mistake about the Schedule in Which a Substance Is Listed

State v. Sartin, cited above, resolved a potential problem presented by the case where the defendant believes the substance is a controlled substance, but believes it is, for example, a substance listed in Schedule IV, but it is in fact listed in Schedule I. The

schedule determines the penalty and there can be a substantial difference in the penalty between offenses involving Schedule I and Schedule IV substances. A decision of the Wisconsin Court of Appeals had suggested that where the difference in schedules results in different penalties, knowledge of the identity of the substance is required:

> Knowledge as to the exact nature or chemical name of the controlled substance is necessary only when the evidence points to substances of different schedules and penalties. State v, Smallwood, 97 Wis.2d 673, 678.

Sartin held that the quoted provision was dicta ("unnecessary to the resolution of the issue before [the court] and therefore is not binding in subsequent cases as legal precedent):

> We expressly overrule any language in Smallwood which suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

Proof of the Knowledge Element

Establishing the mental element in a controlled substance case, like proving intent in any criminal prosecution, can be difficult to accomplish without using circumstantial evidence. In cases where the mental element is disputed, all the circumstances surrounding the incident will be relevant. Section 961.41(1m) offers guidance as to the types of facts that may be present:

> Intent under this subsection [intent to manufacture, distribute or deliver] may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance or a controlled substance analog prior to and after the alleged violation.

Facts of this type may be relevant in any case where the mental element is contested.

In State v. Poellinger, 153 Wis.2d 493, 451 N.W.2d 752 (1990), the defendant was charged with possession of cocaine based on residue in the threads of the cap to a small glass vial. She maintained that she knew the vial had once contained cocaine, but thought it was empty at the time of the arrest. The court reaffirmed that the state must

prove that the defendant knew she possessed a controlled substance and found that there was a reasonable basis in the evidence for such a finding by the jury:

> The jury could reasonably infer that the defendant looked at the vial when replacing its cap, saw the white powder residue on the threads holding the cap, and therefore, knew that there was cocaine residue on the vial at the time of her arrest. Alternatively, the jury could conclude that unless one takes extraordinary measures to remove the contents of a bottle after all usable amounts are gone, some of the contents will remain behind . . . [T]he jury could reasonably infer that the defendant knew that the vial contained residual amounts of cocaine at the time of her arrest. 153 Wis.2d 493, 509.

COMMENT

Wis JI-Criminal 6000 was originally published in 1981 and revised in 1996. This revision, which involved adopting a new format, was approved by the Committee in October 2009.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996.

6001 FINDING THE AMOUNT OF CONTROLLED SUBSTANCE

ADD THE FOLLOWING TO INSTRUCTIONS FOR CASES INVOLVING THE MANUFACTURE, DISTRIBUTION, OR DELIVERY OF A CONTROLLED SUBSTANCE OR THE POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO MANUFACTURE, DISTRIBUTE, OR DELIVER, WHERE THE EVIDENCE IS SUFFICIENT TO SUPPORT A FINDING THAT THE AMOUNT POSSESSED EXCEEDED THE REQUIRED AMOUNT[1]:

If you find the defendant guilty, you must answer the following question(s)[2] "yes" or "no":

Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it,[3] more than (state amount which determines the penalty)?

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the amount was more than (state amount).

If you are not so satisfied, you must answer the question "no."

IF THERE IS A REASONABLE BASIS IN THE EVIDENCE FOR FINDING THAT A LARGER AMOUNT WAS NOT ESTABLISHED AND THAT A SMALLER AMOUNT WAS, ADD THE FOLLOWING AND REPEAT IF NECESSARY.

If you answer the first question "no," you must answer the following question "yes" or "no":

Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, more than (state amount which

determines the penalty)?[4]

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the amount was more than (state amount).

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 6001 was originally published in October 1986 and revised in 1989, 1991, 1992, 1996, 2010, and 2018. The 2010 revision adopted a new format and updated the Comment. The 2018 revision added a model for submitting more than one question regarding the amount involved. This revision was approved by the Committee in April 2022; it added to the comment.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

This instruction provides for a jury finding of the amount of controlled substance involved in offenses under Chapter 961. It is modeled after the instruction for finding value in theft cases. See Wis-JI Criminal 1441A. See Wis JI-Criminal 6001A EXAMPLE for an adaptation of this instruction for methamphetamine cases.

The penalty-depending-upon-weight provision originally applied to cocaine offenses only but was expanded to cover other substances in 1989. (See 1987 Wisconsin Act 339.) The amounts vary depending on the kind of controlled substance. Because many variables are involved, the Committee decided to revise this instruction to provide a general framework into which the proper amounts must be inserted.

The following statutes provided for penalties based on the amount of controlled substance involved: § 961.41(1), subsections (cm) through (im), for manufacture, distribution, or delivery offenses; and § 961.41(1m), subsections (cm) through (im), for offenses involving possession with intent to manufacture, distribute, or deliver. Under each statute, the subsections deal with the same substances: (cm) cocaine and cocaine base; (d) heroin; (dm) fentanyl, a fentanyl analog; (e) phencyclidine, amphetamine, methamphetamine, et al.; (em) synthetic cannabinoids; (f) lysergic acid diethylamide; (g) psilocin or psilocybin; (h) tetrahydrocannabinols; (hm) certain other Schedule 1 controlled substances and ketamine; and, (im) flunitrazepam.

Sections 961.41(1)(h) and (1m)(h) include penalty grades based on the number of plants containing tetrahydrocannabinols possessed. In such cases, the reference in the question would have to be changed to refer to the number of plants rather than the "amount of" substance.

The Committee suggests the following as an addition to the guilty verdict form:

(Answer the following "yes" or "no"):

Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, more than (state amount which determines the penalty)?

1. The Committee concluded that it was preferable to state the question in terms of whether the required amount is present rather than to ask the jury to agree on a specific amount. Requiring agreement might cause a delay in reaching a verdict that is not related to any essential issue.

The Committee also concluded that it is not necessary to include the upper threshold – e.g., "but not more than 10 grams" – to avoid unnecessary jury debate about whether or not the upper threshold was exceeded.

2. It may be appropriate to submit more than one question if there is a reasonable basis for finding that a larger amount was not established and that a smaller amount was established (as in a lesser included offense situation).

3. With regard to determining the amount of the controlled substance, § 961.41(1r) provides as follows:

> 961.41(1r) In determining amounts under . . . subs. (1) and (1m), an amount includes the weight of the [controlled substance or controlled substance analog] . . . together with any compound, mixture, diluent, plant material, or other substance mixed or combined with the controlled substance or controlled substance analog.

In Chapman v. United States, 500 U.S. 453 (1991), the United States Supreme Court reviewed federal sentencing provisions that are similar to § 961.41(1r) in including the weight of material mixed or combined with the controlled substance. The Court held that the sentencing provisions were constitutional in the context of a case where the weight of the blotter paper containing LSD, not the weight of the pure LSD alone, was used to determine the amount for sentencing purposes.

"Stems or branches supporting the marijuana leaves or buds . . . are not excluded as 'mature stalks'" under the definition of "controlled substance" in § 961.01(14). State v. Martinez, 210 Wis.2d 396, 412 13, 563 N.W.2d 922 (Ct. App. 1997).

4. If the case involves possession with intent to manufacture or deliver, the Committee recommends restating this sentence as follows: "Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, possessed with intent to (manufacture) (deliver) more than _____?" The purpose is to avoid any argument that the necessary amount was simply possessed as opposed to being possessed with intent to deliver. Simple possession is not subject to the added penalties addressed by this instruction.

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6001A EXAMPLE FINDING THE AMOUNT OF CONTROLLED SUBSTANCE IN A METHAMPHETAMINE CASE

ADD THE FOLLOWING TO INSTRUCTIONS FOR CASES INVOLVING THE MANUFACTURE, DISTRIBUTION, OR DELIVERY OF METHAMPHETAMINE OR THE POSSESSION OF METHAMPHETAMINE WITH INTENT TO MANUFACTURE, DISTRIBUTE, OR DELIVER,[1] WHERE THE EVIDENCE IS SUFFICIENT TO SUPPORT A FINDING THAT THE AMOUNT POSSESSED EXCEEDED THE REQUIRED AMOUNT:

If you find the defendant guilty, you must answer the following question "yes" or "no":

Was the amount of methamphetamine, including the weight of any other substance or material mixed or combined with it, more than 50 grams?

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the amount was more than 50 grams.

If you are not so satisfied, you must answer the question "no."

IF THERE IS A REASONABLE BASIS IN THE EVIDENCE FOR FINDING THAT THE LARGER AMOUNT WAS NOT ESTABLISHED AND THAT A SMALLER AMOUNT WAS, ADD THE FOLLOWING.

If you answer the first question "no," you must answer the following question "yes" or "no":

Was the amount of methamphetamine, including the weight of any other substance or material mixed or combined with it, more than 10 grams?

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the amount was more than 10 grams.

If you are not so satisfied, you must answer the question "no."

IF THERE IS A REASONABLE BASIS IN THE EVIDENCE FOR FINDING THAT THE LARGER AMOUNT WAS NOT ESTABLISHED AND THAT A SMALLER AMOUNT WAS, ADD THE FOLLOWING.

If you answer the second question "no," you must answer the following question "yes" or "no":

Was the amount of methamphetamine, including the weight of any other substance or material mixed or combined with it, more than 3 grams?

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the amount was more than 3 grams.

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 6001A was approved by the Committee in April 2018; it provides an example for how Wis JI-Criminal 6001 would be adapted for a methamphetamine case.

Penalties for manufacture, distribution, or delivery of methamphetamine are found in § 161.41(1)(e):

- three grams or less – Class F felony
- more than 3 grams but not more than 10 – Class E felony
- more than 10 grams but not more than 50 – Class D felony
- more than 50 grams – Class C felony

The questions in this instruction begin with the highest amount and then work down, in a lesser included offense type of approach. The Committee concluded that a question about the amount is not required for the "3 grams or less" case – the offense instruction will have required that some amount of methamphetamine was involved. The Committee also concluded that it is not necessary to include the upper threshold – e.g., "but not more than 10 grams" – to avoid unnecessary jury debate about whether or not the upper threshold was exceeded.

For commentary and footnotes relating to finding the amount in controlled substance cases, see Wis JI-Criminal 6001.

1. If the case involves possession with intent to manufacture or deliver, the Committee recommends restating this sentence as follows: "Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, possessed with intent to (manufacture) (deliver) more than _____?" The purpose is to avoid any argument that the necessary amount was simply possessed as opposed to being possessed with intent to deliver or manufacture. Simple possession is not subject to the added penalties addressed by this instruction.

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6002 DELIVERING A CONTROLLED SUBSTANCE TO A MINOR — § 961.46

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information alleges not only that the defendant delivered[1] (name controlled substance) [2] but also that the defendant was 17 years of age or over and delivered[3] (name controlled substance) to a person who was 17 years of age or under and who was three years younger than the defendant.

If you find the defendant guilty, you must answer the following three questions:[4]

"Was the defendant 17 years of age or over at the time of the delivery?"

"Did the defendant deliver (name controlled substance) to a person who was 17 years of age or under?"

"Was that person at least three years[5] younger than the defendant?"

Before you may answer a question "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied as to any question, you must answer that question "no."

COMMENT

Wis JI-Criminal 6002 was originally published in 1991 and revised in 1996. This revision was approved by the Committee in February 2003 and involved adding reference to 2001 Wisconsin Act 109 to the comment.

Section 961.46 was revised by 2001 Wisconsin Act 109, effective date: February 1, 2003. The penalty-increasing provision was simplified to provide for an increase in the applicable maximum term of imprisonment of not more than 5 years.

1. Section 961.46 provides increased penalties for "violations of § 961.41(1)" which involve delivering or distributing a controlled substance to a child. Section 961.41(1) prohibits delivering, distributing or manufacturing a controlled substance. The instruction is drafted for cases involving delivery. "Distributing" means "delivery", see note 3, below. "Manufacturing" alone is not enough; the penalty increase applies only where there is delivery or distribution.

2. The Committee suggests naming the controlled substance throughout the instruction. The jury will only be considering this special question if they have found the defendant guilty of an offense involving the named substance. It is the nature of the substance that determines the applicable penalty, and it is that penalty which is increased by the facts addressed by this instruction. Section 961.46 also applies to delivery of a "controlled substance analog." For cases involving "analogs," see Wis JI-Criminal 6005.

3. Section 961.46 refers to "distributing or delivering" a controlled substance to a child. The instruction uses "deliver" instead because the Committee concluded that most cases were likely to involve a delivery. Further, § 961.01(9) defines "distribute" as follows: "to deliver other than by administering or dispensing a controlled substance." "Administer" and "dispense" are defined in §§ 961.01(1) and (7), respectively, to refer to activities of "practitioners," further defined in § 961.01(19) as doctors, pharmacists, etc. Thus, "distribute" means "deliver."

4. The Committee recommends that facts which increase the range of penalties be submitted to the jury in the form of three questions. The following form is suggested for the guilty verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.
>
> If you find the defendant guilty, answer the following questions "yes" or "no":
>
> "Was the defendant 17 years of age or over at the time of the delivery?"
>
> "Did the defendant deliver <u>(name controlled substance)</u> to a person who was 17 years of age or under?"
>
> "Was that person at least three years younger than the defendant?"

5. The Committee concluded that "three years" refers to a period of 36 months.

6003 DELIVERING A CONTROLLED SUBSTANCE TO A PRISONER — § 961.465

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information alleges not only that the defendant delivered[1] (name controlled substance) [2] but also that the defendant delivered[3] (name controlled substance) to a prisoner.

If you find the defendant guilty, you must answer the following question:[4]

"Did the defendant deliver (name controlled substance) to a prisoner [within the precincts of a (prison) (jail) (house of correction)]?"[5]

ADD THE FOLLOWING ONLY IF "PRECINCTS" ARE INVOLVED:

["Precinct" means a place where any activity is conducted by a (prison) (jail) (house of correction).][6]

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant delivered (name controlled substance) to a prisoner[7] [within the precincts of a (prison) (jail) (house of correction)].

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 6003 was originally published in 1990 and revised in 1996. This revision was approved by the Committee in February 2003.

Section 961.465 was repealed by 2001 Wisconsin Act 109, effective February 1, 2003. Wis JI-Criminal 6003 is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by § 961.465 have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(8).

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

Section 961.465 provides for increased penalties for a "person who violates § 961.41(1) or (1m) by delivering or possessing with intent to deliver or distribute a controlled substance or controlled substance analog to a prisoner within the precincts of any prison, jail, or house of correction." § 961.465(1). Subsection (2) of § 961.465 doubles the "applicable minimum and maximum fines and minimum and maximum periods of imprisonment" for violations of § 961.41(1) or (1m) involving "cocaine, cocaine base, heroin, phencyclidine, lysergic acid diethylamide, psilocin, psilocybin, amphetamine, methamphetamine, methalinone, or any form of tetrahydrocannabinols." Subsection (1) applies the regular fine and doubles the possible maximum term of imprisonment for offenses involving any other controlled substance or analog not specified in subsection (2).

Both subsections apply to violations of § 961.41(1) and (1m). Section 961.41(1) applies to the manufacture, distribution, or delivery of a controlled substance. See Wis JI-Criminal 6020 and 6021. Section 961.41(1m) applies to possession of a controlled substance with intent to manufacture, distribute, or deliver. See Wis JI-Criminal 6035 and 6036. Both subsections of § 961.465 also apply to violations accomplished by delivering or distributing a controlled substance to a prisoner or by possessing a controlled substance with intent to deliver or distribute to a prisoner.

1. The underlying offense can be a violation of either § 961.41(1) – manufacture, distribution, or delivery of a controlled substance – or § 961.41(1m) – possession of a controlled substance with intent to deliver, distribute, or manufacture. This instruction uses "delivery"; it would need to be changed if one of the other alternatives was the basis for the underlying charge.

2. The Committee suggests naming the controlled substance throughout the instruction. The jury will only be considering this special question if they have found the defendant guilty of an offense involving the named substance. It is the nature of the substance that determines the applicable penalty and it is that penalty which is increased by the facts addressed by this instruction.

3. This instruction is drafted for a case where there was an actual delivery of a controlled substance to a prisoner. The statute also applies, however, to possession of a controlled substance with intent to deliver or distribute to a prisoner. See the comment preceding note 1, supra.

4. The Committee recommends that facts which increase the range of penalties be submitted to the jury in the form of a special question. The following form is suggested for the guilty verdict:

> We, the jury, find the defendant guilty of _____ , under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant deliver (name controlled substance) to a prisoner [within the precincts of a (prison) (jail) (house of correction)]?"

5. The Committee suggests including the reference to "precincts" only where the case involves an alleged delivery outside the prison or jail proper.

6. This is the definition of "precincts" provided by § 961.465(3). Also see State v. Cummings, 153 Wis.2d 603, 451 N.W.2d 463 (Ct. App. 1989), where the court invoked the precinct rationale in the case of a prisoner who was receiving medical treatment in a hospital outside the prison.

7. If a definition of "prisoner" is needed, the Committee suggests the following which is adapted from the one used in Wis JI-Criminal 1222: "A prisoner is one who is confined to a (prison) (jail) (house of correction) as a result of a violation of law." It is based on the discussion in State v. Brill, 1 Wis.2d 288, 83 N.W.2d 721 (1957), cited with approval in In Interest of C.D.M., 125 Wis.2d 170, 370 N.W.2d 287 (Ct. App. 1985). Also see note 1, Wis JI-Criminal 1222. The term "prisoner" is also defined in § 46.011(2) for purposes of chapters 46 to 51, 55, and 58, and in § 301.01(2) for purposes of chapters 301 to 304.

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6004 DELIVERING A CONTROLLED SUBSTANCE ON OR NEAR CERTAIN PREMISES — § 961.49

[THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.]

The information alleges not only that the defendant delivered[1] (name controlled substance) [2] but also that the defendant delivered[3] (name controlled substance) while (on) (within 1,000 feet of) school premises.[4]

If you find the defendant guilty, you must answer the following question:[5]

"Did the defendant deliver (name controlled substance) while (on) (within 1,000 feet of) school premises?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the defendant delivered (name controlled substance) while (on) (within 1,000 feet of) school premises.

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 6004 was originally published in December 1990 and revised in 1995, 1996, and 1999. This revision was approved by the Committee in August 2002. It updated the Comment and made editorial changes in the text.

Section 961.49 was amended by 2001 Wisconsin Act 109, but its basic penalty-enhancing provision was retained.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

This instruction is for cases involving § 961.49, which provides for an increase of up to five years in the term of imprisonment for certain controlled substance offenses. It applies to violations of § 961.41(1) and (1m) committed "on or otherwise within 1,000 feet" of certain premises. Schools are the premises

most commonly involved, but see note 4, below. Because the statute provides an enhanced penalty upon the finding of an additional fact, the Committee concluded that the additional fact is to be submitted to the jury. This is the same approach used for other penalty enhancers, see Wis JI-Criminal 990, Using a Dangerous Weapon, and Wis JI-Criminal 994, Concealing Identity.

Subsections (2) and (3) of § 961.49, which provided for sentences for "presumptive minimum" sentences were repealed by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

Section 961.495 applies to simple possession offenses committed within 1,000 feet of the same types of premises covered by § 961.49. It requires the sentencing court to impose 100 hours of community service work in addition to any other penalties imposed. This does not affect the penalty range and therefore does not present a factual issue for the jury.

In State v. Hermann, 164 Wis.2d 269, 474 N.W.2d 906 (Ct. App. 1991), the court refused to interpret the statute to include a mental element. That is, there is no requirement, express or implied, that the defendant know that the delivery is taking place within 1,000 feet of a school. The Hermann court also rejected a variety of constitutionally-based challenges to the statute.

The application of § 161.49 was discussed in State v. Rasmussen, 195 Wis.2d 109, 536 N.W.2d 106 (Ct. App. 1995). Rasmussen's vehicle was stopped for a traffic violation beyond the 1,000 foot zone, and a search disclosed 59 grams of cocaine in the defendant's purse. The trial court dismissed the enhancement provision, finding that the defendant was simply traveling between a tavern and her house when she passed within 1,000 feet of a school. The court of appeals reversed, holding that the evidence was sufficient to show that the defendant possessed cocaine with the intent to deliver and did so within the 1,000 foot zone; that is all that is required to support the application of § 161.49 (now §§ 961.49).

1. The underlying offense can be a violation of either § 961.41(1) – manufacture or delivery of a controlled substance – or § 961.41(1m) – possession of a controlled substance with intent to deliver or manufacture. This instruction uses "delivery"; it would need to be changed if one of the other alternatives was the basis for the underlying charge.

2. The Committee suggests naming the controlled substance throughout the instruction. The jury will only be considering this special question if they have found the defendant guilty of an offense involving the named substance. It is the nature of the substance that determines the applicable penalty, and it is that penalty which is increased by the facts addressed by this instruction.

3. This instruction is drafted for a case where there was an actual delivery of a controlled substance within 1,000 feet of the designated premises. The statute also applies, however, to possession of a controlled substance with intent to deliver. See the comment preceding note 1, supra.

4. The instruction is drafted for a case involving delivery "on or within 1,000 feet of school premises." This type of place is one of several covered by § 961.49. The list of premises in § 961.49(1) was amended by 1997 Wisconsin Act 327 [effective date: July 15, 1998] to read as follows:

(a) While the person is in or on the premises of a scattered-site public housing project.
(b) While the person is in or on or otherwise within 1,000 feet of a any of the following:

1. A state, county, city, village or town park.

2. A jail or correctional facility.
3. A multiunit public housing project.
4. A swimming pool open to members of the public.
5. A youth center or a community center.
6. Any private or public school premises.
7. A school bus, as defined in s. 340.01(56).

(c) While the person is in or on the premises of an approved treatment facility, as defined in s. 51.01(2), that provides alcohol and other drug abuse treatment.
(d) While the person is within 1,000 feet of the premises of an approved treatment facility, as defined in s. 51.01(2), that provides alcohol and other drug abuse treatment, if the person knows or should have known that he or she is within 1,000 feet of the premises of the facility or if the facility is readily recognizable as a facility that provides alcohol and other drug abuse treatment.

"School" is not specially defined for purposes of § 961.49. In State v. Andrews, 171 Wis.2d 217, 491 N.W.2d 504 (Ct. App. 1992), the court referred to § 115.01 for a definition of "public school" and to § 118.165(1) for a definition of "private school." The court held that "a University of Wisconsin campus, such as at Oshkosh, does not fit either definition." 171 Wis.2d 217, 223. The court noted that 21 U.S.C. § 860 apparently served as a model for § 961.49. While the federal statute explicitly refers to colleges and universities, the Wisconsin counterpart does not. The court "presume[d] the difference in language reflects a deliberate choice. . . ." 171 Wis.2d 217, 224.

In State v. Hall, 196 Wis.2d 850, 540 N.W.2d 219 (Ct. App. 1995), the court held that the use of the word "premises" in § 961.49 does not make the statute unconstitutionally vague. The court concluded "that the statute provides fair warning that the region contemplated by the statute begins at the property line." 196 Wis.2d 850, 872-73.

A "daycare center" is a type of "youth center" to which § 961.49 applies. State v. Van Riper, 222 Wis.2d 197, 198, 586 N.W.2d 198 (Ct. App. 1998).

5. The Committee recommends that facts which increase the range of penalties be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant deliver (name controlled substance) while (on) (within 1,000 feet of) school premises?"

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6005 CONTROLLED SUBSTANCE ANALOG — § 961.01(4m)

[INSERT THE FOLLOWING IN INSTRUCTIONS FOR VIOLATIONS OF CHAPTER 961 INVOLVING "CONTROLLED SUBSTANCE ANALOGS."]

"Controlled substance analog" is a substance with a chemical structure substantially similar to[1] (name controlled substance included in Schedule I or II) [2] and

[which has a (stimulant), (depressant), (narcotic) (or) (hallucinogenic)[3] effect on the central nervous system substantially similar to the effect[4] of (name controlled substance included in schedule I or II)];[5] [or]

[which the defendant[6] represents or intends to have a (stimulant), (depressant), (narcotic) (or) (hallucinogenic)[7] effect on the central nervous system substantially similar to the effect of (name controlled substance included in schedule I or II)].[8]

COMMENT

Wis JI-Criminal 6005 was originally published in 1996. This revision adopted a new format and was approved by the Committee in October 2009.

The definition provided here for "controlled substance analog" is based on the one provided in § 961.01(4m)(a). The statute was created by 1995 Wisconsin Act 448 [effective date: July 9, 1996] which also renumbered Chapter 161 to Chapter 961 and extended all controlled substance violations to include "controlled substance analogs."

See Wis JI-Criminal 6020A for an example instruction building in the definition of "controlled substance analog." Note that other changes were necessary in the text of the instruction.

The statutory definition of "controlled substance analog" requires that the analog have a substantially similar chemical structure and that the analog either have a substantially similar effect or that the defendant intend or represent that it have a substantially similar effect.

The complete definition of § 961.01(4m) reads as follows:

> (a) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance included in schedule I or II and:

1. Which has a stimulant, depressant, narcotic, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, narcotic, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule I or II; or

2. With respect to a particular individual, which the individual represents or intends to have a stimulant, depressant, narcotic or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, narcotic, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule I or II.

(b) "Controlled substance analog" does not include:

1. A controlled substance.

2. A substance for which there is an approved new drug application;

3. A substance with respect to which an exemption is in effect for investigational use by a particular person under 21 USC 355 to the extent that conduct with respect to the substance is permitted by the exemption; or

4. Any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance.

The Committee concluded that it was necessary to try to simplify this lengthy definition. See notes 1-8, below.

1. The instruction substitutes ". . . is a substance with a chemical structure substantially similar to . . ." for the statute's ". . . means a substance the chemical structure of which is substantially similar to the chemical structure of . . ." No change of meaning is intended.

2. The Committee recommends using the name of the controlled substance which the analog resembles, assuring that the controlled substance appears in Schedule I or II. Schedule I is found in § 961.14; Schedule II is found in § 961.16. With a name inserted, the first part of the definition would read as follows: "Controlled substance analog" is a substance with a chemical structure substantially similar to cocaine."

3. The Committee recommends selecting the effect or effects supported by the evidence. More than one effect may apply, but it appeared to be unlikely that all alternative would be applicable to a single substance.

4. The instruction uses "similar to the effect of" in place of the statute's "similar to the stimulant, depressant, narcotic or hallucinogenic effect on the central nervous system of." No change of meaning is intended.

5. See note 2, supra.

6. The instruction substitutes the term "defendant" for the following phrase in the statute: "with respect to a particular individual, the individual . . ." The Committee reads the statutory definition as requiring either that the analog have a substantially similar effect or that the defendant represent or intend that the analog have a substantially similar effect. Some repetition in the statutory definition was also eliminated. See note 1, supra.

7. See note 3, supra.

8. See note 2, supra.

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6009 POSSESSION OF A CONTROLLED SUBSTANCE WITHOUT TAX STAMP — § 139.95(2)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 6009 was originally published in 1982 and revised in 1996 and 2009. It was withdrawn in 2018.

This instructions was withdrawn because Subchapter IV of chapter 139 was repealed – 2015 Wisconsin Act 193. The effective date of the repeal is March 2, 2016.

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6020 DELIVERY OF A CONTROLLED SUBSTANCE — § 961.41(1)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to deliver[1] a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant delivered a substance.

   "Deliver" means to transfer or attempt to transfer something from one person to another.[2]

2. The substance was (name controlled substance).[3] (Name controlled substance) is a controlled substance whose delivery is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the delivery of which is prohibited by law.][4]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt

that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

Deciding About Knowledge or Belief

You cannot look into a person's mind to find knowledge or belief. Knowledge or belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6020 was originally published in 1981 and revised in 1990, 1992, 1996, 1999, 2010, and 2018. This revision was approved by the Committee in December 2023; it added to the comment.

The penalty for offenses involving the delivery of a controlled substance depends on the amount involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

The 1996 revision addressed changes made by 1995 Wisconsin Act 448. [Effective date: July 9, 1996.] The primary changes were:

(1) renumbering the statute to § 961.41;
(2) adding "distributing" to the prohibited conduct; and
(3) extending the coverage of the statute to "controlled substance analogs."

The instruction continues to refer only to "deliver" because that term seems to include "distribute" as well. "Distribute" is defined in § 961.01(9) as "to deliver other than by administering or dispensing . . ." For

offenses involving "manufacture" see Wis JI-Criminal 6021. For offenses involving a "controlled substance analog," see Wis JI-Criminal 6020A and 6005.

It might be assumed the possession of a controlled substance is a lesser included offense of delivery of a controlled substance, but this may not be the case. In State v. Clemons, 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991), the court held that possession of a controlled substance is not a lesser included offense of reckless homicide as defined in § 940.02(2)(a). That homicide offense requires that the defendant "cause the death of another . . . by manufacture, distribution, or delivery of a controlled substance in violation of § 961.41. . . ." (Wis JI-Criminal 1021.) The Clemons court held that the strict statutory elements test for lesser included offenses was not satisfied because one can "deliver" without "possession," as where a doctor provides drugs to a person by writing an illegitimate prescription. 164 Wis.2d 506, 512. Apparently the same conclusion should apply to the delivery offense defined by this instruction.

1. Section 961.41(1) prohibits the delivery, distribution, or manufacture of a controlled substance. The instruction continues to refer only to "deliver" because that term seems to include "distribute" as well. "Distribute" is defined in § 961.01(9) as "to deliver other than by administering or dispensing . . ." For offenses involving "manufacture" see Wis JI-Criminal 6021. The penalty for the offense depends on the nature of the substance; see subsections (a)-(j) of § 961.41(1).

2. This definition was adapted from that found in § 961.01(6), which reads as follows:

> "Deliver" or "delivery," unless the context otherwise requires, means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

3. The instruction has been drafted to provide for the insertion of the specific name of the substance. The Committee concluded that it adds clarity to use the name of the alleged substance from this point on in the instruction. Whether the substance actually is the substance named and whether the defendant actually delivered the substance remain questions for the jury. The identity of a controlled substance may be proved without an expert, by circumstantial evidence. State v. Anderson, 176 Wis.2d 196, 500 N.W.2d 328 (Ct. App. 1993).

4. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not

necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance."This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

6020A DELIVERY OF A CONTROLLED SUBSTANCE ANALOG — § 961.41(1); 961.01(4m)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to deliver a controlled substance analog.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant delivered a substance.

   "Deliver" means to transfer or attempt to transfer something from one person to another.[1]

2. The substance was a controlled substance analog.

   [USE THE PARTS OF THE FOLLOWING DEFINITION THAT APPLY][2]

   "Controlled substance analog" is a substance with a chemical structure substantially similar to (name controlled substance included in Schedule I or II) [3] and

   [which has a (stimulant) (depressant) (narcotic) (or) (hallucinogenic) effect on the central nervous system substantially similar to the effect of (name controlled substance included in schedule I or II)];[4] [or]

[which the defendant represents or intends to have a (stimulant) (depressant) (narcotic) (or) (hallucinogenic) effect on the central nervous system substantially similar to the effect of (name controlled substance included in schedule I or II)].[5]

3. The defendant knew or believed that the substance was a controlled substance analog.[6]

This requires two things: first, that the defendant knew or believed that the chemical structure of the substance was substantially similar to (name controlled substance) ; and, second that the defendant knew or believed that the (stimulant) (depressant) (narcotic) (or) (hallucinogenic) effect of the substance was substantially similar to the effect of (name controlled substance) .]

Deciding About Knowledge or Belief

You cannot look into a person's mind to find knowledge or belief. Knowledge or belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6020A was originally published in 1996 and revised in 2010. This revision was approved by the Committee in April 2018; it added a cross reference to Wis JI-Criminal 6001 to the Comment.

The penalty for offenses involving the delivery of a controlled substance analog depends on the amount involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

1995 Wisconsin Act 448 [effective date: July 9, 1996] extended all controlled substance violations to include "controlled substance analogs." [Act 448 also renumbered Chapter 161 to Chapter 961.]

A separate instruction defining "controlled substance analogs" is provided at Wis JI-Criminal 6005. This instruction is a revision of Wis JI-Criminal 6020 to apply to an offense involving a controlled substance analog. Accomplishing this revision required more than a mechanical substitution of "controlled substance analog" for references to "a controlled substance," so the Committee concluded it was advisable to publish this as a model.

At least one important substantive question was raised: Since regular controlled substance offenses require knowledge that the substance is a controlled substance, does the analog offense require knowledge that the substance is a controlled substance analog? The Committee concluded that a knowledge element should be required and therefore is included as the third element.

1. This definition was adapted from that found in § 961.01(6), which reads as follows:

> "Deliver" or "delivery," unless the context otherwise requires, means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

2. The text that follows is that of Wis JI-Criminal 6005. See that instruction for footnotes explaining the Committee's approach to the extensive statutory definition.

3. The Committee recommends using the name of the controlled substance which the analog resembles, assuring that the controlled substance appears in Schedule I or II. Schedule I is found in § 961.14; Schedule II is found in § 961.16. With a name inserted, the first part of the definition would read as follows: "Controlled substance analog" is a substance with a chemical structure substantially similar to cocaine."

4. See note 3, supra.

5. See note 3, supra.

6. The Committee concluded that since regular controlled substance offenses require a knowledge element, a similar element should be included here. See Wis JI-Criminal 6000 for a discussion of the knowledge element for regular controlled substance offenses. This instruction relates the knowledge element to one of the alternatives provided in the "controlled substance analog" definition: knowledge that the chemical structure is substantially similar and knowledge that the effect on the central nervous system is substantially similar. The former is always required; the latter can be replaced by the defendant representing or intending that the effect on the nervous system be substantially similar. If the latter alternative is used, no additional knowledge element appears to be required; it would be subsumed by the

requirement that the defendant represent or intend that it have a similar effect on the central nervous system.

6021 MANUFACTURE OF A CONTROLLED SUBSTANCE — § 961.41(1)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to manufacture a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant manufactured a substance.[1]

   "Manufacture" means to produce[2] a substance.

2. The substance was (name controlled substance).[3] (Name controlled substance) is a controlled substance whose manufacture is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][4]

   IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, ADD THE FOLLOWING PARAGRAPH:

   [This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the

defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

Deciding About Knowledge or Belief

You cannot look into a person's mind to determine knowledge or belief. Knowledge or belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge or belief.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6021 was originally published in 1985 and revised in 1989, 1994, 1996, 2001 and 2010. This revision was approved by the Committee in December 2023; it added to the comment.

The penalty for offenses involving the manufacture of a controlled substance depend on the amount of substance involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

1. The instruction is drafted for what the Committee believes will be the most typical case – one that involves the manufacture of a substance. However, in State ex rel. Bell v. Columbia County, 82 Wis.2d 401, 263 N.W.2d 162 (1978), the supreme court held that it is the act of manufacturing that is prohibited; the state need not allege or prove that a controlled substance was actually manufactured or that the defendant possessed a manufactured controlled substance. Bell involved a challenge to the sufficiency of a complaint charging manufacture. The defendant possessed large quantities of everything needed to produce methamphetamine but none of the completed product was on the premises when the arrest took place. The defendant claimed the complaint was defective because it failed to allege that a controlled substance was actually produced. The supreme court rejected the claim.

For a case like Bell, the first element of the instruction should be modified to read as follows:

1. The defendant engaged in the act of manufacturing a substance. It is not required that a substance was actually produced.

2. Subsection 961.01(13) provides a lengthy definition of "manufacture" that lists many different alternatives. The Committee suggests selecting the type of manufacturing that is alleged to be involved in the case and specifying that type in the instruction. The instruction as drafted uses "produce" because the Committee concluded that it is likely to apply in the greatest number of cases. The complete definition in § 961.01(13) is as follows:

If there is a dispute about whether a particular action constitutes "manufacturing," a detailed definition is provided by § 961.01(13):

> "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of, or to produce, prepare, propagate, compound, convert or process, a controlled substance or controlled substance analog, directly or indirectly, by extraction from substances of natural origin, chemical synthesis or a combination of extraction and chemical synthesis, including to package or repackage or the packaging or repackaging of the substance, or to label or to relabel or the labeling or relabeling of its container. "Manufacture" does not mean to prepare, compound, package, repackage, label or relabel or the preparation, compounding, packaging, repackaging, labeling or relabeling of a controlled substance:
>
> (a) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or
> (b) By a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of or as an incident to, research, teaching or chemical analysis and not for sale.

Subsection 961.01(13) was repealed and recreated by 1993 Wisconsin Act 129, effective date: March 19, 1994. In addition to grammatical changes, one substantive revision was made: the exception for "the preparation or compounding of a controlled substance by an individual for his own use" was eliminated.

3. The instruction has been drafted to provide for the insertion of the specific name of the substance because the Committee concluded that it adds clarity to use the name of the alleged substance throughout the instruction. Whether the substance actually is the substance named and whether the defendant actually manufactured the substance remain questions for the jury.

4. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

6030 POSSESSION OF A CONTROLLED SUBSTANCE — § 961.41(3g)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess a controlled substance.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a substance.

"Possessed" means that the defendant knowingly[2] had actual physical control of a substance.[3]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE:

[A substance is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the substance.]

[It is not required that a person own a substance in order to possess it. What is required is that the person exercise control over the substance.]

[Possession may be shared with another person. If a person exercises control over a substance, the substance is in that person's possession, even though another person may also have similar control.]

[It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][4]

2. The substance was (name controlled substance)[5]. (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][6]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, ADD THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

Deciding About Knowledge or Belief

You cannot look into a person's mind to determine knowledge or belief. Knowledge or belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge or belief.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense

have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 6030 was originally published in 1976 and revised in 1987, 1990, 1995, 1996, 1998, 2001, 2010, 2011, 2013, 2014, 2016, and 2021. This revision was approved by the Committee in December 2023; it added to the Comment.

A separate instruction addresses attempts to possess a controlled substance. See Wis JI-Criminal 6031.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

2011 Wisconsin Act 31 amended § 961.41(3g) by creating sub. (3g)(em) which prohibits possession of "a controlled substance specified in s. 961.14(4)(tb) to (ty)." Those substances are nonnarcotic, hallucinogenic substances commonly known as "synthetic cannabinoids." Act 31 classifies them as Schedule I substances. See footnote 1.

Possession of THC becomes a felony if the offender has a prior drug conviction. See § 961.48(2). The prior conviction is not an element of the felony possession offense and the state is not required to prove the prior offense beyond a reasonable doubt at trial. State v. Miles, 221 Wis.2d 56, 584 N.W.2d 703 (Ct. App. 1998). The court characterized this penalty enhancing provision as one that is not concerned with the factual circumstances surrounding the underlying crime and that does not change the substantive nature of the charged offense. Enhancers of that type do become an element subject to jury determination. Repeater provisions like the one involved in the Miles case are in a different group.

The definition of possession offenses provided in § 961.41(3g) provides that no person may possess a controlled substance or analog "unless the person obtains the substance or the analog directly from, or pursuant to a valid prescription . . ." The instruction does not include an element requiring that there be no prescription because the Committee concluded that this issue is properly handled in the same manner as other statutory exceptions. For example, the offense of carrying concealed weapon applies to "any person except a peace officer." § 941.23. The Wisconsin Supreme Court has concluded that whether the defendant is a peace officer, and thus exempted from the statute, is an issue that must be raised by the defendant as an affirmative defense. See State v. Williamson, 58 Wis.2d 514, 524, 206 N.W.2d 613 (1973), and the discussion in footnote 1, Wis JI-Criminal 1335.

Factual disputes about the applicability of the exception for valid prescriptions would likely be determined by pretrial motion. If a factual dispute is raised at trial, the Committee concluded that it is not an issue in the case until there is some evidence of the existence of a valid prescription. Once there is

evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the exception is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

2013 Wisconsin Act 194 [effective date: April 9, 2014] created § 961.443. Under § 961.443, a defendant is entitled to immunity from criminal prosecution for possession of a controlled substance or a controlled substance analog if the charge stems from the act of rendering aid to a person believed to be suffering from a drug overdose. Specifically, § 961.443(2) provides:

> An aider is immune from prosecution under s. 961.41(3g) for the possession of a controlled substance or a controlled substance analog . . . under the circumstances surrounding or leading to his or her commission of an act described in sub. (1).

The phrase "circumstances surrounding" means that the facts forming the basis for the possession of a controlled substance or a controlled substance analog charge must be closely connected to the events concerning the defendant rendering aid to an individual suffering from a drug overdose. State v. Lecker, 2020 WI App 65, 394 Wis.2d 285, 294, 950 N.W.2d 910.

> An "aider" means a person who does any of the following:
>
> (a) Brings another person to an emergency room, hospital, fire station, or other health care facility and makes contact with an individual who staffs the emergency room, hospital, fire station, or other health care facility if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.
>
> (b) Summons and makes contact with a law enforcement officer, ambulance, emergency medical services practitioner, as defined in s. 356.01(5), or other health care provider, in order to assist another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.
>
> (c) Calls the telephone number "911" or, in an area in which the telephone number "911" is not available, the number for an emergency medical service provider, and makes contact with an individual answering the number with the intent to obtain assistance for another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog. Wis. Stat. § 961.443(1).

The legislature did not expressly provide in § 961.443 who should make the immunity decision and when that decision should be made. However, in State v. Williams, 2016 WI App 82, 372 Wis.2d. 365, 888 N.W.2d 1, the court held that the determination of immunity is to be made by the circuit court before trial, not by the fact finder at trial. The burden is on the defendant to prove by a preponderance of the evidence that he or she is entitled to immunity. Id. at ¶14.

1. The penalty for possession offenses varies with the type of substance possessed. The penalties are set forth in the following subsections of § 961.41(3g):

(3g)(am) – a controlled substance classified in Schedule I or II which is a narcotic drug
(3g)(b) – a controlled substance other than one classified in Schedule I or II which is a narcotic drug [except as provided in subs. (3g)(c) to (g))]
(3g)(c) – cocaine or cocaine base
(3g)(d) – lysergic acid diethylamide, phencyclidine, amphetamine, methcathinone, methylenedioxypyrovalerone, 4-methylmethcathinone, psilocin or psilocybin
(3g)(e) – tetrahydrocannabinols
(3g)(em) – synthetic cannabinoids
(3g)(f) – gamma-hydroxybutyric acid, gamma-butyrolactone, 1,4-butanediol, ketamine or flunitrazepam
(3g)(g) – methamphetamine

The instruction has been drafted to provide for the insertion of the specific name of the substance. To avoid confusion, the Committee strongly suggests that only the name of the statutorily listed controlled substance be used throughout the instruction, even if the specific substance alleged to have been possessed by the defendant is not listed in Chapter 961. For example, if the substance is heroin, "heroin," should be used throughout. Conversely, if the substance is a synthetic cannabinoid not listed by name in Section 961.14(4)(tb), "synthetic cannabinoid" should be used throughout the instruction, not the specific variation alleged to have been possessed by the defendant. Whether the substance actually is the substance named and whether the defendant actually possessed the substance remain questions for the jury.

2011 Wisconsin Act 31 amended § 961.41(3g) by creating sub. (3g)(em) which prohibited possession of "a controlled substance specified in s. 961.14(4)(tb) to (ty)." Those substances are nonnarcotic, hallucinogenic substances commonly known as "synthetic cannabinoids." 2013 Wisconsin Act 351 amended § 961.41(3g)(em) to refer to "a controlled substance specified in s. 961.14(4)(tb)." Act 351 also repealed and recreated sub. (4)(tb) to include the entire list of substances considered to be "synthetic cannabinoids" and repealed subsecs. (4)(te) through (4)(ty). [Effective date: April 25, 2014.]

The term "synthetic cannabinoid" does not appear in the text of sub. (3g)(em) but is used as the title of that subsection. The Committee recommends that, if the parties agree, the term be used in the instruction where it calls for "(name controlled substance)." (see discussion in footnote 5). The actual names of the "synthetic cannabinoids" as they appear in § 961.14(4)(tb) would have no meaning to the jury and are generally unpronounceable.

The state will be required to prove that the substance in question was in fact one of the chemicals designated a "synthetic cannabinoid" under § 961.14(4)(tb).

All the possession offenses listed above prohibit both "possession" and "attempts to possess." Regarding attempts, see Wis JI-Criminal 6031.

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414 18, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 493, 508-09, 451 N.W.2d 752 (1990).

"[T]he mere presence of drugs in a person's system is insufficient to prove that the drugs are knowingly possessed by the person or that the drugs were within the person's control. . . . [However] the presence of drugs is circumstantial evidence of prior possession." State v. Griffin, 220 Wis.2d 371, 381, 584 N.W.2d

127 (Ct. App. 1998). To support a finding of possession, there must be sufficient corroborating evidence. Id.

3. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another:

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so called constructive possession.

4. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

5. It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the substance possessed by the defendant tested positive for cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the substance possessed by the defendant tested positive for "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," not that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

If the evidence shows that the substance tested positive for tetrahydrocannabinols, note that under sec. 961.14(4)(t), tetrahydrocannabinols does not include any of the following:

1. Tetrahydrocannabinols contained in a cannabidiol product that is dispensed as provided in s. 961.38 (1n) (a) or that is possessed as provided in s. 961.32 (2m) (b).
2. Tetrahydrocannabinols contained in fiber produced from the stalks, oil or cake made from the seeds of a Cannabis plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of a Cannabis plant which is incapable of germination.
3. Tetrahydrocannabinols contained in hemp, as defined in s. 94.55 (1).
4. A drug product in finished dosage formulation that has been approved by the United States food and drug administration that contains cannabidiol (2-[1R-3-methyl-6R-(1-methylethenyl)-2-cyclohexen-1-yl]-5-pentyl-1,3-benzenediol) derived from cannabis and no more than 0.1 percent (w/w) residual tetrahydrocannabinols.

6. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

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6031 ATTEMPTED POSSESSION OF A CONTROLLED SUBSTANCE — § 961.41(3g)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess or attempt to possess (name controlled substance)[1]. (Name controlled substance)[2] is a controlled substance whose possession is prohibited by law.][3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant attempted to possess a substance.

   Attempt requires that the defendant intended to possess (name controlled substance) and did acts which indicated unequivocally that the defendant intended to possess (name controlled substance) and would have done so except for the intervention of another person or some other extraneous factor.[4]

   "Possessed" means that the defendant knowingly[5] had actual physical control[6] of a substance.

   [It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][7]

2. The defendant knew or believed that the substance was [(name controlled

substance)] [a controlled substance. A controlled substance is a substance the delivery of which is prohibited by law.][8]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6031 was originally published in 1995 and revised in 1996, 2010, 2014, 2015, and 2020. The 2020 revision reflected changes to the Comment made by 2019 Wisconsin Act 68. This revision

was approved by the Committee in December 2023; it added to the comment.

Section 961.41(3g) prohibits both "possession of" and "attempts to possess" controlled substances and the analogs of those substances. This instruction is drafted for a case involving a charge of attempted possession. It differs from the instruction for possession cases (see Wis JI-Criminal 6030) in that it has two elements instead of three. The second element of the possession offense – "that the substance was (name controlled substance)" – has been eliminated here. It is sufficient to constitute an attempt that the defendant intended to possess a controlled substance; it is not required that the substance in fact be a controlled substance. (See State v. Kordas, 191 Wis.2d 124, 528 N.W.2d 483 (Ct. App. 1995), holding that it constitutes an attempt to receive stolen property where the defendant intended to receive property that in fact was not "stolen," but which he believed to be stolen.)

1. The penalty for possession offenses varies with the type of substance possessed. The penalties are set forth in the following subsections of § 961.41(3g):

(3g)(am) — a controlled substance classified in Schedule I or II which is a narcotic drug
(3g)(b) — a controlled substance other than one classified in Schedule I or II which is a narcotic drug [except as provided in subs. (3g)(c) to (g))]
(3g)(c) — cocaine or cocaine base
(3g)(d) — lysergic acid diethylamide, phencyclidine, amphetamine, methcathinone, methylenedioxypyrovalerone, 4-methylmethcathinone, psilocin or psilocybin
(3g)(e) — tetrahydrocannabinols
(3g)(em) — synthetic cannabinoids
(3g)(f) — gamma-hydroxybutyric acid, gamma-butyrolactone, 1,4-butanediol, ketamine or flunitrazepam
(3g)(g) — methamphetamine

Note: All the penalty subsections except sub. (3g)(am) refer to "possesses or attempts to possess" – see the discussion preceding footnote 1.

2. It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the defendant's blood tested positive for cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the defendant's blood tested positive for "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," not that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

If the evidence shows that the substance tested positive for tetrahydrocannabinols, note that under sec. 961.14(4)(t), tetrahydrocannabinols does not include any of the following:

> 1. Tetrahydrocannabinols contained in a cannabidiol product that is dispensed as provided in s. 961.38 (1n) (a) or that is possessed as provided in s. 961.32 (2m) (b).
> 2. Tetrahydrocannabinols contained in fiber produced from the stalks, oil or cake made

> from the seeds of a Cannabis plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of a Cannabis plant which is incapable of germination.
> 3. Tetrahydrocannabinols contained in hemp, as defined in s. 94.55 (1).
> 4. A drug product in finished dosage formulation that has been approved by the United States food and drug administration that contains cannabidiol (2-[1R-3-methyl-6R-(1-methylethenyl)-2-cyclohexen-1-yl]-5-pentyl-1,3-benzenediol) derived from cannabis and no more than 0.1 percent (w/w) residual tetrahydrocannabinols.

3. The instruction has been drafted to provide for the insertion of the specific name of the substance. To avoid confusion, the Committee strongly suggests that only the name of the statutorily listed controlled substance be used throughout the instruction, even if the specific substance alleged to have been possessed or attempted to be possessed by the defendant is not listed in Chapter 961. For example, if the substance is heroin, "heroin," should be used throughout. Conversely, if the substance is a synthetic cannabinoid not listed by name in Section 961.14(4)(tb), "synthetic cannabinoid" should be used throughout the instruction, not the specific variation alleged to have been possessed or attempted to be possessed by the defendant. Whether the defendant actually intended to possess the substance remains a question for the jury.

4. The definition of attempt provided here is adapted from the full definition in § 939.32. The definition in § 939.32 "applies to crimes throughout the statutes and is not limited to the Criminal Code." § 939.20. The briefer definition is believed to be sufficient for most cases. If more is desired, see Wis JI-Criminal 580, Attempt. Wis JI-Criminal 580 includes an extensive Comment, including a discussion of State v. Stewart, 143 Wis.2d 28, 420 N.W.2d 44 (1988), which held that proof of the existence of an "extraneous factor" is not required to establish a criminal attempt.

5. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 2, supra.

6. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so called constructive possession.

7. See State v. Dodd, 28 Wis.2d 643, 651 52, 137 N.W.2d 465 (1965).

8. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the

possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

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6035 POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER [§ 961.41(1m)] WITH LESSER INCLUDED OFFENSE OF POSSESSION OF A CONTROLLED SUBSTANCE

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess a controlled substance with intent to deliver.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of Possession With Intent To Deliver That the State Must Prove

1. The defendant possessed a substance.

   "Possessed" means that the defendant knowingly[1] had actual physical control[2] of a substance.

   [It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][3]

2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][4]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

4. The defendant intended to deliver (name controlled substance).

"Deliver" means to transfer or attempt to transfer from one person to another.[5]

"Intended to deliver" means that the defendant had the purpose to deliver or was aware that (his) (her) conduct was practically certain to cause delivery.[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge. As a part of the circumstances, you may consider the quantity and monetary value of the substance.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of possession of a controlled substance with intent to deliver have been proved, you should find the

defendant guilty.

If you are not so satisfied, you must not find the defendant guilty of possession with intent to deliver,[8] [CONTINUE WITH THE FOLLOWING IF THE LESSER INCLUDED OFFENSE IS SUBMITTED] and you should consider whether the defendant is guilty of possession of (name controlled substance) in violation of section 961.41_____[9] of the Wisconsin Statutes.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on your verdict on the charge of possession with intent to deliver before considering the offense of possession. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of possession with intent to deliver, you should consider whether the defendant is guilty of possession of (name controlled substance).

Elements of Possession Of A Controlled Substance That the State Must Prove

1. The defendant possessed a substance.
2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.
3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty of possession of a controlled substance.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant possessed a controlled substance with intent to deliver, the offense charged in the information, you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense I have submitted to you.

If you are not satisfied beyond a reasonable doubt from the evidence in this case that the defendant committed either one of the offenses I have submitted to you, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6035 was originally published in 1976 and revised in 1987, 1990, 1996, 2010, and 2018. The 2018 revision added a cross reference to Wis JI-Criminal 6001 to the Comment. This revision was approved by the Committee in December 2023; it added to the comment.

The penalty for offenses involving possession with intent to deliver a controlled substance depends on the amount involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

A person who holds drugs for another and intends to return the drugs to that person has the "intent to

deliver" required for a violation of § 961.41(1m). State v. Pinkard, 2005 WI App 226, 287 Wis.2d 592, 706 N.W.2d 157. "Whether Pinkard had delivered the drugs to the original owner for distribution to buyers, or to a third party for distribution to buyers, the ultimate conduct would have been the same: delivering drugs for use by others, a crime the legislature intended to punish under Wis. Stat. § 961.41(1m)." Ibid, ¶12.

1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 5.

2. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

3. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

4. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme

Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

5. See section 961.01(6).

6. See section 939.23(4) and Wis JI-Criminal 923B.

7. Subsection 961.41(1m) provides as follows with respect to intent to manufacture or deliver:

> Intent under this subsection may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance or a controlled substance analog prior to and after the alleged violation.

8. Wis JI-Criminal 6035 includes an instruction for a finding on the lesser included offense of simple possession. Of course, it is to be used only if a reasonable interpretation of the evidence supports the instruction. See SM-6, Instructing the Jury on Lesser Included Offenses, for a discussion of the evidentiary standard. The transitional material leading into the finding on the lesser included offense is adapted from Wis JI-Criminal 112A.

9. In the blank, insert the appropriate statutory subsection. It will vary depending on the nature of the substance possessed. See note 1, Wis JI-Criminal 6030.

10. See note 4, supra.

6036 POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO MANUFACTURE [§ 961.41(1m)] WITH LESSER INCLUDED OFFENSE OF POSSESSION OF A CONTROLLED SUBSTANCE

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess a controlled substance with intent to manufacture.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of Possession With Intent To Manufacture That the State Must Prove

1. The defendant possessed a substance.

   "Possessed" means that the defendant knowingly[1] had actual physical control[2] of a substance.

   [It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][3]

2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][4]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

4. The defendant intended to manufacture (name controlled substance).

"Intended to manufacture" means that the defendant had the purpose to manufacture.

"Manufacture" [means to (produce) (propagate) (compound) (convert) (process) a controlled substance] [directly or indirectly (by extraction from substances of natural origin) or (by chemical synthesis)] [includes packaging or repackaging of the substance or labeling or relabeling of its container].[5]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge. As a part of the circumstances, you may consider the quantity and monetary value of the substance.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of possession of a controlled substance with intent to manufacture have been proved, you should find the defendant guilty.

If you are not so satisfied, you must not find the defendant guilty of possession with intent to manufacture,[7] [CONTINUE WITH THE FOLLOWING IF THE LESSER INCLUDED OFFENSE IS SUBMITTED] and you should consider whether the defendant is guilty of possession of (name controlled substance) in violation of section 961.41_____[8] of the Wisconsin Statutes.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on your verdict on the charge of possession with intent to manufacture before considering the offense of possession. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of possession with intent to manufacture, you should consider whether the defendant is guilty of possession of (name controlled substance).

Elements of Possession Of A Controlled Substance That the State Must Prove

1. The defendant possessed a substance.
2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty of possession of a controlled substance.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant possessed a controlled substance with intent to manufacture, the offense charged in the information, you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense I have submitted to you.

If you are not satisfied beyond a reasonable doubt from the evidence in this case that the defendant committed either one of the offenses I have submitted to you, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6036 was originally published in 1976 and revised in 1987, 1990, 1994, 1996, 2010, and 2018. The 2018 revision added a cross reference to Wis JI-Criminal 6001 to the Comment. This revision was approved by the Committee in December 2023; it added to the comment.

The penalty for offenses involving possession with intent to manufacture a controlled substance depends on the amount involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 5.

2. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

3. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

4. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme

Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

5. The definition of "manufacture" is based on the one provided in § 961.01(13). See note 3, Wis JI-Criminal 6021.

6. Subsection 961.41(1m) provides as follows with respect to intent to manufacture or deliver:

> Intent under this subsection may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance or a controlled substance analog prior to and after the alleged violation.

7. Wis JI-Criminal 6035 includes an instruction for a finding on the lesser included offense of simple possession. Of course, it is to be used only if a reasonable interpretation of the evidence supports the instruction. See SM-6, Instructing the Jury on Lesser Included Offenses, for a discussion of the evidentiary standard. The transitional material leading into the finding on the lesser included offense is adapted from Wis JI-Criminal 112A.

8. In the blank, insert the appropriate statutory subsection. It will vary depending on the nature of the substance possessed. See note 1, Wis JI-Criminal 6030.

9. See note 4, supra.

6037A KEEPING OR MAINTAINING A PLACE RESORTED TO BY PERSONS USING CONTROLLED SUBSTANCES IN VIOLATION OF CHAPTER 961 FOR THE PURPOSE OF USING CONTROLLED SUBSTANCES — § 961.42[1]

Statutory Definition of the Crime

Section 961.42 of the Wisconsin Statutes provides that it is unlawful for any person knowingly to keep or maintain any structure or place[2] which is resorted to by persons using controlled substances in violation of Chapter 961 for the purpose of using controlled substances.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant kept or maintained a structure or place.[3]

   To keep or maintain a place is to exercise management or control over the place.

   This element does not require that the defendant owned (name of place), but it does require that the defendant exercised management or control of the place in question.[4]

2. The place was resorted to by persons using controlled substances in violation of Chapter 961 for the purpose of using controlled substances.

(Name substance) is a controlled substance, the use of which violates Chapter 961.[5]

3. The defendant kept or maintained the place knowingly.

"Knowingly" requires that the defendant knew that the place was resorted to by persons using controlled substances for the purpose of using controlled substances.[6]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6037A was originally published in 1993 and revised in 1996. This revision was approved by the Committee in August 2007 and involved adoption of a new format and nonsubstantive changes to the text.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996.

1. Section 961.42 applies to keeping or maintaining a structure or place for two different illicit purposes: for use by persons using controlled substances in violation of Chapter 961; and for manufacturing, keeping, or delivering controlled substances in violation of Chapter 961. The latter alternative is addressed by Wis JI-Criminal 6037B.

The penalty is a fine of not more than $25,000 or imprisonment for not more than one year, or both.

2. The instruction refers to "structure or place," but § 961.42 provides a more extensive list: ". . . any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place." The rest of the instruction uses the general term, "place." If one of the more specific terms is identified by the charge or the evidence, it should be used in the instruction as well.

For a case involving a vehicle, see State v. Slagle, 2007 WI App 117, 300 Wis.2d 662, 731 N.W.2d 284, where the court found the evidence insufficient to establish that the use of a vehicle on a single occasion was for "keeping" cocaine. See Wis JI-Criminal 6037B.

3. See note 2, supra.

4. "Keep" is not defined in statutes or case law. The Committee concluded that it implies the exercise of management or control over the operation of the place. See Wis JI-Criminal 1570, Keeping a Place of Prostitution.

5. Section 961.42 refers to "using controlled substances in violation of Chapter 961." Literally speaking, Chapter 961 does not prohibit the "use" of controlled substances. Rather, it prohibits possession, delivery, manufacture, etc. As a practical matter, of course, any "use" of a controlled substance would inevitably involve at least possession and thus would be "in violation of Chapter 961."

6. Section 961.42(1) specifically requires that the violation be committed "knowingly." This requires knowledge that the place was used in connection with controlled substances. For a discussion of various issues relating to the knowledge requirement in controlled substance cases, see Wis JI-Criminal 6000.

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6037B KEEPING OR MAINTAINING A PLACE USED FOR MANUFACTURING, KEEPING, OR DELIVERING CONTROLLED SUBSTANCES — § 961.42[1]

Statutory Definition of the Crime

Section 961.42 of the Wisconsin Statutes provides that it is unlawful for any person knowingly to keep or maintain any structure or place[2] which is used for manufacturing, keeping, or delivering controlled substances.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant kept or maintained a structure or place.[4]

   To keep or maintain a place is to exercise management or control over the place.

   This element does not require that the defendant owned (name of place), but it does require that the defendant exercised management or control of the place in question.[5]

2. The place was used for (manufacturing) (keeping) (delivering) (name controlled substance).[6] (Name controlled substance) is a controlled substance whose (manufacture) (keeping) (delivery) is prohibited by law.

["Manufacturing" means the production, preparation, propagation, or processing of a controlled substance.][7]

["Keeping" requires that controlled substances be kept for the purpose of warehousing or storage for ultimate manufacture or delivery. It requires more than simple possession.][8]

["Delivering" means the transfer or attempt to transfer something from one person to another.][9]

3. The defendant kept or maintained the place knowingly.

"Knowingly" requires that the defendant knew that the place was used for the (manufacture) (keeping) (delivery) of (name controlled substance) .[10]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6037B was originally published as Wis JI-Criminal 6037 in 1989. It was renumbered Wis JI-Criminal 6037B and revised in nonsubstantive ways in March 1993. It was revised in

1994 to change the definition of "manufacture." See footnote 7, below. It was revised in 1996 to add to the text at footnote 5 and in 2008 to adopt a new format. This revision was approved by the Committee in February 2010 and involved nonsubstantive changes to the text.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996.

1. Section 961.42 applies to keeping or maintaining a structure or place for two different illicit purposes: for use by persons using controlled substances in violation of Chapter 961; and for manufacturing, keeping, or delivering controlled substances in violation of Chapter 961. The latter alternative is addressed by this instruction. The former is addressed by Wis JI-Criminal 6037A.

2. The instruction refers to "structure or place," but § 961.42 provides a more extensive list: ". . . any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place." The rest of the instruction uses the general term, "place." If one of the more specific terms is identified by the charge or the evidence, it should be used in the instruction as well.

For a case involving a vehicle, see State v. Slagle, 2007 WI App 117, 300 Wis.2d 662, 731 N.W.2d 284, where the court found the evidence insufficient to establish that the use of a vehicle on a single occasion was for "keeping" cocaine. See note 8, below.

3. Section 961.42(1) defines this offense in terms of maintaining a place "which is used for manufacturing, keeping, or delivering [controlled substances] in violation of this chapter," (emphasis added). Generally, the underlined phrase would require adding to the instruction that the manufacture, keeping, or delivery be "in violation of Chapter 961." That addition was not made in this instruction, however, because the Committee concluded that the other elements of the offense, properly defined, will always establish that the manufacture, keeping, or delivery was in violation of Chapter 961.

The only exception would be where one of the exceptions to the penalties imposed by Chapter 961 applies, such as the possession and special use authorizations set forth in §§ 961.32 and 961.335, respectively. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925). These situations are best handled, in the Committee's judgment, in the same manner as an "affirmative defense." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

4. See note 2, supra.

5. "Keep" is not defined in statutes or case law. The Committee concluded that it implies the exercise of management or control over the operation of the place. See Wis JI-Criminal 1570, Keeping a Place of Prostitution.

6. The instruction provides for inserting the name of the specific controlled substance, based on the Committee's conclusion that it adds clarity to do so. Whether the place was actually maintained for

the manufacture, keeping, or delivery of the controlled substance is the factual issue for the jury to determine.

7. The definition of "manufacture" is based on the one provided in § 961.01(13), as revised by 1993 Wisconsin Act 129 (effective date: March 19, 1994). In addition to grammatical changes, the statutory revision made one substantive change: the exception for "the preparation or compounding of a controlled substance by an individual for his own use" was eliminated. The exceptions for practitioners remain. See note 3, Wis JI-Criminal 6021.

8. In State v. Brooks, 124 Wis.2d 349, 369 N.W.2d 183 (Ct. App. 1985), the court held that "keeping" had to be defined in a way that distinguished it from mere possession under § 961.41(3): "We read into the noun 'keeping' in sec. 961.42(1) the requirement that the controlled substance be kept for the purpose of warehousing or storage for ultimate manufacture or delivery." 124 Wis.2d 349, 354.

Brooks was applied to a case involving a vehicle in State v. Slagle, 2007 WI App 117, 300 Wis.2d 662, 731 N.W.2d 284. The court found the evidence insufficient to establish that the use of a vehicle on a single occasion was for "keeping" cocaine.

9. This definition was adapted from the one provided in § 961.01(6). See note 3, Wis JI-Criminal 6020.

10. Section 961.42(1) specifically requires that the violation be committed "knowingly." This requires knowledge that the place was used in connection with controlled substances. For a discussion of various issues relating to the knowledge requirement in controlled substance cases, see Wis JI-Criminal 6000.

6038 ACQUIRING POSSESSION OF A CONTROLLED SUBSTANCE BY MISREPRESENTATION — § 961.43(1)(a)

Statutory Definition of the Crime

The Wisconsin Statutes[1] make it a crime to acquire possession of (name controlled substance)[2] by misrepresentation.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained possession of a substance.[3]

   "Possession" means that the defendant knowingly[4] had actual physical control of a substance.[5]

2. The substance was (name controlled substance).[6] (Name controlled substance) is a controlled substance whose possession is regulated by law.

3. The defendant believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is regulated by law.][7]

4. The defendant obtained possession of the substance by misrepresentation made with the intent to deceive another and with intent to induce that person to rely and

act thereon.[8]

This element requires that the defendant intended to deceive (name person) and intended to induce (name person) to rely and act on the misrepresentation.

5. (Name person) was deceived by the misrepresentation.

This requires that (name person) must have been induced to and did in fact part with possession of the (name controlled substance) in reliance upon the misrepresentation.

Deciding About Belief and Intent

You cannot look into a person's mind to find belief or intent. While belief and intent must be found as a fact before you can find the defendant guilty, they must be found, if found at all, from any acts, words, or statements bearing upon belief and intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6038 was originally published in 1983 and revised in 1987, 1995, 1996, 2007, 2010. This revision was approved by the Committee in December 2023; it added to the comment.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996.

1. Section 961.43(1)(a) provides that it is unlawful for any person to "acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge."

2. The instruction has been drafted to provide for the insertion of the specific name of the substance as alleged in the information. The Committee has concluded that it adds clarity to use the name of the alleged substance throughout the instruction, although whether the defendant actually possessed the substance remains a question for the jury (see the second element).

3. Although it should rarely be in issue with respect to this offense, it is not required that a substantial amount of the substance be obtained – any amount is sufficient. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

4. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 6, supra.

5. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

6. The instruction has been drafted to provide for the insertion of the specific name of the substance. The Committee concluded that it adds clarity to use the name of the alleged substance from this point on in the instruction. Whether the substance actually is the substance named and whether the defendant actually delivered the substance remain questions for the jury. The identity of a controlled substance may be proved without an expert, by circumstantial evidence. State v. Anderson, 176 Wis.2d 196, 500 N.W.2d 328 (Ct. App. 1993).

7. The defendant must believe that the substance was a controlled substance. State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973). Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978).

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

8. The explanation of the fourth element was adapted from the elements of theft by fraud set forth in § 943.20(1)(d).

6040 DELIVERY OF AN IMITATION CONTROLLED SUBSTANCE: FELONY[1] — § 961.41(4)(am)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to deliver[2] a substance to another person and represent to that person that the substance is a controlled substance, knowing that it is not a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant delivered[3] a substance[4] to (name recipient) .

   "Deliver" means to transfer or attempt to transfer something from one person to another.[5]

2. The defendant represented to (name recipient) that the substance was (name controlled substance) .

   (Name controlled substance) is a controlled substance.[6]

   This requires that the defendant indicated by words or conduct that the substance was (name controlled substance) .[7]

3. The substance was not a controlled substance.

It is not necessary for the State to establish what the substance was. It is sufficient if the substance was not a controlled substance.[8]

4. The defendant knew the substance was not a controlled substance.[9]

Deciding About Knowledge

You cannot look into a person's mind to determine knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6040 was originally published in 1983 and revised in 1992, 1996, and 2001. This revision was approved by the Committee in April 2006.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

This instruction is for a violation of subsec. (am)1.a. of § 961.41(4), which was created as § 161.41(4)(a) by Chapter 90, Laws of 1981, and reads as follows:

> (4) IMITATION CONTROLLED SUBSTANCES (am)1. No person may knowingly distribute or deliver, attempt to distribute or deliver or cause to be distributed or delivered a noncontrolled substance and expressly or impliedly represent any of the following to the recipient:
> a. That the substance is a controlled substance.
> b. That the substance is of a nature, appearance or effect that will allow the recipient to display, sell, distribute, deliver, or use the noncontrolled substance as a controlled substance, if the representation is made under circumstances in which the person has reasonable cause to believe that the noncontrolled substance will be used or distributed for use as a controlled substance.

Subsection (4)(am)2. identifies several circumstances that are considered to be "prima facie" evidence of a representation that a substance is controlled.

Note that a penalty is provided in subsec. (4)(am)3.; the penalty structure set forth in § 961.41(1) does not apply to this offense.

A very similar offense with a misdemeanor penalty is defined in § 961.41(4)(bm). See Wis JI-Criminal 6042.

1. If the title is to be included in the written copy of the instructions provided to the jury, "FELONY" should be deleted.

2. The instruction is drafted for offenses involving "delivery." The statute also applies to "distribution," which is defined essentially as a "delivery." See § 961.01(9). Thus, instructing as to "delivery" ought to be sufficient in either situation.

The statute also applies to attempts to deliver or distribute and "causing" delivery or distribution. For "causing to deliver" cases, the instruction should be modified. The instruction ought to be sufficient as drafted for attempted delivery cases. "Deliver" is defined in § 961.01(6) as an "actual, constructive or attempted transfer from one person to another . . ." The instruction includes the substance of that definition in the first element. Also see note 4, below.

3. See note 2, supra.

4. The statute is phrased in terms of delivery "of a noncontrolled substance." "Noncontrolled substance" is not defined in the statutes and apparently has no special meaning. Therefore, the instruction is drafted in terms of "delivery of a substance," the conclusion of the Committee being that it is not necessary for the state to prove that the substance was "noncontrolled." However, it is necessary to establish that the substance was not what it was represented to be; see the third element.

5. This definition was adopted from that found in § 961.01(6) which reads as follows:

> "Deliver" or "delivery" means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

6. Because all controlled substances are listed by name in the schedules in Chapter 961, the jury may be told that, for example, "cocaine is a controlled substance."

7. Subsection 961.41(4)(am)2. defines four types of conduct which are to be considered "prima facie evidence" of a representation that a substance is a controlled substance. The Committee concluded that the significance of these four matters should be that evidence tending to establish one of them is enough to justify sending the case to the jury. But the Committee also concluded that it was not appropriate to instruct the jury on the effect of the prima facie evidence.

8. See note 4, supra.

9. The knowledge element of the instruction is based on a plain language reading of the statute: "knowingly deliver a noncontrolled substance" means that the person must know that what he delivers is a

noncontrolled substance. This is believed to be consistent with the rule for Criminal Code offenses, to which § 939.23(2) applies: "'Know' requires only that the actor believes that the specified fact exists." Here, the "specified fact" is that the substance is noncontrolled.

In 1992, the Committee reviewed this knowledge element in light of case law from other states. Most states have statutes similar to Wisconsin's, and there is extensive case law interpreting those statutes. A majority of the decisions conclude that knowledge of the noncontrolled nature of the substance is not required. See State v. Shiffbauer, 251 N.W.2d 359 (Neb. 1977); People v. Pfarr, 696 P.2d 235 (Colo. 1984); State v. Thomas, 428 So. 2d 327 (Fla. App. 1983); State v. Marsh, 684 P.2d 459 (Kan. App. 1984); State v. Lauterbach, 653 P.2d 1320 (Wash. App. 1982); State v. Freeman, 450 N.W.2d 826 (Iowa 1990); Jenkins v. State, 788 S.W.2d 677 (Tex. App. 1990); State v. Pierre, 500 So.2d 382 (La. 1987); and Annotation, Validity, Construction, and Effect of State Statutes Regulating Sales of Counterfeit or Imitation Controlled Substances, 84 A.L.R.4th 936 (1991).

For contrary conclusions, see State v. Duncan, 414 N.W.2d 91 (Iowa 1987), and State v. Mughni, 514 N.E.2d 870 (Ohio 1987).

For several reasons, the Committee did not find the authority from other states persuasive. First, the statutes are all slightly different. Some use "knowingly" and some do not. Those that use "knowingly" do not connect it with "noncontrolled" as Wisconsin's statute does. For example, the Kansas statute says: "no person shall knowingly deliver any substance which is not a controlled substance . . . under circumstances which would give a reasonable person reason to believe it is a controlled substance." Nebraska prohibits: "knowingly or intentionally delivering a substance that the person represents is a controlled substance but which in fact is not such a substance." Both the Kansas and Nebraska courts held that it is not necessary to prove that the defendant knew the substance was not controlled. But neither statute connects "knowingly" with "noncontrolled substances."

Further, the legislative history of the Wisconsin provision is relevant. In an early draft of the bill, the main subsection of the statute, which was (4)(a) at that time, did not have "knowingly" in it. It simply read: "It is unlawful for any person to deliver, attempt to deliver, or cause to be delivered a noncontrolled substance. . . ." "Knowingly" was written in after "person" in the above sentence and was included in the statute as enacted.

That same draft had a subsection (c) that was first revised, then deleted entirely, and not included in the statute as enacted. That subsection provided:

> In any prosecution for unlawful delivery of a noncontrolled substance it is no defense that the accused believed the noncontrolled substance to actually be a controlled substance.

It appears likely that the original draft of the statute, which did not include "knowingly" and did not include sub. (c), was patterned after a model or uniform act because it closely resembles some of the statutes involved in the cases cited above. It does not match exactly with the current versions of the various model acts. The biggest difference is the way "knowingly" is used.

Finally, Wisconsin has another statute that seems to apply to the same sort of conduct and which does not include "knowingly." See § 961.41(4)(bm), punished by a fine of up to $500 and imprisonment for up to six months or both. See Wis JI-Criminal 6042.

Given this background and the absence of any case law interpreting the Wisconsin statute [but see State v. Cooper, 127 Wis.2d 429, 380 N.W.2d 383 (Ct. App. 1985), dissent referring to what was then § 161.41(4)(a) but decided on other grounds], the Committee concluded that the plain language of the statute should prevail.

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6042 DELIVERY OF AN IMITATION CONTROLLED SUBSTANCE: MISDEMEANOR[1] — § 961.41(4)(bm)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to offer to have any controlled substance unlawfully delivered to another person and then to deliver a substance which is not a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant offered to have a controlled substance unlawfully delivered to (name recipient) .

   "Deliver" means to transfer or attempt to transfer something from one person to another.[2]

   (Name controlled substance) is a controlled substance which is unlawful to deliver.[3]

   This element requires that the defendant indicated by words or conduct that the substance was (name controlled substance) .[4]

2. The defendant [delivered] [arranged to have delivered][5] a substance to (name recipient) that was not a name controlled substance.

It is not necessary for the State to establish what the substance was. It is sufficient if the substance was not a name controlled substance.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6042 was approved by the Committee in April 2006.

This instruction is for a violation of subsec. (4)(bm) of § 961.41. The statute originally appeared as § 161.41(2m) and was renumbered by 1995 Wisconsin Act 448. It reads as follows:

> (4) IMITATION CONTROLLED SUBSTANCES . . . . (bm) It is unlawful for any person to agree, consent or offer to lawfully manufacture, deliver , distribute, or dispense any controlled substance to any person, or to offer, arrange or negotiate to have any controlled substance unlawfully manufactured, delivered, distributed or dispensed, and then manufacture, deliver, distribute, or dispense or offer, arrange or negotiate to have manufactured, delivered, distributed or dispensed to any such person a substance which is not a controlled substance.

The penalty is a fine of not more than $500 or imprisonment for not more than 6 months or both. A very similar offense with a felony penalty is defined in § 961.41(4)(am). See Wis JI-Criminal 6040. That offense requires that the defendant "knowingly" deliver, etc., which is not required for this offense.

1. If the title is to be included in the written copy of the instructions provided to the jury, "MISDEMEANOR" should be deleted.

2. This definition was adopted from that found in § 961.01(6) which reads as follows:

> "Deliver" or "delivery" means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

3. This is the approach typically used in the controlled substance instructions. The statutes specifically list the substances that are "controlled substances"; except for certain statutory exceptions, delivery of any controlled substance is unlawful.

4. This statement is borrowed from Wis JI-Criminal 6040. In the context of this offense, to "offer" to deliver a controlled substance must require some representation that the substance is a "controlled

substance."

5. Choose the alternative supported by the evidence. The Committee concluded that the statute applies where the defendant delivers the substance personally or arranges for another person to deliver the substance.

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6044 POSSESSION OF METHAMPHETAMINE WASTE — § 961.67(2)(a)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to knowingly possess methamphetamine manufacturing waste.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly possessed a substance.

"Possessed" means that the defendant knowingly[1] had actual physical control of a substance.[2]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.

[A substance is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the substance.]

[It is not required that a person own a substance in order to possess it. What is required is that the person exercise control over the substance.]

[Possession may be shared with another person. If a person exercises control over a substance, the substance is in that person's possession, even though another person may also have similar control.]

[It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][3]

2. The substance was methamphetamine manufacturing waste.

3. The defendant knew that the substance was methamphetamine manufacturing waste.[4]

Meaning of "Methamphetamine Manufacturing Waste"

"Methamphetamine manufacturing waste" means any solid, semisolid, liquid or contained gaseous material or article that results from or is produced by the manufacture of methamphetamine.[5]

Deciding About Knowledge

You cannot look into a person's mind to determine knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6044 was originally published in 2002. It was revised in 2009 to reflect the renumbering of the statute.

This instruction is for violations of § 961.67(2)(a): knowingly possessing methamphetamine manufacturing waste. The statute was created as § 961.437 by 1999 Wisconsin Act 129, effective date: May 24, 2000. It was renumbered § 961.67 by 2005 Wisconsin Act 14, effective date: June 22, 2005. Subsection (2)(b) prohibits intentionally disposing of methamphetamine manufacturing waste. A uniform instruction has not been drafted for that offense because the possession offense is likely to cover that conduct: one who disposes of material must have possessed it.

Subsection (3) creates an exception for persons who are handling the material in compliance with statutes dealing with solid and hazardous waste or who have notified law enforcement of the existence of the material.

1. Section 961.67(2)(a) specifically requires that the defendant "knowingly possess" methamphetamine manufacturing waste.

In addition, inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 394, 508-09, 451 N.W.2d 752 (1990).

2. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

3. This statement is included in instructions for possession of a controlled substance and the Committee concluded that it properly applies here, as well. Regarding possession of a controlled substance, see State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

4. This requirement is based on the statute's requirement that the defendant "knowingly possess" methamphetamine manufacturing waste.

5. See § 961.67(1)(c). The statutory definition includes reference to "a controlled substance analog of methamphetamine." The Committee concluded that prosecution for violation of this statute is unlikely to be based on manufacturing an "analog" and therefore did not include that reference in the instruction. And, the statutory definition concludes with: ". . . in violation of this chapter." The Committee also concluded that retaining that reference in the instruction was not necessary. If the facts of a case raise the issue of methamphetamine being manufactured in compliance with Chapter 961, the instruction must be modified.

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6046 USING A CHILD TO DELIVER A CONTROLLED SUBSTANCE[1] — § 961.455

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime for any person who has attained the age of 17 years to knowingly use a child[2] to deliver a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) delivered[3] a substance.

   "Deliver" means to transfer or attempt to transfer something from one person to another.[4]

2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. (Name of child) was a child, that is, had not attained the age of 18 years at the time of the alleged delivery.

   Knowledge of (name of child)'s age by the defendant is not required and mistake regarding (name of child)'s age is not a defense.[5]

4. The defendant knowingly used[6] (name of child) to deliver (name controlled substance).

This requires that the defendant knew that (name of child) delivered a substance to another person and knew that the substance was (name controlled substance).[7]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

5. The defendant had attained the age of 17 years at the time of the alleged delivery.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6046 was originally published in 1990 and revised in 1996. This revision involved a nonsubstantive editorial correction and was approved by the Committee in February 2010.

This instruction is for a violation of § 961.455, created by 1989 Wisconsin Act 121 (effective date: January 31, 1990.)

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

1. The instruction uses "to deliver" in place of the words of the statute: "for the purpose of violating § 961.41(1)." Section 961.41(1) makes it unlawful for any person to manufacture, distribute, or deliver a controlled substance. The Committee concluded that offenses involving delivery are likely to be the most common and therefore drafted this instruction for delivery cases. For cases involving manufacture, Wis JI-Criminal 6021 may be helpful as a model.

Further, this instruction is drafted for the case where an actual delivery has taken place. But a delivery is apparently not required by the words of § 961.455 which refer to using a child "for the purpose of" violating § 161.41. The plain meaning of that phrase appears to be that it is sufficient if the defendant uses a child for the purpose of delivering a controlled substance, even if there is not an actual delivery. This conclusion is supported by subsection (4) of § 961.455 which provides: "If the conduct described under sub. (1) results in a violation under § 961.41(1), the actor is subject to prosecution and conviction under § 961.41(1) or this section or both." See Wis JI-Criminal 6047, which is drafted for a case where a delivery has not necessarily taken place.

2. The instruction uses "child" as the more understandable equivalent of the statute's reference to persons who "is 17 years of age or under." The third element defines "child" in the more common way – as one who "has not attained the age of 18 years."

3. See note 1, supra.

4. This definition was adapted from that found in § 961.01(6), which reads as follows:

> "Deliver" or "delivery," unless the context otherwise requires, means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

5. See § 961.455(2).

6. "Uses" is one of the five verbs used in § 961.455: ". . . solicits, hires, directs, employs, or uses . . ." One of the other terms should be substituted if appropriate in a particular case. Wis JI-Criminal 6047 is drafted for a "soliciting" case where a delivery has not necessarily taken place.

7. For controlled substances cases generally, the defendant must know that the substance was a

controlled substance. State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973). Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). See the discussion at Wis JI-Criminal 6020, note 3, and Wis JI-Criminal 6000.

6047 SOLICITING A CHILD FOR THE PURPOSE OF DELIVERING A CONTROLLED SUBSTANCE[1] — § 961.455

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime for a person who has attained the age of 17 years to knowingly solicit a child[2] for the purpose of delivering a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly solicited (name of child) for the purpose of[3] delivering[4] a substance.

"Deliver" means to transfer or attempt to transfer something from one person to another.[5]

"Solicit" means to advise another person to commit a crime under circumstances that indicate, unequivocally, that the person intends that the crime be committed.[6]

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's conduct, under the circumstances.[7]

Before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the defendant advised (name of child) to deliver (name

controlled substance) and intended that (name of child) deliver (name controlled substance). However, it is not required that any delivery actually took place. It is sufficient if the defendant solicited (name of child) for the purpose of delivering.[8]

2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. (Name of child) was a child, that is, had not attained the age of 18 years at the time of the alleged delivery.

Knowledge of (name of child)'s age by the defendant is not required and mistake regarding (name of child)'s age is not a defense.

4. The defendant had attained the age of 17 years at the time of the alleged delivery.

Deciding About Knowledge and Purpose

You cannot look into a person's mind to find knowledge and purpose. Knowledge and purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6047 was originally published in 1990 and revised in 1996. This revision involved a nonsubstantive editorial correction and was approved by the Committee in February 2010.

This instruction is for a violation of § 961.455, created by 1989 Wisconsin Act 121 (effective date: January 31, 1990.)

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

1. This instruction is for a violation of § 961.455 which involves soliciting a child for the purpose of delivering a controlled substance. There are several other variations of conduct that may violate this statute. Wis JI-Criminal 6046 is drafted for a case where a defendant uses a child to make an actual delivery. This instruction doe not require a delivery; the offense is committed if one solicits a child for the purpose of making a delivery. See the Comment to Wis JI-Criminal 6046 for a discussion of § 161.455.

2. The instruction uses "child" as the more understandable equivalent of the statute's reference to persons who "is 17 years of age or under." The third element defines "child" in the more common way – as one who "has not attained the age of 18 years."

3. This instruction is drafted for a case where the defendant is charged with soliciting a child for the purpose of delivering a controlled substance and a delivery has not necessarily taken place. That this conduct is prohibited by § 961.455(1) is apparently clear from the plain meaning of the statute, which includes the "for the purpose of" language. The conclusion is supported by subsection (4) of § 961.455 which provides: "If the conduct described under sub. (1) results in a violation under § 961.41(1), the actor is subject to prosecution and conviction under § 961.41(1) or this section or both."

4. See note 1, supra.

5. This definition was adapted from that found in § 961.01(6), which reads as follows:

> "Deliver" or "delivery," unless the context otherwise requires, means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

6. The definition of "solicit" is based on § 939.30, which defines the inchoate crime of solicitation as advising another to commit a felony under circumstances which indicate unequivocally that the person intends that such crime be committed. Subsection (3) of § 961.455 provides that "solicitation under sub. (1) occurs in the manner described under § 939.30. . . ." See Wis JI-Criminal 550, Solicitation As A Crime.

7. The definition of "unequivocally" is based on the one used in Wis JI-Criminal 580, Attempt.

8. See note 4, supra.

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6050 POSSESSION OF DRUG PARAPHERNALIA — § 961.573(1)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess drug paraphernalia with the primary intent to use the drug paraphernalia to ingest, inhale, or otherwise introduce into the human body[1] a controlled substance, in violation of Chapter 961 of the Wisconsin Statutes.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed an item.

"Possessed" means that the defendant knowingly[3] had actual physical control of an item.[4]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE:

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, the item is in that person's possession, even though another person

may also have similar control.]

2. The item in question was drug paraphernalia.

"Drug paraphernalia" means all equipment, products, and materials of any kind that are used, designed for use, or primarily intended for use to ingest, inhale, or otherwise introduce into the human body a controlled substance.[5]

(Name controlled substance) is a controlled substance.[6]

3. The defendant possessed drug paraphernalia with the primary intent[7] to use it to ingest, inhale, or otherwise introduce into the human body a controlled substance.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6050 was originally published in 1993 and revised in 1994, 1996, 2000, and 2006. This revision was approved by the Committee in April 2021; it added to the Comment.

This instruction is for the simple possession offense defined in § 961.573(1). It carries a penalty of a fine of not more than $500 or imprisonment for not more than 30 days or both. Section 961.573 was

amended by 1999 Wisconsin Act 129 [effective date: May 24, 2000]. New sub. (3) was created; it prohibits possession of drug paraphernalia with "the primary intent" to use it in connection with methamphetamine. Violations of sub. (3) carry a maximum penalty of a fine of not more than $10,000 or imprisonment for not more than 5 years or both. See Wis JI-Criminal 6053.

Other drug paraphernalia offenses are defined in § 961.574, manufacture or delivery of drug paraphernalia; § 961.575, delivery of drug paraphernalia to a minor; and § 961.576, advertisement of drug paraphernalia.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses, including the offense addressed by this instruction, to include "controlled substance analogs." See Wis JI-Criminal 6005 for suggested changes for analog cases.

2013 Wisconsin Act 194 [effective date: April 9, 2014] created § 961.443. Under § 961.443, a defendant is entitled to immunity from criminal prosecution for possession of paraphernalia if the charge stems from the act of rendering aid to a person believed to be suffering from a drug overdose. Specifically, § 961.443(2) provides:

> An aider is immune from prosecution under s. 961.573 for the possession of drug paraphernalia . . . under the circumstances surrounding or leading to his or her commission of an act described in sub. (1).

The phrase "circumstances surrounding" means that the facts forming the basis for the possession of paraphernalia charge must be closely connected to the events concerning the defendant rendering aid to an individual suffering from a drug overdose. State v. Lecker, 2020 WI App 65, 394 Wis.2d 285, 294, 950 N.W.2d 910.

An "aider" means a person who does any of the following:

> (a) Brings another person to an emergency room, hospital, fire station, or other health care facility and makes contact with an individual who staffs the emergency room, hospital, fire station, or other health care facility if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.
>
> (b) Summons and makes contact with a law enforcement officer, ambulance, emergency medical services practitioner, as defined in s. 356.01(5), or other health care provider, in order to assist another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.
>
> (c) Calls the telephone number "911" or, in an area in which the telephone number "911" is not available, the number for an emergency medical service provider, and makes contact with an individual answering the number with the intent to obtain assistance for another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog. Wis. Stat. § 961.443(1).

The legislature did not expressly provide in § 961.443 who should make the immunity decision and when that decision should be made. However, in State v. Williams, 2016 WI App 82, 372 Wis.2d. 365, 888 N.W.2d 1, the court held that the determination of immunity is to be made by the circuit court pretrial, not by the fact finder at trial. The burden is on the defendant to prove by a preponderance of the evidence that he or she is entitled to immunity. Id. at ¶14.

1. The phrase beginning with "to ingest" is selected from the following complete statement in § 961.573(1):

> . . . to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, inject, ingest, inhale, or otherwise introduce into the human body.

The Committee drafted the instruction for what is believed to be the most common case. If other alternatives are presented by the evidence, the instruction must be modified accordingly.

2. The reference to "in violation of Chapter 961" is included in the statutory definition of the crime, so it is included here. It is not included in the instruction's statement of the elements of the crime because the Committee concluded that "in violation of Chapter 961" could be addressed in the same way that statutory exceptions are generally treated. (See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon.) If the facts raise an issue about being "in violation of Chapter 961" a statement should be added to the second and third elements that indicates the burden is on the State to prove that there was intent to ingest, inhale, etc., "in violation of Chapter 961."

3. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 394, 508 09, 451 N.W.2d 752 (1990).

"[T]he mere presence of drugs in a person's system is insufficient to prove that the drugs are knowingly possessed by the person or that the drugs were within the person's control. . . . [However] the presence of drugs is circumstantial evidence of prior possession." State v. Griffin, 220 Wis.2d 371, 381, 584 N.W.2d 127 (Ct. App. 1998). To support a finding of possession, there must be sufficient corroborating evidence. Id.

4. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so called constructive possession.

5. This definition is based on the extremely lengthy one provided in § 961.571(1)(a). The definition refers to "primarily intended for use." Subsec. 961.571(2) defines "primarily" as meaning "chiefly or mainly."

Subsection 961.571(1)(b) provides that "drug paraphernalia" excludes:

1. Hypodermic syringes, needles and other objects used or intended for use in parenterally injecting substances into the human body.
2. Any items, including pipes, papers and accessories, that are designed for use or primarily intended for use with tobacco products.

[Note: "Parenteral" means "taken into the body or administered in a manner other than through the digestive tract, as by intravenous or intramuscular injection." American Heritage Dictionary of the English Language, 3rd Edition.]

Section 961.572 sets forth a list of twelve factors that "a court or other authority shall consider in addition to all other legally relevant factors" in determining whether an object is drug paraphernalia. It may be helpful to the jury to add something like the following to the instruction:

In determining whether an object is drug paraphernalia, you may consider any of the following:

[list the factors in § 961.572(1) (a) through (L) that apply].

6. Whether a substance is a "controlled substance" is a legal conclusion which the court may pass along to the jury.

It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the paraphernalia was used in connection with cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the paraphernalia was used in connection with "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," not that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

Whether the item of alleged paraphernalia was used in connection with a controlled substance is the factual issue that the jury must determine.

Note that offenses involving methamphetamine are separately defined in sub. (3) of § 961.573 and carry a higher penalty. See Comment preceding note 1, supra.

7. This mental element is specifically required by § 961.573.

The United States Supreme Court reviewed the mental element required by a federal statute relating to drug paraphernalia in Posters 'N' Things v. United States, 114 S.Ct. 1747 (May 23, 1994). The court focused on the definition of "drug paraphernalia" found in 21 U.S.C. § 857, which, like § 961.571(1)(a), refers to material "primarily intended" for use in ingesting, etc., drugs. The court held that the reference to "primarily intended" in the definition did not serve as the basis for a subjective mental requirement that would apply to the offense of selling drug paraphernalia. Rather, the Court held that all that is required for violations of § 857 is that the defendant "knew that the items at issue are likely to be used with illegal drugs."

The decision in Posters 'N' Things is not directly applicable to interpreting the Wisconsin statute addressed by this instruction. Here, the subjective mental element is stated in § 961.573, which defines the crime as possession of drug paraphernalia **with the primary intent** to ingest, etc., a controlled substance. This specifically requires a subjective mental element; one need not rely on the argument made by the Posters defendant that the reference to "primarily intended" in the definition of drug paraphernalia was the source of such an element.

6053 POSSESSION OF DRUG PARAPHERNALIA: METHAMPHETAMINE — § 961.573(3)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess drug paraphernalia with the primary intent to use the drug paraphernalia to manufacture[1] methamphetamine in violation of Chapter 961 of the Wisconsin Statutes.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed an item.

"Possessed" means that the defendant knowingly[3] had actual physical control of an item.[4]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE:

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, the item is in that person's possession, even though another person may also have similar control.]

2. The item in question was drug paraphernalia.

"Drug paraphernalia" means all equipment, products, and materials of any kind that are used, designed for use, or primarily intended for use to manufacture methamphetamine.[5]

3. The defendant possessed drug paraphernalia with the primary intent[6] to use it to manufacture methamphetamine.

"Intent to manufacture methamphetamine" means that the defendant had the purpose to manufacture methamphetamine.

"Manufacture methamphetamine"means to produce[7] methamphetamine.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS G FELONY AND THERE IS EVIDENCE THAT IT WAS COMMITTED IN THE PRESENCE OF A CHILD WHO WAS 14 YEARS OF AGE OR YOUNGER.[8]

If you find the defendant guilty, you must answer the following question:

1. "Had the defendant attained the age of 18 years at the time of the offense?"

If you answer question 1. "yes," you must answer question 2.

If you answer question 1. "no," do not answer question 2.

2. "Did the defendant commit this offense while in the presence of a child who was 14 years of age or younger?"

Before you may answer a question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 6053 was originally published in 2006. This revision was approved by the Committee in August 2006; it reflects changes made by 2005 Wisconsin Act 263.

This instruction is for the offense defined in § 961.573(3), which prohibits possession of drug paraphernalia with "the primary intent" to use it in connection with methamphetamine. Subsection (3) was created by 1999 Wisconsin Act 129. [Effective date: May 24, 2000]. Basic violations are Class H felonies. The penalty increases to a Class G felony if the statute is violated in the presence of a child who is 14 years of age or younger. The latter was created by 2005 Wisconsin Act 263. [Effective date: April 20, 2006.] Violations of § 961.573(1), the general prohibition on drug paraphernalia, carry a maximum penalty of a fine of not more than $500 or imprisonment for not more than 30 days or both.

Other drug paraphernalia offenses are defined in § 961.574, manufacture or delivery of drug paraphernalia; § 961.575, delivery of drug paraphernalia to a minor; and § 961.576, advertisement of drug paraphernalia. There are no uniform instructions for those offenses. Section 961.65 defines the offense

of possessing certain substances with intent to manufacture methamphetamine. See Wis JI-Criminal 6065.

1. The instruction is drafted for cases involving "manufacture" because the Committee concluded that "manufacture" is likely to be the most inclusive term. However, the statute applies to "manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack or store methamphetamine . . . ." If use of one of the other terms is necessary, the instruction should be modified by substituting that term for "manufacture" throughout and modifying the third element.

2. The reference to "in violation of Chapter 961" is included in the statutory definition of the crime, so it is included here. It is not included in the instruction's statement of the elements of the crime because the Committee concluded that "in violation of Chapter 961" could be addressed in the same way that statutory exceptions are generally treated. (See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon.) If the facts raise an issue about being "in violation of Chapter 961" a statement should be added to the second and third elements that indicates the burden is on the State to prove that there was intent to manufacture methamphetamine "in violation of Chapter 961."

3. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 394, 508-09, 451 N.W.2d 752 (1990).

4. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

5. This definition is based on the extremely lengthy one provided in § 961.571(1)(a). The definition refers to "primarily intended for use." Subsec. 961.571(2) defines "primarily" as meaning "chiefly or mainly."

Subsection 961.571(1)(b) provides that "drug paraphernalia" excludes:

1. Hypodermic syringes, needles and other objects used or intended for use in parenterally injecting substances into the human body.
2. Any items, including pipes, papers and accessories, that are designed for use or primarily intended for use with tobacco products.

[Note: "Parenteral" means "taken into the body or administered in a manner other than through the digestive tract, as by intravenous or intramuscular injection." American Heritage Dictionary of the English Language, 3rd Edition.]

Section 961.572 sets forth a list of twelve factors that "a court or other authority shall consider in addition to all other legally relevant factors" in determining whether an object is drug paraphernalia. It may be helpful to the jury to add something like the following to the instruction:

In determining whether an object is drug paraphernalia, you may consider any of the following:

[list the factors in § 961.572(1) (a) through (L) that apply].

6. This mental element is specifically required by § 961.573(3).

The United States Supreme Court reviewed the mental element required by a federal statute relating to drug paraphernalia in Posters 'N' Things v. United States, 114 S.Ct. 1747 (May 23, 1994). The court focused on the definition of "drug paraphernalia" found in 21 U.S.C. § 857, which, like § 961.571(1)(a), refers to material "primarily intended" for use in ingesting, etc., drugs. The court held that the reference to "primarily intended" in the definition did not serve as the basis for a subjective mental requirement that would apply to the offense of selling drug paraphernalia. Rather, the Court held that all that is required for violations of § 857 is that the defendant "knew that the items at issue are likely to be used with illegal drugs."

The decision in Posters 'N' Things is not directly applicable to interpreting the Wisconsin statute addressed by this instruction. Here, the subjective mental element is stated in § 961.573(3), which defines the crime as possession of drug paraphernalia **with the primary intent** to manufacture, etc., methamphetamine. This specifically requires a subjective mental element; one need not rely on the argument made by the Posters defendant that the reference to "primarily intended" in the definition of drug paraphernalia was the source of such an element.

7. Subsection 961.01(13) provides a lengthy definition of "manufacture" that lists many different alternatives. The Committee suggests selecting the type of manufacturing that is alleged to be involved in the case and specifying that type in the instruction. The instruction as drafted uses "produce" because the Committee concluded that it is likely to apply in the greatest number of cases. If there is a dispute about whether a particular action constitutes "manufacturing," a detailed definition is provided by § 961.01(13):

> "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of, or to produce, prepare, propagate, compound, convert or process, a controlled substance or controlled substance analog, directly or indirectly, by extraction from substances of natural origin, chemical synthesis or a combination of extraction and chemical synthesis, including to package or repackage or the packaging or repackaging of the substance, or to label or to relabel or the labeling or relabeling of its container. "Manufacture" does not mean to prepare, compound, package, repackage, label or relabel or the preparation, compounding, packaging, repackaging, labeling or relabeling of a controlled substance:
>
> (a) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or
> (b) By a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of or as an incident to, research, teaching or chemical analysis and not for sale.

Subsection 961.01(13) was repealed and recreated by 1993 Wisconsin Act 129, effective date: March 19, 1994. In addition to grammatical changes, one substantive revision was made: the exception

for "the preparation or compounding of a controlled substance by an individual for his own use" was eliminated.

8. This material reflects the change made in the penalty provisions of s. 161.573 by 2005 Wisconsin Act 263. [Effective date: April 20, 2006.] The basic penalty is a Class H felony. However, sub. (3)(b)2. provides: "Any person who is 18 years of age or older and who violates par. (a) while in the presence of a child who is 14 years of age or younger is guilty of a Class G felony."

The Committee concluded that this provision identifies two factual matters that must be submitted to the jury: that the defendant is "18 years of age or older"; and, that the offense was committed in the presence of "a child who is 14 years of age or younger."

As with similar penalty-increasing facts, the Committee believes these issues are best handled by submitting them to the jury as two special questions. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of possession of drug paraphernalia, under sec. 161.573(3), at the time an place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no."

1. "Had the defendant attained the age of 18 years at the time of the offense?"

If you answer question 1. "yes," you must answer question 2 "yes" or "no."

.

If you answer question 1. "no," do not answer question 2.

2. "Did the defendant commit this offense while in the presence of a child who was 14 years of age or younger?"

6065 POSSESSING MATERIALS FOR MANUFACTURING METHAMPHETAMINE — § 961.65

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess (insert name of substance) [1] with intent to manufacture methamphetamine.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a substance, (insert name of substance) .[2]

"Possessed" means that the defendant knowingly[3] had actual physical control of that substance.[4]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE:

[A substance is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the substance.]

[It is not required that a person own a substance in order to possess it. What is required is that the person exercise control over the substance.]

[Possession may be shared with another person. If a person exercises control over a substance, the substance is in that person's possession, even though another person may also have similar control.]

[It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][5]

2. The defendant possessed (insert name of substance) with intent to manufacture methamphetamine.

"Intent to manufacture methamphetamine" means that the defendant had the purpose to manufacture methamphetamine.

"Manufacture methamphetamine" means to produce[6] methamphetamine.

With respect to intent to manufacture methamphetamine, you cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all of the facts and circumstances in this case bearing upon intent. As part of the circumstances, you may consider the quantity and monetary value of the substance possessed.

[ADD THE FOLLOWING IF THERE IS EVIDENCE OF POSSESSION OF MORE THAN 9 GRAMS OF EPHEDRINE OR PSEUDOEPHEDRINE.][7]

[Evidence has been received that the defendant possessed more than 9 grams of (ephedrine) (pseudoephedrine).

If you are satisfied beyond a reasonable doubt that the defendant possessed more than 9 grams of (ephedrine) (pseudoephedrine), you may find from this fact alone that the defendant intended to manufacture methamphetamine, but you are not required to do so. You are the sole judges of the facts, and you must not find that the defendant intended to manufacture methamphetamine unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6065 was approved by the Committee in October 2005.

Wis JI-Criminal 6065 is drafted for a violation of § 961.65, an offense created by 2005 Wisconsin Act 14. The effective date is June 22, 2005.

1. Insert the name of the substance involved in the case. Those covered by § 961.65 are: "an ephedrine or pseudoephedrine product, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, or pressurized ammonia. . . . '[E]phedrine' and 'pseudoephedrine' include any of their salts, isomers, and salts of isomers." § 961.65.

2. Insert the name of the substance involved in the case. Those covered by § 961.65 are: "an ephedrine or pseudoephedrine product, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, or pressurized ammonia. . . . '[E]phedrine' and 'pseudoephedrine' include any of their salts, isomers, and salts of isomers." See § 961.65.

3. Inherent in the legal definition of "possession" is the concept of knowing or conscious

possession. See Schwartz v. State, 192 Wis. 414-18, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 394, 508-09, 451 N.W.2d 752 (1990).

"[T]he mere presence of drugs in a person's system is insufficient to prove that the drugs are knowingly possessed by the person or that the drugs were within the person's control. . . . [However] the presence of drugs is circumstantial evidence of prior possession." State v. Griffin, 220 Wis.2d 371, 381, 584 N.W.2d 127 (Ct. App. 1998). To support a finding of possession, there must be sufficient corroborating evidence. Ibid.

4. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

5. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

6. Subsection 961.01(13) provides a lengthy definition of "manufacture" that lists many different alternatives. The Committee suggests selecting the type of manufacturing that is alleged to be involved in the case and specifying that type in the instruction. The instruction as drafted uses "produce" because the Committee concluded that it is likely to apply in the greatest number of cases. The complete definition in § 961.01(13) is as follows:

> "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of, or to produce, prepare, propagate, compound, convert or process, a controlled substance or controlled substance analog, directly or indirectly, by extraction from substances of natural origin, chemical synthesis or a combination of extraction and chemical synthesis, including to package or repackage or the packaging or repackaging of the substance, or to label or to relabel or the labeling or relabeling of its container. "Manufacture" does not mean to prepare, compound, package, repackage, label or relabel or the preparation, compounding, packaging, repackaging, labeling or relabeling of a controlled substance:
>
> (a) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or
> (b) By a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of or as an incident to, research, teaching or chemical analysis and not for sale.

Subsection 961.01(13) was repealed and recreated by 1993 Wisconsin Act 129, effective date: March 19, 1994. In addition to grammatical changes, one substantive revision was made: the exception for "the preparation or compounding of a controlled substance by an individual for his own use" was eliminated.

7. The bracketed material implements the "rebuttable presumption of intent to manufacture,"

which is set forth in § 961.65 and stated as follows:

> Possession of more than 9 grams of ephedrine or pseudoephedrine, other than pseudoephedrine contained in a product to which s. 961.01(20c)(a) or (b) applies, creates a rebuttable presumption of intent to manufacture methamphetamine.

The approach used in the instruction is the one the Committee has adopted to deal with "rebuttable presumptions" and "prima facie cases" in other situations. See Wis JI-Criminal 225.

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6070 USE OR POSSESSION OF A MASKING AGENT — § 961.69(2)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime for a person to use, or possess with the primary intent to use, a masking agent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [used] [possessed with the primary intent to use] a substance or device.

   ["Possessed" means that the defendant knowingly[1] had actual physical control of a substance or device.[2]]

Deciding About Knowledge[3]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

2. The substance or device was a masking agent.

   A masking agent is any substance or device that is intended for use to defraud, circumvent, interfere with, or provide a substitute for a bodily fluid in conjunction

with a lawfully administered drug test.[4]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 6070 was originally published in 2016 and revised in 2021. This revision was approved by the Committee in October 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

This instruction is for possession or use of a masking agent in violation of § 961.69(2), which was created by 2015 Wisconsin Act 264, effective date: March 19, 2016. Subsection (3) of § 961.69 prohibits delivery, possession with intent deliver, or manufacturing with intent to deliver, a masking agent. Subsection (4) prohibits placing an advertisement to promote the sale of a masking agent. Uniform instructions have not been drafted for violations of subs. (3) and (4).

2013 Wisconsin Act 194 [effective date: April 9, 2014] created § 961.443. Under § 961.443, a defendant is entitled to immunity from criminal prosecution for possession of a masking agent if the charge stems from the act of rendering aid to a person believed to be suffering from a drug overdose. Specifically, § 961.443(2) provides:

> An aider is immune from prosecution under under s. 961.69(2) for possession of a masking agent under the circumstances surrounding or leading to his or her commission of an act described in sub. (1).

The phrase "circumstances surrounding" means that the facts forming the basis for the possession of a masking agent charge must be closely connected to the events concerning the defendant rendering aid to an individual suffering from a drug overdose. State v. Lecker, 2020 WI App 65, 394 Wis.2d 285, 294, 950 N.W.2d 910.

An "aider" means a person who does any of the following:

> (a) Brings another person to an emergency room, hospital, fire station, or other health care facility and makes contact with an individual who staffs the emergency room, hospital, fire station, or other health care facility if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any

controlled substance or controlled substance analog.

(b) Summons and makes contact with a law enforcement officer, ambulance, emergency medical services practitioner, as defined in s. 356.01(5), or other health care provider, in order to assist another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(c) Calls the telephone number "911" or, in an area in which the telephone number "911" is not available, the number for an emergency medical service provider, and makes contact with an individual answering the number with the intent to obtain assistance for another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog. Wis. Stat. § 961.443(1).

The legislature did not expressly provide in Wis. Stat. § 961.443 who should make the immunity decision and when that decision should be made. However, in State v. Williams, 2016 WI App 82, 372 Wis.2d. 365, 888 N.W.2d 1, the court held that the determination of immunity is to be made by the circuit court pretrial, not by the fact finder at trial. The burden is on the defendant to prove by a preponderance of the evidence that he or she is entitled to immunity. Id. at ¶14.

1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

2. "Possess" is defined in Wis JI-Criminal 920 to require "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

3. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 1, supra. The Committee concluded that sec. 961.69(2) does not require proof that defendants know of the prohibition against possessing a masking agent. This conclusion is based on sec. 939.23(1).

4. This is the definition of "masking agent" provided in § 961.69(1).

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6100 OBTAINING A PRESCRIPTION DRUG BY FRAUD — § 450.11(7)

Statutory Definition of the Crime

Section 450.11(7) of the Wisconsin Statutes is violated by one who obtains a prescription drug by willful misrepresentation.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained a prescription drug.

   A prescription drug is a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug.[2]

2. The defendant knew or believed that the substance was a prescription drug.[3]

3. The defendant obtained the prescription drug by a willful misrepresentation.

   This requires that the defendant intended to deceive (name person) and intended to induce (name person) to rely and act on the misrepresentation.

   This element also requires that (name person) was deceived by the misrepresentation. (Name person) must have been induced to and must have in

fact parted with possession of the prescription drug in reliance upon the misrepresentation.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6100 was originally published in 1996. This revision was approved by the Committee in June 2004 and involved adoption of a new format and revisions in the Comment.

This instruction is for one type of violation defined in § 450.11(7)(a), which reads as follows:

> No person may obtain or attempt to obtain a prescription drug, or procure or attempt to procure the administration of a prescription drug, by fraud, deceit or willful misrepresentation or by forgery or alteration of a prescription order; or by willful concealment of a material fact; or by use of a false name or address.

A similar violation relating to controlled substances is defined in § 961.43(1)(a). See Wis JI-Criminal 6038.

Violations of § 450.11(7) are punishable by a fine of not more than $500 or imprisonment for not more than 6 months, or both. § 450.11(9)(a). Violations resulting in delivery, or possession with intent to manufacture or deliver, are punishable as a Class H felony. For an instruction on offenses involving possession with intent to deliver, adding the fourth element of Wis JI-Criminal 6035 to this instruction should provide a usable model.

1. This statement of the offense selects from the various alternatives presented by the statute. See the Comment preceding this footnote. The statute prohibits obtaining or attempting to obtain a prescription drug and procuring or attempting to procure the administration of a prescription drug by fraud, deceit, willful misrepresentation, forgery, alteration of a prescription order, concealment of a material fact, or use of a false name or address.

2. Section 450.01(20)(a) provides that "prescription drug" means "any drug, drug product or drug-containing preparation which is subject to 21 USC 353(b) or 21 CFR 201.105." Sub. (20)(b) of the same statute provides that for purposes of other subsections of § 450.11 certain controlled substances may be considered prescription drugs, but sub. (7) is not one of those subsections.

21 USC 353(b) reads as follows:

(1) A drug intended for use by man which C
(A) is a habit-forming drug to which 21 USC § 351(d) applies; or
(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or
(C) is limited by an approved application under 21 USC § 355 to use under the professional supervision of a practitioner licensed by law to administer such drug, shall be dispensed only (I) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such a written or oral prescription if such refilling is authorized by the prescriber . . .

21 CFR 201.105 Veterinary Drugs, reads as follows:

A drug subject to the requirement of section 504(f)(l) of the act shall be exempt from section 502(f) of the act if all the following conditions are met:
(a) The drug is:
(1)(I) In the possession of a person (or his agents or employees) regularly and lawfully engaged in the manufacture, transportation, storage, or wholesale distribution of drugs that are to be used only by or on the prescription or other order of a licensed veterinarian; or . . .

In the Committee's judgment, these definitions boil down to the one suggested in the instruction: "a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug."

3. This element is based on Wis JI-Criminal 6038, Acquiring Possession Of A Controlled Substance By Misrepresentation. A knowledge element like this is added to all the controlled substance instructions because of case law. See, for example, State v. Sartin, 200 Wis.2d 47, 547 N.W.2d 449 (1996).

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6110 POSSESSION OF A PRESCRIPTION DRUG WITH INTENT TO DELIVER — § 450.11(7)(g)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess a prescription drug with intent to deliver.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a substance.

   "Possessed" means that the defendant knowingly[1] had actual physical control[2] of a substance.

   [It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][3]

2. The substance was a prescription drug.

3. The defendant knew or believed that the substance was a prescription drug.[4]

   A prescription drug is a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug.[5]

4. The defendant intended to deliver a prescription drug.

"Deliver" means to transfer or attempt to transfer from one person to another.[6]

"Intended to deliver" means that the defendant had the purpose to deliver.[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all of the facts and circumstances in this case bearing upon intent and knowledge. As a part of the circumstances, you may consider the quantity and monetary value of the substance.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6110 was approved by the Committee in April 2006.

This instruction is drafted for violations of § 450.11(7)(g) and (9)(b). Subsection (9)(c) provides as follows:

> In any action or proceeding brought for the enforcement of this section, it shall not be necessary to negate any exception or exemption contained in this section, and the burden of proof of any such exception or exemption shall be upon the defendant.

The instruction does not address any "exceptions or exemptions."

1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 5.

2. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
>
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
>
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called "constructive possession."

3. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

4. This knowledge element is included to be consistent with the other instruction for a "prescription drug" offense – see Wis JI-Criminal 6100, footnote 3.

5. Section 450.01(20)(a) provides that "prescription drug" means "any drug, drug product or drug-containing preparation which is subject to 21 USC 353(b) or 21 CFR 201.105." Sub. (20)(b) of the same statute provides that for purposes of other subsections of § 450.11 certain controlled substances may be considered prescription drugs, but sub. (7) is not one of those subsections.

21 USC 353(b) reads as follows:

> (1) A drug intended for use by man which –
> (A) is a habit-forming drug to which 21 USC § 351(d) applies; or
> (B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or
> (C) is limited by an approved application under 21 USC § 355 to use under the professional supervision of a practitioner licensed by law to administer such drug, shall be dispensed only (I) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such a written or oral prescription if such refilling is authorized by the prescriber . . .

21 CFR 201.105 Veterinary Drugs, reads as follows:

> A drug subject to the requirement of section 504(f)(l) of the act shall be exempt from section 502(f) of the act if all the following conditions are met:
> (a) The drug is:
> (1)(I) In the possession of a person (or his agents or employees) regularly and lawfully engaged in the manufacture, transportation, storage, or wholesale distribution of drugs that are to be used only by or on the prescription or other order of a licensed veterinarian; or . . .

In the Committee's judgment, these definitions boil down to the one suggested in the instruction: "a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug."

6. This is based on the definition of "delivery" in sec. 961.01(6).

7. "Intent" is defined in the Criminal Code to require either "mental purpose" or being "aware that (his) (her) conduct was practically certain to cause" the result. The Committee concluded that the "mental purpose" alternative is most likely to apply to this offense. But see, Wis JI-Criminal 923A and 923B.

8. This is based on section 450.11(7)(g), which applies to controlled substance violations and provides as follows with respect to intent to manufacture or deliver:

> . . . Intent under this paragraph may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the prescription drug prior to, during and after the alleged violation.

6112 POSSESSION OF A PRESCRIPTION DRUG WITHOUT A VALID PRESCRIPTION — § 450.11(7)(h)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime for a person to possess a prescription drug unless (he) (she) obtained it with a valid prescription.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a prescription drug.

   "Possessed" means that the defendant knowingly[2] had actual physical control[3] of a prescription drug.

   [It is not necessary that the quantity be substantial. Any amount is sufficient.][4]

   A prescription drug is a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug.[5]

2. The defendant knew or believed that the substance was a prescription drug.[6]

3. The prescription drug was not dispensed[7] to the defendant upon a prescription order issued by a practitioner.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all of the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6112 was approved by the Committee in July 2009. A non-substantive editorial correction was made in 2013.

This instruction is drafted for violations of § 450.11(7)(h), which reads as follows: "No person may possess a prescription drug unless the prescription drug is obtained in compliance with this section." Section 450.11(1) provides that "[n]o person may dispense any prescribed drug or device except upon the prescription order of a practitioner." Reading these two sections together yields the offense addressed by this instruction: possessing a prescription drug without a valid prescription. The penalty for violations of § 450.11(7)(h) is set forth in sub. (9)(b).

Subsection (9)(c) of § 450.11 provides as follows:

> In any action or proceeding brought for the enforcement of this section, it shall not be necessary to negate any exception or exemption contained in this section, and the burden of proof of any such exception or exemption shall be upon the defendant.

The instruction does not address any "exceptions or exemptions."

1. This is a paraphrase of the definition of the offense in §450.11(7)(h), which reads as follows: "No person may possess a prescription drug unless the prescription drug is obtained in compliance with this section." Section 450.11(1) provides that "[n]o person may dispense any prescribed drug or device except upon the prescription order of a practitioner." Reading these two sections together yields the offense addressed by this instruction: possessing a prescription drug obtained without a valid prescription.

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 5.

3. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

4. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

5. Section 450.01(20)(a) provides that "prescription drug" means "a drug, drug product, or drug-containing preparation that is subject to 21 USC 353(b) or 21 CFR 201.105." Subsection (20)(b) of § 450.01 provides that for purposes of specified subsections of § 450.11 certain controlled substances may be considered prescription drugs, but sub. (7) is not one of those subsections.

21 USC 353(b) reads as follows:

> (1) A drug intended for use by man which –
> (A) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or
> (B) is limited by an approved application under section 355 of this title to use under the professional supervision of a practitioner licensed by law to administer such drug; shall be dispensed only
> (i) upon a written prescription of a practitioner licensed by law to administer such drug, or
> (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or
> (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

21 Sec. 201.105 Veterinary drugs, reads as follows:

A drug subject to the requirements of section 503(f)(1) of the act shall be exempt from section 502(f)(1) of the act if all the following conditions are met: (a) The drug is:

(1)(i) In the possession of a person (or his agents or employees) regularly and lawfully engaged in the manufacture, transportation, storage, or wholesale distribution of drugs that are to be used only by or on the prescription or other order of a licensed veterinarian; or (ii) In the possession of a retail, hospital, or clinic pharmacy, or other person authorized under State law to dispense veterinary prescription drugs, who is regularly and lawfully engaged in dispensing drugs that are to be used only by or on the prescription or other order of a licensed veterinarian; or (iii) In the possession of a licensed veterinarian for use in the course of his professional practice . . .

In the Committee's judgment, these definitions boil down to the one suggested in the instruction: "a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug."

6. This knowledge element is included by analogy to controlled substance offenses, where case law has added a knowledge requirement. See, State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973), and State v. Sartin, 200 Wis.2d 47, 546 N.W.2d 449 (1996), discussed in Wis JI-Criminal 6000, Note On The Knowledge Element In Controlled Substance Cases.

7. "Dispense" is defined in § 450.01(7).

SM-5 SUGGESTED ORDER OF INSTRUCTIONS

[RENUMBERED WIS JI-CRIMINAL 1.]

COMMENT

SM-5 was originally published in 1966. It was renumbered Wis JI-Criminal 1 in 1995.

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SM-6 JURY INSTRUCTIONS ON LESSER INCLUDED OFFENSES

CONTENTS

Scope

This Special Material attempts to provide a framework for deciding when it is proper to instruct the jury on a lesser included offense. There are two tests to consider: first, whether an offense is a lesser included offense of the crime charged; and second, whether the evidence supports an instruction on the lesser included offense. If both tests are satisfied, an instruction must be given upon request of either party.

I. When is a crime a lesser included offense of the charged crime?

The authority for convicting a defendant of a lesser included offense and the standard for determining when an offense is "lesser included" are found in § 939.66 of the Wisconsin Statutes:

> Conviction of included crime permitted. Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime but not both. An included crime may be any of the following:
>
> (1) A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.
>
> (2) A crime which is a less serious type of criminal homicide than the one charged.
>
> (2m) A crime which is a less serious or equally serious type of battery than the one charged.
>
> (2p) A crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged.
>
> (2r) A crime which is a less serious type of violation under s. 943.23 than the one charged.
>
> (3) A crime which is the same as the crime charged except that it requires recklessness or negligence while the crime charged requires a criminal intent.

(4) An attempt in violation of s. 939.32 to commit the crime charged.

(4m) A crime of failure to timely pay child support under s. 948.22(3) when the crime charged is failure to pay child support for more than 120 days under s. 948.22(2).

(5) The crime of attempted battery when the crime charged is sexual assault, sexual assault of a child, robbery, mayhem, or aggravated battery or an attempt to commit any of them.

(6) A crime specified in s. 940.285(2)(b)4. or 5. when the crime charged is specified in ss. 940.19(2) to (6), 940.225(1), (2), or (3), or 940.30.

(6c) A crime that is a less serious type of violation under s. 940.285 than the one charged.

(6e) A crime that is a less serious type of violation under s. 940.295 than the one charged.

(7) The crime specified in s. 940.11(2) when the crime charged is specified in s. 940.11(1).

The principle which allows conviction for a lesser included offense upon an information charging a greater offense is that the defendant has received adequate notice of the lesser offense since it does not require proof of any fact not required for the greater.[1]

In order to instruct the jury on a lesser included offense, the offense must qualify under one of the subsections of § 939.66. A trial court is not permitted to instruct or submit a verdict on a lesser crime which is not included in the charged crime.[2] The subsections of § 939.66 are an exhaustive list of the categories of lesser included offenses; if an offense does not fit within one of these categories, it is not "lesser included" and it may not be submitted to the jury.

The subsections of § 939.66 break down into two groups. One group states general principles relating to lesser included offenses that can apply across the range of criminal statutes. Consisting of subsections (1), (2), (3), and (4), this group has been part of the statute since it was originally enacted as part of the 1956 Criminal Code revision. The rest of the subsections constitute the second group which states special rules for specific statutes or groups of statutes. Only subsection (5) was part of § 939.66 as originally enacted. These special rules have become necessary for two reasons. First, the general lesser included offense rules are strictly interpreted to focus solely on the statutorily-defined elements

rather than on the facts of the case. (See the discussion below.) Second, new criminal statutes tend to be drafted in a way that does not follow the principles of the 1956 Criminal Code revision. The result is that the general principles do not identify offenses that should logically be included offenses, making special rules necessary.

The discussion below considers each of the general rules and then the special rules as a group.

A. Section 939.66(1): "A crime which does not require proof of a fact in addition to those which must be proved for the crime charged."

The key to applying this subsection is understanding that it is concerned with the statutorily required elements of the crimes and not with the particular facts alleged or proved in the case at hand.[3] "When determining whether a crime is a lesser included offense under sec. 939.66(1), the determinative factor is the statutorily defined elements of the respective crimes."[4] Language in earlier decisions of the Wisconsin Supreme Court, especially State v. Melvin,[5] implicitly approving consideration of the peculiar facts of the case in determining lesser included offenses, has not been followed in subsequent cases,[6] and the strict "statutory elements" test now appears to be clearly established.

In properly applying § 939.66(1), one must compare the statutory definition of the charged crime with the statutory definition of the alleged lesser included crime. If the lesser crime includes any element not included in the definition of the charged crime, the lesser crime is not an "included" offense.

Thus, in Randolph v. State,[7] where the facts involved the shooting of the victim by the defendant, it was held that injury by conduct regardless of life and reckless use of a weapon were not included in the crime of attempted murder. Both the lesser offenses require proof of facts not required for attempted murder. Injury by conduct regardless of life requires proof of injury; reckless use of a weapon requires proof that a weapon was used. Attempted murder requires proof of neither injury nor use of a weapon, although both facts were part of the case against Randolph.

Other illustrations of the "statutory elements" test are found in the following cases:

- State v. Verhasselt[8] – injury by negligent use of a weapon is not included within injury by conduct regardless of life;
- State v. Smith[9] – pointing a weapon is not included within armed robbery;
- State v. Driscoll[10] – indecent liberties with a child is not included within sexual

intercourse with a child;

- State v. Elbaum[11] – resisting an officer is not included within battery to a police officer.

- State v. Hagenkord[12] – injury by conduct regardless of life is not an included offense when the charge is first degree sexual assault.

- State v. Carrington[13] – reckless use of a weapon, in violation of § 941.20(1)(a) is not a lesser included offense of endangering safety while armed, in violation of § 941.30 and § 939.63(1).

- State v. Peck[14] – possession of a controlled substance is not a lesser included offense of manufacturing a controlled substance.

- State v. Martin[15] – battery is not a lesser included offense of second degree sexual assault [sexual contact] under § 940.225(2)(a).

- State v. Clemons[16] – possession of a controlled substance is not a lesser included offense of first degree reckless homicide under § 940.02(2)(a), causing death by the delivery of a controlled substance.

- State v. Rundle[17] – reckless child abuse causing great bodily harm under § 948.03(3)(a) is not a lesser included offense of intentional child abuse causing bodily harm under § 948.03(2)(b).

In many of these situations, it can be argued that the strict "statutory elements" test leads to an unfair, or at least excessively rigid, result. (Some of the rigidity is relieved by other subsections of § 939.66 which are discussed below.) This rigidity or unfairness is compounded by the fact that the lesser included offense test has also been adopted for the purposes of determining when multiple convictions are possible. See, for example, State v. Elbaum, 54 Wis.2d 213, 194 N.W.2d 660 (1971). Under this rule, multiple convictions are allowed whenever one offense is not "included" within the other under the definition of § 939.66.[18]

The "elements only" approach and alternative lesser included offense tests were thoroughly reviewed in State v. Carrington.[19] The Wisconsin Supreme Court reaffirmed the "elements only" test but acknowledged two qualifications. First, a "penalty enhancer" may be considered in determining what the statutory elements of the charged offense are. Thus, a charge of endangering safety by conduct regardless of life, with the addition of the penalty enhancer provided in § 939.63 – while possessing or using a dangerous weapon –

includes an element of possessing or using a dangerous weapon which becomes part of the lesser included offense analysis. Second, the Carrington decision acknowledged that the charging document may be referred to in one situation: where a statute provides alternative elements, courts should look to the charging document to determine the greater crime to which the elements only test applies.[20]

Wisconsin is not alone in its commitment to the strict statutory elements test. In United States v. Schmuck, 840 F.2d 384 (7th Cir. 1988), the court, en banc, reversed a panel decision and reaffirmed that the strict "comparison-of-the-elements" test is the proper one to use in federal prosecutions in the 7th Circuit. The panel had adopted a more flexible, "inherent relationship" test, which allowed consideration of the facts alleged in the charge and the evidence presented. The en banc opinion held that the elements test is better for three reasons: 1) it is more consistent with the "necessarily included" standard in Rule 31(c) of the Federal Rules of Criminal Procedure; 2) it avoids problems in giving notice to the defendant; and 3) it is consistent with the test used for double jeopardy purposes. The en banc decision was affirmed by the United States Supreme Court, with the Court emphasizing that the comparison-of-the-statutory-elements test is what is required by Rule 31(c). The court also found that the

> elements test is far more certain and predictable in its application than the inherent relationship test . . . [it] permits both sides to know in advance what jury instructions will be available . . . [and] promotes judicial economy by providing a clearer rule of decision and by permitting appellate courts to decide whether jury instructions were wrongly refused without reviewing the entire evidentiary record for nuances of reference.

United States v. Schmuck, 489 U.S. 705, 720-21 (1989)

B. Section 939.66(2): "A crime which is a less serious type of criminal homicide than the one charged."

Section 939.66(2) provides a special standard for homicides: all less serious types of criminal homicide are considered to be included within all more serious types of homicide. The evidence must support the giving of the instruction on the lesser offense, but in the proper case, instruction on any homicide offense could be proper, even though the "statutory elements" test of § 939.66(1) is not satisfied.[21]

This rule can be applied without difficulty in most cases. The Wisconsin Supreme Court has compared the maximum penalties to determine if one homicide is less serious than another. State v. Davis, 144 Wis.2d 852, 425 N.W.2d 411 (1988). Thus, for any given homicide offense, all other homicides with lower maximum penalties are included crimes

and should be submitted to the jury if the evidentiary standard is satisfied.

Determining when one homicide is "less serious" than another has become more complicated than one would expect it to be because some homicide offenses have the same penalty. For example, both second degree intentional homicide under § 940.05 and first degree reckless homicide under § 940.02(1) are Class B felonies; both second degree reckless homicide under § 940.06 and homicide by intoxicated use of a vehicle under § 940.09(1) are Class D felonies. In State v. Wolske, 143 Wis.2d 175, 420 N.W.2d 60 (Ct. App. 1988), convictions for a count of negligent homicide and a count of homicide by intoxicated use of a vehicle for each victim of the defendant's operation of a boat were upheld. The court held that the crimes have different elements and that since the penalties were the same, one was not "less serious" than the other. The specific situation addressed in Wolske will not recur because penalties have changed. But the same situation can arise with other statutes.

In State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909, the defendant gave a controlled substance to a 17-year-old girl and she died as a result of using the substance. Patterson was convicted of 1st degree reckless homicide under § 940.02(2) and of contributing to the delinquency of a child with death as a consequence under § 948.40(4)(a). The court affirmed the two convictions, concluding the offenses are not "multiplicitous" because they require proof of different facts. Further, the court concluded that contributing to the delinquency of a child with death as a consequence is not a "less serious type of criminal homicide" for purposes of Wis. Stat. § 939.66(2). "Rather than being a homicide statute, Wis. Stat. § 948.40(4)(a) is more akin to other offenses spread throughout the statutes that proscribe certain conduct and impose a more serious punishment where death results. . . [T]he legislature did not intend contributing to the delinquency of a child with death as a consequence to be a type of criminal homicide." Patterson, ¶¶24, 25.

Non-homicide offenses may also be lesser included offenses of homicides but to so qualify, they must satisfy one of the other subsections of § 939.66.

C. Section 939.66(3): "A crime which is the same as the crime charged except that it requires recklessness or negligence while the crime charged requires a criminal intent."

The threshold requirement for application of § 939.66(3) is that the lesser crime be "the same as" the crime charged, except for the recklessness or intent element. This requirement has been interpreted to involve the same strict comparison of statutory elements that applies under § 939.66(1). Therefore, subsection (3) does not apply where the lesser offense involves any element not contained within the charged offense.[22] For

example, first degree reckless injury, requiring "criminal recklessness" and "utter disregard for human life" is not the "same crime" as aggravated battery and does not meet the test under sub. (3).[23]

The second requirement for the application of subsection (3) is that the charged offense must require a showing of criminal intent. Under the Criminal Code, when criminal intent is an element of a crime it is indicated by the terms "intentionally," "with intent to," "with intent that," or by forms of the verbs "know" or "believe."[24] If none of these "intent words" appear in the statute defining the greater offense, subsection (3) does not apply.[25]

A third requirement for the application of subsection (3) is that the lesser offense require "recklessness or negligence." When recklessness is an element of a crime, it is indicated by the term "reckless" or "recklessly." See § 939.24(2). When criminal negligence is an element of a crime, it is indicated by the term "negligent." See § 939.25(2).

D. Section 939.66(4): "An attempt in violation of § 939.32 to commit the crime charged."

An attempt to commit the charged crime is always a lesser included offense under subsection (4). An implicit qualification on this rule is that the attempt must in fact be a crime. This qualification was recognized by the Wisconsin Supreme Court in State v. Melvin,[26] where the court held that a defendant was not entitled to an instruction on attempted homicide by reckless conduct because there was no such offense; one cannot attempt to commit a crime which only requires reckless conduct.[27]

Note that several crimes are defined to punish an attempt equally with the completed crime: § 161.41, Possession of a Controlled Substance; §§ 940.41-.49, Intimidation of Witnesses and Victims; § 948.07, Child Enticement; and § 948.605(3), Discharge of Firearm in a School Zone. In these situations, of course, the attempt is not lesser included with respect to the completed crime.

E. The crime-specific provisions.

Several subsections of § 939.66 declare specific offenses to be included crimes of other offenses. These have become necessary to preserve lesser included offenses where they are logically appropriate but where the statutory drafting style and the strict statutory elements test combine to eliminate them. The individual subsections are discussed briefly below.

1. Section 939.66(2m): "A crime which is a less serious or equally serious type of battery than the one charged."

This provision was created in 1987, apparently in response to the decision in State v. Richards,[28] which applied the strict comparison-of-the-statutory-elements test to hold that simple battery was not a lesser included offense of aggravated battery. Since that time, § 940.19, the principal battery statute, has been extensively revised and numerous special battery statutes have been created. See §§ 940.20, 940.201, 940.203, 940.205, 940.207, and 940.208.

In determining whether one battery offense is "less serious" than another, the appropriate test is probably the same as that used for homicide offenses: comparing the maximum penalties. (See the discussion of § 939.66(2) in section I. B., above.) Note that unlike the similar provision for homicides in § 939.66(2), this subsection includes "equally serious" types of battery – that is, those with the same penalties.

2. Section 939.66(2p): "A crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged."

This subsection relates to sexual assault of a child. As amended by 2007 Wisconsin Act 80, § 948.02 defines five first degree offenses [one Class A felony and four Class B felonies], one second degree offense [Class C felony], and one offense involving failure to act by a person responsible for the welfare of a child [Class F felony].

3. Section 939.66(2r): "A crime which is a less serious type of violation under s. 943.23 than the one charged."

This subsection relates to offenses defined in the statute titled, "Operating a Vehicle Without the Owner's Consent." (Included are offenses referred to as "carjacking." See § 943.23(1g).) The maximum penalties are compared to determine whether an offense is "less serious."[29]

4. Section 939.66(4m): "A crime of failure to timely pay child support under s. 948.22(3) when the crime charged is failure to pay child support for more than 120 days under § 948.22(2)."

This subsection relates to the felony nonsupport offense prohibited by § 948.22(2) and the misdemeanor offense defined in sub. (3) of the same statute. The distinguishing feature is the duration of the failure to pay support: if it is 120 days or more, the offense is a felony; if less than 120 days, the offense is a misdemeanor.

5. Section 939.66(5): "The crime of attempted battery when the crime charged is sexual assault, sexual assault of a child, robbery, mayhem, or aggravated battery or an attempt to commit any of them."

Under this subsection, attempted battery is an included offense of sexual assault, sexual assault of a child, robbery, mayhem, and aggravated battery, and of an attempt to commit any of those offenses, even though attempted battery may require proof of elements not contained in the enumerated offenses. The Wisconsin Supreme Court has held that this subsection limits attempted battery as an included offense only of the offenses listed.[30] This may be an overstatement, since attempted battery may well be an included offense of crimes not enumerated in subsection (5) if other subsections of § 939.66 are satisfied. For example, it would be an included crime under subsection (4) where battery is charged.

6. Section 939.66(6): "A crime specified in s. 940.285(2)(b)4. or 5. when the crime charged is specified in ss. 940.19(2) to (6), 940.225(1), (2), or (3), or 940.30."

The "crime[s] specified in s. 940.285(2)(b)4. or 5." are misdemeanor offenses involving abuse of individuals at risk. This provision makes them included offenses of felony battery crimes [§ 940.19(2) to (6)], first, second, and third degree sexual assault [§ 940.225(1), (2), or (3)], and false imprisonment [§ 940.30].

7. Section 939.66(6c): "A crime that is a less serious type of violation under s. 940.285 than the one charged."

Section 940.285 defines several different offenses involving the abuse of individuals at risk. The maximum penalties are compared to determine whether an offense is "less serious."[31]

8. Section 939.66(6e): "A crime that is a less serious type of violation under s. 940.295 than the one charged."

Section 940.295 defines several different offenses involving the abuse and neglect of patients and residents of various facilities. The maximum penalties are compared to determine whether an offense is "less serious."[32]

9. Section 939.66(7): "The crime specified in s. 940.11(2) when the crime charged is specified in s. 940.11(1)."

"The crime specified in s. 940.11(2)" is hiding or burying a corpse; the "crime specified in s. 940.11(1)" is mutilating, disfiguring, or dismembering a corpse.

II. If an offense is "lesser included," when is it proper to submit an instruction on that offense?

Once it has been determined that a crime is a lesser included offense of the charged crime, the trial judge must decide whether the evidence warrants the giving of the instruction. The evidentiary standard is necessary because juries are not to be given the discretion to pick and choose the offense of which the defendant should be found guilty.[33] "Juries cannot rightly convict of the lesser merely from sympathy or for the purpose of reaching an agreement. They are bound by the evidence. . . ."[34]

A. The general rule.

The evidentiary standard for determining when the instruction on the lesser crime should be given was stated as follows in Zenou v. State:

> . . . . if the evidence, in one reasonable view, would suffice to prove guilt of the higher degree beyond a reasonable doubt, and if, under a different, but reasonable view, the evidence would suffice to prove guilt of the lower degree beyond a reasonable doubt, but leave a reasonable doubt as to some element included in the higher degree but not in the lower, the court should, if requested, submit the lower degree as well as the higher.[35]

The court in Zenou went on to describe why the lesser included offense instruction is proper when this test is met:

> . . . . Both the state and the defendant have a right to have the lower degree submitted so that the jury will not be subjected to the choice of either acquitting or convicting of the higher degree where it is really convinced of only the lower degree. Ordinarily, if a court is in doubt, it should submit both degrees upon request.[36]

The test has been upheld in the face of a challenge to its constitutionality. In Ross v. State,[37] the court rejected the defendant's contention that an instruction should be given whenever there is any evidence probative of the lesser offense.[38] The court held that the test did not deny the defendant due process by requiring that there be a reasonable basis in the evidence for the instruction on the lesser offense. To add instructions on offenses not supported by a reasonable basis would not be in the defendant's interest, said the court, since it would make compromise verdicts more likely in cases where acquittal would otherwise have been proper.

In State v. Bergenthal, the court elaborated on the application of the evidentiary standard:

> The key word in the rule is "reasonable." The rule does not suggest some near automatic inclusion of all lesser but included offenses as additional options to a jury. Only if "under a different, but reasonable view," the evidence is sufficient to establish guilt of the lower degree and also leave a reasonable doubt as to some particular element included in the higher degree but not the lower, should the lesser crime also be submitted to the jury. However, there is not to be read into the rule the requirement that "there are not reasonable grounds on the evidence to convict of the greater offense." That goes too far. Where the defendant is able to demonstrate that there is no reasonable view of the evidence that warrants conviction on the greater offense, and the trial court agrees, there remains no issue on such charge to go to the jury. The purpose of multiple verdicts is to cover situations where under different, but reasonable, views of the evidence there are grounds either for conviction of the greater or of the lesser offense. The lesser degree verdict is not to be submitted to the jury unless there exists reasonable grounds for conviction of the lesser offense and acquittal on the greater.[39]

There are, therefore, two requirements established by the evidentiary standard: 1) reasonable grounds for acquittal on the offense charged (and on other instructed offenses greater than that requested); 2) reasonable grounds for conviction on the lesser offense requested. In assessing the "reasonableness," the evidence should be viewed in the light most favorable to the defendant.[40]

In homicide cases, where all less serious types of homicide are included crimes under § 939.66(3), there must be reasonable grounds for acquittal on all degrees of homicide which are more serious than the offense on which an instruction is requested.[41] However, in at least one situation, full application of this test is not necessary: where the evidence supports instructing on the complete privilege of self defense, an instruction on "imperfect self defense" should always be submitted on request.[42] Thus, in a case where first degree intentional homicide is charged and the evidence supports submitting the complete privilege of self defense, an instruction on second degree intentional homicide under § 940.01(2)(b) (unnecessary defensive force) is always appropriate. A similar situation occurs where first degree intentional homicide is charged and the evidence supports an instruction on the defense of voluntary intoxication: it is error to refuse to instruct on first degree reckless homicide as a lesser included offense.[43]

B. A "reasonable view of the evidence" and inconsistent defenses.

Questions may arise in applying the general evidentiary rule in cases where submitting the lesser included offense appears to be inconsistent with defense testimony or the apparent defense theory of the case. For example, should a lesser offense involving recklessness be submitted where a defendant charged with an intentional crime claims to

have acted in self defense? Or, should a lesser offense be submitted where the defense is entirely exculpatory?[44]

In the Committee's judgment, these questions are best resolved by applying the general test to all the evidence by deciding whether a reasonable view of the evidence supports any lesser included offense instruction that is requested. Trial courts "must recognize the fact that a jury could disbelieve the defendant's version of the facts."[45] Courts should look at all the evidence and the reasonable inferences it supports to determine what offenses are supported by different, but reasonable, views of that evidence.[46]

In State v. Thomas,[47] the Wisconsin Court of Appeals stated this rule in the following way:

> We hold that the defendant or the state may request and receive lesser included offense instructions, even when the defendant has given exculpatory testimony, if under a reasonable but different view of the record, the evidence and any testimony other than that part of the defendant's testimony which is exculpatory supports acquittal on the greater charge and conviction on the lesser charge.

III. The necessity of a request for a lesser included offense instruction; the trial judge's sua sponte authority or obligation to give such an instruction.

A. The general rules.

Wisconsin case law establishes three general rules relating to the trial judge's duty and authority to instruct on lesser included offenses. Assuming that an offense qualifies as "included" under § 939.66 and that the evidentiary test is satisfied, the following rules apply.

First, it is error not to submit the lesser included offense if requested by the state or the defendant.[48] Both the state and the defendant have the right to request that a lesser offense be submitted, "so that the jury will not be subjected to the choice of either acquitting or convicting of the higher degree where it is really convinced of only the lower degree."[49] If the state requests an instruction on a lesser included offense and the evidentiary test is met, an instruction is required, even if the defendant opposes it.[50]

Second, in the absence of a request by the state or the defendant, it is not error for the trial court to fail to instruct on a lesser included offense.[51] This is the general rule for all sua sponte instructions in Wisconsin[52] and contrasts with the duty of California trial judges, for example, who must instruct on all "general principles of law" even in the absence of a request.[53] In California this duty extends to lesser included offenses[54] and is apparently

intended to protect the defendant from incompetent counsel.[55]

Third, if no request has been made, Wisconsin trial courts apparently have the authority, as opposed to the duty or obligation, to instruct on a lesser included offense. The Wisconsin Supreme Court has held that "(t)he determining of instructions is not entirely within the control of the defendant because the court may without any request instruct on the degrees of the offense the evidence will sustain. . . ."[56]

While these general rules sound clear, reconciling them with each other and with other principles raises some difficult issues.

B. No duty to instruct sua sponte versus "plain error."

The Wisconsin rule appears to eliminate the trial judge's obligation to give lesser included offense instructions sua sponte,[57] but this may not be the case in practice. This is because failure to instruct, even in the absence of a request, may be reviewed by an appellate court and may be grounds for reversal where it amounts to "plain error."[58] Further, instructions which "misstate the law" may also be reviewed in the absence of proper objection.[59] It is likely that the failure to instruct on a lesser included offense that is fairly raised by the evidence could be characterized as "affecting substantial rights" or that instructions which omit a fairly raised lesser included offense could be characterized as "misstating the law." Thus, although the Wisconsin trial judge is not specifically required to give an instruction on a lesser included offense in the absence of a request, it may be a good idea for the judge to explore the issue in a proper case. The possible problems with doing so are discussed below.

C. Sua sponte instructions versus trial strategy.

One of the primary reasons for the Wisconsin rule requiring a request for a lesser included offense instruction is the recognition that requesting or not requesting a lesser included offense instruction is largely a matter of trial strategy.[60] The theory is that the defendant may choose to test the state's evidence on the greater offense and take the chance that it will be found to be insufficient, requiring an acquittal. For the trial judge to instruct on an included crime where the defendant has chosen to go "all or nothing" on the charged crime alone may raise questions of unfair interference with trial strategy.

D. Anticipating problems at the instruction conference.

The Committee recommends that the possible problems regarding the submission of lesser included offenses be anticipated and dealt with at the instruction conference. The defendant must be present; the conference must be recorded and should raise all appropriate

considerations. It is good practice to ask the state and the defendant if instructions on lesser included offenses are requested.[61] If requests are not made for offenses that the trial judge believes may be raised by the evidence, specific inquiry should be made regarding the defendant's strategic decision not to request submission of that offense. The Committee recommends that the defendant be addressed personally in this regard even though the Wisconsin Supreme Court has held that a defendant is bound by counsel's decision not to request an instruction.[62] Given the potential importance of the decision[63] and the close relationship of the judge's sua sponte instruction authority[64] to the need to protect defendants from ineffective counsel, it may be significant to have the record indicate that the defendant fully participated in the decision.[65]

IV. Instructing the jury on the transition between the charged crime and a lesser included crime.

Wis JI-Criminal 112 and 122[66] offer suggested uniform instructions for the transition between the instruction on the charged crime and the instruction for a lesser included crime. The specific issue with which these instructions deal is what result must be reached with regard to the charged crime before moving on to the included crime. The objective is to advise the jury of its options without having any coercive effect on free deliberation.

Wis JI-Criminal 112 and 122 resolve the issue by advising the jury to make every reasonable effort to reach unanimous agreement on the charged crime before moving on to the lesser included crime. This advice is contained in the following paragraph:

> You should make every reasonable effort to agree unanimously on your verdict on the charge of (name charged crime) before considering the offense of (name lesser included crime). However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the offense of (name charged crime), you should consider whether the defendant is guilty of (name lesser included crime).[67]

The basis for this instruction is the assumption that it would be error for the instruction to require the jury to be unanimous in finding the defendant not guilty of the charged crime before considering the lesser offense. This conclusion has not been explicitly adopted by the Wisconsin Supreme Court,[68] but is implicit in two earlier decisions[69] and has been adopted in other states.[70]

At the other extreme from requiring unanimity on the charged crime is to allow the jury to consider any of the submitted offenses without regard to sequence. This theory was rejected on the ground that it is reasonable to ask that the jury's attention first be focused on the charged crime.

V. Other issues.

A. Instructing on an offense for which the statute of limitations has run.

In State v. Muenter, 138 Wis.2d 374, 406 N.W.2d 415 (1987), the Wisconsin Supreme Court held that an instruction should be given on a lesser included offense even if the statute of limitations has run on that crime. Muenter was charged with several felonies in violation of the State Banking Code. The jury was instructed on lesser included misdemeanor offenses on which the statute of limitations had run and found the defendant guilty of those misdemeanors. On appeal, the court held that "the running of the statute of limitations does not preclude the jury from reaching a verdict convicting the defendant of a crime; it rather precludes the trial court from entering a judgment of conviction on the finding of guilt."[71] The court concluded that this result does not "work a fraud upon the jury's verdict." The evidentiary support for submitting the lesser included offense must, of course, still exist.[72]

B. Attorney argument regarding lesser included offenses.

In State v. Neuser, 191 Wis.2d 131, 528 N.W.2d 49 (Ct. App. 1995), a conviction was reversed because the prosecutor engaged in improper argument regarding the court's submission of a lesser included offense. The following remarks were made: "As to the lesser included offense, the court did not submit that. The defense requested that and the court granted the request. It's not the court ordering that it be done." 191 Wis.2d 131, 137. The court of appeals held that this statement was improper for two reasons: it misstated the law, and it presumed to speak for the trial court. The court described the proper scope of argument:

> The question of whether a lesser included offense is to be submitted is a legal issue which is resolved between the court and counsel. It does not involve the jury, and the proceedings relative to the question are not played out before the jury. With the court having made that decision, it is not within the province of either counsel to opine to the jury why the court may have chosen to do so. Rather, the role of counsel is to argue whether the evidence supports the greater, the lesser or neither charge.

191 Wis.2d 131, 138.

COMMENT

Wis JI-Criminal SM-6 was originally published in 1980 and revised in 1995 and 2014. This revision

was approved by the Committee in August 2023; it amended formatting errors.

1. Remington and Joseph, "Charging, Convicting, And Sentencing The Multiple Criminal Offender." 1961 Wis. L. Rev. 528, 546.

2. Clark v. State, 62 Wis.2d 194, 205, 214 N.W.2d 450 (1974).

3. State v, Verhasselt, 83 Wis.2d 647, 266 N.W.2d 342 (1978); Randolph v. State, 83 Wis.2d 630, 266 N.W.2d 334 (1978); Geitner v. State, 59 Wis.2d 128, 207 N.W.2d 837 (1973); State v. Smith, 55 Wis.2d 304, 198 N.W.2d 630 (1972).

4. Verhasselt, cited in note 3, supra, at 664.

5. 49 Wis.2d 246, 181 N.W.2d 490 (1970).

6. See cases cited in note 3, supra.

7. 83 Wis.2d 630, 266 N.W.2d 334 (1978). Under current law, reckless injury under § 940.23 is the equivalent offense to "injury by conduct regardless of life," the offense at issue in Randolph.

8. 83 Wis.2d 647, 266 N.W.2d 342 (1978).

9. 55 Wis.2d 304, 198 N.W.2d 630 (1972).

10. 53 Wis.2d 699, 193 N.W.2d 851 (1972).

11. 54 Wis.2d 213, 194 N.W.2d 660 (1972).

12. 100 Wis.2d 452, 302 N.W.2d 42 (1981).

13. 134 Wis.2d 260, 397 N.W.2d 484 (1986).

14. 143 Wis.2d 624, 422 N.W.2d 160 (Ct. App. 1988).

15. 156 Wis.2d 399, 456 N.W.2d 892 (Ct. App. 1990).

16. 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991).

17. 166 Wis.2d 715, 480 N.W.2d 518 (Ct. App. 1992).

18. See a full critique of the strict test of Randolph in NOTE: Criminal Law – Critique of Wisconsin's Lesser Included Offense Rules 1979 Wis. L. Rev. 896.

19. 134 Wis.2d 260, 397 N.W.2d 484 (1986).

20. 134 Wis.2d 260, 271, citing State v. Hagenkord, 100 Wis.2d 452, 482-83, 302 N.W.2d 421 (1981).

21. Harris v. State, 68 Wis.2d 436, 441, 228 N.W.2d 645 (1975).

22. State v. Randolph, cited in note 3, supra.

23. State v. Eastman, 185 Wis.2d 405, 518 N.W.2d 257 (Ct. App. 1994). The same result was reached under prior law, where cases held that the "conduct evincing a depraved mind" standard failed to meet the test under sub. (3) because the standard was distinct from, and not a species of, recklessness or negligence. See State v. Randolph, cited in note 3, supra; and State v. Weso, 60 Wis.2d 404, 407-410, 210 N.W.2d 442 (1973).

24. Wis. Stat. § 939.23(1).

25. Under the pre-1989 homicide statutes, cases had held that if the charged offense contained the "conduct evincing a depraved mind" standard, subsection (3) does not apply, because that standard does not embody criminal intent. See, for example, State v. Verhasselt, cited in note 3, supra. The same result occurs under current law, where it is clear that first degree reckless offenses are crimes involving "criminal recklessness," which is clearly defined as requiring awareness of the risk, not criminal intent. See § 939.24.

26. 49 Wis.2d 246, 181 N.W.2d 490 (1970).

27. Note that recklessly endangering safety under § 941.30 provides the equivalent to an attempt to commit reckless homicide or reckless injury: the conduct is the same in the sense of creating an unreasonable and substantial risk and the mental state – awareness of the risk – is the same, but death or injury need not be caused; it is sufficient that the safety of another be endangered.

28. State v. Richards, 123 Wis.2d 1, 365 N.W.2d 7 (1985).

29. Comparing the maximum penalties is the test used in determining whether one homicide offense is less serious than another under § 939.66(2). See discussion at section I., B.

30. State v. Melvin, 49 Wis.2d 246, 181 N.W.2d 490 (1970).

31. Comparing the maximum penalties is the test used in determining whether one homicide offense is less serious than another under § 939.66(2). See discussion at section I., B.

32. Comparing the maximum penalties is the test used in determining whether one homicide offense is less serious than another under § 939.66(2). See discussion at section I., B.

33. Weisenbach v. State, 138 Wis. 152, 119 N.W. 843 (1909).

34. State v. Melvin, 49 Wis.2d 246, 253, 181 N.W.2d 490 (1970).

35. Zenou v. State, 4 Wis.2d 655, 668, 91 N.W.2d 208 (1958).

36. Zenou, 4 Wis.2d 655, 91 N.W.2d 208 (1958). This standard has been cited with approval in many subsequent decisions of the Wisconsin Supreme Court. See, for example, State v. Bergenthal, 47 Wis.2d 668, 178 N.W.2d 16 (1970); State v. Anderson, 51 Wis.2d 557, 560, 187 N.W.2d 335 (1971); Day v. State, 55 Wis.2d 756, 759, 201 N.W.2d 42 (1972); State v. Garcia, 73 Wis.2d 174, 242 N.W.2d 919 (1976).

37. 61 Wis.2d 160, 211 N.W.2d 827 (1973).

38. The defendant in Ross relied on the more liberal rule that applies in at least some federal courts, that the lesser offense should be submitted where there is "any evidence . . . however weak . . . tending to bear upon the issue of the lesser included offense." Belton v. United States, 382 F.2d 150, 155 (D.C. Cir. 1967).

39. State v. Bergenthal, 47 Wis.2d 668, 675, 178 N.W.2d 16 (1970).

40. Garcia v. State, 73 Wis.2d 174, 186, 242 N.W.2d 919 (1976); Ross v. State, 61 Wis.2d 160, 211 N.W.2d 827 (1973).

41. Harris v. State, 68 Wis.2d 436, 228 N.W.2d 645 (1975); Jones (George Michael) v. State, 70 Wis.2d 41, 233 N.W.2d 430 (1975).

42. State v. Gomaz, 141 Wis.2d 302, 310, 414 N.W.2d 626 (1987).

43. State v. Brown, 118 Wis.2d 377, 348 N.W.2d 593 (Ct. App. 1984), reached this conclusion under pre-1989 Wisconsin homicide law with regard to what was then first and second degree murder. The same result would occur under current statutes. But see State v. Holt, 128 Wis.2d 110, 382 N.W.2d 679 (Ct. App. 1985), holding that if there really was not sufficient evidence to support the intoxication instruction, the instruction on the less serious degree of homicide is not required.

44. These sorts of questions were discussed in two decisions of the Wisconsin Supreme Court. See State v. Sarabia, 118 Wis.2d 655, 348 N.W. 2d 527 (1984), and State v. Johnnies, 76 Wis.2d 578, 251 N.W.2d 807 (1977). Also see State v. Simpson, 125 Wis.2d 375, 373 N.W.2d 673 (Ct. App. 1985), on reconsideration of 118 Wis.2d 454, 347 N.W.2d 920 (Ct. App. 1984).

45. State v. Gomaz, 141 Wis.2d 302, 308, 414 N.W.2d 626 (1987); State v. Sarabia, 118 Wis.2d 655, 663, 348 N.W.2d 527 (1984).

46. See Dickey, Schultz, and Fullin, The Importance of Clarity in the Law of Homicide, 1989 Wis. L. Rev. 1323, 1391.

47. 128 Wis.2d 93, 107, 381 N.W.2d 567 (Ct. App. 1985). For other cases applying this evidentiary rule, see State v. Seibert, 141 Wis.2d 753, 416 N.W.2d 900 (Ct. App. 1987), and State v. Simpson, cited in note 44, supra.

48. Neunfeldt v. State, 29 Wis.2d 20, 138 N.W.2d 25 (1965).

49. Zenou v. State, 4 Wis.2d 655, 668, 91 N.W.2d 208 (1958).

50. State v. Fleming, 181 Wis.2d 546, 510 N.W.2d 837 (Ct. App. 1993). Indications by the prosecution before and during trial that a lesser included offense instruction would not be requested are not binding in the absence of a formal agreement or stipulation.

51 Neunfeldt v. State, 29 Wis.2d 20, 138 N.W.2d 25 (1965); Williamson v. State, 31 Wis.2d 677,

143 N.W.2d 486 (1966); Green v. State, 38 Wis.2d 361, 156 N.W.2d 477 (1968).

52. See, for example, Bergeron v. State, 85 Wis.2d 595, 271 N.W.2d 386 (1978).

53. People v. Wade, 348 P.2d 116 (1959).

54. People v. Sedeno, 518 P.2d 913 (1974); People v. Flannel, 603 P.2d 1 (1979); People v. Wickersham, 650 P.2d 311 (1982).

55. People v. Wade, 348 P.2d 116 (1959).

56. Neunfeldt v. State, 29 Wis.2d 20, 32, 138 N.W.2d 25 (1965). Also see State v. Amundson, 69 Wis.2d 554, 230 N.W.2d 775 (1975), where the giving of an instruction on the defense of entrapment, sua sponte, was upheld even though the defendant objected to the giving of the instruction.

57. See cases cited in note 51, supra.

58. Bergeron v. State, 85 Wis.2d 595, 271 N.W.2d 386 (1978). Also see Virgil v. State, 84 Wis.2d 166, 189-90, 267 N.W.2d 852 (1978) for the definition of "plain error" adopted by the Bergeron decision.

59. Wray v. State, 87 Wis.2d 367, 373, 275 N.W.2d 731 (1978); Lambert v. State, 73 Wis.2d 590, 607, 243 N.W.2d 524 (1976).

60. Turner v. State, 64 Wis.2d 45, 218 N.W.2d 502 (1974).

61. Finalizing the instructions at the instruction conference may help to avoid the issue addressed in State v. Thurmond, 2004 WI App 49, 270 Wis.2d 477, 677 N.W.2d 655. Thurmond was tried before a jury on charges of first degree sexual assault, kidnapping, and attempted armed robbery. During deliberations that lasted for two days, the jury forwarded several questions to the judge; the judge reinstructed on reasonable doubt and later gave Wis JI-Criminal 520. After the jurors indicated they had reached agreement on one count, the state requested an additional instruction on second degree sexual assault and attempted "un-armed" robbery. The jury returned verdicts finding the defendant guilty of second degree sexual assault and kidnapping, and not guilty of attempted robbery. The court of appeals reversed the convictions, relying primarily on the likelihood that the jury may have believed that the trial court was recommending the finding of guilt to the lesser included offenses. And, the fact that the verdict came relatively quickly after the additional instructions were given suggests that the jury failed to thoughtfully consider the lesser included offenses. The court did not adopt a per se rule prohibiting giving lesser included offense instructions in this situation and noted it could find little guidance in Wisconsin law on this question.

62. Green v. State, 38 Wis.2d 361, 156 N.W.2d 477 (1968).

63. In homicide cases in particular, the lesser included offense issue may be almost as important as guilt or innocence. The difference between conviction on first degree intentional homicide (mandatory life imprisonment) and on second degree intentional homicide or reckless homicide is obviously great. It should be a matter of record that the defendant was fully aware of the consequences of not requesting a lesser included offense instruction in a homicide case.

Added support for the suggestion that the trial judge inquire on the record is offered by the decision

of the United States Supreme Court in Beck v. Alabama, 447 U.S. 625 (1980). Beck reviewed the Alabama procedures for imposing the death penalty which included a statutory prohibition on submitting lesser, noncapital offenses to the jury. The Supreme Court held that the Alabama procedure violated the defendant's right to due process, "by introducing a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case." 447 U.S. 625, 643. While Beck is concerned with the death penalty, its reasoning should be equally applicable to noncapital cases, at least to the extent of assuring that the defendant has actively participated in and agreed with the decision not to request the submission of lesser included offenses supported by the evidence.

64. The problems discussed here were acknowledged by the Wisconsin Supreme Court in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983). Felton noted the following statement from Price v. State, 37 Wis.2d 117, 130, 154 N.W.2d 202 (1967):

> [T]he battle might be so unequal due to the disparity of the skill of counsel that justice would require, in the unusual case, that such instructions [referring to instructions offered sua sponte] be offered for counsel's consideration.

65. Wisconsin appellate courts have not held that the decision on requesting a lesser included offense instruction is solely for the defendant. Three court of appeals cases have dealt with the issue in the context of claims of ineffective assistance of counsel. In State v. Ambuehl, 145 Wis.2d 343, 425 N.W.2d 649 (Ct. App. 1988), the defendant sought to establish ineffective assistance of counsel on the ground that defense counsel did not adequately consult with her on the question of requesting an instruction on a lesser included offense. The court rejected the claim but apparently accepted the defendant's argument that the decision on requesting lesser included offense instructions is one for the defendant to make, not defense counsel. Two more recent decisions suggest that the decision is one of trial strategy for defense counsel to make. See State v. Eckert, 203 Wis.2d 497, 510, 553 N.W.2d 539 (Ct. App. 1996): ". . . a defendant does not receive ineffective assistance of counsel where defense counsel has discussed with the client the general theory of defense, and when based on that general theory, trial counsel makes a strategic decision not to request a lesser-included instruction because it would be inconsistent with, or harmful to, the general theory of defense." Also see, State v. Kimbrough, 2001 WI App 138, 246 Wis.2d 648, 630 N.W.2d 752.

A footnote to the previous version of this special material [c. 1995] cited the commentary to the ABA Standards for Criminal Justice, Standard 4-5.2, (2d ed. 1980), stating that the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses. In the current third edition of the standards, the decision on lesser included offenses is not listed as one of those that is for the defendant personally and the comment quoted above has been deleted and replaced with the following: "It is also important in a jury trial for defense counsel to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury."

66. Wis JI-Criminal 112 is for cases where there is a single defendant; Wis JI-Criminal 122 is for cases with co-defendants.

67. Wis JI-Criminal 112 (copyright 2000).

68. The court of appeals discussed this issue in State v. McNeal, 95 Wis.2d 63, 288 N.W.2d 874 (Ct. App. 1980). The defendant challenged a transition instruction that told the jury to consider the lesser included offense only if they found the defendant not guilty of the charged crime. The court held that the defendant had waived the right to challenge the instruction, but then went on to say that the instruction

correctly stated the law, citing Dillon v. State, 137 Wis. 655, 119 N.W. 352 (1909). The Committee reads Dillon as being concerned primarily with the order in which the offenses are considered and as being implicit support for the approach to transition recommended here. See the discussion in note 68, below.

69. In Payne v. State, 199 Wis. 615, 227 N.W. 258 (1929), the jury foreman specifically asked the trial court whether the jury had to reach unanimous agreement whether the defendant was guilty or not guilty of the charged crime before considering lesser included offenses. On appeal, the defendant claimed the trial judge's response was such that it told the jury unanimous agreement was required. The supreme court held that the trial judge's complete response would not give the jury that impression, implying that there was merit to the defendant's claim that it would have been error to require unanimous agreement before moving to the lesser included offenses.

In Dillon v. State, 137 Wis. 655, 119 N.W. 352 (1909), the instructions were described as telling the jury to consider the lesser included offense upon "its failure to find the defendant guilty of some higher degree of offense." In one view, the failure to agree unanimously on guilt on the charged crime is a "failure to find the defendant guilty."

For a more complete discussion of the Committee's conclusion on this issue, see the Comment to Wis JI-Criminal 112.

70. See State v. Ogden, 35 Or. App. 1, 580 P.2d 1049 (1978), and People v. Johnson, 83 Mich. App. 1, 268 N.W.2d 259 (1978).

71. State v. Muenter, 138 Wis.2d 374, 387, 406 N.W.2d 415 (1987).

72. See State v. Wilson, 149 Wis.2d 878, 440 N.W.2d 534 (1989).

SM-8 JUROR QUESTIONING OF WITNESSES

[WITHDRAWN]

COMMENT

Wis JI-Criminal SM-8 was originally published in 1992. It was withdrawn in 2014 when most of the substance was moved to the Comment to Wis JI-Criminal 57 Instruction On Juror Questioning Of Witnesses.

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SM-9 WHEN A JURY REQUESTS TO HEAR/SEE AUDIO/VISUAL EVIDENCE DURING DELIBERATIONS

This Special Material outlines the procedure that a trial judge should follow when an audio/visual recording has been received into evidence and played at trial and a jury requests to listen to or watch the recording during deliberations. Discussed below are the two Wisconsin cases that have addressed this issue.

Deciding whether to replay the recording

The decision to replay an audio/visual recording is within the trial court's discretion.[1] Factors the court should consider in deciding whether to replay the exhibit include:

- whether the recording will aid the jury in proper consideration of the case;
- whether a party will be unduly prejudiced by replaying the exhibit;
- whether the exhibit could be improperly used by the jury, and;
- whether granting a replay request will unfairly over emphasize a particular piece of evidence.[2]

Before responding to a jury request for a replay, the court shall advise the parties of the request and solicit comment, ideally with the defendant present.[3] Only the portions of the recording played during trial may be played during deliberations.[4] Allowing jurors to take notes during the replay is within the discretion of the trial judge.[5]

Recommended procedure for replaying a recording

If the court decides to replay the recording, the best practice is for the trial judge to bring the jury back to the courtroom and replay the recording with all parties present in open court. In Franklin v. State, the defendant's audio-recorded confession was played for the jury during trial. 74 Wis. 2d 717, 720, 247 N.W.2d 721 (1976). During deliberations, the jury requested to hear it again. Over defense counsel's objection, the trial judge sent the tape back into the jury room with a tape player. The Wisconsin Supreme Court held, "[w]e cannot approve of this practice which entails the risk of breakage or accidental erasure of the tape while it is beyond the trial court's supervision and which presents the danger of overemphasis of the confession relative to testimony given from the witness stand." Id. at 724. The Court held that the proper procedure was that the trial court retain control of the jury's exposure to confessions. Id. at 724-25. Thus, if the court decides to replay a recorded confession, the jury should return to the courtroom where the confession is replayed or reread. Id. at 725.

Thirty years after Franklin, the Court addressed this issue again in State v. Anderson, this time in the context of a video recorded forensic interview of a child victim. 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74.[6] The forensic interview was received into evidence and played in its entirety at trial. Id. ¶7. During deliberations, the jury requested that the "victim's videotaped interview, be sent to the jury room and that a television and VCR be provided so that the jurors could watch the victim's videotaped interview." Id. ¶10. The

trial court granted the request over defense counsel's objection. Id. ¶11. The Court concluded that the circuit court properly exercised its discretion in allowing the jury to hear and see the victim's videotaped interview but failed to apply the correct legal standard when it allowed the jury to view the videotape in the jury room. Id. at ¶29. The trial court should have followed the procedure outlined in Franklin and brought the jury back into the courtroom to view the victim's interview in open court. Id. at ¶30. This procedure "minimizes the risk of breakage or erasure of the recording and, more importantly, allows a circuit court to guide the jury, with the assistance of all counsel, so that no part of the recording is overemphasized relative to the testimony given from the witness stand." Id.

While the case law only addresses recorded statements, the Committee has concluded that the above-described procedure applies to any recorded evidence. When only a portion of the recording was played during trial, the court must take special care to ensure that only that section is played during deliberations. The court or the parties should make a record of exactly what was played during deliberations by noting the beginning and end times from the exhibit.

COMMENT

SM-9 was approved by the Committee in June 2022.

1. See State v. Anderson, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74. (Overruled in part on other grounds. See State v. Alexander, 2013 WI 70, ¶¶26-28, 349 Wis. 2d 327, 833 N.W.2d 126).

2. Id. at ¶105.

3. See State v. Bjerkaas, 163 Wis. 2d 949, 957, 472 N.W.2d 615 (Ct. App. 1991) and State v. Alexander, 2013 WI 70, ¶29, 349 Wis. 2d 327, 833 N.W.2d 126.

4. See State v. Hines, 173 Wis. 2d 850, 861, 496 N.W.2d 720 (Ct. App. 1993).

5. Wis. Stat. § 972.10(1)(a)1.

6. State v. Anderson, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74 was overruled in part on other grounds. See State v. Alexander, 2013 WI 70, ¶¶26-28, 349 Wis. 2d 327, 833 N.W.2d 126).

SM-10 GRAND JURY PROCEEDINGS

The grand jury in Wisconsin is an institution created and controlled by §§ 968.40 through 968.53. The judge plays a limited role: the judge orders the creation of the grand jury; sees to it that a full grand jury is selected and sworn; instructs the grand jurors before they begin their work; presides over proceedings in which statutory immunity for witnesses is sought; accepts lists of all witnesses called by, progress reports from and indictments returned by the grand jury during its session; takes appropriate action when indictments are returned; and discharges the grand jury.

The procedural and legal aspects of a grand jury proceeding are outlined at CR-46, Wisconsin Judicial Benchbook, Volume I, Criminal and Traffic. This Special Material provides scripted material that is not included in the Benchbook.

I. Swearing in the Grand Jurors

The judge shall administer the following oath[1] to grand jurors before they begin the performance of their duties:

> "You, as grand jurors for the county of _____, do solemnly swear or affirm that you will diligently inquire as to all matters and things which come before this grand jury; that you will keep all matters which come before this grand jury secret; that you will indict no person for envy, hatred or malice; that you will not leave any person unindicted for love, fear, favor, affection or hope

of reward; and that you will indict truly, according to the best of your understanding."

II. Swearing in the Court Reporters

The judge must administer to each reporter and assistant the following oath:

"Do you solemnly swear that you will faithfully record and transcribe all the proceedings before the grand jury and keep secret the matter relative to such proceedings?"[2]

III. Charge to the Grand Jury

It is the duty of the court to instruct the grand jury.[3] The following is recommended.

"The function of the grand jury is not to determine guilt or innocence but rather to investigate possible violations of the criminal law and decide whether the person or persons about whom evidence is presented should be brought to trial. The only job of the grand jury is to return indictments and, if such is appropriate, to report its progress to the court.[4] These progress reports, if any, must be prepared and limited so as not to violate the secrecy rule, and unless so limited, they may not be received by the court.

"Your first duty is to select a presiding juror and a clerk. It shall be the duty of the clerk to preserve the minutes of the proceedings and all exhibits.[5]

"All 17 jurors must attend each session unless excused by the presiding juror for good and sufficient reason.[6]

"No business may be transacted by the grand jury unless at least 14 members are in attendance.[7]

"It is the duty of the district attorney of the county to attend your grand jury sessions whenever the jury so desires for the purpose of examining witnesses in your presence, giving you advice upon any legal matter, issuing subpoenas and other process to bring witnesses before you and helping to draw bills of indictment.[8]

"It is the duty of the presiding juror to return to the judge a list, signed by the presiding juror, of all witnesses who are sworn before the grand jury.[9]

"All witnesses brought before the grand jury shall be put under oath. The presiding juror, the district attorney, or other prosecuting officer shall have the authority to administer such oath.[10]

"Any witness subpoenaed to appear before you has the right to confer with and obtain the legal advice of an attorney.[11] Although the attorney is not entitled to be present during the questioning before the grand jury, the witness should be allowed to confer with the attorney outside the jury room whenever the witness so desires.[12] Any witness also has the privilege against self-incrimination granted by the Fifth Amendment to the United States Constitution. Pursuant to

that privilege, the witness may refuse to answer questions before the grand jury. It is the job of the district attorney and the court to decide whether the witness has properly invoked that privilege.

"Any witness should be advised by the prosecuting officer(s) that the witness has a privilege against self-incrimination and has the right to confer with counsel. Such advice should appear on the grand jury record.[13]

"All grand jury deliberations are to be secret, and no one is permitted to be present at your sessions except the jury, the official sworn reporter(s) and typist(s), the prosecuting officer(s), the witness under examination, and a duly sworn interpreter, if one is required.

"The primary duty of the grand jury is to weigh the evidence against the accused. If the evidence 'excites in your minds after careful consideration an honest reasonable belief that the accused committed the offense charged,'[14] you the grand jury may return an indictment of the accused for the offense charged. Only such evidence as is presented during the grand jury sessions shall be considered. You should not subject yourselves to the opinions or accounts of other persons, of the media, or of any other source regarding such evidence. No indictment shall be returned unless at least 12 grand jurors concur therein.[15]

"No grand juror shall be allowed to state or testify in court in what manner he or she or any other member of the jury voted on any question before you, or what opinion was expressed by any juror in relation to any question.[16]

"No grand juror or officer of the court shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, otherwise than by issuing or executing process on such indictment, until the person has been arrested.[17]

"The grand jurors normally serve for a period of 31 consecutive days, unless more days are necessary to complete service. The court may discharge the grand jury at any time.[18]

"When the grand jury is discharged, all transcripts of testimony, minutes of proceedings, exhibits and other records of the grand jury shall be collected by the clerk of the grand jury and delivered, as the jury directs, either to the attorney general or to the district attorney, or, upon approval of the court, to the clerk of the court who shall impound them subject to further order or orders of the court."[19]

IV. Inquiry When a Witness Claims the Privilege Against Self-Incrimination; Grants of Immunity

The judge presides over proceedings relating to the assertion of the privilege against self-incrimination. See Special Material 55 for an outline of a suggested procedure.

COMMENT

SM-10 was originally published in 1974, withdrawn in 1993, and republished in 1995. This revision updated statutory references and was approved by the Committee in December 2003.

This Special Material was withdrawn in 1993 because procedures for grand juries are outlined at CR 46, Wisconsin Judicial Benchbook, Volume I, Criminal and Traffic. It was restored because it provides scripted material that is not included in the Benchbook.

1. The oath is based on § 968.41, which specifies the content of the oath which must be administered.

2. Section 968.43(2) requires that "[b]efore assuming the duties prescribed in this section, each reporter shall make and file an oath faithfully to record and transcribe all the proceedings before the grand jury and to keep secret the matters relative to the proceedings." The oath recommended follows this statutory language. Violation of the oath is punishable as a Class H felony. § 968.43(3).

3. State v. Lawler, 221 Wis. 423, 427, 267 N.W. 65 (1936), states that ". . . it is the duty of the court to instruct the [grand] jury. . . ."

4. In re Grand Jury Report, 204 Wis. 409, 235 N.W. 789 (1931).

5. Section 968.42. These minutes and exhibits are not a matter of public record. Havenor v. State, 125 Wis. 444, 104 N.W. 116 (1905).

6. Section 968.48. There are to be at least 17 qualified jurors on the grand jury. Section 968.40(4).

7. Section 968.48.

8. Sections 968.47 and 978.05(4).

9. Section 968.44 refers to "witnesses who are sworn before the grand jury." It is sufficient that witnesses give an affirmation rather than an oath. § 906.03.

10. Section 968.44.

11. Section 968.45(1) provides in part as follows:

> Any witness appearing before a grand jury may have counsel present, but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge. Counsel may consult with his or her client while before a grand jury.

It is generally conceded that a witness has no constitutional right to the assistance of counsel at the grand jury proceeding. A plurality opinion in United States v. Mandujano, 425 U.S. 564 (1976), held that the right to counsel under the 6th Amendment does not apply at the grand jury because no criminal proceedings have been instituted. Federal courts of appeals have held that the right to counsel does not attach at grand jury proceedings. See, for example, United States v. Ramsey, 785 F.2d 184, 193 (7th Cir. 1986).

12. Section 968.45.

13. At this point, the former version of SM-10 provided special advice for "target witnesses." Special warnings are not required for "targets"; the general advice regarding the privilege against self-incrimination is sufficient. United States v. Washington, 431 U.S. 181 (1977). [Also see State v. Ryan, 79 Wis.2d 83, 255 N.W.2d 910 (1977): a John Doe witness is not entitled to a "target witness" warning.]

14. State v. Lawler, note 3, supra, at 435.

15. Section 968.48.

16. Section 968.52.

17. Section 968.51.

18. Section 968.40(6).

19. Section 968.505.

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SM-12 JOHN DOE PROCEEDINGS

CONTENTS

Scope

The Wisconsin John Doe proceeding is a criminal investigatory inquiry provided for by § 968.26. Its purpose is to ascertain whether a crime has been committed and by whom. Only a judge may conduct a John Doe proceeding. The judge has the power to subpoena and examine witnesses and to determine the extent of the examination.

The procedural and legal aspects of a John Doe proceeding are outlined at CR-46, Wisconsin Judicial Benchbook, Volume I, Criminal and Traffic. This Special Material provides scripted material that is not included in the Benchbook.

I. Instruction to a Witness[1]

After administering the oath or affirmation, the judge should address the witness as follows or direct the prosecutor to do so.[2]

A. Introduction

"You are advised that you are appearing in a John Doe proceeding before (me) (Judge _____) as Circuit Court Judge for _____ County.

"Under Wisconsin law, the circuit judge has the power to subpoena witnesses and compel testimony before this John Doe. You are directed to answer all questions put to you, remembering your oath or affirmation.

"If you believe that a truthful answer to any question asked of you would incriminate you, that is, subject you to criminal prosecution, you may refuse to answer the question on the grounds that it may incriminate you.[3] Do you understand that?

"Do you understand that your answers to questions put to you may be used against you by this John Doe or in another legal proceeding?

"Do you understand that if you testify falsely you may be criminally prosecuted for perjury or false swearing committed during your testimony before this John Doe proceeding?[4]

"Under Wisconsin law, several types of confidential communications are privileged. These include[5] communications between spouses, between a health care provider and patient, between attorney and client, and between a person and a member of the clergy. Do you understand that you may refuse to answer any question asked of you if it would require you to reveal conversations which are privileged by law?

"Do you understand that there are no other lawful grounds upon which you may refuse to answer questions before this John Doe?"

B. Right to Counsel[6]

"You are also advised that you have the right to have an attorney present with you during your testimony. Further, you may confer with your attorney during your testimony. However, your attorney will not be allowed to ask you questions, cross-examine other witnesses, or argue before the judge. Do you understand that?"

[IF THE WITNESS APPEARS WITH COUNSEL, READ THE "INSTRUCTION TO COUNSEL" PROVIDED BELOW AFTER COMPLETING THE INSTRUCTION TO THE WITNESS.]

[IF THE WITNESS APPEARS WITHOUT COUNSEL, ADD THE FOLLOWING.]

"You are appearing before this John Doe without an attorney. Do you understand that (here identify the prosecutors) represent the state of Wisconsin and may not and cannot act as your attorney? Do you understand that if you do not have an attorney but wish to consult with one about these proceedings or have an attorney appear with you, you will be required to return and testify at a future time? Do you wish to have an attorney present with you at this time? If not, has anyone made any threats or promises to get you to give up your right to consult with an attorney or have an attorney appear with you during this John Doe?"[7]

C. Conclusion

"Your testimony at this proceeding will be recorded word-for-word and will be transcribed. Do you understand that?

"I am giving you a copy of the instruction which I have just read to you. Do you acknowledge that you have received a copy of this instruction?"

II. Instruction to Attorney Representing a John Doe Witness

The following should be read to the attorney who appears with a witness subpoenaed before the John Doe.[8]

"(Name of witness) appears with Attorney _____. Attorney _____, you are advised that you are subject to the restrictions set forth in § 968.26(3)(c) of the Wisconsin Statutes.

"Section 968.26(3)(c) allows a witness subpoenaed before a John Doe proceeding to have counsel present at the examination. However, you may not examine your client, cross-examine other witnesses, or argue before the judge.

"If your client wishes to consult with you before answering any question, your client may do so off the record."

III. Order of Secrecy[9]

[ADD THE FOLLOWING IF A SECRET JOHN DOE PROCEEDING HAS BEEN AUTHORIZED.]

"Under Wisconsin law, a circuit judge may order that a John Doe proceeding be secret. That has been done in this case. You are ordered to maintain the

secrecy of this John Doe proceeding and to inform no one of the questions asked, the answers given, or any other matters observed or heard during this proceeding. Violation of this secrecy order may be subject to a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.[10]

"You are now being given a copy of the Order of Secrecy. Do you acknowledge receipt of this Order of Secrecy?"

IV. Inquiry When a Witness Claims the Privilege Against Self-Incrimination; Grants of Immunity

The judge presides over proceedings relating to the assertion of the privilege against self-incrimination. Section 968.26(3)(d) provides: "A court, on the motion of a district attorney, may compel a person to testify or produce evidence under s. 972.08(1). The person is immune from prosecution as provided in s. 972.08(1), subject to the restrictions under s. 972.085." Note that while a John Doe proceeding is conducted by a judge, the compelling of testimony and granting of immunity is undertaken by a court. See Special Material 55 for recommended procedures for compelling testimony, evaluating a claim of the privilege against self-incrimination, and the granting of immunity.

COMMENT

SM-12 was originally published in 1974, withdrawn in 1993, and republished in 1995. It was revised in 1999, 2007, 2009, 2010, and 2011. This revision reflects extensive changes to John Doe procedure made by 2015 Wisconsin Act 64 and was approved by the Committee in June 2019.

This Special Material was withdrawn in 1993 because procedures for John Doe proceedings are outlined at CR 46, Wisconsin Judicial Benchbook, Volume I, Criminal and Traffic. It was restored after being revised to provide scripted material that is not included in the Benchbook.

2015 Wisconsin Act 64 [effective date: October 25, 2015] made extensive changes in the standards and procedures for John Doe investigations. Among the most significant:

- the crimes that may be investigated are limited to specified felonies
    - Class A, B, C, or D felony under chs. 940 to 948 or 961 – § 968.26(1b)(a)1.
    - violation of listed statutes if a Class E, F, G, H, or I felony penalty applies – § 968.26(1b)(a)2.
    - other offenses specified in § 968.26(1b)(a)3., 4., or 4m.
    - crimes committed by a law enforcement officer, corrections officer, or state probation, parole, or extended supervision officer if the individual was engaged in his or her official duties at the time – § 968.26(1b)(a)5.

- secrecy orders apply only to the judge, the district attorney or other prosecuting attorney who participates in the proceeding, law enforcement personnel admitted to the proceeding, an interpreter who participates in the proceeding, or a reporter who makes or transcribes a record of a proceeding. See footnote 7, below.

- the proceeding may not investigate a crime that was not part of the original request unless "a majority of judicial administrative district chief judges find good cause to add specified crimes and the identification of the vote of each judge is available to the public" – § 968.26(5)(b)

- there is a six-month time limit – § 968.26(5)(a) – which "may be extended only if a majority of judicial administrative district chief judges find good cause for the extension and identification of the vote of each judge is available to the public" – § 968.26(5)(a)2.

- reserve judges may not conduct the proceeding – § 968.26 (1b)(b)

- a judge may issue a search warrant relating to a John Doe proceeding only if the judge is not presiding over that proceeding – § 968.26(5)(c)

Section 968.26 was amended by 2009 Wisconsin Act 24 to provide different procedures for John Doe requests made by district attorneys and requests made by other persons. If a district attorney makes a request, "the judge shall convene a hearing . . ." Section 968.26(1m). If a person other than a district attorney makes a request, "the judge shall refer the complaint to the district attorney . . ." Section 968.26(2)(am). The district attorney must decide within 90 days whether to issue charges or refuse to issue charges. If the district attorney refuses, he or she must forward the records and explanation of the refusal to the "judge in whose jurisdiction the crime was allegedly committed." Section 968.26(2)(b). The judge "shall convene a proceeding . . . if he or she determines that a proceeding is necessary to determine if a crime has been committed." Section 968.26(2)(b).

In State ex rel. Reimann v. Circuit Court, 214 Wis.2d 605, 622, 571 N.W.2d 385 (1997), the Wisconsin Supreme Court held that:

> . . . § 968.26 imposes a threshold requirement on persons filing petitions for John Doe proceedings. Before a circuit court judge's obligation to conduct an examination . . . is

> triggered, the John Doe complainant must establish that he or she has "reason to believe" that a crime has been committed
> . . . [A] John Doe complainant must do more than merely allege that a crime has been committed
> . . . [the] complainant . . . must allege objective, factual assertions sufficient to support a reasonable belief that a crime has been committed.

If the Riemann test is met, the John Doe judge does not have the authority to analyze the merits of the case. Even if the judge "applied his common sense and reasonably concluded that conducting a John Doe would be a waste of time," the John Doe must be held. The John Doe judge is not to assess credibility or choose between competing inferences. State ex rel. Williams v. Fiedler, 2005 WI App 91, ¶2, 282 Wis.2d 486, 698 N.W.2d 294.

The Wisconsin Court of Appeals reviewed § 968.24 as amended by 2009 Wisconsin Act 24 in Naseer v. Miller, 2010 WI App 142, 329 Wis.2d 724, 793 N.W.2d 209:

> We therefore conclude that the same interpretation of the "reason to believe" language relating to the prior statute's examination duty should also apply to the amended statute's referral duty. That is, under the amended statute, a judge has a mandatory duty to refer a John Doe complaint to the district attorney only if the four corners of the complaint provide a sufficient factual basis to establish an objective reason to believe that a crime has been committed in the judge's jurisdiction. ¶11.

Suppression of testimony is not required by statute or constitutional principles where a witness was questioned at the John Doe proceeding by a law enforcement officer who was not licensed to practice law. State v. Noble, 2002 WI 64, 253 Wis.2d 206, 646 N.W.2d 38.

John Doe proceedings are sometimes used in an attempt to secure the issuance of charges where the district attorney has refused to charge. The Wisconsin Supreme Court has upheld the constitutionality of the use of the John Doe statute in that situation. See State v. Unnamed Defendant, 150 Wis.2d 352, 441 N.W.2d 696 (1989). Also see State v. Schober, 167 Wis.2d 371, 481 N.W.2d 689 (Ct. App. 1992), holding that a criminal complaint resulting from a John Doe is subject to the regular standard for deciding whether to grant a prosecution motion to dismiss – whether dismissal "is in the public interest."

In State ex rel. Hipp v. Murray, 2008 WI 67, 310 Wis.2d 342, 750 N.W.2d 873, the court held that a John Doe judge has exclusive authority to subpoena witnesses in a John Doe proceeding; the clerk's general authority to issue subpoenas under § 885.01(1) does not apply. The court also held that the subpoenas should have been issued in this case, but "saved for another day" the issue whether a John Doe judge is required to subpoena every witness that a John Doe petitioner requests. 2008 WI 67, ¶52. [A motion for reconsideration was denied at 2008 WI 118, 314 Wis.2d 67, 756 N.W.2d 34.]

The issue "saved for another day" in State ex rel. Hipp v. Murray, supra, was addressed in State ex rel. Robins v. Madden, 2009 WI 46, 317 Wis.2d 342, 766 N.W.2d 837:

> ¶2 The issue we address today is whether the judge in a John Doe hearing is required under Wis. Stat. § 968.26 to examine all the witnesses a complainant produces and to issue subpoenas to all the witnesses a complainant wishes to produce. We read the statute as extending judicial discretion in a John Doe hearing not only to the scope of a witness's examination, but also to whether a witness need testify at

all. Accordingly, we hold that a judge is not required by § 968.26 to examine all the witnesses a complainant produces at a John Doe hearing, or to subpoena all the witnesses a complainant wishes to produce.

1. The 2010 version of SM-12 included a warning to a target witness:

> You are now advised that your testimony given here can be used against you in criminal proceedings and to support the issuance of a warrant for your arrest. You can claim the privilege against self-incrimination and you have the right to have counsel present during your testimony and to consult your counsel before answering.

Both federal and state courts have rejected the need to provide investigatory targets with special warnings. The advice given all witnesses adequately apprises them of the privilege against self-incrimination and other rights. United States v. Washington, 431 U.S. 181, 189 (1977); Ryan v. State, 79 Wis.2d 83, 96, 255 N.W.2d 910 (1977).

2. Practice apparently varies with respect to whether the judge reads the advice personally or allows the prosecutor to do so. The material has been drafted to be usable in either situation.

3. In State v. Hanson, 2019 WI 63, ¶35, 387 Wis.2d 233, 928 N.W.2d 607, the Wisconsin Supreme Court concluded that Miranda warnings are not required for a John Doe witness, but recommended that the advice contained here be given:

> A witness at a John Doe proceeding is not subject to custodial interrogation and therefore Miranda warnings are not required. Although we do not require Miranda warnings be given at John Doe proceedings, we recommend a John Doe judge address a witness in accordance with Special Materials 12.

The court noted that this is the case even if the witness happens to be in custody on charges unrelated to the John Doe.

4. Failure to give the witness this advice will not preclude a perjury prosecution. See United States v. Wong, 431 U.S. 174, 178 (1977). However, providing the advice may impress upon the witness the seriousness and importance of the John Doe and may reinforce the obligation to testify truthfully.

5. The list of privileges is not exhaustive. See, for example, § 905.045 Domestic violence or sexual assault advocate-victim privilege. Rather, it is intended to give the witness an idea of what types of communications may be privileged. If there is reason to believe that other privileges may apply, additional description should be given.

6. The right to counsel is provided in § 968.26(3)(c): "Any witness examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge."

7. If it appears to be necessary to take a more formal waiver of counsel at this point, see Special Material 30 which provides a model for a full waiver.

"A John Doe judge has the authority to disqualify counsel for a witness in a John Doe proceeding but must ensure that there is a record of that decision for review." Unnamed Persons Numbers 1, 2, and 3 v. State, 2003 WI 30, 260 Wis.2d 653, 660 N.W.2d 260.

8. See note 5, supra.

9. The rules relating to secrecy orders were significantly changed by 2015 Wisconsin Act 64. The judge's general authority to order that the proceeding be secret was eliminated and replaced by § 968.26(4)(a) which provides:

- a secrecy order may be issued upon a showing of good cause by the district attorney
- a secrecy order applies only to:
  - the judge
  - the district attorney or other prosecuting attorney who participates in the proceeding
  - law enforcement personnel admitted to the proceeding
  - an interpreter who participates in the proceeding
  - a reporter who makes or transcribes a record of a proceeding
- the order may not apply to any other person

The scripted material formerly provided in SM-12 was clearly directed at a witness; it has been revised to reflect the Act 64 changes.

Any secrecy order shall be terminated if any person applies to the judge and establishes that good cause no longer exists – § 968.26(4)(b). If a complaint is filed following a proceeding in which a secrecy order was entered, the order is terminated at the initial appearance and § 971.23 governs disclosure of information from the proceeding – § 968.26(4)(c).

10. See § 968.26(4)(d), created by 2015 Wisconsin Act 64. Prior law provided that violation of the secrecy order was punished as contempt of court.

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SM-15 SUBSTITUTION OF JUDGE

[WITHDRAWN]

COMMENT

SM-15 was originally published in 1974. It was withdrawn by the Committee in 1993.

See "Substitution of Judge/Recusal" at CR 6, Wisconsin Judicial Benchbook Volume I, Criminal and Traffic.

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SM-16 COLLATERAL ATTACK ON PRIOR CONVICTIONS

CONTENTS

Scope

Under the current criminal statutes, many criminal offense definitions, penalty enhancers, and penalty schemes are based on the defendant having prior convictions. As these situations become more common, the propriety of a challenge to the validity of the priors in a prosecution for a new crime is an increasingly important issue. This is commonly referred to as "collateral attack" on the prior convictions. It is deemed "collateral" because the challenge comes not in a direct appeal of the original conviction but in the context of a later prosecution.

There are two issues that arise with respect to collateral attacks on prior convictions:

(1) What uses of prior convictions require allowing collateral attack?

(2) What types of defects in the prior conviction may be raised in a collateral attack?

I. Collateral Attack Must Be Allowed When Prior Convictions Are Used To Support Guilt Or Enhance Punishment

The standard for determining the uses of prior convictions that require allowing collateral attack may be summarized as follows:

- when priors are used to support guilt or enhance punishment, collateral attack must be allowed;

- when priors are used to "identify members of a potentially dangerous class," a defendant may not collaterally attack a prior.

This difficult distinction was articulated by the United States Supreme Court in Lewis v. United States, 445 U.S. 55 (1980). In Lewis, the court held that a federal defendant charged with being a felon in possession of a firearm was not entitled to collaterally attack the prior conviction relied on to establish his felon status. This was based on the distinction that the prior conviction in this situation was used in a way that focused "not on reliability, but on the mere fact of conviction. . . . Enforcement of that essentially civil disability through a criminal sanction does not 'support guilt or enhance punishment.'" 445 U.S. 55, 67.

The Wisconsin Court of Appeals commented on the Lewis rule in State v. Foust, 214 Wis.2d 568, 573-4, 570 N.W.2d 905 (Ct. App. 1997), calling it an "elusive" distinction and "a conundrum." However, the court found it settled as a matter of state law that prior criminal convictions for operating under the influence used to establish the defendant's present status as, for example, a third-time offender, are used "primarily to enhance punishment." The court relied on State v. Baker, 169 Wis.2d 49, 485 N.W.2d 237 (1992), which allowed collateral attack on prior criminal convictions for operating after revocation [OAR]. The Baker decision reviewed Lewis and concluded that "the OAR statute uses prior OAR convictions primarily to enhance punishment, not to identify and classify a defendant or enforce a civil disability with a criminal sanction." 169 Wis.2d 49, 64.[1]

So, Baker and Foust make it clear that the use of prior convictions in the state's graduated penalty schemes for operating after revocation and operating under the influence is "primarily to enhance punishment" and thus appropriate for collateral attack. An example of the other category – use to identify the defendant as a member of a potentially dangerous class – may be offered by the criminal offense of violating a temporary restraining order or injunction in violation of § 813.12. The Wisconsin Court of Appeals held that a "defendant cannot collaterally attack the validity of a harassment injunction in a criminal prosecution for the violation of that injunction." State v. Bouzek, 168 Wis.2d 642, 484 N.W.2d 362 (Ct. App. 1992).

This could be characterized as fitting the Lewis "dangerous class" category, although the Bouzek decision does not make that explicit. The nature of Bouzek's challenge is identified only as the injunction being "overly broad" and "improperly issued." It probably did not involve a constitutionally-based challenge, thus failing to meet what is characterized here as the second part of the standard.

II. Collateral Attack Is Allowed Only For Claims That The Defendant Was Denied The Right To Counsel At The Time Of The Prior Conviction

Collateral attack is allowed only for claims that the defendant was denied the right to counsel at the time of the prior conviction.[2] Custis v. United States, 511 U.S. 485 (1994); State v. Hahn, 2000 WI 118, 238 Wis.2d 889, 618 N.W.2d 528. This includes a claim that the defendant did not knowingly, intelligently, and voluntarily waive his or her constitutional right to counsel. State v. Ernst, 2005 WI 107, 283 Wis.2d 300, 699 N.W.2d 92.

In Custis v. United States, 511 U.S. 485 (1994), the United States Supreme Court rejected a claim that the United States Constitution requires allowing collateral attack on the grounds of ineffective assistance of counsel and the absence of a knowing and intelligent guilty plea. The court recognized a "sole exception" to the rule prohibiting collateral attacks – convictions obtained in violation of the right to counsel: "failure to appoint counsel for an indigent defendant was a unique constitutional defect." 511 U.S. 485, 496.

The Wisconsin Supreme Court adopted the Custis rule in State v. Hahn, 2000 WI 118, 238 Wis.2d 889, 618 N.W.2d 528. Noting that Custis interpreted the federal constitution, the court adopted the same conclusion as a matter of state law:[3]

> Although these administrative considerations may weigh differently in different cases, we conclude that considerations of judicial administration favor a bright-line

> rule that applies to all cases. We, therefore, hold that a circuit court may not determine the validity of a prior conviction during an enhanced sentence proceeding predicated on the prior conviction unless the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior conviction. Instead, the offender may use whatever means available under state law to challenge the validity of a prior conviction on other grounds in a forum other than the enhanced sentence proceeding. If successful, the offender may seek to reopen the enhanced sentence. If the offender has no means available under state law to challenge the prior conviction on the merits because, for example, the courts never reached the merits of this challenge under State v. Escalona-Naranjo, 185 Wis.2d 168, 517 N.W.2d 157 (1994), or the offender is no longer in custody on the prior conviction, the offender may nevertheless seek to reopen the enhanced sentence. We do not address the appropriate disposition of any such application.[4]

State v. Hahn, 2000 WI 118, ¶28, as modified on reconsideration by 2001 WI 6, ¶2.

In State v. Ernst, 2005 WI 107, 283 Wis.2d 300, 699 N.W.2d 92, the court confirmed that the right to collateral attack extends to claims of invalid waiver of counsel. The standards for a valid counsel waiver are set forth in State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1977). The Klessig standards, though not mandated by the United States Constitution, are required by the Wisconsin Supreme Court as an exercise of its superintending power.[5]

Klessig identified four requirements for a valid waiver of counsel to be covered in a colloquy conducted by the court. The colloquy must ensure that the defendant:

1) made a deliberate choice to proceed without counsel;
2) was made aware of the difficulties and disadvantages of self-representation;
3) was aware of the seriousness of the charge of charges against him; and,
4) was aware of the general range of penalties that could have been imposed on him.

Klessig, 211 Wis.2d 194, 206. [Cited in Ernst, 2005 WI 107, ¶14.]

For a description of the Klessig requirements and discussion of related issues, see SM-30 Waiver and Forfeiture of Counsel; Self-Representation; Standby Counsel; "Hybrid Representation"; Court Appointment of Counsel.

III. Procedure

In State v. Ernst, 2005 WI 107, 283 Wis.2d 300, 699 N.W.2d 92, the court set forth the procedures to be used when a defendant challenges a prior conviction on a collateral attack. In State v. Clark, 2022 WI 21, 401 Wis. 2d 344, 972 N.W.2d 533, the court clarified that the procedure set forth in Ernst applies only in cases in which there is a transcript of the relevant proceedings from the prior case and the transcript shows a defect in the defendant's waiver of the right to counsel in the prior case. If a transcript is unavailable or does not show a defect in the waiver of the right to counsel, Clark mandates a different procedure. The two procedures are described below.

While Ernst and Clark were specifically concerned with an alleged deficiency in obtaining a waiver of counsel, the same general procedure would be suitable for a claim that counsel was denied.

A. When a transcript is available, and the transcript shows a defect in the waiver of counsel

If a transcript of the relevant proceedings from the prior case is available, the procedure set forth in Ernst applies. The procedure is modeled after that used for withdrawal of a plea of guilty. See State v. Bangert, 131 Wis.2d 246, 389 N.W.2d 12 (1986).

1. The burden is on the defendant to make a prima facie showing of a constitutional violation

The defendant must allege that the constitutional right to counsel was violated, either by denial of counsel or by failure to obtain a knowing, intelligent, and voluntary waiver of counsel. The allegation must point to specific facts that support the allegation:

> For there to be a valid collateral attack, we require the defendant to point to facts that demonstrate that he or she did not know or understand the information which should have been provided in the previous proceeding and, thus, did not knowingly, intelligently, and voluntarily waive his or her right to counsel. Any claim of a violation on a collateral attack that does not detail such facts will fail.

Ernst, 2005 WI 107, ¶25 (internal citations omitted). Clark clarified that, in pointing to facts to support the collateral attack, the defendant must identify in the transcript a defect in or failure to conduct the colloquy required by State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), when accepting a defendant's waiver of the right to counsel. The defendant cannot make a prima facie showing absent a defect in the colloquy, as evidenced

by the transcript. Clark, 401 Wis.2d 344, ¶¶18, 20.

The Ernst decision also stated that "[a]n affidavit from the defendant setting forth such facts [facts that demonstrated that he or she did not knowingly, intelligently, and voluntarily waive counsel] would be necessary, in order to establish a prima facie case." Ernst, 2005 WI 107, ¶33. In other words, not only must the defendant identify a defect in or failure to conduct the Klessig colloquy, the defendant must also allege that he or she did not understand the information that should have been covered in the colloquy. Ernst, 2005 WI 107, ¶26.

Applying this standard in the Ernst case, the court found that the defendant failed to meet it:

> Ernst made no mention of specific facts that show that his waiver was not a knowing, intelligent, and voluntary one. Instead, Ernst simply relied on the transcript and asserted that the court's colloquy was not sufficient to satisfy Klessig. . . . Since this was a collateral attack, the lack of specific facts resulted in a failure to establish a prima facie case that Ernst did not knowingly, intelligently, and voluntarily waive his right to counsel.

Ernst, 2005 WI 107, ¶26.

In State v. Bohlinger, 2013 WI App 39, 346 Wis.2d 549, 828 N.W.2d 900, decided before Clark, a conviction for 4th offense operating under the influence was reversed, and the case remanded for an evidentiary hearing on whether the defendant validly waived counsel during his prosecutions for the 2nd and 3rd offenses. The court held the defendant made a sufficient prima facie showing that because of cognitive disability, he did not have the mental capacity to understand the rights he was waiving. Note, however, that while transcripts from the prior cases were available in Bohlinger, the defendant did not allege the waiver colloquies were defective, and the court held he was not required to show a defect in the colloquy to make a prima facie showing. 345 Wis.2d 549, ¶¶17-20. That part of Bohlinger's holding is no longer valid in light of Clark.

Also see State v. Hammill, 2006 WI App 128, 293 Wis.2d 654, 718 N.W.2d 747, and State v. Verhagen, 2013 WI App 16, 346 Wis.2d 196, 827 N.W.2d 891, where the court of appeals concluded that the defendant failed to make a prima facie showing. Note that transcripts were not available in either of these cases; thus, after the decision in Clark, the defendants would not be entitled to the burden-shifting procedure set forth in Ernst but would bear the burden of showing a constitutional violation.

2. If a prima facie showing is made, an evidentiary hearing should be held, at which the burden shifts to the state

The burden is on the state to prove by clear and convincing evidence that the defendant was not denied the right to counsel or that the defendant's waiver of counsel was knowingly, intelligently, and voluntarily entered.[6] The "court should hold an evidentiary hearing to allow the State an opportunity to meet its burden." Ernst, 2005 WI 107, ¶27.

3. At the hearing, the state may call the defendant as a witness

Ernst concluded that the collateral attack situation was the same as that where withdrawal of a plea of guilty is sought. The defendant may be called as a witness to shed light on his or her understanding of matters relevant to entering a voluntary and intelligent plea or a voluntary waiver of counsel. Ernst, 2005 WI 107, ¶31.

4. The defendant may not claim the privilege against self-incrimination

If called as a witness, the defendant may not validly claim the 5th Amendment privilege against self-incrimination. Making a prima facie case will require an affidavit from the defendant alleging facts in support of the constitutional violation. Once a defendant successfully makes a prima facie showing, the defendant cannot avoid testifying about circumstances concerning that claim. By raising the issue, the defendant has waived the privilege. Ernst, 2005 WI 107, ¶33. "Finally, if the defendant refuses to testify under these circumstances, a circuit court is free to draw the reasonable inference that the State has satisfied its burden, and that the waiver of counsel was a knowing, intelligent, and voluntary one." Ernst, 2005 WI 107, ¶35.

B. When a transcript is not available or does not show a defect in the waiver of counsel

If a defendant collaterally attacking a prior conviction cannot point to a defect in the relevant transcript, either because a transcript of the relevant proceeding is not available or because the colloquy in the transcript is facially valid, the burden-shifting procedure established in Ernst does not apply. Instead, the defendant carries the burden to demonstrate that his or her waiver of counsel in the prior proceeding was not knowing, intelligent, and voluntary. Clark, 401 Wis.2d 344, ¶20.

IV. Common Situations Where the Collateral Attack Issue May Arise

This section lists the situations where the collateral attack issue is addressed by case law or in the published jury instructions. The situations are divided into two categories: those where priors are used to support guilt or enhance punishment and where collateral attack must be allowed; those where priors are used to "identify members of a potentially dangerous class" and where a defendant may **not** collaterally attack the prior. Within the categories, the offenses are listed in the order in which they appear in the statutes. [Some of the examples do not involve prior convictions but rather are based on a prior court order or injunction. The Committee believes the same analysis would apply to the court order/injunction cases.]

A. Priors used to support guilt or enhance punishment – collateral attack must be allowed

1. Prior convictions for operating after revocation – § 343.44

State v. Baker, 169 Wis.2d 49, 485 N.W.2d 237 (1992), allowed collateral attack on prior criminal convictions for operating after revocation [OAR]. The Baker decision concluded that "the OAR statute uses prior OAR convictions primarily to enhance punishment, not to identify and classify a defendant or enforce a civil disability with a criminal sanction." 169 Wis.2d 49, 64.[7]

2. Prior convictions for operating under the influence – § 346.63

In State v. Foust, 214 Wis.2d 568, 570 N.W.2d 905 (Ct. App. 1997), the court found it settled as a matter of state law that prior criminal convictions for operating under the influence used to establish the defendant's present status as, for example, a third-time offender, are used "primarily to enhance punishment." The court relied on State v. Baker, supra. The same should be true for convictions used to support the application of the 0.02 level of alcohol concentration.

3. Prior convictions used under the "habitual criminality" statute ("repeater") – § 939.62

Although there is not a published decision directly on point in Wisconsin, the logic of the cases discussed above is that collateral attack would be allowed with respect to prior convictions used to support a repeater allegation under § 939.62. The United States Supreme Court recognized the propriety of collateral attack in that situation in Burgett v. Texas, 389 U.S. 109 (1967).

4. Prior convictions used under the "persistent repeater" statute ("three strikes") – § 939.62(2m)(b)1.

In State v. Hahn, 2000 WI 118, 238 Wis.2d 889, 618 N.W.2d 528, the court allowed collateral attack on a prior conviction used as the basis for a "persistent repeater" or "three strikes" determination under § 939.62(2m)(b)1.

5. Prior convictions used at sentencing

In United States v. Tucker, 404 U.S. 443 (1972), the United States Supreme Court held that convictions obtained in violation of the right to counsel could not be relied on as prior convictions at sentencing in a later prosecution.[8] That the priors were obtained in violation of the right to counsel had been established in a collateral attack in the state courts.

To be distinguished is State v. Orethun, 84 Wis.2d 487, 267 N.W.2d 318 (1978), a decision upholding an OAR conviction despite the fact that a speeding conviction upon which the revocation was based had been reversed. In terms of the categories outlined here, the prior conviction only identified the defendant as a member of a class – those whose privileges could be revoked – and did not support guilt or enhance punishment.

B. Priors used to identify members of a potentially dangerous class – collateral attack is not allowed

1. Contempt of court: punitive sanction – § 785.01

The Committee's conclusion is stated as follows in the Comment to Wis JI-Criminal 2031, Contempt of Court: Punitive Sanction: "It apparently is not appropriate to challenge the validity of the order in the context of the criminal prosecution based on failure to obey that order." The basis for this conclusion was a civil case holding that regardless of the legality of an order, a party is bound to comply with it until it is set aside through regular appeal channels. Getka v. Lader, 71 Wis.2d 237, 238 N.W.2d 87 (1976). Of course, the fact that there was a court order and that the defendant violated a provision of that order are elements of the crime.

2. Violation of injunction or restraining order – §§ 813.12, 813.122, 813.123, 813.125

"A defendant cannot collaterally attack the validity of a harassment injunction in a criminal prosecution for the violation of that injunction." State v. Bouzek, 168 Wis.2d 642,

484 N.W.2d 362 (Ct. App. 1992). See the discussion in the Comment to Wis JI-Criminal 2040, Violating a Temporary Restraining Order or an Injunction.

3. Felon in possession of a firearm – § 941.29

In Lewis v. United States, 445 U.S. 55 (1980), the United States Supreme Court held that a defendant charged under the federal counterpart to § 941.29 was not allowed to collaterally attack the prior conviction relied on to establish his felony status. The conclusion in Lewis was based on the distinction that the prior conviction in this situation was used in a way that focused "not on reliability, but on the mere fact of conviction. . . Enforcement of that essentially civil disability through a criminal sanction does not 'support guilt or enhance punishment.'" 445 U.S. 55, 57.

4. Escape – § 946.42

The Committee's conclusion is stated as follows in footnote 4, Wis JI-Criminal 1774, Jail or Prison Escape: "Although there apparently is no Wisconsin law on the subject, the Committee is of the opinion that the legality of the underlying conviction and sentence is not an issue where the charge is escape after conviction or sentence. Thus, it should be no defense that the defendant's underlying conviction is subject to challenge."

V. Effect of a Successful Collateral Attack on the Original Conviction

One of the Committee's assumptions when SM-16 was originally drafted was that a successful collateral attack affects only the use of the attacked prior conviction in the current proceeding. That is, the court in the current case has no authority to take any other action with respect to the prior; it remains a valid conviction for all other purposes unless additional action is taken in the court that entered the conviction.

In State v. Deilke, 2004 WI 104, 274 Wis.2d 595, 682 N.W.2d 945, a defendant in a 2001 prosecution for 5th offense operating under the influence moved to collaterally attack prior convictions from 1993, 1994, and 2000 on the ground that they were obtained in violation of his right to counsel. The state conceded that the record did not show a valid waiver of counsel, and the trial court granted Deilke's motion. The State then moved to reopen those priors, and the motion was granted in two of the three cases.[9] The Wisconsin Supreme Court held that Deilke's successful collateral attack violated a term of the plea agreements on which those convictions were based. This was a breach of the plea agreement, and the breach was material because it deprived the state of a benefit for which it had bargained – using those convictions as predicates for higher penalties for future violations. So, the state could seek to reopen the convictions and, when successful, could

reissue those original charges and try, or negotiate with, Deilke again. The court's decision did not address the basis for the court's authority to reopen those final judgments.[10]

Deilke involved unique facts in that all the prior convictions and the current prosecution were in the same county. The decision allows options for the prosecution that are beyond the scope of this Special Material. It does not affect the substance of the analysis provided here, which focuses on the validity of the prior convictions in a new prosecution.

COMMENT

SM-16 was originally published in 2000 and revised in 2001, 2003, 2005, 2009, and 2019. This revision was approved by the Committee in April 2023; it updated the text and the comment.

1. When this SM was originally drafted, State v. Baker was one of the leading decisions relating to collateral attack. It was decided when OAR criminal penalties were determined by the number of prior OAR convictions. OAR penalties have changed several times since Baker was decided. Under the 2017-2018 Wisconsin Statutes, OAR is criminal only if the revocation is based on an OWI-related offense as set forth in § 343.307(2) or if death or great bodily harm is caused. The references to Baker in this SM were retained because the general rules it announced regarding collateral attack continue to apply.

2. For the right to counsel to apply, the prior offense must be a crime. For example, a refusal proceeding is a civil matter to which the right to counsel does not apply. State v. Krause, 2006 WI App 43, 289 Wis.2d 573, 712 N.W.2d 67.

3. Before Hahn, appellate decisions in Wisconsin allowed collateral attack based on at least two different defects in the prior prosecution:

(a) denial of the right to counsel; and,
(b) acceptance of a guilty plea that was not voluntarily and understandingly made.

In State v. Baker, 169 Wis.2d 49, 485 N.W.2d 237 (1992), the Wisconsin Supreme Court allowed collateral attack based on an allegation that the guilty plea in the prior case was not understandingly and voluntarily made. The court stated that collateral attack must be allowed whenever the alleged defect "undermines the reliability of the conviction." Baker relied on its interpretation of the decisions of the United States Supreme Court that had dealt with this issue – the primary one being Burgett v. Texas, 389 U.S. 109 (1967), which dealt with a challenge based on denial of counsel. Hahn limited Baker to the rule stated in Custis. 238 Wis 2d. 889, ¶17.

In State v. Foust, 214 Wis.2d 568, 570 N.W.2d 905 (Ct. App. 1997), the defendant was charged with operating under the influence as a third offense. The court of appeals held that the defendant could challenge the validity of one of the prior offenses in the new prosecution because he alleged that the earlier conviction was obtained as a result of a constitutionally defective plea colloquy. Though not referred to in Hahn, Foust is inconsistent with the Hahn decision and is implicitly overruled. [Also see State v. Dye, 215

Wis.2d 281, 572 N.W.2d 524 (Ct. App. 1997), suggesting that a collateral attack could be based on a contention that the earlier conviction was "constitutionally invalid because of an alleged Fourth Amendment violation: that it was the result of an illegal stop." 215 Wis.2d 281, 291. This possibility is clearly inconsistent with Hahn.].

4. In Hahn, the court stated that it was providing a bright line rule and repeated its holding three times – compare paragraphs 4, 28, and 29 – in essentially the same words. The second-to-last sentence of paragraph 28 did not appear in the other two statements of the new rule. This sentence was revised in response to the state's motion for reconsideration in the decision reported at 2001 WI 6.

The Wisconsin Supreme Court applied Hahn in State v. Peters, 2001 WI 74, 244 Wis.2d 470, 628 N.W.2d 797. The court held that the defendant could collaterally attack his second conviction for operating after revocation [OAR] in a prosecution for a fifth offense OAR because the challenge was based on the denial of the right to counsel.

The defendant in Peters had focused his argument "on the Sixth Amendment and due process implications of conducting a plea and sentencing hearing by closed-circuit television from jail." 2001 WI 74, ¶18. Because the court found that the challenge was actually based on denial of the right to counsel, it could resolve the case by a straightforward application of Hahn:

> Whether the defendant is entitled to mount this sort of constitutional challenge to a prior conviction collaterally rather than directly (or at all) depends upon an interpretation of the above-quoted language in Hahn [referring to the decision on rehearing, 2001 WI 6, ¶2], and the influence, if any, of the Supreme Court's recent opinions in Daniels and Lackawanna County. We do not address this issue, however, because the record reflects an arguable right-to-counsel violation, which is clearly established as an exception to the rule against collateral attacks on prior convictions. 2001 WI 74, ¶18.

[The United States Supreme Court cases referred to are Daniels v. United States, 532 U.S. 374, (2001) and Lackawanna County District Attorney's Office v. Coss, 532 U.S. 394, (2001). Their relevance to Wisconsin practice is unclear because they discuss the collateral attack in the context of the procedural limits on a federal motion to vacate a sentence under 28 USC § 2255 (Daniels) and federal habeas corpus review of a state conviction under 28 USC § 2254.].

5. "We conclude that the Klessig colloquy requirement was and is a valid use of the court's superintending and administrative authority, . . . and that such a rule does not conflict in any way with the United States Supreme Court's decision in Tovar . . ." State v. Ernst, 2005 WI 107, ¶21, 283 Wis.2d 300, 699 N.W.2d 92. The reference is to Iowa v. Tovar, 541 U.S. 77 (2004), where the court held that a valid waiver of the Sixth Amendment right to counsel did not require specific advice from the court that waiver of counsel might result in a viable defense being overlooked and losing the opportunity for an independent opinion on whether pleading guilty is a wise choice.

In State v. Gracia, 2013 WI 15, 345 Wis.2d 488, 826 N.W.2d 87, the court rejected a collateral attack on a prior operating under the influence conviction: "despite a technically deficient plea colloquy, Gracia knowingly, intelligently, and voluntarily waived his right to counsel before he pleaded no contest to his second OWI in 1998 . . . He understood the difficulties and disadvantages of self-representation." ¶4.

6. To the extent that reconstructing the record relating to waiver of counsel appears to be necessary,

see State v. DeFelippo, 2005 WI App 213, 287 Wis.2d 193, 704 N.W.2d 410. The decision outlines the standards for reconstructing the record where, on direct appeal, the defendant claimed absence of a voluntary waiver of counsel.

7. When this SM was originally drafted, State v. Baker was one of the leading decisions relating to collateral attack. It was decided when OAR criminal penalties were determined by the number of prior OAR convictions. OAR penalties have changed several times since Baker was decided. Under the 2017-2018 Wisconsin Statutes OAR is criminal only if the revocation is based on an OWI-related offense as set forth in § 343.307(2) or if death or great bodily harm is caused. The references to Baker in this SM were retained because the general rules it announced regarding collateral attack continue to apply.

8. The Committee believes that Tucker does not affect the general rule that allows considering other bad acts at sentencing even if they did not result in a criminal conviction. Tucker recognized that greater weight might be given to convictions believed to be valid and suggested the sentence might have been different if the trial judge had known that Tucker served 10 years on a conviction obtained in violation of the right to counsel.

9. State v. Deilke, 2004 WI 104, 274 Wis.2d 595, 682 N.W.2d 945, at footnote 4: "The State's motion regarding Deilke's 1993 and 2000 cases was granted by the circuit court for Eau Claire County, Judge Eric J. Wahl, presiding. The State's motion regarding Deilke's 1994 conviction was denied by a different judge in a different circuit court branch . . ." [Judge Wahl was the presiding judge in Deilke's new prosecution, in which he collaterally attacked the 1993, 1994, and 2000 convictions.].

10. The convictions affected were from 1993 and 2000. As to those convictions, Deilke had "served all of his time, paid all his fines, attended all required classes, endured his license revocations, and even forfeited his vehicle." 2004 WI 104, ¶51 [dissenting opinion of Justice Bradley].

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SM-18 DEFENDANT'S CONSENT TO PROCEED BY VIDEOCONFERENCE – WAIVER OF RIGHT TO BE PRESENT UNDER § 971.04

The following is intended for use when a defendant with counsel wishes to waive the statutory right to be present in the same courtroom as the presiding judge at a proceeding. See § 971.04 and State v. Soto, 2012 WI 93, 343 Wis.2d 43, 817 N.W.2d 848. If the defendant is without counsel, it may be necessary to obtain or renew a waiver of counsel. See SM-30, Waiver and Forfeiture of Counsel.

1. The court should have the participants state their appearances and should identify where each participant is located.

2. The court should ascertain that the technology is working properly and ask questions like the following:[1]

   a. "Can you hear me?"

   b. "Can you see me?"

   c. "Do you understand that if at any time there is a problem with your ability to hear or see what is occurring in court today you are to immediately inform the court?"

   d. "Do you understand that if at any time you need to speak privately with your lawyer, you should inform the court and proper accommodations will be made?"

3. The court should identify for those appearing from a remote location any person in the courtroom who may not be visible to them. If the litigant or counsel wishes to physically see a particular individual, the court should accommodate that request if appropriate.

4. The court should engage in a colloquy with the defendant to ascertain whether the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing:[2]

a. "Do you understand that you have the right to be physically present in the same courtroom[3] as the presiding judge during this proceeding?"

b. "Do you understand that you are not required to consent to having this proceeding conducted by videoconferencing?"

c. "Have you discussed this with your lawyer?"

d. "Has anyone made any promises or threats to you in connection with waiving your right to be present?"

e. "Do you wish to waive your right to be physically present in this courtroom at this proceeding?"

d. "Do you consent to conducting this proceeding by videoconferencing?"

5. The court should make a finding, on the record, that the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing.

COMMENT

SM-18 was approved by the Committee in February 2014.

This Special Material provides a model for an inquiry that is to be conducted when a defendant wishes to consent to having a court appearance conducted by video-conferencing. It applies where the defendant has the right to be present at a proceeding under § 971.04. The decision in State v. Soto, 2012 WI 93, 343 Wis.2d 43, 817 N.W.2d 848, suggested that a colloquy be conducted in this situation.

See §§ 885.50 to 885.64, which address the "use of videoconferencing in the circuit courts." Section 885.60(2)(a) provides in part: "Except as may otherwise be provided by law, a defendant in a criminal

case . . . is entitled to be physically present in the courtroom at all trials and sentencing or dispositional hearings." Soto held that the defendant's right to be physically present under § 885.60(2)(a) does not enlarge or diminish the statutory right under § 971.04. ¶31.

Section 971.04(1) provides that the defendant shall be present:

(a) At the arraignment;
(b) At trial;
(c) During voir dire of the trial jury;
(d) At any evidentiary hearing;
(e) At any view by the jury;
(f) When the jury returns its verdict;
(g) At the pronouncement of judgment and the imposition of sentence;
(h) At any other proceeding when ordered by the court.

Plea hearings are not listed in § 971.04; however, if the defendant is found guilty at the conclusion of a plea hearing, it qualifies as "pronouncement of judgment" under sub. (1)(g).

When the defendant in Soto entered his guilty plea, he, defense counsel, and the DA were present in the courtroom in Trempealeau County. The judge participated via videoconference from Jackson County. A complete plea colloquy was conducted. The court held:

> ¶2 We conclude that Wis. Stat. § 971.04(1)(g) provides a criminal defendant the statutory right to be in the same courtroom as the presiding judge when a plea hearing is held, if the court accepts the plea and pronounces judgment. However, we also conclude that this statutory right may be waived and that Soto waived it prior to pleading and the court's pronouncement of judgment. We so conclude because Soto appeared in a courtroom in the Trempealeau County courthouse; both his attorney and the prosecuting attorney also appeared in the same courtroom; through videoconferencing, the judge was able to see, speak to and hear Soto and Soto was able to see, speak to and hear the circuit court judge; the judge explained that videoconferencing would be used for the plea hearing if Soto chose to enter a plea that day; and Soto expressly consented to the use of videoconferencing for the plea hearing. Accordingly, we affirm the circuit court's order denying Soto's motion to withdraw his guilty plea.

The court also described the type of inquiry that should accompany the use of videoconferencing for a hearing at which "presence" is required:

> ¶46 When videoconferencing is proposed for a plea hearing at which it is anticipated that judgment will be pronounced, the judge should enter into a colloquy with the defendant that explores the effectiveness of the videoconferencing then being employed. In that regard, the judge shall ascertain whether the defendant and his attorney, if represented by counsel, are able to see, speak to and hear the judge and that the judge can see, speak to and hear the defendant and counsel. The judge shall also ascertain, either by personal colloquy or by some other means, whether the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing. In so doing, questions should be asked to suggest to the defendant that he has the option of refusing to employ videoconferencing for a plea hearing at which judgment will be pronounced.

Note: Soto addressed the right to be present under § 971.04. The court did not address whether presence was required as a matter of due process, noting that Soto "abandoned his constitutional challenge in this court." ¶15, footnote 4.

This Special Material addresses waiver of the right to be present. However, the right may also be forfeited. State v. Vaughn, 2012 WI App 129, 344 Wis.2d 764, 823 N.W.2d 543, involved a defendant who, after being found competent to stand trial, was very difficult to deal with in the courtroom. The trial court warned him repeatedly, but ultimately had him removed from the courtroom. Trial proceeded with him absent and a jury found him guilty of attempted first degree intentional homicide. The court of appeals affirmed the conviction, finding that the record established that Vaughn forfeited his right to be present.

1. There are two aspects to the waiver inquiry: whether the technology is working properly and whether the defendant is waiving his or her right to present in the same courtroom as the judge. The questions in this section address the first aspect and are adopted from the "Video Conferencing Appearance Colloquy" distributed to trial judges.

2. The questions in this section address the second aspect of the waiver inquiry: whether the defendant is waiving his or her right to present in the same courtroom as the judge.

3. The Soto decision emphasized the importance of the courtroom setting:

> ¶23 We have required that the defendant be in a courtroom because the statute clearly speaks to the defendant's presence at the location of the proceeding. Requiring that the defendant be present in the courtroom is guided also by the belief that a courtroom is a setting epitomizing and guaranteeing "calmness and solemnity," see Cox v. Louisiana, 379 U.S. 536, 583 (1965) (Black, J., dissenting), so that a defendant may recognize that he has had access to the judicial process in a criminal proceeding. Finally, requiring the defendant to make his appearance in a courtroom avoids the potential or perceived problems that can occur when the defendant is located in another facility such as a jail, while the judge, prosecutor, and perhaps even defense counsel are in the courtroom. See generally Anne Bowen Poulin, Criminal Justice and Videoconferencing Technology: The Remote Defendant, 78 Tul. L. Rev. 1089 (2004).
> 2012 WI 93, 343 Wis.2d 43, 817 N.W.2d 848, ¶23.

SM-20 VOIR DIRE

CONTENTS

Scope

The manner in which voir dire is conducted lies within the discretion of the court and varies greatly among judges. This special material begins with a suggested script that covers introductory and other general matters. Then it identifies the topics on which voir dire questions are statutorily required and suggests additional topics that are often covered. In both instances, the actual form of the question is left to the judge. The current framework for analyzing potential juror bias is outlined. The Comment attempts to collect relevant case law.

I. Introduction

VOIR DIRE IS TO BE CONDUCTED IN OPEN COURT, ABSENT FORFEITURE OR WAIVER [1]

ASSURE THAT THE DEFENDANT AND DEFENSE COUNSEL ARE PRESENT.[2] AFTER THE CASE IS CALLED AND THE PANEL IS SWORN, PROCEED WITH THE FOLLOWING:

"All members of the jury panel, including those (back of the rail) (outside the jury box) should listen to all the questions that are directed to the panel until a jury of (12) (14) is selected."

"This is a criminal case, not a civil case, and I will read the allegations of the Information to you. An Information is nothing more than a written formal accusation against the defendant, charging the commission of one or more criminal acts. You are not to consider the Information as evidence against the defendant in any way. It does not raise any inference of guilt."

[READ OR SUMMARIZE THE INFORMATION.]

"The defendant (name) has entered a plea of not guilty to (the) (each) charge in the Information, which means the State must prove every element of the offense charged beyond a reasonable doubt."

[IDENTIFY THE PROSECUTOR, DEFENDANT, DEFENSE COUNSEL, AND ANY OTHERS AT COUNSEL TABLE. EACH PERSON SHOULD STAND WHEN INTRODUCED.]

"I will now ask you some general questions about your qualifications to sit as jurors in this case. Counsel should listen carefully to these general questions and not repeat them. Counsel may ask the jurors generally any proper questions and in addition ask proper questions of each juror as to matters specific to each juror."

"If your answer to any of my questions is 'yes,' raise your hand."

II. Juror Qualifications And Required Questions[3]

A. Juror Qualifications – § 756.02

Section 756.02[4] sets out the basic qualifications for being a juror. Although these requirements are usually covered by juror qualification forms, judges may wish to review them at the beginning of voir dire by asking the panel whether anyone:

- is not a United States citizen;
- is not currently a resident of _____ County;
- is under the age of 18;
- is unable to understand English;[5] and,
- has been convicted of a felony and has not had his or her civil rights restored.

B. Required Questions – § 805.08(1)

Subsection 805.08(1) requires that questions on certain topics be asked by the judge. An affirmative answer to questions on either of the following topics requires that the juror be excused on the basis of "statutory bias":[6]

- whether any juror is related by blood or marriage to the defendant[7] or to any attorney; and
- whether any juror has any financial interest in the case.

Because case law requires excusing jurors who are related to a state witness,[8] an additional question should be asked in every case:

- whether any juror is related to any witness for the state.

Subsection 805.08(1) also requires questions on the following topics; an affirmative answer does not require excusing the juror but does require additional inquiry:[9]

- whether any juror has expressed or formed any opinion; and
- whether any juror is aware of any bias or prejudice in the case.

C. Juror Qualification Forms; Supplemental Information; Case-Specific Questionnaires

There are several different forms containing juror information that are often referred to as "questionnaires." The Committee has concluded that there is value in using different terms to describe them because their functions are different.

1. Juror Qualification Forms – § 756.04(6)(am)

These are the forms sent out by the clerk when jurors are summoned for service. They cover the basic requirements for qualification for juror service. There is a standard form – Circuit Court Form GF-132 – available to judges through the clerk of court. Additional content varies by county.

2. Supplemental Information – § 756.04(6)(cm)

"The juror qualification form . . . may be supplemented to request other information that the court requires to manage the jury system in an efficient manner, including information that may be sought during voir dire examination." § 756.04(6)(cm)

3. Case-Specific Questionnaires

Additional questions may be submitted to potential jurors that relate to the specific case on which they might serve. Drafted by counsel, their use requires approval by the court and a cover letter explaining them. Their use is not feasible in counties where potential jurors are summoned without reference to a particular case.

Positive aspects to using questionnaires:

- they can be helpful in cases where there has been extensive pretrial publicity;
- where sensitive topics are involved, jurors may be more forthcoming than in open court;
- they can potentially save time in a case where extensive voir dire might be necessary on specific issues.

Negative aspects to using questionnaires:

- approving their use and content can take considerable court time;
- issues can be addressed more efficiently during voir dire.
- the questions may prompt jurors to try to research the case.

4. Confidentiality – § 756.04(11)(a)

All juror information forms "shall remain confidential." They shall be used only for trial and appeal; counsel and parties may not retain copies. § 756.04(11)(a).

III. Voir Dire Of An Individual Juror Out Of The Presence Of The Jury Panel

The court's discretion over the form and number of questions extends to whether prospective jurors should be questioned collectively or individually out of the presence of the other prospective jurors. State v. Koch, 144 Wis.2d 838, 847, 426 N.W.2d 586 (1988). Factors relevant to deciding whether to conduct a sequestered voir dire are:

> (1) whether the circuit court conducted a thorough initial questioning of the panel members; (2) whether the panel members were reluctant to state whether they had a preconceived notion of the defendant's guilt or innocence; and (3) whether the circuit court imposed any restrictions upon the extent of defense counsel's questioning of the panel members on voir dire.

144 Wis.2d 838, 849, citing State v. Dean, 67 Wis.2d 513, 528, 227 N.W.2d 712 (1975). Other cases dealing with requests for individual or sequestered voir dire include State v. Smith, 117 Wis.2d 399, 344 N.W.2d 711 (Ct. App. 1983); State v. Herrington, 41 Wis.2d 757, 165 N.W.2d 120 (1969).

Individual voir dire is most often used in cases involving sexual assault or significant pretrial publicity. While practice varies, an example of an explanation of the process and questions to the full panel in a sexual assault case follows. [If a different potentially sensitive crime or pretrial publicity is involved, the example must be modified.]

> Jurors, at this point the court is going to ask you some general questions. I ask that you raise your hand if "yes" would be your answer to any of these questions.
>
> In this case, the court is varying from its typical practice in that we will be conducting individual voir dire of persons depending on how these particular questions are answered. Listen carefully.
>
> Has any member of the panel or any member of their family, or any friends, relatives, or co-workers, been affected by unwanted sexual conduct, whether reported or not?
>
> [Note for the record the jurors – by name or number – who have raised their hands.]
>
> Referring to the entire panel again now, have you or any family member or close friend ever been investigated for, accused of, or charged with sexual assault?

[Note for the record the jurors – by name or number – who have raised their hands.]

[Add the following if the case has generated significant publicity.

Is there anyone among you who has read or heard anything about this case?]

[Note for the record the jurors – by name or number – who have raised their hands.]

At this point the court is going to conduct an individual voir dire of those persons who raised their hand in response to the questions. The process we will follow is that the prospective juror, the attorneys, the defendant, court personnel, and any members of the general public who wish to attend will go to [a jury room] [(designate other room)] where questions will be asked of the individual juror outside the presence of the other jurors.

This will take a few minutes. Please continue to be patient. The group of jurors whose names have been called must maintain their same seating order. While we are doing this you can stand up if you need to stretch or relax. If someone needs to use the restroom let the bailiff know and the bailiff will see that you are able to do that. But the group must maintain the same seating order that you are in.

The court, court reporter, clerk, security officer, the parties and their attorneys (and the alleged victim if requested) move to another room out of the presence of the rest of the panel. Those jurors who raised their hands are then invited in one at a time escorted by a bailiff. The court begins the questioning followed by questions by the prosecutor and the defense counsel. The court rules on whether or not a juror is to be excused. When everyone has returned to the courtroom the process may have to be repeated if additional jurors are called.

IV. Suggested Topics For Voir Dire Questions[10]

A. The Purpose Of Voir Dire

The Committee suggests that the court explain to the panel that the purpose of voir dire is to assure that persons chosen to serve will be fair and impartial jurors. An example follows.

Impartiality

I would like to tell you what I mean by the term fair and impartial juror. I want you to all assume that you have heard all the evidence in this case, listened to my instructions on the law, deliberated with the other jurors, and you are thinking that the State has not proved this case beyond a reasonable doubt, you are thinking the defendant is not guilty. Is there anything in your background, your life experiences, your view of the criminal justice system, anything at all that makes you think that you would vote to find the defendant guilty anyway, even though the State had not proved him guilty?

The flip side of that question is equally important. You listened to all the evidence and my instructions and you are thinking he is guilty, the State has proved the case beyond a reasonable doubt. Is there anything in your background, life experiences, your view of the justice system that makes you feel that you would vote to find him not guilty even though the State has proved the case?

Or to put it a little more simply, are you going to decide this case based on anything other than what you hear from the witness stand and the rules of law that I instruct you on?

That is what I mean by being a fair and impartial juror. As you sit here right now without knowing much about this case, is there anyone who thinks, for any reason that they can not be a fair and impartial juror?

Bias

[It is obvious to everyone in the courtroom that Mr. _____ is (African-American) with respect to his racial background.][11] I think we all walk around realizing we are different from everyone else. Those differences might be based on race, gender, ethnicity, body size, hair color or any number of factors, but when we let those kind of differences control how we judge someone or a situation we call that bias or prejudice or discrimination.

What is very important to me and everyone involved with this case is that we end up with 12 jurors who will decide this case on the evidence you hear from the witnesses and the rules of law I instruct you on and not on any of these kinds of difference.

Now I realize what I am about to ask you is pretty difficult. I am asking you to tell me if you don't think you can be fair. That is pretty hard even in a one on one conversation let alone in front of a room full of strangers, but it is critically important. I am not going to argue with you or try to convince you to feel differently but I do need to know if you don't think you can be fair for this or any other reason.

Is there anyone who has concerns about or simply feels that they cannot be a fair juror in this case?

B. Topics For Questions

Questions on the following topics are often included in a judge's voir dire and are recommended for consideration in all cases. Other topics may be appropriate depending on the facts of the case.

1. Whether the estimated length of trial makes it impossible for anyone to serve.

2. Whether anyone has a physical or medical condition that makes it impossible to serve or makes it difficult to hear or understand the testimony.[12]

3. Whether there are any circumstances such as work schedule, medication, etc., that may make it difficult for a juror to pay attention or stay alert.[13]

4. Advise that it is alright to ask for a recess if a juror is having trouble staying alert.

5. Whether anyone knows any member of the defendant's family.

6. Whether anyone knows the defense attorney or the prosecutor or the judge.

7. Whether anyone knows the complaining witness or other witnesses who are expected to testify.

8. Whether anyone or a member of their immediate family is employed in a law enforcement capacity.[14]

9. Whether anyone would give more or less weight to the testimony of a police witness because that person is a police officer.

10. Whether anyone has heard or read anything about the case.

11. Whether anyone has expectations about the conduct of the court and counsel, the nature of the evidence that will be presented, or the law that will be applied to this case based on descriptions of criminal investigations and trials from books, movies, television programs or the media.[15]

12. Whether anyone has previously served on a jury and, if so, whether that jury reached a verdict.[16]

13. Whether anyone has been the victim of a crime.[17]

14. Whether racial bias or prejudice may affect anyone.

15. Whether anyone has a religious or philosophical belief that prohibits them from sitting in judgment on another person.

16. If the case involves an interpreter, whether anyone speaks or understands the language involved.[18]

V. Dismissal For Cause; Following Up On Affirmative Answers[19]

If a panel member indicates that an answer to a question would be "yes," further inquiry is required. In any situation, the mere fact of an affirmative response is not enough to disqualify a person from jury service. The ultimate test is whether, the affirmative response notwithstanding, the juror can decide the case fairly and impartially on the evidence that is presented in court.[20]

In a group of four cases decided on the same day, the Wisconsin Supreme Court identified and implemented a new set of three terms for classifying juror bias.[21] State v. Faucher, 227 Wis.2d 700, 596 N.W.2d 770 (1999), was the lead decision. It held that the usefulness of the old terms for types of juror bias had "run full course" and that the terms "implied bias," "actual bias," and "inferred bias" should no longer be used. In their place, the following are adopted: statutory bias, subjective bias, and objective bias.

A. Statutory bias

"Statutory bias" refers to prospective jurors who are excluded from jury service under § 805.08(1):

- those related by blood or marriage to any party;
- those related by blood or marriage to any attorney appearing in the case; and
- those who have a financial interest in the case.

A person meeting one of these descriptions may not serve regardless of his or her ability to be impartial.

A prospective juror who is the brother-in-law of a state witness must be struck for cause on the basis of statutory bias. State v. Czarnecki, 231 Wis.2d 1, 604 N.W.2d 891 (Ct. App. 1999).[22]

Note: § 805.08(1) also refers to those who have expressed or formed an opinion or are aware of any bias or prejudice in the case; they are not considered to fall into the "statutory bias" class but are more accurately described as those for whom evidence of "subjective bias" exists. Faucher, supra, 227 Wis.2d 700, 717. Thus, an individual inquiry is required before they are to be dismissed.

In addition to those jurors falling within the "statutory bias" category, one other class of jurors must always be excused: jurors who are related to a state witness.[23] With these exceptions, it is improper to exclude any class of jurors without individual inquiry into ability fairly to decide the case.[24]

B. Subjective bias

"Subjective bias" refers to a prospective juror who has opinions or feelings about the case that the juror is unable or unwilling to set aside. It refers to the juror's actual state of mind and is usually revealed by a prospective juror during voir dire. Faucher, supra, 227 Wis.2d 700, 719; State v. T. Oswald, 2000 WI App 2, ¶19, 232 Wis.2d 62, 606 N.W.2d 207.[25]

The inquiry into subjective bias involves determining whether the prospective juror has expressed or indicated an opinion or a bias and, if so, whether the juror has the willingness and ability to set those feelings aside and consider the case on the evidence presented in court. As to the latter issue, courts should seek to elicit a clear expression of impartiality by asking a question like the following:

> Are you able to put your feelings or opinions aside and decide this case based solely on the evidence presented and the law as the court defines it for you?

However, "a prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality." State v. Erickson, 227 Wis.2d 758, 776, 596 N.W.2d 749 (1999). "Magical words" are not required. State v. Jimmie R.R., 2000 WI APP 5, ¶28, 232 Wis.2d 138, 606 N.W.2d 196. Also see State v. Ferron, 219 Wis.2d 481, 579 N.W.2d 654 (1998), where a prospective juror's statement that he could "probably" set his feelings aside was not considered to be a strong enough statement.[26]

In State v. Carter, 2002 WI App 55, 250 Wis.2d 851, 641 N.W.2d 517, the court found that subjective bias was established as a matter of law where a prospective juror clearly stated that his own experience with a sexual assault in his family would influence his ability to be fair and impartial and where no follow-up questions qualified that statement. The trial court's finding that no subjective bias was shown was clearly erroneous and defense counsel provided ineffective assistance by failing to question the juror's statement or move to strike the juror. 2002 WI App 55, ¶¶13, 15.

Appellate courts reviewing these cases will look carefully at the answers to voir dire questions but evaluating the juror's sincerity also depends on the juror's conduct, demeanor, and nonverbal cues. Jimmie R.R., supra, 232 Wis.2d 138, ¶29. Thus, substantial deference will be accorded to the trial judge who can observe these qualities. The value of reliance on answers to voir dire questions is further reduced because lawyers ask leading questions and intentionally elicit contradictory answers, Jimmie R.R., supra 232 Wis.2d 138, ¶30, and sometimes present confusing and ambiguous questions. State v. Gilliam, 2000 WI App 152, ¶¶12-14, 238 Wis.2d 1, 615 N.W.2d 1.

C. Objective bias

Objective bias refers to a prospective juror whose opinions or feelings are such that a reasonable person in the juror's position could not set them aside. Objective bias may involve a direct, critical, personal connection between the individual juror and crucial evidence or a dispositive issue in the case or an intractable negative attitude toward the justice system in general. State v. J. Oswald, 2000 WI App 3 ¶8, 232 Wis.2d 103, 606 N.W.2d 238.[27]

In State v. Faucher, 227 Wis.2d 700, 596 N.W.2d 770 (1999), a prospective juror had a strong opinion about the credibility of a crucial state's witness. The supreme court found that objective bias was established because the juror "could not truly set aside his strongly held belief that [the witness] would not lie" despite his apparently sincere intentions to do so. 227 Wis.2d 700, 733.[28]

In State v. Lindell, 2001 WI 108, ¶4, 245 Wis.2d 689, 629 NW.2d 223, the court held that objective juror bias was established as a matter of law where the juror knew the homicide victim as a friend of the family and business associate.

In State v.Erickson, 227 Wis.2d 758, 776, 596 N.W.2d 749 (1999), a juror in a sexual assault case had been a victim of sexual abuse as a child. But the supreme court found that objective bias was not established because the juror's connection was remote.

Objective bias may also be established if the prospective juror has a direct connection to a dispositive issue in the case, such as the defense theory, coupled with a personal belief regarding the outcome of that issue. In State v. Kiernan, 227 Wis.2d 736, 596 N.W.2d 760 (1999), the supreme court held that "veteran jurors" who had rejected a breathalyzer defense in a preceding case should have been dismissed from service in a second drunk driving case involving the same defense. Veteran jurors are not to be dismissed solely on the basis of their having served as jurors in a similar case, but "these veteran jurors did exhibit bias in that reasonable jurors in their position could not set aside expressed opinions and prior knowledge relating to the veracity of breathalyzer results." 227 Wis.2d 736, 751.

A third situation where objective bias may be present is where jurors demonstrate an intractable or ingrained negative attitude towards the justice system. In State v. Mendoza, 227 Wis.2d 838, 596 N.W.2d 736 (1999), the supreme court held that prospective jurors with negative experience with the justice system cannot be automatically excluded but must be excluded if their experience is recent and left them with negative feelings.

The Mendoza decision advised that trial courts should err on the side of caution when considering a request to remove a juror for cause, especially where objective bias is concerned:

> The circuit courts are . . . advised to err on the side of striking prospective jurors who appear to be biased, even if appellate courts would not reverse their determinations of impartiality. Such action will avoid the appearance of bias, and may save judicial time and resources in the long run.

Mendoza, supra, at 868 (quoting State v. Ferron, 219 Wis.2d 481, 503, 579 N.W.2d 654 (1998). This admonition was repeated in State v. Lindell, supra, ¶49. Also see State v. J. Oswald, 2000 WI App 3 ¶¶52-53, 232 Wis.2d 103, 606 N.W.2d 238, J. Nettesheim, concurring.

A different aspect of objective bias was considered in State v. Neumann, 2013 WI 58, 348 Wis.2d 455, 832 N.W.2d 560, a case involving extensive pretrial publicity. Both parents of an 11-year-old were convicted of 2nd degree reckless homicide under § 940.06 after the girl died from diabetic ketoacidosis resulting from untreated juvenile onset diabetes. The wife was tried first and convicted. The jury in trial of the father was told of the result of the mother's trial. The court stated: "We recognize that evidence of a co-defendant's guilt, under some circumstances, can be prejudicial to the defendant on trial, and in cases in other jurisdictions, convictions have been overturned on this ground. . . . Nevertheless, circumstances in the present case justified informing the jury about the mother's status." 2103 WI 58, ¶¶158, 159.

In State v. Tody, 2009 WI 31, 316 Wis.2d 689, 764 N.W.2d 737, all six members of the court who participated agreed that it was error for the trial judge to fail to strike the judge's mother from the jury panel. Three justices concluded that the circumstances showed "objective bias."[29] Three justices concluded that the judge's error was in not removing the juror or recusing himself under the trial court's inherent authority to administer justice.

In State v. Sellhausen, 2012 WI 5, 338 Wis.2d 243, 808 N.W.2d 390, the issue was whether a new trial was required where the trial judge failed to disqualify his daughter-in-law from sitting on the jury. All members of the court apparently agreed that a new trial was not required because the defense removed the juror by using a peremptory challenge and received a fair trial from an impartial jury. Justice Ziegler concurred, adopting her concurring opinion in the Tody case. Three justices joined her, meaning that the concurring opinion in Tody is now the law on this issue.

D. Remedy

The erroneous failure to excuse a juror for cause does not require retrial where the defense used a peremptory challenge to strike that juror, resulting in an impartial jury. State v. Lindell, 2001 WI 108, ¶5, 245 Wis.2d 689, 629 NW.2d 223. Lindell overruled State v. Ramos, 211 Wis.2d 12, 564 N.W.2d 328 (1997), which had required an automatic reversal when a defendant used a peremptory strike to remove a prospective juror who should have been excused for cause.[30]

VI. Peremptory Challenges

A. Number – § 972.03

In a felony case, both the state and the defendant receive 4 peremptory challenges. The number increases to 6 if the crime is punishable by life imprisonment.[31] An additional peremptory challenge is to be allowed each side if additional jurors [commonly referred to as "alternate jurors"] are selected under § 972.04(1), bringing the total to 7. The number for the defense also increases if there are multiple defendants.[32] Trial courts lack authority to allow correction of an allegedly mistaken exercise of a peremptory challenge once the jury is impaneled.[33]

B. Claim that a challenge is race- or gender-based

Peremptory challenges may not be used to exclude a prospective juror on the basis of the juror's race.[34] This rule applies even though the members of a jury panel are of a different race than the defendant.[35] The same rule applies to the exercise of peremptory challenges based on the juror's gender.[36]

In order to constitute a class for these purposes, "the group must be objectively identifiable from the rest of the community, be large enough that the general community recognizes it as an identifiable group, and its members share ethnic and cultural traditions and customs, and, perhaps most important, share discrimination because of their identity and 'differentness.'" State v. Guerra-Reyna, 201 Wis.2d 751, 756, 549 N.W.2d 779 (Ct. App. 1996). Mexican-Americans are a class entitled to equal protection of the law in connection with jury service. Id.

A claim that a peremptory challenge was improperly based on race or gender must be raised by motion before the jury is sworn or it will be considered waived.[37] Upon the defendant's timely motion, a three-step process is used to evaluate the claim:[38]

- there must be a prima facie showing that the peremptory challenge was based on race or gender;[39]
- the burden shifts to the opposing party to articulate a race- or gender-neutral explanation for striking the juror;[40] and
- the court must determine whether the objecting party has carried the burden of proving purposeful discrimination.

VII. Concluding Questions

At the end of the court-conducted voir dire, many judges review one or more of the important jury instructions with the jury. An example follows.

If you are selected as a juror, following the completion of all of the testimony and the arguments of counsel, I will instruct you on the principles of law that will govern you in your consideration of the evidence, weighing the testimony, and reaching your verdict. One of the instructions is on burden of proof and presumption of innocence. It reads as follows:

[READ WIS JI-CRIMINAL 140]

Is there anyone who believes that he or she could not follow that instruction?"

Another instruction relates to the credibility of witnesses. It reads as follows:"

[READ WIS JI-CRIMINAL 300]

Is there anyone who believes that he or she could not follow that instruction?"

VIII. Instruction After Jury is Selected[41]

HERE INSERT PRELIMINARY INSTRUCTIONS IF DESIRED. SEE, FOR EXAMPLE, WIS JI-CRIMINAL 50.

IX. Anonymous And "Numbers" Juries

Whenever a court restricts any juror information, including referring to a juror by number instead of by name, the court must make an individualized determination that the restriction of information is necessary and must take reasonable precautions to minimize any prejudicial effect to the defendant.

In State v. Britt, 203 Wis.2d 25, 553 N.W.2d 528 (Ct. App. 1996), the trial court had ruled that the jurors' names, addresses, and places of employment could not be publicly revealed in open court or on the record; however, both parties had access to all juror information via written questionnaires. This was considered to be an "anonymous jury" and its use upheld by the court of appeals because there was a strong reason to believe that the jury needed protection and reasonable precautions were taken to minimize any prejudicial effect to the defendant.

In State v. Tucker, 2003 WI 12, 259 Wis.2d 484, 657 N.W.2d 374, the trial court used only numbers to refer to the jurors, although both parties had access to all juror information, including the jurors' names. The Wisconsin Supreme Court held that this practice, termed a "numbers jury," was subject to the same requirements as those that apply to an anonymous jury[42] and found that the trial court erred in two respects. First, the trial court did not make an individualized determination that the jurors needed protection based on the specific circumstances of the case. Second, the trial court did not take adequate precautions to minimize any prejudicial effect.

A. Individualized Determination

Before a trial court restricts any juror information, the court must make an individualized determination that the facts and circumstances of the case require that the jury be protected. Among the factors that may be taken into account:

(1) the defendant's involvement in organized crime;
(2) the defendant's participation in a group with the capacity to harm jurors;
(3) the defendant's past attempts to interfere with the judicial process; and
(4) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment.

State v. Tucker, 2003 WI 12, ¶22 [citing United States v. Darden, 70 F.3d 1507, 1532 (8th Cir. 1995); United States v. Ross, 33 F.3d 1507, 1520 (11th Cir. 1994).]

B. Precautionary Statement

When juror information is restricted, there is a danger that the jurors will interpret the special measures as reflecting on the defendant's guilt or character. The general instruction on the presumption of innocence is not sufficient to address this issue. Therefore, "the circuit court, at a minimum, must make a precautionary statement to the jury that the use of numbers instead of names should in no way be interpreted as a reflection of the defendant's guilt or innocence. . . A precautionary statement must not mislead a jury, but must be based on factors and influences that are relevant in a particular case." State v. Tucker, 2003 WI 12, ¶23, ¶24.[43]

While it may be necessary to tailor the precautionary statement for the facts of a particular case, the Committee offers the following as a general model:[44]

> I have decided that for the convenience of court and counsel, we will refer to jurors by numbers. This should not influence your verdict in any manner.

COMMENT

Wis JI-Criminal SM-20 was originally published in 1966 and revised in 1991, 2000, 2003, 2004, and 2010. This revision was approved by the Committee in August 2017.

"Control of the voir dire examination rests primarily with the trial court. . . . The trial court has broad discretion as to the form and number of questions to be asked. The exercise of this discretion and the court's restriction upon inquiries, however, are subject to 'the essential demands of fairness.'" (Citation omitted.) Hammill v. State, 89 Wis.2d 404, 408, 278 N.W.2d 821 (1979).

General standards set forth by the Wisconsin Supreme Court in a 1962 decision strike the Committee as appropriate today:

> We approve the procedure followed by the trial court in conducting the voir dire examination. This procedure is for the court to propound the questions quite generally asked of jurors in most jury trials. Under this procedure, counsel are confined to later propounding only those questions to individual jurors which cover matters not included in the questions put by the court. We deem that this greatly shortens the time required in picking a jury over that required where the court leaves the questioning entirely to counsel, but at the same time adequately protects the interests of the parties. We especially commend the step here followed of holding a preliminary conference between the court and counsel, without the hearing of the jury, for the purpose of permitting counsel to request that particular questions be propounded to the jury and permitting opposing counsel to enter objections thereto. If any requested questions are denied, or if objections are entered to questions the court proposes to ask the panel, the reporter should record the same as was done here.

Filipiak v. Plombon, 15 Wis.2d 484, 496, 113 N.W.2d 365 (1962).

Subsection 805.08(1) provides in part that questions by the parties "shall not be . . . based on hypothetical questions." (The complete statute is quoted in note 3, below.)

1. Closing voir dire to the press and public is justified only when there is a compelling need to protect the defendant's right to a fair trial. A hearing must be conducted and specific findings must be made before a closure order is entered. State ex rel. LaCrosse Tribune v. Circuit Court, 115 Wis.2d 220, 340 N.W.2d 460 (1983). Also see State ex rel. Storer v. Gorenstein, 131 Wis.2d 342, 388 N.W.2d 633 (Ct. App. 1986); Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).

In two cases from the same county, the same trial judge excluded the public from voir dire, primarily because the courtroom was too small to accommodate the large jury panels and members of the public. Neither defendant objected, and the rest of the trial was open. In State v. Pinno and State v. Seaton, 2014 WI 74, 356 Wis.2d 106, 850 N.W.2d 207, the Wisconsin Supreme Court reached the following conclusions:

> ¶6 First, the Sixth Amendment right to a public trial extends to voir dire. Presley v. Georgia, 558 U.S. 209, 213 (2010). A judge's decision to "close" or limit public access to a courtroom in a criminal case requires the court to go through an analysis on the record in which

the court considers overriding interests and reasonable alternatives as set out in Waller v. Georgia, 467 U.S. 39, 45, 48 (1984). The court must make specific findings on the record to support the exclusion of the public and must narrowly tailor the closure. Id.

¶7 Second, the Sixth Amendment right to a public trial may be asserted by the defendant at any time during a trial. A defendant who fails to object to a judicial decision to close the courtroom forfeits the right to a public trial, so long as the defendant is aware that the judge has excluded the public from the courtroom. . . .

¶8 Third, the records in these cases are clear that neither Seaton nor Pinno objected to the alleged courtroom closure. . . . Therefore, Seaton and Pinno both forfeited their rights to a public trial.

Note: There is an extensive discussion of the obligations of the trial judge with respect to closing the courtroom – see ¶¶69-80.

2. The defendant has a right to be present at voir dire under § 971.04(1)(c) and the state and federal constitutions; further, this right may not be waived. State v. Harris, 229 Wis.2d 832, 839, 601 N.W.2d 682 (Ct. App. 1999). The right to be present includes voir dire conducted in camera. State v. David J.K., 190 Wis.2d 726, 528 N.W.2d 434 (Ct. App. 1994). The exclusion of the defendant from the in camera interview of three jurors was found to be harmless error in State v. Tulley, 2001 WI App 236, 248 Wis.2d 505, 635 N.W.2d 807. However, in extreme cases, a defendant may forfeit the right to be present by engaging in disruptive behavior. Trial courts are afforded considerable discretion in dealing with these difficult situations. See, for example, State v. Haste, 175 Wis.2d 1, 500 N.W.2d 678 (Ct. App. 1993); Illinois v. Allen, 397 U.S. 337 (1970). (Also see SM-30, WAIVER AND FORFEITURE OF COUNSEL . . .)

In State v. Gribble, 2001 WI App 227, 248 Wis.2d 409, 636 N.W.2d 488, the court held that it was not error for the trial court to conduct inquiries of prospective jurors regarding possible undue hardship resulting from jury service outside the presence of the defendant and defense counsel. Questioning about possible excuse from or deferral of jury service under § 756.03 is not part of the "voir dire" within the meaning of § 971.04(1)(c). 2001 WI App 227, ¶18. However, caution should be exercised in engaging in any conversation with jurors off the record. See State v. Harris, supra.

In State v. Alexander, 2013 WI 70, 349 Wis.2d 327, 833 N.W.2d 126, the defendant was tried before a jury on a charge of 1st degree intentional homicide. During the trial, two jurors approached the bailiff to state that one juror knew a woman in the gallery and the other that he knew one of the defense witnesses. The judge held separate in-chambers discussions with each juror; the prosecutor and defense counsel were present; the defendant was not. The judge dismissed both jurors. The defendant appealed on the ground that he had a right to be present at the in-chambers discussions. The Wisconsin Supreme Court recognized that the defendant had a constitutional right to be present at his trial, but "[w]hether this right to be present at trial encompasses in-chambers meetings "admits of no categorical 'yes' or 'no' answer. A conference in chambers might well constitute part of the trial depending upon what matters are discussed or passed upon. Likewise, such a conference might not be a part of the trial in the sense of one's constitutional right to be present. . . The test for whether a defendant's presence is required at an in-chambers hearing, or at a conference in the courtroom after the judge has emptied it of spectators, is

whether his absence would deny him a fair and just hearing." ¶1 The court concluded that Alexander's constitutional and statutory rights to be present were not violated.

3. The statutory framework relating to the selection of jurors and voir dire is provided by §§ 972.01 and 805.08. Section 972.01 provides that civil rules apply:

> The summoning of jurors, the selection and qualifications of the jury, the challenge of jurors for cause and the duty of the court in charging the jury and giving instructions and discharging the jury when unable to agree shall be the same in criminal as in civil actions, except that s. 805.08(3) shall not apply.

(The excepted section, § 805.08(3), relates to the number of peremptory challenges, which is covered by § 972.03 for criminal cases.) Sections 756.001 through 756.03 address the qualifications of jurors and excuses from and deferrals of jury service. The standards for examination of jurors in civil cases are set forth in § 805.08(1):

> The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood or marriage to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.

4. "**756.02 Juror qualifications.** Every resident of the area served by a circuit court who is at least 18 years of age, a U.S. citizen and able to understand the English language is qualified to serve as a juror in that circuit unless that resident has been convicted of a felony and has not had his or her civil rights restored."

5. Persons who are not "able to read and understand the English language" are not qualified for jury service; the clerk shall strike their names from the list of prospective jurors. §§ 756.02 and 756.04(9). State v. Carlson, 2003 WI 40, ¶2, 261 Wis.2d 97, 661 N.W.2d 51.

6. State v. Faucher, 227 Wis.2d 700, 596 N.W.2d 770 (1999), adopted the term "statutory bias" to identify those excluded from jury service under § 805.08(1): those related by blood or marriage to any party or to any attorney appearing in the case and those who have a financial interest in the case. A person meeting one of these descriptions may not serve regardless of his or her ability to be impartial. Those who are to be excluded for "subjective bias" or "objective bias" can be identified only after a more complete inquiry. See the text at section V for a summary of the jury bias jurisprudence announced in Faucher and its companion cases.

7. Marriage does not cause the blood relatives of one spouse to become related to the blood relatives of the other spouse. Thus, it was not error to refuse to disqualify a juror whose second cousin was married to the victim's sister. State v. Noren, 125 Wis.2d 204, 211, 371 N.W.2d 381 (Ct. App. 1985).

8. "[P]rospective jurors who are related to a state witness by blood or marriage to the third degree as shown in Figure 852.03(2), Stats., must be struck from the jury on the basis of implied bias." State v. Gesch, 167 Wis.2d 660, 662, 482 N.W.2d 99 (1992). [Note: The degree of kinship table formerly found in § 852.03(2) was recreated as § 990.001(16) by 1999 Wisconsin Act 32.] Under the current juror bias jurisprudence, Gesch is apparently to be treated as a unique case where "objective bias" will always be present. State v. Faucher, 227 Wis.2d 700, 724, 596 N.W.2d 770 (1999). See the text at section V for a summary of the jury bias jurisprudence announced in Faucher and its companion cases.

A prospective juror who is the brother-in-law of a state witness must be struck for cause on the basis of statutory bias. State v. Czarnecki, 231 Wis.2d 1, 604 N.W.2d 891 (Ct. App. 1999).

9. Faucher, note 6, supra, concluded that jurors who are covered by the second set of statutorily-required questions – those who have expressed or formed an opinion and those who are aware of any bias or prejudice in the case – are not in the "statutory bias" class who must always be excluded. Rather, their affirmative answer is evidence of "subjective bias" or "objective bias" which requires further inquiry into their ability to be fair and impartial. See text at section V for a summary of the jury bias jurisprudence announced in Faucher and its companion cases.

10. The Committee does not believe that the order in which the questions are presented makes any difference, and it is expected that judges will develop a sequence that seems to them to be the most logical and convenient.

11. If the defendant's difference is not obvious, start with the second sentence.

12. A trial court's finding that a juror's physical limitations caused by a medical condition did not prevent him from sitting as a juror was affirmed in State v. Guzman, 2001 WI App 54, 241 Wis.2d 310, 624 N.W.2d 717. The constitutional right to an impartial jury requires that a defendant not be tried by a juror who cannot comprehend testimony. This right was violated where two hearing-impaired jurors did not hear some of the testimony of two child witnesses. State v. Turner, 186 Wis.2d 277, 521 N.W.2d 148 (Ct. App. 1999).

13. Asking questions like this may help to avoid problems with claims relating to alleged "sleeping jurors" that have reached the appellate courts. See, for example, State v. Novy, 2013 WI 23, 346 Wis.2d 289, 827 N.W.2d 610 and State v. Saunders, 2011 WI App 156, 338 Wis.2d 160, 807 N.W.2d 679.

14. Law enforcement officers are not per se ineligible to serve as jurors. "Absent actual proof to the contrary elicited during voir dire, there is simply no basis for concluding that law enforcement officers would not act in accordance with their sworn duty and decide a case impartially. . . ." State v. Louis, 156 Wis.2d 470, 483, 457 N.W.2d 484 (1990). Whether any individual officer should be removed for cause lies within the trial court's discretion. 156 Wis.2d 470, 479. Knowing a police officer involved in the case is not cause for dismissal if the persons say it will not impair their ability fairly to determine the evidence. State v. Zurfluh, 134 Wis.2d 436, 438, 397 N.W.2d 154 (Ct. App. 1986). ¶3

In State v. Smith, 2006 WI 74, 291 Wis.2d 569, 716 N.W.2d 482 , the Wisconsin Supreme Court held that it was not error (in a Milwaukee criminal prosecution) to refuse to strike for cause a juror who worked in the Milwaukee County DA's office in Children's Court: ". . . [T]he circuit court reasonably concluded that [the juror] was not objectively biased under the facts and circumstances as a reasonable

person in [the juror's] position could be impartial. . . . Essentially, we decline to create a per se rule that excludes potential jurors for the sole reason that they are employed by the Milwaukee County District Attorney's Office."

15. This topic was added by the Committee in response to suggestions that the so-called CSI effect be addressed. This refers to unrealistic expectations about investigative practices that jurors may have as a result of watching television shows, movies, etc. The Committee believes it is important to state the inquiry broadly enough to include expectations relating to the law and how judges and lawyers act as well as to include expectations created by books and media reports.

16. So-called veteran jurors should not be categorically excluded, even where issues in a subsequent trial are nearly identical to the initial trial. Rather, there should be an individualized analysis of each juror to determine if there is "subjective bias" or "objective bias." State v. Kiernan, 227 Wis.2d 736, 596 N.W.2d 760 (1999). In Kiernan, the court applied the "objective bias" test to "veteran jurors" who, sitting in a previous case, had rejected the same breathalyzer defense that Kiernan used. The court held that the veteran jurors showed "objective bias" – reasonable jurors in their position could not set aside their opinions and prior knowledge about the accuracy of breathalyzer results.

Also see State v. Loukata, 180 Wis.2d 191, 196, 580 N.W.2d 896 (Ct. App. 1993): while "jurors who had acquitted a defendant in an unrelated case were improperly excused from the panel from which Loukata's jury panel was drawn," the defendant's right to a jury selected from a fair cross section of the community was not violated.

17. In State v. Delgado, 223 Wis.2d 270, 588 N.W.2d 1 (1999), the court reversed a conviction and ordered a new trial where a juror failed to disclose, in response to a voir dire question, that she had been the victim of a sexual assault when she was a child. The court found that the trial court's finding of no "inferred bias" was clearly erroneous. Under the court's juror bias jurisprudence, this type of case is to be analyzed under the test for "objective bias." State v. Faucher, 227 Wis.2d 700, 726-27, 596 N.W.2d 770 (1999).

Also see State v. Olson, 179 Wis.2d 715, 508 N.W.2d 616 (Ct. App. 1993), involving the same situation as that presented in Delgado.

In State v. Funk, 2011 WI 62, 335 Wis.2d 369, 799 N.W.2d 421, the defendant was convicted by a jury of two counts of sexual assault of a child. After trial, it was discovered that one of the jurors, Tanya G., had been the victim of multiple sexual assaults by a school bus driver when she was 10 and the victim of a forcible sexual assault when she was 17. Specific questions about jurors' possible history as victims were not asked during voir dire, but closely related questions were. The trial court held a postconviction hearing and concluded that Tanya G. was subjectively biased and objectively biased and ordered a new trial. The court of appeals affirmed and the supreme court reversed, summarizing its holding as follows:

> ¶2 We conclude that Tanya G. failed to respond to a material question during voir dire when Funk's attorney asked if anyone on the jury panel had previously testified in a criminal case. We also conclude that the circuit court's finding that Tanya G. was subjectively biased against Funk is unsupported by facts of record and is clearly erroneous. Finally, we conclude that the facts necessary to ground a circuit court's reasonable legal conclusion that a reasonable person in Tanya G.'s position could not be impartial were not

> developed in this case, and therefore the circuit court's conclusion that Tanya G. was objectively biased was erroneous. Accordingly, we reverse the court of appeals order and reinstate the guilty verdict and judgment of conviction.

Three justices dissented, concluding that the trial court's decision deserved greater deference and that it was supported by a reasonable interpretation of the facts.

18. See Wis JI-Criminal 60 for a suggested instruction advising jurors that they must rely on the evidence as presented through the official court interpreter. It may be advisable to obtain a juror's commitment to do so during voir dire.

19. Objection to a juror's bias is waived if no motion is made to remove the juror for cause. State v. Olexa, 136 Wis.2d 475, 402 N.W.2d 733 (Ct. App. 1987). Defense counsel's "failure to so move is a waiver of the defendant's right to object to that person sitting on the jury. There need be no statement on the record by the defendant that he consents to each juror that is sworn in." State v. Brunette, 220 Wis.2d 431, 445, 583 N.W.2d 174 (Ct. App. 1998).

20. Whether jurors' answers were sufficient to "rehabilitate" them was discussed in State v. Lepsch, 2017 WI 27, 374 Wis.2d 98, 892 N.W.2d 682.

21. State v. Faucher, 227 Wis.2d 700, 596 N.W.2d 770 (1999) was the lead decision. It concluded that a juror who had a strong opinion that a key witness was credible should have been dismissed for "objective bias." State v. Kiernan, 227 Wis.2d 736, 596 N.W.2d 760 (1999), concluded that "veteran jurors" should not be categorically excused but that the jurors in the case showed "objective bias" because they had strong opinions about the reliability of breathalyzer test results, which was the focus of the defense in the case. State v. Mendoza, 227 Wis.2d 838, 596 N.W.2d 736 (1999), reached a similar conclusion with regard to jurors with criminal records – they should not be categorically excused but may show "objective bias" when their criminal justice experience is recent and resulted in strong negative feelings about the system. In the fourth case, State v. Erickson, 227 Wis.2d 758, 596 N.W.2d 749 (1999), the court concluded that a juror's experience 40 years earlier as a victim of sexual assault did not show either subjective or objective bias.

The Faucher decision also reviewed seven previously-decided juror bias cases and classified them under the new terminology. 227 Wis.2d. 700, 721-30.

22. Czarnecki relied on State v. Gesch, see note 8, supra, which had held that a juror who was the brother of the state's police witness should be excluded on the basis of "objective bias."

23. See State v. Gesch, discussed in note 8, supra. Faucher characterized Gesch as a "unique" case apparently to be treated as one of "objective bias." 227 Wis.2d 700, 724.

24. State v. Louis, 156 Wis.2d 470, 457 N.W.2d 484 (1990): police officers; State v. Kiernan, 227 Wis.2d 736, 596 N.W.2d 760 (1999): veteran jurors; State v. Mendoza, 227 Wis.2d 838, 596 N.W.2d 736 (1999): jurors with a criminal record; and State v. Chosa, 198 Wis.2d 392, 321 N.W.2d 280 (1982): Native Americans in a case where the defendant was a Native American.

25. Subjective bias was not present where a self-employed juror said he did not want to serve, because his income would suffer and that he thought this would affect his ability to fair. "Inconvenience and inability to work during regular working hours should not, and cannot, be transferred into bias sufficient to strike a juror for cause." State v. Guzman, 2001 WI App 54, ¶17, 241 Wis.2d 310, 624 N.W.2d 717.

26. But see State v. Czarnecki, 2000 WI App 155, 237 Wis.2d 794, 615 N.W.2d 672, where subjective bias was not found to be established, despite the juror's statements that he believed police officers were generally more credible than other witnesses and that he could "probably" put that belief aside.

27. But see Oswald v. Bertrand, 374 F.3d 475 (7th Cir. 2004), where the U.S. Court of Appeals for the 7th Circuit granted relief, concluding that there was inadequate inquiry of the extent to which extensive publicity affected the jury panel's ability to be impartial. The decision emphasized the trial court's duty to undertake a diligent inquiry where there is a high probability of jury bias. Decisions of "lower federal courts" are not binding on courts in Wisconsin. State v. Lepsch, 2017 WI 27, 374 Wis.2d 98, 892 N.W.2d 682, ¶35, footnote 14.

28. But see State v. Czarnecki, 2000 WI App 155, 237 Wis.2d 794, 615 N.W.2d 672, where Faucher was distinguished on the grounds that the juror did not have a strong opinion about the credibility of the police officer witness.

29. In Tody, three justices noted three bases contributing to "objective bias": "the judge's mother has an interest in the case, namely her familial relationship with the judge, that is extraneous to the evidence on which the jury is to base its decision"; "the mother's presence may have a potential impact on the trial proceedings or the jury's deliberations"; and, "the presence of a member of the judge's immediate family on the jury seems conspicuously inconsistent with the jury's function as, in part, a check upon the power of the judge." 2009 WI 31, ¶¶38-40. Three justices concluded that "it was counterproductive to pigeonhole this case into the category of objective bias," 2009 WI 31, ¶66, but agreed that the judge erred in presiding over the case with his mother on the jury panel. They referred to SCR 60.04(4)(e) which requires a judge to recuse himself or herself when "a person within the third degree of kinship" to the judge is a party, a lawyer, has more than a de minimis interest that could be substantially affected by the proceeding or is likely to be a material witness. The rule does not specifically list being a juror as a ground for recusal, but may offer some guidance as to the nature of the relationships that might raise the issue presented in Tody.

30. The automatic reversal rule of Ramos was not required under the federal constitution. In United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000), the Court held that if a defendant elects to cure a trial court's erroneous refusal to excuse a juror for cause by exercising a peremptory challenge, "and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right." Ramos was based on the deprivation of statutorily granted peremptory challenges, not on constitutional grounds. It is that decision that was overruled in Lindell.

In the opposite situation – where a juror is unnecessarily removed for cause, automatic reversal is not required. State v. Mendoza, 227 Wis.2d 838, 856-64, 596 N.W.2d 736 (1999); State v. Jimmie R.R., 2000 WI App 5, ¶25, 232 Wis.2d 138, 606 N.W.2d 196.

31. Note that a penalty of life imprisonment applies not only to Class A felonies but also to life sentences for persistent repeaters under § 939.62(2m). See State v. Erickson, 227 Wis.2d 758, 596 N.W.2d 749 (1999).

32. Section 972.03 provides in part:

> If there is more than one defendant, the court shall divide the challenges as equally as practicable among them; and if their defenses are adverse and the court is satisfied that the protection of their rights so requires, the court may allow the defendants additional challenges.

If the crime is punishable by life imprisonment, the number increases to 12 if there are two defendants and to 18 if there are three defendants. Id.

33. State v. Nantelle, 2000 WI App 110, 235 Wis.2d 91, 612 N.W.2d 356.

34. In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court reexamined the portion of Swain v. Alabama, 380 U.S. 202 (1965), relating to the evidentiary burden a defendant must meet to show unfair use of racially-based peremptory challenges. The following new test was announced:

> . . . a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

476 U.S. 79, 96.

The Wisconsin Supreme Court applied the Batson decision in State v. Walker, 154 Wis.2d 158, 453 N.W.2d 127 (1990), reversing a conviction because the record showed "an unrebutted prima facie case of purposeful discrimination." 154 Wis.2d 158, 179. See State v. Waites, 158 Wis.2d 376, 462 N.W.2d 206 (1990), where the court found the Batson claim was waived. Also see State v. Lamon, 2003 WI 78, 262 Wis.2d 747, 664 N.W.2d 607, which did not articulate new legal principles but did provide a detailed example of reasons found to be race-neutral.

35. Powers v. Ohio, 499 U.S. 400 (1991).

36. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); State v. Joe C., 186 Wis.2d 580, 522 N.W.2d 222 (Ct. App. 1994); State v. Jagodinsky, 209 Wis.2d 577, 563 N.W.2d 188 (Ct. App. 1997).

37. State v. Jones, 218 Wis.2d 599, 581 N.W.2d 561 (Ct. App. 1998).

38. The three-part test is the one developed in Batson v. Kentucky, 476 U.S.79 (1986), for cases involving racial discrimination. It also applies to gender discrimination. State v. King, 215 Wis.2d 295, 572 N.W.2d 530 (Ct. App. 1997); State v. Jagodinsky, 209 Wis.2d 577, 563 N.W.2d 188 (Ct. App. 1997).

39. For a case finding a failure to make the required prima facie showing of race-based peremptory, see State v. Lopez, 173 Wis.2d 724, 496 N.W.2d 617 (Ct. App. 1992).

40. The party defending a claim of use of peremptories for discriminatory purposes "must offer something more than a bald, but otherwise credible, statement that other nonprohibited factors were considered. Rather, he or she must demonstrate how there is a nexus between these legitimate factors and the juror who was struck." State v. Jagodinsky, 209 Wis.2d 577, 584-85, 563 N.W.2d 188 (Ct. App. 1977).

Fears that a bilingual juror would be unable to rely exclusively on the court interpreter's version of testimony is a race-neutral ground for exercising a peremptory challenge. Hernandez v. New York, 500 U.S. 352 (1991).

The following were found to be racially neutral reasons in State v. Gregory, 2001 WI App 107, ¶12, 244 Wis.2d 65, 630 N.W.2d 711: concern about the juror's truthfulness; family members with relationship with cocaine, the substance on which the charge was based; close proximity to the alleged drug house; and, a concern that the juror's uncle could have been recently arrested for involvement with drug trafficking.

41. Whether to include preliminary instructions at this point depends on the preference of the trial judge and other factors, such as the amount of time that may pass before the trial begins. Wis JI-Criminal 50 includes recommended preliminary instructions and cautions regarding juror's use of electronic communication devices.

42. "[T]he jury in this case was not a classic 'anonymous' jury. Notwithstanding whether the jury in this case is characterized as an 'anonymous' or a 'numbers' jury, if restrictions are placed on juror identification or information, due process concerns are raised regarding a defendant's rights to an impartial jury and a presumption of innocence. Accordingly, although this case does not deal with the classic 'anonymous' jury, the reasoning in cases involving anonymous juries is beneficial to our analysis." State v. Tucker, 2003 WI 12, ¶11.

43. Tucker offered the following as illustrations of statements that have been made by courts in other jurisdictions: United States v. DeLuca, 137 F.3d 24 (1st Cir. 1998) (district court may instruct jury that their identities will be withheld to ensure that no extrajudicial information is conveyed to them); United States v. Scarfo, 850 F.2d 1015 (3d Cir. 1988) (district court may instruct jury that their anonymity is a precautionary measure to ensure that both sides get a fair trial); State v. Samonte, 928 P.2d 1 (Haw. 1996) (circuit court may instruct jury that anonymity is to protect jurors from contacts by the news media); State v. Bowles, 530 N.W.2d 521 (Minn. 1995) (circuit court may instruct jury that purpose of anonymity is to shield jurors from media harassment and undesirable publicity); State v. McKenzie, 532 N.W.2d 210 (Minn. 1995) (circuit court may instruct jury that they will remain anonymous to shield them from media harassment and ward off curiosity that might infringe on their privacy). State v. Tucker, 2003 WI 12, ¶24.

44. The model is also published as a freestanding instruction. See Wis JI-Criminal 146.

SM-21 WAIVER OF JURY TRIAL: ACCEPTANCE, WITHDRAWAL, AND RELATED ISSUES

The following is intended for use when a defendant with counsel wishes to waive a jury trial.[1] If the defendant is without counsel, it may be necessary to obtain or renew a waiver of counsel. See SM-30, Waiver and Forfeiture of Counsel.

CONTENTS

I. Accepting or Rejecting a Proposed Jury Trial Waiver

A. Consent of the State

The court should first ask the prosecutor whether the State consents to a proffered jury trial waiver. Section 972.02(1) provides that a jury trial waiver requires the consent of the state. The State is not required to offer reasons for refusing to consent.[2]

B. Trial Court Authority to Reject a Waiver

The trial court has authority to reject a jury trial waiver even if the State consents. Like the State's decision to withhold consent, the trial court need not explain its decision and, absent extraordinary circumstances, that decision is not reviewable.[3]

II. Determining the Defendant's Ability to Understand the Waiver

As with any waiver, the waiver of the right to a jury trial requires that the defendant make an understanding and intelligent decision. This may require an investigation of the defendant's background, present mental condition, etc. For suggested questions designed to explore this aspect of a waiver decision, see SM-32, ACCEPTING A PLEA OF GUILTY, at section II.

III. Determining that the Waiver is Knowing and Voluntary

A jury trial waiver must be made personally, knowingly, and voluntarily. A personal inquiry is required and the record must clearly indicate the defendant's willingness and intent to waive the right to a jury trial.[4] The following are examples of questions that should be asked. Answers indicating the need for more information should be pursued.

> Before your waiver of your constitutional right to a jury trial is accepted, the court will ask you some questions to decide whether your waiver should be accepted. If you have any trouble understanding the questions, please tell me, and take all the time you need to confer with your attorney.
>
> Do you understand that you have the right to a jury trial, that is to have twelve people hear all the evidence in the case and decide whether you are guilty or not guilty?
>
> Do you understand that in a jury trial, the State must convince each member of the jury beyond a reasonable doubt that you committed the crime?[5]
>
> Do you understand that by giving up your right to a jury trial, this court, after hearing all of the evidence, will make a decision on whether you are guilty beyond a reasonable doubt or not guilty?
>
> Has anyone promised you anything to get you to give up your right to a jury trial?

Has anyone threatened you to get you to give up your right to a jury trial?

Knowing what I have just told you, do you still wish to give up your right to a jury trial?

Have you had enough time to discuss this with your attorney?

Has your attorney explained your right to a jury trial to you?

Do you understand the questions I have asked and understand what your attorney has told you?

DIRECT THE FOLLOWING QUESTION TO DEFENSE COUNSEL:

Do you believe that the defendant understands the right to a jury trial and the right to a unanimous verdict and is giving up those rights freely, voluntarily, and intelligently?

IF THE COURT IS SATISFIED THAT DEFENDANT'S WAIVER OF A JURY TRIAL IS MADE FREELY, VOLUNTARILY, AND KNOWINGLY, AND THE COURT APPROVES, THE COURT SHOULD MAKE FINDINGS OF FACT, ON THE RECORD, SUBSTANTIALLY AS FOLLOWS:

The court finds that the defendant understands the constitutional right to a jury trial and that the defendant freely and voluntarily waives that right.

IV. Related Issues

A. Agreeing to a Jury of Less Than Twelve

Section 972.02(2) provides as follows:

> At any time before the verdict in a felony case, the parties may stipulate in writing or by statement in open court, on the record, with the approval of the court, that the jury shall consist of any number less than 12.

The procedures required for waiver of trial by jury apply equally to waiver of a full 12-member jury. State v. Cooley, 105 Wis.2d 642, 646, 315 N.W.2d 369 (Ct. App. 1981).

B. Waiver of a Unanimous Verdict

This question was referred to in State v. Koput, 142 Wis.2d 370, 418 N.W.2d 804 (1988), in connection with the second phase of the bifurcated trial held where a defendant enters a plea of not guilty by reason of mental disease or defect. At the time of the decision, the statute did not, as it does now, provide explicitly for a 5/6 verdict at the second phase. There was uncertainty about whether the second phase verdict had to be unanimous. The court of appeals held that a unanimous verdict was required and that it was so fundamental a right that it could not be waived. State v. Koput, 134 Wis.2d 195, 396 N.W.2d 773 (Ct. App. 1986). The supreme court reversed, but because it held that the verdict was to be 5/6, it did not have to address the waiver issue.

The rule that a unanimous verdict is a right too fundamental to be waived is apparently the common law rule. However, several states do allow such waivers.[6] The ABA Standards for Criminal Justice allow a waiver of a unanimous verdict. Standard 15-1.3(b) (2nd ed. 1980). The court of appeals decision in Koput had relied on a previous holding that there could be no waiver of the unanimous verdict. That holding, Holland v. State, 87 Wis.2d 567, 275 N.W.2d 162 (Ct. App. 1978), was reversed on other grounds, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

C. Partial Jury Trial Waiver

In some situations, a defendant may wish to stipulate that one element of an offense is established. This might be viewed as a waiver of the right to a jury trial on that element. If so, does the acceptance of the stipulation require a partial jury trial waiver and an appropriate inquiry into the defendant's ability to give that waiver? In State v. Villarreal, 153 Wis.2d 323, 450 N.W.2d 519 (Ct. App. 1989), the trial court accepted a stipulation from the prosecutor and defense counsel that the question of whether the offense was committed while armed with a dangerous weapon would be decided by the court instead of the jury. The court of appeals held that this was error: withdrawal of that element from the jury required a personal waiver from the defendant.

V. Withdrawal of a Jury Trial Waiver

In State v. Cloud, 133 Wis.2d 58, 393 N.W.2d 123 (Ct. App. 1986), the court characterized the question of "[w]hether, and under what circumstances, a defendant may withdraw a valid jury waiver" as one "of first impression in this state." 133 Wis.2d 58, 63. The court adopted an abuse of discretion standard for evaluating a trial court's refusal to allow withdrawal of a jury trial waiver, but went further to hold "that it is an abuse of discretion for a trial court to deny a criminal defendant's motion to withdraw a jury waiver if there is no showing that granting withdrawal would have substantially delayed or impeded the cause of justice." 133 Wis.2d 58, 65.

COMMENT

SM-21 was originally published in 1990. Footnote 3 was modified in April 1991. This revision was approved by the Committee in August 2004.

Section 972.02(1) provides that "criminal cases shall be tried by a jury . . . unless the defendant waives a jury in writing or by statement in open court . . . on the record, with the approval of the court and the consent of the state." (The statute allows the waiver to be accepted by telephone under § 967.08.)

The Wisconsin statute was modeled after Rule 23 of the Federal Rules of Criminal Procedure. State v. Cook, 141 Wis.2d 42, 413 N.W.2d 647 (Ct. App. 1987).

Also see CR16-1, Wisconsin Judicial Benchbook - Criminal-Traffic.

All the requirements of § 972.02 and the case law interpreting it do not apply to jury trial waivers in Chapter 980 commitment proceedings. See § 980.05(2). State v. Bernstein, 231 Wis.2d 292, 605 N.W.2d 555 (Ct. App. 1999); State v. Denman, 2001 WI App 96, 243 Wis.2d 14, 626 N.W.2d 296.

1. The procedure recommended here applies regardless of the time the waiver is offered. In Warrix v. State, 50 Wis.2d 368, 184 N.W.2d 189 (1971), the court interpreted § 957.01, the predecessor to present § 972.02. It held that nothing in the statute prohibited the acceptance of a jury waiver after the trial to a jury had begun. The court noted, however, that "[i]f a judge believes he cannot recollect the testimony or did not make notes to help him or for any reason he cannot function as the trier of the facts he needs only to refuse to accept the offer to waive the jury." 50 Wis.2d 368, 372.

2. Section 972.02(1) provides that a jury trial waiver requires the consent of the state. In State v. Cook, 141 Wis.2d 42, 413 N.W.2d 647 (Ct. App. 1987), the Wisconsin Court of Appeals held that the state is not required to justify its refusal to consent to a defendant's jury trial waiver. It relied on Singer v. United States, 380 U.S. 24 (1965), which reached the same result in interpreting Rule 23 of the Federal Rules of Criminal Procedure. Section 972.02 was modeled after Rule 23. The court did note that a different result might be required if there was a showing of exceptional circumstances, such as denial of equal protection.

3. In State v. Burks, 2004 WI App 14, 268 Wis.2d 747, 674 N.W.2d 640, the court held that "the trial court's 'approval' of a defendant's jury-trial waiver under Wis. Stat. § 972.02(1) is not [a] quasi-ministerial rubber-stamping of the parties' request. . . Rather, . . . , like the prosecution's decision to withhold consent to a defendant's request to waive his or her right to a jury trial, the trial court also need not explain its decision to withhold its approval, and absent extraordinary circumstances not present here, its decision to withhold approval, like the prosecution's decision to withhold consent, is not reviewable." Burks, ¶10.

4. In State v. Anderson, 2002 WI 7, ¶29, 249 Wis.2d 586, 638 N.W.2d 301, the court stated: "Although Anderson submitted a written jury trial waiver form, we find that the circuit court erred by failing to engage Anderson in a personal colloquy regarding the jury trial waiver. . . [W]e mandate the use of a personal colloquy in every case . . ." The court identified four matters that the personal colloquy must cover: 1) a deliberate choice, absent threats or promises, to proceed without trial; 2) awareness that

a jury consists of 12 people who must all agree on all elements of the crime charged; 3) awareness that in a court trial the judge decides whether the defendant is guilty; and, 4) that there was enough time to discuss the decision with counsel. Anderson, ¶24.

Also see State v. Cloud, 133 Wis.2d 58, 62, 393 N.W.2d 123 (Ct. App. 1986), citing State v. Moore, 97 Wis.2d 669, 671, 294 N.W.2d 551, 553 (Ct. App. 1980).

Section 972.02 and appellate decisions emphasize that the record must reflect the jury trial waiver and that a waiver will not be implied from a defendant's acquiescence in a trial to the court. In State v. Krueger, the Wisconsin Supreme Court held: ". . . henceforth a record demonstrating the defendant's willingness and intent to give up the right to be tried by a jury must be established before the waiver is accepted." 84 Wis.2d 272, 282, 267 N.W.2d 602 (1978).

However, the Krueger decision did not adopt a specific procedure for making the required record. It cited two methods with approval:

1) having the district attorney develop the record by asking questions of the defendant. See White v. State, 45 Wis.2d 672, 682, 173 N.W.2d 649 (1970).
2) placing the responsibility on the trial court as suggested by the ABA Standards Relating to Trial by Jury, sec.1.2(b) (1968). Commentary to that section [which is sec. 15-1.2(b) of the 2nd edition, 1980] was cited with approval in State v. Cloud, supra:

> It may well be that a defendant who has been informed by counsel or is otherwise aware of the right to trial by jury may intelligently waive that right without further admonishment from the court. However, consistent with the approach which has been taken with regard to entry of a plea of guilty, the better practice is for a court to advise a defendant of the right to jury trial before accepting a waiver. As one court has observed: "'[T]he serious and weighty responsibility' of determining whether [the defendant] wants to waive a constitutional right requires that he be brought before the court, advised of that right, and then permitted to make 'an intelligent and competent waiver.'" When the record or a written waiver establishes that a defendant was specifically advised that he or she could be tried by a jury, a subsequent attack on the waiver by the defendant is not likely to prevail.

3 Standards for Criminal Justice, sec. 15-1.2(b) commentary at 15.24 (2d ed. 1980), cited at 133 Wis.2d 58, 62.

The requirement that the defendant personally waive the right to a jury trial was reemphasized in State v. Livingston, 159 Wis.2d 561, 464 N.W.2d 839 (1991):

> . . . we hold that any waiver of the defendant's right to trial by jury must be made by an affirmative act of the defendant himself. The defendant must act personally; he and only he has the power and authority to waive his right to a jury trial, and that power and authority is legally effective only by virtue of an affirmative act by him. Neither counsel nor the court nor any other entity can act in any way or to any degree so as to waive on the defendant's behalf his right to trial by jury. The affirmative act by the defendant, in order to constitute a personal waiver, must be such as to comply with at least one of the specific means of effecting a waiver provided in sec. 972.02(1), and the court and the state must consent in order for a waiver to occur in accordance with the statute. The record must clearly demonstrate the defendant's personal waiver; the personal waiver may not be inferred or presumed. All of these concerns reflect the fact that the ultimate question is what the defendant wantsCa court trial or a jury trial; it is his decision, no matter what advice he has received. If the defendant waives the jury "in writing" under the statute when accepting the written waiver, the judge still should question the defendant as to the voluntariness and understanding of his action.

159 Wis.2d 561, 569-70.

The questions suggested here assume that the court will conduct the inquiry. While the recent jury trial waiver cases seem to assume that the court will do so, there appears to be no prohibition against having the prosecutor or defense counsel take the responsibility. This was noted by the Wisconsin Supreme Court in the Livingston case, supra:

> . . . we would add that defense counsel has a corresponding responsibility to ensure that the record of jury waiver is developed and failure to meet this responsibility can sometimes be considered inadequate representation by counsel. We also consider that in accordance with sec. 972.02(1), Stats., the district attorney bears a professional responsibility to develop an adequate record of the defendant's personal waiver of the jury.

159 Wis.2d 561, 570-71.

5. This question is based on the statement recommended in SM-32, Accepting a Plea of Guilty. It is intended to comply with the requirement imposed in State v. Resio, 148 Wis.2d 687, 436 N.W.2d 603 (1989). The court held:

> Although we have determined that knowledge of the unanimity requirement is not constitutionally required for a valid jury waiver, as a matter of judicial administration pursuant to our powers under Art. VII sec. 3 of the Wisconsin Constitution, we direct that, from the date of the mandate of this decision, a circuit court in a criminal case must advise

the defendant that the court cannot accept a jury verdict that is not agreed to by each member of the jury.

148 Wis.2d 687, 696-97.

6. Cases are collected at Annotation: Validity and Efficacy of Accused's Waiver of Unanimous Verdict, 97 A.L.R.3d 1253.

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SM-25 JUDGE'S DUTY AT INITIAL APPEARANCE

[WITHDRAWN]

COMMENT

SM-25 was published in 1987. It was withdrawn by the Committee in 2010.

See "Initial Appearance" CR7-3, Wisconsin Judicial Benchbook, Criminal and Traffic.

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SM-28 INQUIRY REGARDING THE DECISION WHETHER TO TESTIFY

THE FOLLOWING IS REQUIRED WHEN THE DEFENDANT SEEKS TO WAIVE THE RIGHT TO TESTIFY. IT IS RECOMMENDED WHEN THE DEFENDANT HAS DECIDED TO TESTIFY

DIRECT THE FOLLOWING QUESTIONS TO THE DEFENDANT:

"Do you understand that you have a constitutional right to testify?"

"And do you understand that you have a constitutional right not to testify?"

"Do you understand that the decision whether to testify is for you to make?"

"Has anyone made any threats or promises to you to influence your decision?"

"Have you discussed your decision whether or not to testify with your lawyer?"

"Have you made a decision?"

"What is that decision?"

DIRECT THE FOLLOWING QUESTIONS TO DEFENSE COUNSEL:

"Have you had sufficient opportunity to thoroughly discuss this case and the decision whether to testify with the defendant?"

"Are you satisfied that the defendant is making the decision knowingly, intelligently, and voluntarily?"

THE COURT SHOULD STATE THE APPROPRIATE FINDING ON THE RECORD.

COMMENT

SM-28 was originally published in 2004. The Comment was updated in 2005 and 2009. This revision was approved by the Committee in July 2011 to address State v. Denson, 2011 WI 70, 335 Wis.2d 681, 799 N.W.2d 831.

This Special Material is intended to provide a framework for implementing the requirement established in State v. Weed, 2003 WI 85, 263 Wis.2d 434, 666 N.W.2d 485:

> . . . in order to determine whether a criminal defendant is waiving his or her right to testify, a circuit court should conduct an on-the-record colloquy with the defendant outside the presence of the jury. The colloquy should consist of a basic inquiry to ensure that (1) the defendant is aware of his or her right to testify and (2) the defendant has discussed this right with his or her counsel. ¶43.

Weed requires the colloquy only when a defendant seeks to waive the right to testify. The Committee concluded that a similar inquiry should be conducted when the defendant decides to testify, because a constitutional right is involved regardless of the decision that is made. In State v. Jaramillo, 2009 WI App 39, ¶17, 316 Wis.2d 538, 765 N.W.2d 855, the Wisconsin Court of Appeals noted that while it lacked the authority to require a colloquy where a defendant decides to testify, "we do recommend it as good practice," citing this Comment.

In State v. Denson, 2011 WI 70, 335 Wis.2d 681, 799 N.W.2d 831, the Wisconsin Supreme Court addressed the question whether a colloquy is required when the defendant has decided to testify. The court concluded that while a fundamental constitutional right is involved, an on-the-record inquiry is not required. However, after noting there are some potential dangers in having the judge conduct a colloquy, the court recommended that an inquiry like that suggested in SM-28 be conducted. Relevant portions of the Denson decision follow.

> ¶8 A criminal defendant's constitutional right not to testify is a fundamental right that must be waived knowingly, voluntarily, and intelligently. However, we conclude that circuit courts are not required to conduct an on-the-record colloquy to determine whether a defendant is knowingly, voluntarily, and intelligently waiving his or her right not to testify. While we recommend such a colloquy as the better practice, we decline to extend the mandate pronounced in Weed. In any case, once a defendant properly raises in a postconviction motion the issue of an invalid waiver of the right not to testify, an evidentiary hearing is an appropriate remedy to ensure that the defendant knowingly, voluntarily, and intelligently waived his or her right not to testify.
>
> . . . .
>
> ¶64 As the Weed court recognized, we are in the small minority of jurisdictions that impose an affirmative duty upon circuit courts to conduct an on-the-record colloquy to ensure that a criminal defendant is knowingly, intelligently, and voluntarily waiving his or her right to testify. 263 Wis. 2d 434, ¶41. The vast majority of jurisdictions do not impose such a duty upon circuit courts, and in fact, many jurisdictions advise against it. Their reasons for not mandating an on-the-record colloquy are many. [Citations omitted.] The most notable include that by advising the defendant of his or her right to testify, the circuit court might inadvertently influence the defendant to waive his or her right not to testify, might improperly intrude upon the attorney-client relationship or interfere with defense strategy, or might lead the defendant into believing that his or her defense counsel is somehow deficient.

> ¶65 We believe that these risks apply with even greater force to a circuit court's inquiry into a criminal defendant's decision to testify. Defense counsel has the primary responsibility for advising the defendant of his or her corollary rights to testify and not to testify and for explaining the tactical implications of both. . . . In that sense, we believe it "unlikely that a competent defense counsel would allow a defendant to take the stand without a full explanation of the right to remain silent and the possible consequences of waiving that right." Once a defendant, counseled by his or her attorney, makes the decision to testify, a circuit court's inquiry into whether the defendant is aware of his or her corollary right not to testify runs a real risk of interfering with defense strategy and inadvertently suggesting to the defendant that the court disapproves of his or her decision to testify. . . .
>
> ¶66 Therefore, different from our conclusion in Weed, see 263 Wis. 2d 434, ¶¶41-42, we conclude that the risk that a circuit court's inquiry into a criminal defendant's decision to testify will influence the defendant to waive his or her right to testify or will improperly interfere with defense strategy outweighs the benefit of mandating an on-the-record colloquy to ensure that the defendant is knowingly, voluntarily, and intelligently waiving his or her right not to testify.
>
> ¶67 At the same time, as a practical matter, we recognize that conducting an on-the-record colloquy "is the clearest and most efficient means" of ensuring that the defendant has validly waived his or her right not to testify "and of preserving and documenting that valid waiver for purposes of appeal and postconviction motions." See Klessig, 211 Wis.2d at 206; see also Anderson, 249 Wis. 2d 586, ¶23. Here, for instance, we are mindful of the fact that had the circuit court engaged Denson in an on-the-record colloquy regarding his right not to testify, this case likely would not be before us. Accordingly, we recommend an on-the-record colloquy as the better practice. In fact, the Special Materials prepared by the Wisconsin Criminal Jury Instructions Committee already direct circuit courts to inquire into a criminal defendant's understanding of both the right to testify and the right not to testify. See Wis JI-Criminal SM-28.

The Committee recommends conducting this inquiry at the time the defense case is presented, as opposed to doing so at an earlier time. The decision should be made in context, when the consequences of testifying or waiving the right to do so will be more clear.

The questions provided here are just suggestions. If the defendant's replies indicate a possible lack of understanding, follow-up questions or allowing additional consultation between the defendant and defense counsel may be advisable.

For a case finding a waiver colloquy sufficient in light of the Weed requirements, see State v. Arredondo, 2004 WI App 7, 269 Wis.2d 369, 674 N.W.2d 647. Arredondo also addressed the standards to be applied if, after executing a valid waiver, a defendant seeks to reopen the testimony to allow him testify.

In State v. McDowell, 2004 WI 70, 272 Wis.2d 488, 681 N.W.2d 500, the Wisconsin Supreme Court imposed an additional obligation on the trial court in cases where defense counsel seeks to use the narrative approach in eliciting the defendant's testimony because of concern that the defendant may testify falsely. The court first concluded that "defense counsel may not substitute narrative questioning for the traditional question and answer format unless counsel knows the client intends to testify falsely. Absent the most extraordinary circumstances, such knowledge must be based on the client's expressed admission

of intent to testify untruthfully." ¶3. If this standard is met, "the attorney's first duty shall be to attempt to dissuade the client from the unlawful course of conduct." ¶45. If counsel believes this advice will not be followed, "an attorney should seriously consider moving to withdraw from the case." ¶46. If the motion is denied, "counsel should proceed with the narrative form, advising the defendant beforehand of what that would entail." ¶47. Defense counsel also must advise the prosecutor and the court before using the narrative form. Upon being so advised, the court must proceed as follows:

Courts, in turn, shall be required to examine both counsel and the defendant and make a record of the following: (1) the basis for counsel's conclusion that the defendant intends to testify falsely; (2) the defendant's understanding of the right to testify, notwithstanding the intent to testify falsely; and (3) the defendant's, and counsel's, understanding of the nature and limitations of the narrative questioning that will result. ¶48.

SM-30 WAIVER AND FORFEITURE OF COUNSEL; SELF-REPRESENTATION; STANDBY COUNSEL; "HYBRID REPRESENTATION"; COURT APPOINTMENT OF COUNSEL

SM-30 WAIVER AND FORFEITURE OF COUNSEL; SELF-REPRESENTATION; STANDBY COUNSEL; "HYBRID REPRESENTATION"; COURT APPOINTMENT OF COUNSEL

Scope

This Special Material addresses issues that may arise when a defendant expresses the desire to waive counsel or appears without counsel after being directed to obtain representation. In these situations, the trial court must identify accurately the situation that is presented, make the required inquiry and make proper findings.

When a defendant affirmatively wishes to waive counsel, an inquiry must be conducted to determine whether the defendant's waiver is voluntarily and understandingly made. This includes assuring that the defendant understands the benefits of being represented by counsel and the disadvantages of proceeding without counsel. The waiver inquiry must also explore the defendant's competence for self-representation. The Committee concluded that defendants who lack competence to represent themselves cannot execute a valid waiver of the right to counsel. A suggested inquiry, suggested findings, and commentary relating to waiver of counsel are found in Part I.

A defendant may also be found to have forfeited the right to counsel. Forfeiture may occur in situations where the defendant has failed to obtain counsel, has refused to cooperate with counsel, or through other conduct has so seriously interfered with the orderly administration of the case that the right to counsel will be found to have been forfeited. A trial court must warn a defendant that, if the defendant persists in specific conduct, the court will find that the right to counsel is forfeited. The court must also engage in a colloquy designed to assure that the defendant understands the benefits of being represented by counsel and the disadvantages of proceeding without counsel. As with the express waiver of counsel, the inquiry must also explore the defendant's competence for self-representation. The court should make a clear ruling when the court deems the right to counsel to have been forfeited and make factual findings to support that ruling. A suggested inquiry, suggested findings, and commentary relating to forfeiture of counsel are found in Part II.

What makes these cases difficult is that a constitutional right of the defendant is in question regardless of how the case is resolved. The defendant has the right to be represented by counsel but also has the right to waive counsel and proceed pro se. Further, the Wisconsin Supreme Court has reaffirmed the rule that Wisconsin trial courts must evaluate a defendant's competence to proceed pro se whenever defendants seek to

represent themselves. Part III discusses the considerations relating to evaluation of competence for self-representation.

Parts IV and V consider related issues: the appointment and role of standby counsel; and so-called hybrid representation, which occurs when a represented defendant seeks to engage in self-representation only during certain stages of the trial.

Attempts to waive counsel, conduct that may result in forfeiture of counsel, and attempts at self-representation are often connected with the problems confronting defendants who do not qualify for State Public Defender representation who nevertheless cannot afford to retain private counsel. Courts have the inherent power to appoint counsel in some situations. This is discussed in Part VI.

I. Express Waiver of Counsel

A. Suggested Inquiry

THE COURT MUST BE SATISFIED THAT THE DEFENDANT UNDERSTANDS THE PROCEEDINGS BEFORE ACCEPTING THE WAIVER. THE FOLLOWING ARE EXAMPLES OF AREAS THAT SHOULD BE THE SUBJECTS OF INQUIRY. ANSWERS INDICATING THE NEED FOR MORE INFORMATION SHOULD BE PURSUED. QUESTIONS SHOULD BE PHRASED IN A WAY THAT ENCOURAGES STATEMENTS FROM THE DEFENDANT THAT GO BEYOND SIMPLE "YES" AND "NO" ANSWERS.[1]

- Age

- Education and vocational training

- Present employment and employment history

- Present mental health condition and mental health history

- Present alcohol use and history of alcohol use

- Present medication or drug use

- Difficulty in understanding the court

IF THE DEFENDANT UNDERSTANDS THE PROCEEDINGS, THE COURT MUST ASSURE THAT THE DEFENDANT UNDERSTANDS THE RIGHT TO COUNSEL AND UNDERSTANDS THE BENEFITS OF BEING REPRESENTED.[2]

1. "Do you want to be represented by a lawyer?"

2. "Do you understand that you have a constitutional right to be represented by a lawyer in this case?"

3. "Do you understand that you have the right to hire your own lawyer?"

4. "If you do not have enough money to hire your own lawyer, you may be entitled to have a lawyer appointed to represent you. Do you understand that?"[3]

5. "You are charged with _____, which carries a maximum penalty of imprisonment for _____ years and a fine of _____, or both. If you are represented by a lawyer, he or she may discover information or facts which would be helpful in your defense. A lawyer may find that you have a defense to the charge or that there are facts which may result in a lighter penalty. I want you to take this into consideration in deciding whether or not you want a lawyer to represent you."

"The trial will continue under the same legal rules that would apply if you had a lawyer. If you represent yourself, you will have to follow these rules. Because you are not trained in the law, this will make it hard for you to challenge the evidence presented by the state and hard for you to present any evidence that you want to present."

"If you decide to testify you will be sworn as a witness and can give testimony while you are acting as a witness. You will be asked questions by the other side at that time. However, you cannot try to testify while acting as your own lawyer."

6. "Do you understand that a lawyer may be able to help you present your case and that it will be very difficult for you to do a good job being your own lawyer?"

7. "Do you now wish to reconsider your decision not to have a lawyer?"

8. "Has anyone told you that you should not ask for appointment of a lawyer to represent you?"

9. "Has anyone made any promises or any threats or has anyone used any influence or pressure of any kind or force of any kind to get you not to ask for the appointment of a lawyer?"

IF THE DEFENDANT INDICATES A CHANGE OF MIND AND NOW WANTS TO BE REPRESENTED BY A LAWYER, THE COURT SHOULD REFER THE CASE TO THE STATE PUBLIC DEFENDER OR ALLOW THE DEFENDANT TO SEEK PRIVATE COUNSEL.

IF THE DEFENDANT AFFIRMS THE DESIRE TO WAIVE COUNSEL, THE COURT SHOULD INQUIRE INTO THE DEFENDANT'S COMPETENCE FOR SELF-REPRESENTATION. INQUIRY INTO THE FOLLOWING AREAS IS RECOMMENDED; THE INFORMATION MAY HAVE BEEN ELICITED BY QUESTIONS ALREADY ASKED.[4]

- Level of education

- Level of literacy

- Ability to communicate in the courtroom

- Physical or psychological disability that may affect the ability to communicate in the courtroom

B. Use Of A Written Form

A standard form for a waiver of counsel has been adopted by the Judicial Conference. See, Waiver of Right To Counsel, CR-226.

Section 971.025(1) provides: "In all criminal actions and proceedings . . . the parties and court officials shall use the standard court forms adopted by the judicial conference . . ." The form may be supplemented with additional material. § 971.025(2).

Despite the fact that the use of the form is required, case law continues to require that the trial court conduct a colloquy to assure that a waiver of counsel is knowing and voluntary.

A proper integration of the colloquy and the form is illustrated by State v. Polak, 2002 WI App 120, 254 Wis.2d 585, 646 N.W.2d 845. The waiver of counsel was found to be supported by an adequate colloquy, the court noting that "we place particular

emphasis on the written waiver of counsel form, used in conjunction with the oral colloquy, because that form unequivocally states Polak's awareness of the assistance an attorney could provide and that an attorney might discover helpful things unknown to Polak." Polak, ¶19. The court observed that the form was not used as a substitute for the colloquy, but to supplement it.

C. Suggested Findings

1. Waiver of Counsel Accepted

AFTER THE COURT HAS CONDUCTED THE FOREGOING INQUIRY AND IF THE DEFENDANT PERSISTS IN THE REFUSAL TO BE REPRESENTED BY COUNSEL AND APPEARS TO BE COMPETENT TO REPRESENT HIMSELF OR HERSELF, THE COURT SHOULD MAKE FINDINGS OF FACT THAT INCLUDE FINDINGS ON THE FOLLOWING TOPICS:

- that the defendant understands the proceedings, understands the nature and seriousness of the charge, and understands the maximum penalties that can be imposed if the defendant is convicted;

- that the defendant understands that a lawyer may be of assistance, understands that a lawyer may be appointed if the defendant is indigent, and understands the disadvantages of self-representation;

- that the defendant voluntarily and freely waives the right to be represented by counsel and is making a deliberate choice to proceed without counsel; and

- that the defendant has the minimal competence necessary to try to represent himself or herself because [refer to the court's evaluation of the four factors identified in Pickens].

PROPER FINDINGS SHOULD CONCLUDE WITH AN EXPRESS STATEMENT THAT THE COURT CONCLUDES THAT THE DEFENDANT'S REQUEST FOR SELF-REPRESENTATION IS GRANTED.[5]

THE COMMITTEE SUGGESTS THAT A BRIEF INSTRUCTION BE GIVEN TO THE JURY IN A CASE WHERE THE DEFENDANT HAS WAIVED COUNSEL. SEE WIS JI-CRIMINAL 70.

2. Waiver of Counsel Denied[6]

DENIAL OF A WAIVER OF COUNSEL MUST BE SUPPORTED BY ONE OF THE FOLLOWING FINDINGS: (1) THAT THE DEFENDANT DOES NOT UNDERSTANDINGLY AND VOLUNTARILY WAIVE COUNSEL; (2) THAT THE DEFENDANT DOES NOT UNDERSTAND THE DISADVANTAGES OF SELF-REPRESENTATION; OR (3) THAT THE DEFENDANT LACKS THE MINIMAL COMPETENCE NECESSARY TO TRY TO REPRESENT HIMSELF OR HERSELF.

PROPER FINDINGS SHOULD CONCLUDE WITH AN EXPRESS STATEMENT THAT THE COURT CONCLUDES THAT THE DEFENDANT'S REQUEST FOR SELF-REPRESENTATION IS DENIED, SUPPORTED BY FINDINGS OF FACT THAT INCLUDE FINDINGS ON THE BRACKETED MATERIAL THAT APPLIES:

- the defendant does not understand the seriousness of the charge and the maximum possible penalties; or

- the defendant does not understand that a lawyer may be of assistance and that a lawyer may be appointed if the defendant is indigent; or

- the defendant does not understand the disadvantages of self-representation; or

- the defendant does not possess the minimal competence necessary to try to represent himself or herself because [refer to the court's evaluation of the four factors identified in Pickens].[7]

D. Commentary

The questions in Part I. A. are recommended for use whenever it is necessary to accept an express waiver of counsel. The defendant's answers to the recommended questions will undoubtedly suggest additional questions that should be asked to enable the court to make a full and complete determination that the defendant understands the proceedings and the right to have a lawyer, including one appointed at public expense if the defendant is indigent. A voluntary waiver of counsel will not be inferred from a silent record.[8]

The questions assume that the defendant has made clear the intention to proceed without counsel. While the burden is on the court to make a record, the Committee believes that the defendant should always have the opportunity to discuss the matter with a lawyer (e.g., with a public defender if one is available.)[9]

Pickens v. State[10] held that a valid waiver of counsel in a self-representation case requires that the record reflect the following:

(a) the deliberate choice to proceed without counsel;

(b) awareness of the seriousness of the charges and the possible penalties; and

(c) awareness of the difficulties and disadvantages of self-representation.

Pickens, 96 Wis.2d 549, 563.

While the Pickens decision recommended that a colloquy with the defendant address these issues, the Wisconsin Supreme Court later mandated that they be covered. In State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), the court stated:

> [T]he circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him.

The waiver of counsel inquiry has been modified in light of Klessig to explicitly address each of the required issues, including the disadvantages of self-representation.

II. Forfeiture of Counsel

A. Suggested Inquiry

THE COURT SHOULD IDENTIFY THE CONDUCT OF THE DEFENDANT THAT THE COURT BELIEVES PROVIDES A BASIS FOR FINDING A FORFEITURE OF THE RIGHT TO COUNSEL AND THEN ADDRESS THE DEFENDANT AS FOLLOWS:

"If you continue to engage in this conduct, the court will find that you are giving up your right to be represented by a lawyer. If that happens, the trial will continue and you will not have a lawyer to represent you.

1. "Do you understand that?

"You are charged with _____, which carries a maximum penalty of imprisonment for _____ years and a fine of _____, or both. If you are represented by a lawyer, he or she may discover information or facts that would help your defense. A lawyer may find that you have a defense to the charge or that there are facts which may result in a lighter penalty.

2. "Do you understand?

"The trial will continue under the same legal rules that would apply if you had a lawyer. If you represent yourself, you will have to follow these rules. Because you are not trained in the law, this will make it hard for you to challenge the evidence presented by the state and hard for you to present any evidence that you want to present.

"If you decide to testify, you will be sworn as a witness and can give testimony while you are acting as a witness. You will be asked questions by the other side at that time. However, you cannot try to testify while acting as your own lawyer.

3. "Do you understand that a lawyer may be able to help you present your case and that it will be very difficult for you to do a good job being your own lawyer?"

B. Suggested Findings

AFTER THE COURT HAS MADE THESE STATEMENTS AND ASKED ALL THE QUESTIONS AND IF THE DEFENDANT PERSISTS IN THE CONDUCT, THE COURT THEN, ON THE RECORD, SHOULD MAKE FINDINGS OF FACT THAT INCLUDE THE FOLLOWING TOPICS:

- that the defendant understands the charge, understands that a lawyer may be of assistance, and understands that the disadvantages of self representation; and

- that the defendant has refused to waive counsel expressly, but that the defendant has engaged in the following conduct: (describe conduct or refer to the conduct described in the colloquy with the defendant) ; and

- that this conduct has seriously disrupted the fair administration of justice in that: (describe the effects of the defendant's conduct) ; and

- that this requires the court to conclude that the defendant has forfeited the right to counsel.

C. Commentary

"Forfeiture" of counsel refers to situations where the defendant does not expressly waive counsel but, by conduct, gives up the right to representation. Other terms used to describe this situation are "constructive waiver," "waiver by conduct," and "waiver by operation of law." The term "forfeiture of counsel" is used here because it emphasizes that what is occurring is the loss of a right without the express waiver that is usually required. These situations often involve defendants who have difficulty getting along with counsel and thus may present questions whether to grant a motion to discharge counsel or a motion by counsel to withdraw.

In State v. Newton, [decided sub nom. State v. Cummings, 199 Wis.2d 721, 546 N.W.2d 406 (1996)], the Wisconsin Supreme Court held that "there may be situations . . . where a circuit court must have the ability to find that a defendant has forfeited his right to counsel" [199 Wis.2d 721, 757] and found that the case before it presented that situation: "There can be no doubt from the record that Newton's behavior was manipulative and disruptive and that his continued dissatisfaction was based solely upon a desire to delay." 199 Wis.2d 721, 754. The court noted that a similar forfeiture situation was presented in State v. Woods, 144 Wis.2d 710, 424 N.W.2d 730 (Ct. App. 1988).

The Newton decision recommended that "trial courts in the future, when faced with a recalcitrant defendant," follow four steps spelled out in the dissenting opinion before finding that a defendant has forfeited counsel[11]:

(1) provide explicit warnings that, if the defendant persists in specific conduct, the court will find that the right to counsel is forfeited;

(2) engage in a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation;

(3) make a clear ruling when the court deems the right to counsel to have been forfeited; and

(4) make factual findings to support the court's ruling.

To implement this four-step approach, the Committee recommends the statements and questions set forth in Part II. A. A finding that the right to counsel is forfeited will mean that the defendant will proceed without a lawyer. Where counsel is waived expressly, an inquiry into competence for self-representation is required. [See discussion

in Section I.] It is not clear that an inquiry into competence for self-representation is required or would be appropriate where the right to counsel is forfeited rather than expressly waived.

In State v. Coleman, 2002 WI App 100, 253 Wis.2d 693, 644 N.W.2d 383, the court found that grounds for forfeiture of counsel were not established. There were three significant omissions: no specific warning that firing his attorneys would result in forfeiture of his right to counsel; no colloquy to determine understanding of the difficulties of proceeding without counsel; and, no clear ruling that Coleman had forfeited his right to counsel. The trial court was also deficient in not making a finding that Coleman was competent to represent himself. SM-30 is referred to as a "helpful discussion." Coleman, footnote 3.

III. Self-Representation

Defendants in criminal cases have the right, under both the United States[12] and Wisconsin Constitutions,[13] to represent themselves. Where there has been a clear[14] and timely[15] request to exercise this right, the trial court must conduct a careful inquiry covering several different concerns. The trial court must first assure that there is an intelligent and voluntary waiver of the right to be represented by counsel. (As discussed in Part I.) Self-representation cases also often present situations where the defendant has failed to obtain counsel, has refused to cooperate with counsel, or through other conduct has so seriously interfered with the orderly administration of the case that the right to counsel will be found to have been forfeited. (As addressed in Part II.) A finding of competence for self-representation is required where the defendant has forfeited the right to counsel, just as it is where there is an express waiver of counsel. State v. Coleman, 2002 WI App 100, 253 Wis.2d 693, 644 N.W.2d 283.

In addition to the waiver inquiry, the court must assure that the defendant understands the disadvantages of self-representation. The trial court is also required to inquire whether defendants are "competent" to represent themselves. This requirement has been reaffirmed by the Wisconsin Supreme Court in 1997 and 2005. (See State v. Klessig and State v. Ernst, below.)

The leading Wisconsin case on self-representation is Pickens v. State.[16] Pickens held that a valid waiver in the self-representation case requires that the record reflect the following:

(a) the deliberate choice to proceed without counsel;

(b) awareness of the seriousness of the charges and the possible penalties; and

(c) awareness of the difficulties and disadvantages of self-representation.

Pickens, 96 Wis.2d 549, 563.

While the Pickens decision recommended that a colloquy with the defendant address these issues, the Wisconsin Supreme Court later mandated that they be covered. In State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), the court stated:

> [T]he circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him.

The waiver of counsel inquiry[17] has been modified in light of Klessig to explicitly address each of the required issues, including the disadvantages of self-representation.

In State v. Ernst, 2005 WI 107, _21, 283 Wis.2d 300, 699 N.W.2d 92, the Wisconsin Supreme Court held: "We conclude that the Klessig colloquy requirement was and is a valid use of the court's superintending and administrative authority, . . . and that such a rule does not conflict in any way with the United States Supreme Court's decision in Tovar . . ." The reference is to Iowa v. Tovar, 541 U.S. 77 (2004), where the court held that a valid waiver of the Sixth Amendment right to counsel did not require specific advice from the court that waiver of counsel might result in a viable defense being overlooked and losing the opportunity for an independent opinion on whether pleading guilty is a wise choice.

A. Understanding the Disadvantages of Self-Representation

The disadvantages of self-representation are to a significant degree the mirror image of the benefits of representation by counsel that are described in the waiver of counsel inquiry. The additional factors that should be covered include the general conclusion that self-representation is not wise (the old adage that "the lawyer who represents himself has a fool for a client" was used several times by the trial court in the Pickens case) and the more specific caution that the rules governing courtroom procedures will be applied during the trial and that the defendant will be expected to abide by them. In Pickens, the trial court gave the following advice:

> Do you understand that this is a courtroom, we operate under certain legal rules, and you will be expected to comply with those. I will perhaps give some latitude because you are not trained in the law, but you will have to, even though you are not educated in the law, try your lawsuit in accordance with those rules. Do you understand that?

Pickens, 96 Wis.2d 549, 560-61.

It may be advisable to elaborate upon some of these matters by explaining the following:

(1) that the judge will not represent the defendant or protect the defendant's interests in the same manner a lawyer would;

(2) that if the defendant wishes to testify, the defendant must be sworn as a witness and submit to cross-examination – the defendant cannot try to "testify" while acting in the "lawyer" capacity;

(3) that valid objections to questions will be sustained despite the fact that lack of legal training will make it difficult for the defendant to conduct direct or cross-examination in the proper way.

In State v. Clutter, 230 Wis.2d 472, 477, 602 N.W.2d 324 (Ct. App.1999), the court addressed the risks that are involved with a decision to proceed pro se:

> Inherent in a defendant's decision to represent himself is the risk that a defense not known to him will not be presented during trial. When a defendant undertakes pro se representation that is the risk he knowingly assumes. If his strategy in proceeding pro se results in a valid defense being waived, it reflects the hazards of his decision to waive counsel. To rescue this defendant from the folly of his choice to represent himself would diminish the serious consequences of the decision he made when he elected to waive counsel.

B. "Competence" for Self-Representation

Even if there has been a valid waiver of counsel and the defendant understands the disadvantages of self-representation, the trial court must assure that the defendant has the "competence" or capacity for self-representation. This is not the same as "competency to stand trial."[18] "Thus, despite the fact that a defendant has been found competent to stand trial, it may, nevertheless, be determined that he lacks the capacity to represent himself." Pickens v. State, 96 Wis.2d 549, 568.

In State v. Klessig, 199 Wis.2d 397, 544 N.W.2d 605 (Ct. App. 1996), the court of appeals eliminated the requirement for an inquiry into competence for self-representation, holding that law "changed when the United States Supreme Court decided Godinez v. Moran, 113 S. Ct. 2680 (1993)." In Godinez, the court concluded that the only inquiry into competence required for a waiver of the right to counsel was the competence necessary to stand trial. The court of appeals' Klessig decision concluded:

> Once a defendant has been found competent to stand trial, a trial court may not engage in further or heightened competency requirements addressing the defendant's possession of skills, intelligence or experiences that would be sufficient to permit him to adequately represent his best interests at trial. 199 Wis.2d 397, 405.

The Wisconsin Supreme Court reversed the court of appeals in State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), reaffirming the Pickens holding that competency for self-representation is different from competency to stand trial:

> We thus reaffirm the holding in Pickens as still controlling on the issue of competency. In Wisconsin, there is still a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand trial. . . . Accordingly, the circuit court's determination of a defendant's competency to proceed pro se must appear in the record.

The court of appeals had held that the Pickens requirement no longer applied because the United States Supreme Court decision in Godinez v. Moran established that there was a single standard for competency – if a defendant was competent to stand trial that defendant could represent himself without further inquiry into his ability to do so. The Wisconsin Supreme Court concluded that Godinez was concerned with minimal requirements and allowed states to impose higher standards as a matter of state law. The

court said its reaffirmation of the higher Pickens standard "stems from the independent adoption of the higher standard by the state as allowed under Godinez."

Wisconsin, with its reaffirmed Pickens standard, is in the minority in recognizing a requirement of "competence" for self-representation. The majority view in the country apparently stresses the awareness of the disadvantages of proceeding pro se – if the defendant understands the disadvantages but wishes to go ahead, self-representation should be allowed. For example, the ABA Standards for Criminal Justice refer to "competence to represent oneself" but define it in terms of understanding the consequences of the decision to proceed without a lawyer.[19]

The Pickens court recognized that the determination of competence for self-representation "must necessarily rest to a large extent upon the judgment and experience of the trial judge" and that "the trial court must be given sufficient latitude to exercise its discretion in such a way as to insure that substantial justice will result." 96 Wis.2d 549, 569.

Factors to consider in determining whether the defendant "possesses the minimal competence necessary to conduct his own defense" include:

(1) education

(2) literacy

(3) fluency in English

(4) any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury.

Pickens v. State, 96 Wis.2d 549, 569; reaffirmed in State v. Klessig, 211 Wis.2d 194, 212.

CAUTION: Persons of average intelligence are entitled to represent themselves. A request for self-representation "should be denied only where a specific problem of disability can be identified which may prevent a meaningful defense from being offered, should one exist." Pickens, 96 Wis.2d 549, 569. Technical legal knowledge, as such, is not relevant to an assessment of a knowing exercise of the right to defend oneself. Faretta v. California, 422 U.S. 806, 836 (1975).

The cases dealing with self-representation recognize the difficult position of the trial judge. The difficulty is due to the fact that the defendant has a constitutionally-protected right on either side of the issue. The court addressed this in Klessig, stating that if the defendant's competence for self-representation is not established, "the circuit court must prevent the defendant from representing himself or deprive him of his constitutional right to the assistance of counsel. However, if the defendant knowingly, intelligently, and voluntarily waives his right to the assistance of counsel and is competent to proceed pro se, the circuit court must allow him to do so or deprive him of his right to represent himself." State v. Klessig, 211 Wis.2d 194, 203-04. Complete and proper findings are extremely important in these cases.[20] If the request for self-representation is granted, the record must reflect that the defendant:

1. understands the seriousness of the charge and the maximum possible penalties;

2. understands that the defendant has the right to be represented by a lawyer;

3. understands that if the defendant is indigent, a lawyer will be appointed at public expense;

4. understands the advantages of being represented by counsel and the disadvantages of self-representation; and

5. has the minimal competence necessary to try to conduct his or her own defense. These matters are reflect in the suggested findings included in Part I. A.

If the request for self-representation is denied, the Committee has concluded that, based on the Klessig decision, the waiver of counsel must be denied. That is, the right to waive counsel, in Wisconsin, depends on a finding that the defendant is competent to proceed pro se. A defendant who is not competent to proceed pro se, cannot waive counsel. The suggested findings included in Part I. B. reflect this conclusion.

IV. Appointment of Standby Counsel

"Standby counsel" refers to the appointment of a lawyer to assist the defendant whose request for self-representation has been granted.

The authority to appoint standby counsel is recognized as included in the inherent powers of the trial court.[21] The U.S. Supreme Court first addressed the issue in Faretta v. California:[22]

> Of course, a State may – even over objection by the accused – appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.

422 U.S. 806, 835 n.46.

In McKaskle v. Wiggins,[23] the Court elaborated as follows:

> Accordingly, we make explicit today what is already implicit in Faretta: A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel – even over the defendant's objection – to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the pro se defendant's appearance of control over his own defense.

465 U.S. 168, 184.

The proper role of standby counsel was also discussed in McKaskle v. Wiggins. The question was whether the standby counsel is limited to a "seen but not heard" sort of assistance: Is counsel to participate only upon the defendant's request or may counsel directly participate in the trial, unsolicited by the defendant?

The Court held that unsolicited participation by standby counsel does not impermissibly infringe on the defendant's right to self-representation. Two general limits on standby counsel were recognized:

(1) defendants are entitled to preserve actual control over the case they choose to present to the jury; and

(2) participation by standby counsel should not be allowed to destroy the jury's perception that defendants are representing themselves.

Specific actions which do not infringe upon the right to self-representation include:

(1) any actions taken at the specific or implied invitation of the defendant;

(2) assistance in overcoming routine procedural or evidentiary obstacles (e.g., introducing evidence or objecting to testimony);

(3) ensuring the defendant's compliance with basic rules of courtroom protocol and procedure.

McKaskle v. Wiggins, 465 U.S. 168, 183.

The Wisconsin Supreme Court elaborated upon the role of standby counsel in Contempt in State v. Lehman, 137 Wis.2d 65, 403 N.W.2d 438 (1987). The defendant Lehman had fired four attorneys appointed by the State Public Defender and the fifth was allowed to withdraw. The State Public Defender refused to appoint another attorney and the court granted Lehman's request to appear pro se. However, the trial court appointed a lawyer to serve as standby counsel. The Supreme Court clarified that "courts possess the inherent power to appoint counsel," including standby counsel, and to order the county to pay the cost. "The decision to appoint standby counsel in this case was based, as it should be, on a determination that the needs of the Trial Court and not the Defendant, would be best served by doing so." 137 Wis.2d 65, 77 [emphasis in original]. The court emphasized that "the chief purpose of the appointment of counsel in cases like the present one is to serve the interests of the trial court. . . ." 137 Wis.2d 65, 78.

The Lehman decision was reaffirmed in State v. Newton [decided sub nom. State v. Cummings, 199 Wis.2d 721, 546 N.W.2d 406 (1996)]. The court again emphasized that appointment of standby counsel is based on the needs of the trial court to help the trial proceed in an orderly fashion and is not tied to the defendant's right to counsel. 199 Wis.2d 721, 756. In both Lehman and Newton, the court expressly noted that it was not dealing with possible constitutional claims in a situation where a defendant who, having waived (or forfeited) counsel, made a request for standby counsel which was denied by the trial court.

V. "Hybrid" Representation

Occasionally defendants seek to conduct portions of their own defense while they are represented by counsel. For example, Wisconsin cases have involved requests that a represented defendant be allowed to make opening statements or closing arguments. It has been claimed that the right to self-representation requires that defendants be allowed to represent themselves and be represented by counsel in the same case.

The United States Supreme Court has held that the Sixth Amendment to the U.S. Constitution does not require trial courts to permit "hybrid" representation. McKaskle v.

Wiggins, 465 U.S. 168, 183. The Wisconsin Supreme Court has reached the same conclusion with respect to a claim based on the Wisconsin Constitution. Moore v. State, 83 Wis.2d 285, 265 N.W.2d 540 (1978). In Moore, the trial court's refusal to allow the represented defendant to examine witnesses was upheld. Also see Robinson v. State, 100 Wis.2d 152, 301 N.W.2d 429 (1981), where the defendant was not permitted to make a closing argument in addition to the one made by counsel.[24]

A danger in allowing represented defendants partially to represent themselves is illustrated by what happened in State v. Johnson, 121 Wis.2d 237, 358 N.W.2d 824 (1984). Johnson presented his own opening statement but did not testify. The prosecutor responded in his own opening to emphasize that Johnson's statement was not testimony and not evidence. The defendant claimed on appeal that this was unfair comment on his right not to testify. The court of appeals affirmed the conviction and adopted a "partial waiver" rule for this sort of situation which allows a limited prosecutorial comment in response to the defendant's statement. But the court noted the dilemma that the situation presents to both the prosecutor and the trial judge. 121 Wis.2d 237, 245.

VI. Court Appointment of Counsel for Defendants Who Do Not Qualify Under State Public Defender Guidelines

It is increasingly common for trial courts to be confronted with defendants who do not meet the financial criteria of the Office of the State Public Defender but who cannot afford to retain private counsel. These defendants may not wish to waive counsel expressly. And their inability to obtain counsel may result in continuances where, upon returning again without counsel, defendants may find their conduct characterized as that which justifies a finding of forfeiture of counsel. There are other negative effects as well, such as reluctance by prosecutors to discuss the case with unrepresented defendants. This can result in delay and even in the unavailability of plea concessions or sentence recommendations that would be freely offered if counsel was present.

There is a provision for court review of the public defender's indigency determination. Under § 977.07(3), a court "may review any indigency determination upon its own motion or the motion of the defendant and shall review any indigency determination upon the motion of the district attorney or the state public defender." Review under this authority is limited to examining the public defender's application of the legislative criteria and the accompanying mathematical computations. State v. Dean, 163 Wis.2d 503, 510, 471 N.W.2d 310 (Ct. App. 1991)

Trial courts also have inherent power to appoint counsel for defendants who do not meet the criteria for appointment of counsel by the Office of the State Public Defender. In State v. Dean, 163 Wis.2d at 513, the court stated:

> The legislature cannot limit who is constitutionally entitled to an attorney. The creation of the public defender's office is not the exclusive means for assuring counsel to indigents and did not negate the inherent power of the court to appoint when the public defender declines to act. Douglas Co. v. Edwards, 137 Wis.2d 65, 77, 403 N.W.2d 438, 44 (1987). The trial court therefore is required to go beyond the public defender's determination that a defendant does not meet the legislative criteria and determine whether the "necessities of the case" and the demands of "public justice and sound policy" require appointing counsel. See Sparkman [v. State], 27 Wis.2d 92, 98, 133 N.W.2d 776, 780 (1965).

Dean held that the burden of proof lies with the defendant to convince the court that appointment of counsel is necessary despite the defendant's failure to meet the public defender's indigency criteria. The decision identified the following considerations that relate to the trial court's decision:

(1) The defendant must present evidence of his or her assets, income, liabilities and attempts to retain counsel.[25]

(2) The court is not required to conduct an independent inquiry but must ask enough questions to decide the issue. The court cannot restrict itself to the criteria mandated by the legislature in § 977.07(2) but should consider all evidence that is relevant to the defendant's present ability to retain counsel.

(3) In deciding, the court must consider whether the defendant has sufficient assets to retain private counsel at the market rate prevailing in the community. It must disregard the public defender's established cost of retained counsel in Wis. Adm. Code sec. SPD 3.02(1).[26]

Aside from the procedurally-oriented considerations, the basic question is whether the "necessities of the case" and the "demands of public justice and sound policy" require appointment of counsel.

COMMENT

SM-30 was originally approved by the Committee in 1974 and included material now found in SM-25 (Judge's Duties at Initial Appearance) and SM-31 (Waiver of Preliminary Examination). A version of SM-30 dealing only with waiver of counsel was originally published in 1987. The 1997 revision added the sections on forfeiture of counsel and court appointment of counsel and combined material formerly found in SM-30A. This revision involved general updating and was approved by the Committee in December 2005.

Part I of this Special Material is designed to be used whenever it is necessary to accept a waiver of counsel. Depending on the situation, additional issues will also have to be dealt with. If the defendant wishes to waive counsel and enter a guilty plea, SM-30 should be followed by SM-32, Accepting A Plea Of Guilty.

Part I includes a series of questions recommended for use whenever it is necessary to accept a waiver of counsel. The record must reflect a voluntary and intelligent waiver whenever the defendant wishes to go ahead with a "critical stage" of the proceeding without representation. [The right to counsel under the Sixth Amendment to the United States Constitution applies to all critical stages of the proceedings that follow the filing of the criminal charge. See, for example, United States v. Wade, 388 U.S. 218, 87 Sup.Ct. 1926, 18 L.Ed.2d 1149 (1967); Jones v. State, 63 Wis.2d 97, 216 N.W.2d 224 (1974).] Thus, the inquiry may be necessary at the preliminary examination, the entry and acceptance of a plea, trial, or sentencing. The waiver is usually accompanied by a request that the defendant be allowed to represent himself, making additional inquiry necessary.

Part II deals with a problem referred to as forfeiture of counsel. See LaFave and Israel, Criminal Procedure, Sec. 11.3(c), West, 1984. This is intended for those situations where the defendant has failed to obtain counsel, has refused to cooperate with counsel, or through other conduct has so seriously interfered with the orderly administration of the case that the right to counsel will be found to have been forfeited. In State v. Newton, 199 Wis.2d 721, 757, 546 N.W.2d 406 (1996), the Wisconsin Supreme Court held that "there may be situations . . . where a circuit court must have the ability to find that a defendant has forfeited his right to counsel."

Federal cases have held that the right to counsel may be waived by a defendant who fails to retain counsel within a reasonable time when he is financially able to do so. United States ex rel. Baskerville v. Deegan, 428 F.2d 714 (2d Cir. 1970); United States v. McMann, 386 F.2d 611 (2d Cir. 1967). The Wisconsin Supreme Court has addressed this issue once, reversing a trial court's order requiring a defendant to proceed to trial despite the fact that his lawyer did not show up. In State v. Keller, 75 Wis.2d 502, 249 N.W.2d 773 (1977), the court found the record insufficient to indicate that the defendant had in fact knowingly waived his right to counsel and reversed the conviction. The court did not spell out what the trial court should do in a situation where the defendant has not obtained counsel but does not wish to waive the right to be represented. Related, but distinguishable, are cases involving the choice of counsel. Several decisions deal with the issue of abuse of discretion in denying a continuance when the defendant makes a late request to change counsel. See State v. Wedgeworth, 100 Wis.2d 514, 302 N.W.2d 810 (1981); Mulkovich v. State, 73 Wis.2d 464, 243 N.W.2d 198 (1976); Phifer v. State, 64 Wis.2d 24, 218 N.W.2d 354 (1974); Rahhal v. State, 52 Wis.2d 144, 187 N.W.2d 800 (1971). The court in Keller acknowledged that forcing a defendant to go to trial without counsel is drastically different from forcing him to go to trial with a competent counsel not his first choice. (See the discussion of forfeiture of counsel in Section II.)

1. Specific questions are not suggested to emphasize that trial judges should tailor the inquiry to fit

the case at hand and the judge's preferences. Some or all of the questions may be eliminated altogether if a similar inquiry has already been conducted to, for example, set bail. Examples of specific questions on these topics are included in SM-32, Accepting A Plea Of Guilty. Additional questions will often be suggested by the defendant's responses. And, the Committee recommends that the questions be designed to elicit more than one-word answers from the defendant. This is especially important in the context of an inquiry into waiver of counsel.

In State v. Ruszkiewicz, 2000 WI App 125, 237 Wis.2d 441, 613 N.W.2d 893, the court found a waiver of counsel to be valid, despite the trial court not following the procedure recommended by SM-30. However, the decision noted that "SM-30 sets out suggested procedures and colloquies that trial courts should follow." Ruszkiewicz at ¶29.

2. But see note 9, below, suggesting that the best person to discuss the advantages of being represented by counsel is a lawyer.

3. A valid waiver of counsel does not require the trial court to advise the defendant of the right to have counsel appointed at county expense where he does not qualify under the State Public Defender guidelines. State v. Drexler, 2003 WI App 169, 266 Wis.2d 438, 669 N.W.2d 182. Also see the discussion in Sec. VI, this SM.

4. The areas listed may have already been explored in the inquiry into the defendant's ability to understand the proceedings. They are restated here because they reflect the four factors identified in Pickens as relevant to deciding whether the defendant "possesses the minimal competence necessary to conduct his own defense": education; literacy; fluency in English; and "any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury."

5. The Committee recommends that the finding specifically refers to the four factors identified in the Pickens decision: education, literacy, fluency in English, and physical or psychological disability affecting the ability to communicate in the courtroom. Identification of more specific aspects of the competency for self-representation is difficult. As noted in the Klessig decision, the "determination must rest to a large extent upon the judgment and experience of the trial judge." 211 Wis.2d 194, 212 [quoting Pickens].

6. For appellate decisions affirming the denial of a request to proceed pro se see the following: Hamiel v. State, 92 Wis.2d 656, 285 N.W.2d 639 (1979): request was made on the morning trial was to begin and competent counsel was available; Laster v. State, 60 Wis.2d 525, 211 N.W.2d 13 (1973): request was actually to change counsel, not to proceed pro se; Browne v. State, 24 Wis.2d 491, 129 N.W.2d 175 (1964): request was to dismiss appointed counsel and defendant lacked the capacity to intelligently waive counsel.

7. The Committee recommends that the finding specifically refers to the four factors identified in the Pickens decision: education, literacy, fluency in English, and physical or psychological disability affecting the ability to communicate in the courtroom. Identification of more specific aspects of the competency for self-representation is difficult. As noted in the Klessig decision, the "determination must rest to a large extent upon the judgment and experience of the trial judge." 211 Wis.2d 194, 212 [quoting Pickens].

8. Pickens v. State, 96 Wis.2d 549, 292 N.W.2d 601 (1980). Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948), is the leading U.S. Supreme Court decision on the procedure to be used in recording a waiver of counsel. Though it was a plurality opinion, its holding is consistent with decisions of the Wisconsin Supreme Court that both preceded and followed it. In State ex rel. Drankovich v. Murphy, 248 Wis. 433, 438, 22 N.W.2d 540 (1946), the court held that the trial judge had the duty to protect the accused's right to counsel by assuring, on the record, that the accused "knew he had the right to counsel and voluntarily rejected it." In a later plea of guilty case, the court outlined the general nature of the inquiry that a trial court should make:

> 1. To determine the extent of the defendant's education and general comprehension.
>
> 2. To establish the accused's understanding of the nature of the crime with which he is charged and the range of punishments which it carries.
>
> 3. To ascertain whether any promises or threats have been made to him in connection with his appearance, his refusal of counsel, and his proposed plea of guilty.
>
> 4. To alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused.
>
> 5. To make sure that the defendant understands that if a pauper, counsel will be provided at no expense to him.
>
> Finally, the trial judge should be certain that the record itself reflects the fact that careful consideration was given to the foregoing propositions.

State ex rel. Burnett v. Burke, 22 Wis.2d 486, 494, 126 N.W.2d 91 (1964).

The courts have not transformed the requirements of Von Moltke and Burnett into any specific colloquy; flexibility in approach is allowed, as long as the "knowing and voluntary" nature of the decision is apparent on the record. Pickens v. State, 96 Wis.2d 549, 561-64, 292 N.W.2d 601 (1980).

9. This suggestion assumes that a staff public defender is present in court and able to talk to the defendant right away. It is premised on the Committee's conclusion that the best way for a defendant to be informed of the value of representation by counsel is to have a discussion with a lawyer. In many areas of the state, lawyers on the staff of or provided by the State Public Defender are available to speak with unrepresented defendants before the initial appearance. Rather than the judge trying to provide a lengthy explanation of the right to counsel, it is preferable simply to give the defendant a chance to discuss the matter with an attorney.

10. 96 Wis.2d 549, 292 N.W.2d 601 (1980).

11. 199 Wis.2d 721, 757, n.18. The four steps are outlined in the dissent at 199 Wis.2d 721, 765.

12. The Sixth Amendment to the United States Constitution does not expressly recognize the right to represent oneself, but the Supreme Court has found that the right ". . . to make one's defense

personallyCis thus necessarily implied by the structure of the Amendment." Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

13. Article I, Section 7, of the Wisconsin Constitution explicitly recognizes the right to self-representation: "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel. . . ." Cases have recognized the state constitutional right for many years. See Dietz v. State, 149 Wis. 462, 479, 136 N.W. 166 (1912). The reference to "by himself and counsel" (emphasis added) has been held not to require "hybrid" representation – pro se and by counsel – in a single case. See discussion at note 24, below.

14. Cases involving self-representation often involve defendants who are dissatisfied with retained or appointed counsel. It is important to clarify whether a defendant is seeking to dismiss or change his present lawyer or actually seeking to represent himself. See Laster v. State, 60 Wis.2d 525, 539, 211 N.W.2d 13 (1973).

15. The question of "How soon in the criminal proceeding must a defendant decide between proceeding by counsel or pro se?" was addressed in Hamiel v. State, 92 Wis.2d 656, 285 N.W.2d 639 (1979). The court upheld the trial court's denial of a request to proceed pro se when the request was made just as the trial was to begin. The court held that the right to proceed pro se, like the right to be represented by counsel "cannot be manipulated so as to obstruct the orderly procedure for trials or to interfere with the orderly administration of justice." 92 Wis.2d 656, 672. The factors for the trial court to consider in exercising discretion were identified:

> Where the request to proceed pro se is made on the day of trial or immediately prior thereto, the determinative question is whether the request is proffered merely to secure delay or tactical advantage. In such a situation, the trial court should determine if the request could have been made earlier, and if so, why not. If the defendant cannot show good cause as to why a demand was not made at an earlier appearance before the court, and if an adjournment would result from a granting of the defendant's self-representation request, the trial court must weigh the defendant's constitutional guarantee to a fair trial as well as the convenience of the witnesses, jurors, and the court schedule when exercising its discretion to approve or deny the request.

92 Wis.2d 656, 673.

16. 96 Wis.2d 549, 292 N.W.2d 601 (1980).

17. See section I., supra.

18. Procedures and legal standards relating to competency to stand trial are discussed in SM-50, Competency to Proceed.

19. See Standard 6-3.6, The Defendant's Election To Represent Himself or Herself At Trial, and Commentary. ABA Standards For Criminal Justice.

20. In State v. Marquardt, 2005 WI 157, 286 Wis.2d 204, 705 N.W.2d 878, the court affirmed a trial court finding that the defendant was not competent to represent himself. The circuit court had referred to the seriousness of the charges, the complexity of the case and evidence of the defendant's

mental illness. See ¶63. The supreme court concluded that "the medical and psychological opinions in this case identified a emmber of specific problems that could have prevented Marquardt from meaningfully presenting his own defense." ¶69.

21. In Contempt in State v. Lehman, 137 Wis.2d 65, 403 N.W.2d 438 (1987), the Wisconsin Supreme Court recognized that appointment of standby counsel for a pro se defendant was within the inherent power of the trial court. The court emphasized that in cases like the one before it in Lehman, the appointment of standby counsel is to serve the interests of the court – to help assure that the trial proceeds in an orderly fashion. 137 Wis.2d 65, 78.

The ABA Standards for Criminal Justice recommend the following standard for the appointment of standby counsel:

> Standard 6-3.7 Standby counsel for pro se defendant
>
> When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his or her motion. Standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants.

22. 422 U.S. 806, 95 S.Ct. 252, 45 L.Ed.2d 562 (1975).

23. McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

24. The text of the Wisconsin constitutional provision (see note 13, supra) offers some support for the argument that "hybrid representation" is required in that it refers to "the right to be heard by himself and counsel. . . ." (emphasis added). However, the argument was expressly rejected in Moore v. State, 83 Wis.2d 285, 298-300, 265 N.W.2d 540 (1978).

25. Forms have been created by the Office of Director Of State Courts to facilitate this determination. See "Petition For Appointment Of Counsel, Affidavit Of Indigency And Order," Form GF-152, 4/97.

26. In State v. Nieves-Gonzales, 2001 WI App 90, 242 Wis.2d 782, 625 N.W.2d 913, the court found that the trial court applied the federal poverty guidelines incorrectly in denying counsel to the defendant. Those guidelines should be considered, though not every defendant with income less than the guidelines is entitled to court-appointed counsel. "W]here a trial court denies a motion for court-appointed counsel after the defendant has shown that she or he has no assets and a household income well below the federal guidelines, a trial court should set forth findings explaining why it has determined the defendant can nevertheless afford counsel." Nieves-Gonzales, ¶8.

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SM-31 WAIVER OF PRELIMINARY EXAMINATION

THE FOLLOWING IS RECOMMENDED FOR USE WHEN A DEFENDANT WITHOUT COUNSEL WISHES TO WAIVE THE PRELIMINARY EXAMINATION. IT WILL ALSO BE NECESSARY TO CONDUCT A WAIVER OF COUNSEL INQUIRY, SEE SM-30.

"Since you are charged with a felony, you are entitled to a preliminary examination if you want one, or you may waive it. A preliminary examination is not a trial, but it is a step in the proceedings against you. Witnesses will be called by the State to testify against you and you have the right to cross-examine them. You will also have the right to present evidence. You are entitled to the assistance of a lawyer if you want one.

The purpose of the preliminary examination is to determine whether probable cause exists. Probable cause means facts, together with reasonable inferences from those facts, which lead a reasonable person to conclude that a felony has probably been committed and that you probably committed it.[1] If the court finds that there is probable cause to believe that you did commit a felony, you will be required to stand trial. If the court does not find probable cause, the charges will be dismissed or reduced or the state may refile."[2]

"Do you understand that?"

"Has anyone made any promise or threat to you to get you to waive the preliminary examination?"

Do you want a preliminary examination?"

IF THE DEFENDANT SAYS THAT HE OR SHE DOES NOT WANT A PRELIMINARY EXAMINATION, THE JUDGE SHOULD MAKE THE FOLLOWING FINDING OF FACT:

"The court finds that the defendant has freely, voluntarily, and understandingly waived (his) (her) right to a preliminary examination."

AFTER THE COURT MAKES THE FINDING OF WAIVER, THE COURT SHOULD BIND THE DEFENDANT OVER FOR TRIAL.

THE COURT SHOULD SET OR REVIEW BAIL IN ACCORDANCE WITH CHAPTER 969 OF THE WISCONSIN STATUTES.

COMMENT

SM-31 was originally published in 1987; it consisted of material previously included as part of SM-30, Waiver of Counsel. This revision was approved the Committee in February 2011; it adopted a new format and made minor additions and editorial changes.

There are no Wisconsin cases dealing specifically with the adequacy of a waiver of a preliminary examination. There are cases holding that a guilty plea constitutes an effective waiver of a preliminary, though these predated the days of great concern over adequate documentation of such matters.

The primary reason why there has not been appellate litigation on this issue is probably that the strict waiver standards apply to waivers of constitutional rights. A preliminary examination is not constitutionally required, so arguably a full record of a "knowing and intelligent waiver" is not required either.

Regardless of the legal arguments that can be made, it is undoubtedly the wise practice to reflect the waiver on the record. The inquiry ought to be quite brief when the defendant is represented by counsel. But where the defendant is not represented, a description of the preliminary hearing and an inquiry into the defendant's understanding should be conducted. SM-31 is intended as a guide for this type of inquiry.

The primary case discussing the waiver of the preliminary by entering a guilty plea is State v. Strickland, 27 Wis.2d 623, 633, 135 N.W.2d 295 (1965):

> Where a defendant appears by counsel, . . . and enters a plea of guilty without requesting a preliminary hearing, a trial court has the right to assume that the preliminary hearing has been intelligently waived.

Thus, Strickland was based on the assumption that counsel would do his job properly. Strickland used that same assumption to find that the type of plea acceptance colloquy now found in SM-32 should not be required (though it was recommended). As to the guilty plea procedure, Strickland was overruled

in Ernst. Unfortunately, its assumption that the lawyer would do his or her job was explicitly overruled as well.

Even Strickland would impose a duty on the trial judge in cases where the defendant appears without counsel:

However, where a defendant charged with a felony appears without counsel and waives counsel, . . . it is the duty of the court to advise the defendant of his right to a preliminary hearing before proceeding further. 27 Wis.2d 623, 633-34.

1. The definition of probable cause is based on the one provided in the Benchbook, section CR-5. For cases discussing probable cause in the context of the preliminary examination see: State v. Berby, 81 Wis.2d 677 (1978); State v. Beal, 40 Wis.2d 607 (1968); State v. Dunn, 117 Wis.2d 487 (1984); and, State v. Schaefer, 2008 WI 25, 308 Wis.2d 279, 746 N.W.2d 457.

2. If a felony is charged but the preliminary examination discloses that only a misdemeanor was committed, the court shall order the complaint amended to conform to the evidence. § 970.03(8).

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SM-32 ACCEPTING A PLEA OF GUILTY

Scope

Scope

The inquiry suggested here is intended to illustrate a complete plea acceptance procedure, fully implementing the personal inquiry required by § 971.08 and Wisconsin case law.

SM-32 has been repeatedly cited with approval by the Wisconsin Supreme Court, in decisions urging that it be used by the trial courts. In a 2006 decision, the court "strongly encouraged" trial courts to follow the procedures prescribed in SM-32. State v. Brown, 2006 WI 100, ¶23, footnote 11, 293 Wis.2d 594, 716 N.W.2d 906. Also see, State v. Hampton, 2004 WI 107, ¶44, 274 Wis.2d 379, 683 N.W.2d 14; State v. Bangert, 131 Wis.2d 246, 272, 389 N.W.2d 12 (1986); State v. Minniecheske, 127 Wis.2d 234, 245-46, 378 N.W.2d 283 (1983); and, State v. Bartelt, 112 Wis.2d 467, 483-84, 334 N.W.2d 91 (1983).

The use of written plea acceptance forms has been expressly approved. State v. Moederndorfer, 141 Wis.2d 823, 416 N.W.2d 627 (Ct. App. 1987); State v. Brandt, 226 Wis.2d 610, 594 N.W.2d 759 (1999). But a personal inquiry of the defendant is still required, ". . . making a record that the defendant had sufficient time prior to the hearing to review the form, had an opportunity to discuss the form with counsel, had read each paragraph, and had understood each one." 141 Wis.2d 823, 827. The Judicial Conference has adopted CR-227, a form titled, "Plea Questionnaire/Waiver of Rights." Section 971.025(1) provides: "In all criminal actions and proceedings . . . the parties and court officials shall use the standard court forms adopted by the judicial conference under s. 758.18 . . ."

SM-32 is divided into ten sections, each identified by a Roman numeral. The section headings are intended only to clearly identify the different parts of the plea acceptance inquiry. Directions to the judge are in all capital letters.

The suggested questions and statements to be addressed to the defendant (and, in a few instances, to defense counsel) are found in quotation marks and are numbered from 1 to 30. Their form is merely suggested by this Special Material; judges will undoubtedly want to tailor them to the case at hand and develop others of their own.

THE FOLLOWING ASSUMES THE DEFENDANT IS REPRESENTED BY COUNSEL. IF THE DEFENDANT IS NOT REPRESENTED, A VALID WAIVER OF COUNSEL MUST BE OBTAINED BEFORE ACCEPTING THE PLEA.[1]

I. Determining Compliance With Victims' Rights Legislation

THE COURT SHOULD INQUIRE OF THE PROSECUTOR:

"Have you complied with the victim notice and consultation law – § 971.095(2)?"[2]

II. Reading the Charging Document; Guilty Plea Tendered

ASSURE THAT THE DEFENDANT HAS A COPY OF THE COMPLAINT OR THE INFORMATION; IDENTIFY THE CHARGE, THE MAXIMUM TERM OF IMPRISONMENT AND THE MAXIMUM FINE,[3] APPLICABLE REPEATER STATUTES, PENALTY ENHANCERS, AND MANDATORY MINIMUM SENTENCES.[4]

THE INFORMATION OR COMPLAINT SHOULD BE READ, UNLESS THE READING IS WAIVED.[5]

THE COURT SHOULD INQUIRE PERSONALLY[6] OF THE DEFENDANT:

1. "How do you plead?"

IF THE DEFENDANT ANSWERS "NO CONTEST" OR "ALFORD," THE COURT SHOULD ADDRESS THE DEFENDANT AND DEFENSE COUNSEL AS FOLLOWS.[7]

["A plea of no contest means that you do not contest the state's ability to prove

the facts necessary to constitute the crime."]

["An Alford plea is a guilty plea accompanied by a claim of innocence."]

["Do you understand that for the purposes of this proceeding, (a plea of no contest) (an Alford plea) will have the same effect as a plea of guilty? And that, if accepted, it will result in a conviction that carries the same character and force as a conviction resulting from a plea of guilty?"]

["Counsel, have you discussed the consequences of the plea with the defendant and do you believe the defendant understands them?"]

CONTINUE WITH THE FOLLOWING IN ALL CASES.

2. "Before your plea is entered and accepted by the court, the court will ask you certain questions to determine whether or not your plea should be entered and accepted. If you have any trouble understanding the questions, take all the time you need to confer with your attorney."

3. **"If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."**[8]

ADD THE FOLLOWING IN ALL FELONY CASES.

4. "If you are convicted of a felony, you will not be allowed to possess a firearm. Section 941.29 makes it a crime punishable by imprisonment for up to ten years or a fine of up to $25,000, or both, for a person convicted of a felony to possess a

firearm."[9]

5. "If you are convicted of a felony, you may not vote in any election until your civil rights are restored."[10]

CONTINUE WITH THE FOLLOWING IN ALL CASES.

6. "If you are convicted, you may be required to make full or partial restitution to any victim of the crime."[11]

III. Determining the Defendant's Ability to Understand the Proceedings

THE COURT MUST BE SATISFIED THAT THE DEFENDANT UNDERSTANDS THE PROCEEDINGS BEFORE ACCEPTING THE PLEA. THE COURT SHOULD MAKE PERSONAL INQUIRY OF THE DEFENDANT INTO AREAS SUCH AS EDUCATION, WORK EXPERIENCE, HISTORY OF MENTAL ILLNESS, RECENT DRUG OR ALCOHOL USE, ETC. THE FOLLOWING ARE EXAMPLES OF QUESTIONS[12] THAT SHOULD BE ASKED. ANSWERS INDICATING THE NEED FOR MORE INFORMATION SHOULD BE PURSUED.

7. "How old are you?"

8. "How far did you go in school?"

9. "Do you have a job?"

IF THE ANSWER IS YES:

"Where do you work?"

"How long have you worked there?"

IF THE ANSWER IS NO:

"When were you last employed?"

"What are you trained to do?"

10. "Have you received treatment for mental or emotional problems?"

11. "Have you had any alcohol or other intoxicants today?"

"Have you taken any medication or drugs today?"

12. "Are you having any difficulty understanding the court?"

"Are you having any difficulty understanding your attorney?"

13. "Is there anything you do not understand about what has happened in this case so far?"

IV. Establishing the Voluntariness of the Plea

ESTABLISHING VOLUNTARINESS INVOLVES TWO AREAS OF INQUIRY:

1. PLEA AGREEMENT; AND

2. THREATS OR COERCION OR PROMISES OUTSIDE OF A PLEA AGREEMENT.

14. "Is there a plea agreement in this case?"

IF THERE IS A PLEA AGREEMENT,[13] PUT IT ON THE RECORD AND ESTABLISH THE DEFENDANT'S UNDERSTANDING OF THE AGREEMENT.

15. "Do you understand the plea agreement?"

16. "Do you understand that the court is not bound by a sentencing recommendation or other terms of the plea agreement?"[14]

17. "Do you understand that upon your plea of guilty, the court may impose the maximum penalty, in spite of any agreement?"[15]

IF THE PLEA AGREEMENT INVOLVES READ-INS, ADD THE FOLLOWING:[16]

18. Do you understand that if any charges are read-in as part of a plea agreement they have the following effects:

- Sentencing – although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased.
- Restitution – you may be required to pay restitution on any read-in charges.
- Future prosecution – the State may not prosecute you for any read-in charges.

IF THE PLEA AGREEMENT CALLS FOR PROBATION, ADD THE FOLLOWING:[17]

19. "Do you understand that if you are placed on probation and if you later violate a condition of probation, that your probation may be revoked and you may be required to serve a sentence in jail or prison?"

CONTINUE WITH THE FOLLOWING IN ALL CASES:

20. "Has anyone else made any promise or threat to you[18] (aside from the plea agreement) to get you to plead guilty to this charge?"

V. Determining the Defendant's Understanding of the Crime Charged

21. "By pleading guilty, you are admitting that you committed all the elements of the crime of _____, which are as follows:"

THE COURT MUST BE SATISFIED THAT THE DEFENDANT UNDERSTANDS THE CHARGE TO WHICH THE GUILTY PLEA IS BEING ENTERED. ONE WAY TO ACHIEVE THIS IS TO SUMMARIZE THE ELEMENTS OF THE CRIME CHARGED, RELATING THEM TO THE FACTS OF THE CASE.[19] REFERRING TO THE UNIFORM INSTRUCTION FOR THE OFFENSE WILL BE HELPFUL IN IDENTIFYING THE ELEMENTS. ATTACHING A COPY OF THE APPLICABLE INSTRUCTION

TO THE PLEA QUESTIONNAIRE IS RECOMMENDED. THE COURT SHOULD INQUIRE OF DEFENSE COUNSEL REGARDING ANY SPECIAL ISSUES[20] OR PROBLEMS THAT SHOULD BE EXPLAINED TO THE DEFENDANT.

22. "Do you understand that you are admitting that you committed each of these elements?"[21]

FOR NO CONTEST PLEAS, SUBSTITUTE THE FOLLOWING.[22]

["Do you understand that your plea does not contest that the state can prove each of these elements?"]

FOR ALFORD PLEAS, SUBSTITUTE THE FOLLOWING.

["Do you understand that these are the elements the state would have to prove if you went to trial?

"And do you understand that despite your claim of innocence, if your plea is accepted the court will find you guilty, because strong evidence of guilt will have been established?"]

VI. Waiver of Constitutional Rights[23]

23. "By pleading (guilty you admit that you committed the crime) (no contest you do not contest that you committed the crime) and, thus, you relieve the state of proving at a trial that you committed that crime, and you also waive – that is, you give up – important constitutional rights.

IF AN ALFORD PLEA IS INVOLVED, SEE SM-32A NO CONTEST AND ALFORD PLEAS.[24]

"You give up your right to have the state prove that you committed each element of the crime. The state must convince each member of the jury beyond a reasonable doubt that you committed the crime. Do you understand that?

"You give up your right not to incriminate yourself, which means, you have a right not to admit to a crime, not to say anything that will subject you to a criminal penalty. If the court accepts your plea, you will be convicted, and the court can impose sentence against you. Do you understand that?

"You give up the right to confront your accusers, which means you have the right to face the witnesses against you, to hear their sworn testimony against you, and to cross-examine them by asking them questions to test the truth and accuracy of their testimony. If the court accepts your plea, you give up your right to confront your accusers. Do you understand that?

"You give up the right to present evidence in your own behalf and to require witnesses to come to court and testify for you. Do you understand that?

"Knowing that if the court accepts your plea, you give up your constitutional right to a trial by jury, your constitutional right not to incriminate yourself, and your constitutional right to confront the witnesses against you and to subpoena witnesses, do you still wish to plead (guilty) (no contest)?"

VII. Inquiry of Counsel and Defendant

THE FOLLOWING QUESTIONS SHOULD BE DIRECTED TO DEFENSE COUNSEL.

24. "Have you had sufficient opportunity to thoroughly discuss this case and the plea decision with the defendant?"

25. "Are you fully satisfied that the defendant is making (his) (her) plea of guilty freely, voluntarily, and intelligently?"

26. "Are you satisfied that the defendant understands the nature of the charge(s), the elements thereof, and the effects of (his) (her) plea?"

27. "And, are you satisfied the defendant is knowingly and intelligently waiving (his) (her) constitutional rights?"

ADD THE FOLLOWING IF A REPEATER ALLEGATION IS INVOLVED.

[28. "And, are you satisfied that the defendant understands the enhanced penalty that can be imposed if the court accepts the plea(s) of guilty as a repeater?"]

THE FOLLOWING QUESTIONS SHOULD BE DIRECTED TO DEFENDANT.

29. "Have you thoroughly discussed this case and the plea decision with your lawyer?"

30. "Are you satisfied with the representation you have received from your lawyer?"

VIII. Entering the Plea

IF, BASED ON THE ABOVE INQUIRY, THE COURT IS SATISFIED THAT THE PLEA SHOULD BE ENTERED, THE COURT SHOULD STATE:[25]

"The clerk is directed to enter the plea in the record. The court does not thereby accept the plea, but the court defers acceptance of the plea and will now hear facts to determine whether the court should accept the plea of guilty."

IX. Establishing a Factual Basis for the Plea

IT IS REQUIRED THAT THE COURT MAKE A RECORD SHOWING THAT THERE IS A FACTUAL BASIS FOR THE DEFENDANT'S PLEA.[26] THE TRIAL JUDGE MUST DETERMINE THAT A FACTUAL BASIS FOR THE PLEA EXISTS BY MAKING "SUCH AN INQUIRY AS SATISFIES [THE COURT] THAT THE DEFENDANT IN FACT COMMITTED THE CRIME CHARGED." WIS. STAT. § 971.08(1)(b).[27]

IF THE CASE INVOLVES AN ALFORD PLEA, THE COURT MUST MAKE A FINDING THAT THERE IS "STRONG EVIDENCE OF GUILT."[28]

THE PRECISE METHOD BY WHICH THIS DUTY IS MET HAS BEEN LEFT TO THE DISCRETION OF THE TRIAL COURTS.[29] IT IS NOT REQUIRED THAT THE EVIDENCE SUBMITTED AS A BASIS FOR THE PLEA BE ADMISSIBLE AT A TRIAL OR THAT IT BE SUFFICIENT TO CONVICT BEYOND A REASONABLE DOUBT.[30]

THE REQUIRED INFORMATION MAY BE ESTABLISHED IN A VARIETY OF WAYS, AND THE TRIAL COURT MAY ADOPT DIFFERENT PROCEDURES, DEPENDING ON THE SERIOUSNESS OF THE CHARGE. IT IS COMMON PRACTICE TO ASK THE PROSECUTOR TO ESTABLISH THE FACTUAL BASIS FOR THE PLEA. ACCEPTED METHODS INCLUDE:

(1) REFERRING TO THE CRIMINAL COMPLAINT;

(2) CONSIDERING TRANSCRIPTS OF THE PRELIMINARY EXAMINATION[31] OR HEARINGS ON PRETRIAL MOTIONS;

(3) ALLOWING THE PROSECUTOR TO DESCRIBE THE FACTS;

(4) REFERRING TO POLICE REPORTS[32] OR STATEMENTS OF THE DEFENDANT;

(5) RECEIVING TESTIMONY FROM POLICE OFFICERS,[33] VICTIMS, OR OTHER WITNESSES;[34] AND

(6) TAKING JUDICIAL NOTICE OF COURT RECORDS IN OTHER CASES (e.g., TRIAL OF A CODEFENDANT).

(7) ALLOCUTION BY THE DEFENDANT.

IN ADDITION TO THE ABOVE-DESCRIBED METHODS, SOME COURTS ADVOCATE THE USE OF A FULLY DESCRIPTIVE STIPULATION, OFTEN IN CONNECTION WITH A WRITTEN GUILTY PLEA FORM, WHICH IS SIGNED BY THE DEFENDANT, DEFENSE COUNSEL, AND THE PROSECUTOR AND DISCLOSES THE CHARGE, ITS CONSEQUENCES, THE RIGHTS WAIVED BY A GUILTY PLEA, THE FACTS SUPPORTING THE PLEA, AND ANY PLEA BARGAIN THAT HAS BEEN NEGOTIATED.[35]

THE CASE MAY BE ADJOURNED BY THE COURT FOR THE PURPOSE OF PREPARING FOR ANY OF THE METHODS OF ESTABLISHING THE FACTUAL BASIS FOR THE PLEA.

IF THE PLEA IS BEING ENTERED TO A REPEATER ALLEGATION, ADD THE FOLLOWING QUESTION.[36]

31. "Were you convicted of (name offense) on (date)?"

FOLLOWING THE OFFERING OF THE FACTUAL BASIS, DEFENSE COUNSEL SHOULD BE ASKED:

32. "From your own investigation, are you satisfied that there is a factual basis for the plea?"

X. Accepting the Plea and Pronouncing Judgment

IF THE COURT IS SATISFIED FROM THE SHOWING PRESENTED BY THE STATE THAT A FACTUAL BASIS EXISTS FOR THE DEFENDANT'S PLEA TO THE OFFENSE TO WHICH THE DEFENDANT PLEADS (OR TO A MORE SERIOUS OFFENSE),[37] THE COURT SHOULD MAKE FINDINGS OF FACT, ON THE RECORD, SUBSTANTIALLY AS FOLLOWS:[38]

"The court finds that the defendant understands the proceedings and that the plea of guilty is freely, voluntarily, and intelligently made. The court finds that the defendant understands the constitutional rights that are waived by a guilty plea and that the defendant freely and voluntarily waives those rights."

"The court finds from the record that a factual basis exists for the plea and that the

defendant has committed the crime charged."

SUBSTITUTE THE FOLLOWING IF THE CASE INVOLVES AN ALFORD PLEA.

["The court finds from the record that a factual basis exists for the plea, that there is strong evidence of guilt, and that the defendant has committed the crime charged."]

CONTINUE WITH THE FOLLOWING IN ALL CASES.[39]

"The court accepts the plea and finds the defendant guilty."

THE COURT SHOULD NOW STATE UPON THE RECORD:

"Upon the court's finding of guilty, it is adjudged that the defendant is convicted of the crime of _____ in violation of § _____, Wisconsin Criminal Code."

THE COURT SHOULD NOW DECIDE WHETHER A PRESENTENCE INVESTIGATION SHOULD BE ORDERED AND A DATE SHOULD BE SET FOR SENTENCING.

COMMENT

SM-32 was originally published in 1966 as "SM-30." It was revised and renumbered "SM-32" in 1974 and revised again in 1980, 1985, 1992, 1994, 1995, 2007 and 2019. The 2007 revision involved the addition of Section I., revision of question 15, and extensive updating of the Comment. This revision was approved by the Committee in February 2021; it updated the Comment and footnotes.

The inquiry suggested here is intended to illustrate a complete plea acceptance procedure, fully implementing the personal inquiry required by § 971.08 and Wisconsin case law. It is expected that individual judges will use it only as a general guide, choosing those parts that seem helpful and modifying others as appropriate to local practice and the case at hand.

The 1980 version of SM-32 was cited with approval by the Wisconsin Supreme Court in State v. Bartelt, 112 Wis.2d 467, 334 N.W.2d 91 (1983). The court "strongly advise[d] trial judges to give substantial heed to the explicit directions contained therein when accepting a plea of guilty or no contest." 112 Wis.2d 467, 484 n.3. The 1985 version was cited with approval in State v. Bangert, 131 Wis.2d 246, 389 N.W.2d 12 (1986). See discussion below. The 1995 version was cited with approval and its use urged in State v. Hampton, 2004 WI 107, ¶44, 274 Wis.2d 379, 683 N.W.2d 14 and State v. Brown, 2006 WI 100, ¶23, note 11, 293 Wis.2d 594, 716 N.W.2d 906.

Court-Required Plea Acceptance Procedures

The first Wisconsin decision to identify significant requirements for guilty plea acceptance was Ernst v. State, 43 Wis.2d 661, 170 N.W.2d 713 (1969). Ernst held that the then-existing procedures of Rule 11 of the Federal Rules of Criminal Procedure were required in state courts as a matter of federal constitutional law under the decision in Boykin v. Alabama, 395 U.S. 238 (1969). It is now clear that Rule 11 procedures are not constitutionally required in state practice. State v. Bangert, supra, at 259-60. Even though application of Federal Rule 11is not required and though it has been extensively changed since 1969, its extensive commentary and the federal cases interpreting it may be helpful when questions about Wisconsin guilty plea practice arise.

State v. Bangert, supra, reaffirmed the requirement that a full personal inquiry be conducted in accepting a plea, including an inquiry into the defendant's understanding of the elements and their relation to the facts of the case. The rule of State v. Cecchini, 124 Wis.2d 200, 368 N.W.2d 830 (1985), that a plea can automatically be withdrawn if there is a defect in the acceptance colloquy, was overruled. In its place, Bangert created a new procedure to replace automatic withdrawal of a plea where the record of plea acceptance is defective:

> (1) the defendant must make a prima facie showing that required plea acceptance procedures were not complied with and must allege that the plea was not understandingly made;
>
> (2) if that showing is made, the burden shifts to the State to show that the plea was knowingly, voluntarily and intelligently entered. The state may go outside the record of the plea colloquy and use any evidence relevant to the issue.

The Bangert court also stated:

> Henceforth, we will also require as a function of our supervisory powers that state courts at the plea hearing follow the provisions set forth in Wis JI-Criminal SM-32 (1985), Part V, Waiver of Constitutional Rights . . .
>
> Although Bangert questions only the adequacy of the nature of the charge and constitutional waiver colloquy of the plea hearing, we urge trial courts to closely follow all of the procedures for the taking of a guilty or no contest plea as set forth at Wis JI-Criminal SM-32 (1985). We have previously expressed this recommendation, and believe that careful adherence to SM-32 will satisfy the constitutional standard of a voluntary and knowing plea, as well as the Ernst requirements, the procedure of Section 971.08, Stats., and the other mandatory procedures described herein.
> 131 Wis.2d 246, 22.
>
> . . . .
>
> We reiterate that the duty to comply with the plea hearing procedures falls squarely on the trial judge. We understand that most trial judges are under considerable calendar constraints, but it is of paramount importance that judges devote the time necessary to ensure that a plea meets the constitutional standard. The plea hearing colloquy must not be reduced to a perfunctory exchange. It demands the trial court's "utmost solicitude." Such solicitude will serve to forestall postconviction motions, which have an even more detrimental effect on a trial court's time limitations than do properly conducted plea hearings. Intentional failure to follow such mandate could be grounds for judicial discipline.
> 131 Wis.2d 246, 278-79.

In State v. Pegeese, 2019 WI 60, — Wis.2d —, 928 N.W.2d 590, the Wisconsin Supreme Court restated the list of duties a court has at a plea acceptance proceeding:

> ¶23 This court has recognized that circuit courts have a number of duties at a plea hearing to ensure that a defendant's guilty or no contest plea is knowing, intelligent, and voluntary, which include conducting a colloquy to:
>
> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
>
> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;
>
> (3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;
>
> (4) Ensure the defendant understands that if he is indigent and cannot afford an attorney, an attorney will be provided at no expense to him;
>
> (5) Establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea;
>
> (6) Ascertain personally whether a factual basis exists to support the plea;
>
> (7) Inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights;
>
> (8) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;
>
> (9) Notify the defendant of the direct consequences of his plea; and
>
> (10) Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in Wis. Stat. § 971.08(1)(c).

SM-32 covers all of the above, although not in the same order.

Addressing The Defendant Personally

Requirements at several stages of the plea acceptance procedure refer to the trial court "personally" providing advice or making inquiry. In State v. Hampton, supra, the court discussed what "personally" requires in the context of determining the defendant's understanding that the judge is not bound by sentencing recommendations in the plea agreement. The court held that the judge's duty "does not require that the court all the essential information personally, although personal explanation by the court strikes us as the most logical, consistent, and efficient way of delivering the information." 2004 WI 107, ¶43 (emphasis in original). See note 5, below.

Relying On A Plea Questionnaire/Waiver Of Rights Form

In State v. Hoppe, 2009 WI 41, 317Wis.2d 161,765 N.W.2d 794, the court held that the plea colloquy was insufficient but that other evidence showed the plea was voluntarily and understandingly made. The primary issue was the permissible extent of reliance on a signed "Plea Questionnaire/Waiver of Rights" form:

> ¶ 30. A circuit court may use the completed Plea Questionnaire/Waiver of Rights Form when discharging its plea colloquy duties. . . .
>
> ¶ 31. A circuit court may not, however, rely entirely on the Plea Questionnaire/Waiver of Rights Form as a substitute for a substantive in-court plea colloquy. . . [T]he plea hearing transcript must demonstrate that the circuit court used a substantive colloquy to satisfy each of the duties listed in [State v.] Brown. . . .
>
> ¶ 32. . . . A complete Form can therefore be a very useful instrument to help ensure a knowing, intelligent, and voluntary plea. The plea colloquy cannot, however, be reduced to determining whether the defendant has read and filled out the Form. Although we do not require a circuit court to follow inflexible guidelines when conducting a plea hearing, the Form cannot substitute for a personal, in-court, on-the-record plea colloquy between the circuit court and a defendant.

In State v. Pegeese, 2019 WI 60, — Wis.2d —, 928 N.W.2d 590, the Wisconsin Supreme Court reaffirmed the holding in Hoppe:

> ¶36 A plea questionnaire is indeed a useful tool to supplement a plea colloquy, but it alone does not replace a plea colloquy during which the circuit court must determine whether a plea is being made knowingly, intelligently, and voluntarily.
> . . . . .
> ¶39 We therefore reaffirm that the circuit court may utilize a waiver of rights form such as Form CR-227, but the use of that form does not otherwise eliminate the circuit court's plea colloquy duties. While the circuit court must exercise great care when conducting a plea colloquy so as to best ensure that a defendant is knowingly, intelligently, and voluntarily entering a plea, a formalistic recitation of the constitutional rights being waived is not required.

The Defendant's Right To Be Present

". . . § 971.04(1)(g) provides a criminal defendant the statutory right to be in the same courtroom as the presiding judge when a plea hearing is held, if the court accepts the plea and pronounces judgment. However, we also conclude that this statutory right may be waived ..." State v. Soto, 2012 WI 93, 343Wis.2d 43, ¶2, 817 N.W.2d 848. The court also described the type of inquiry that should accompany the use of videoconferencing for a hearing at which "presence" is required. 343Wis.2d 43, ¶46. See SM-18 Defendant's Consent To Proceed By Videoconference B Waiver Of Right To Be Present Under § 971.04.

Joining A Guilty Plea With A Plea Of Not Guilty By Reason Of Mental Disease Or Defect

The Committee recommends that the full guilty plea acceptance procedure should be followed in cases where a defendant joins a plea of guilty with a plea of not guilty by reason of mental disease or defect [NGI]. The cases should be treated as involving two pleas. First, there is a plea of guilty to the offense(s) charged, with the full plea acceptance procedures used. This is consistent with State v. Shegrud, 131 Wis.2d 133, 389 N.W.2d 7 (1986) – holding that an NGI plea is like a no contest plea and that Bangert and § 971.08 procedures should be followed – and State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986). Also see, State v. Vander Linden, 141 Wis.2d 155, 414 N.W.2d 72 (Ct. App. 1987), where the recommended procedure was referred to with apparent approval. Second, there is the plea of "not guilty by reason of mental disease or defect." The Committee recommends that the colloquy reflect that defendants understand the nature of this plea, including the maximum term of commitment to which they are exposed. See § 971.17(1).

In State v. Fugere, 2019 WI 33, 386 Wis.2d 76, 924 N.W.2d 469, the Wisconsin Supreme Court held that trial courts are not required to advise defendants of the maximum term of commitment if they are found not guilty by reason of mental disease or defect and declined to exercise its supervisory authority to require courts to do so.

> ¶2. We conclude that a circuit court is not required to inform an NGI defendant of the maximum possible term of civil commitment at the guilt phase: (1) because a defendant who prevails at the responsibility phase of the NGI proceeding has proven an affirmative defense in a civil proceeding, avoiding incarceration, and is not waiving any constitutional rights by so proceeding in that defense; and (2) because an NGI commitment is not punishment, but rather a collateral consequence to one who successfully mounts an NGI defense to criminal charges. We therefore decline to exercise our superintending and administrative authority to require circuit courts to advise NGI defendants of the maximum period of civil commitment.

In State v. Francis, 2005 WI App 161, 285 Wis.2d 451, 701 N.W.2d 632, the court of appeals held that when accepting a guilty plea from a defendant who had originally entered an insanity plea, the court was not required to address the defendant personally with respect to the withdrawal of the insanity plea. However, the court noted:

> . . . we believe it nonetheless advisable for the trial court to engage in personal colloquy for a least two reasons: First, it helps satisfy the court that the defendant is aware and alert as to what is going on. Second, the record is protected from later ineffective assistance of counsel claims where a convicted defendant might assert that counsel never discussed the NGI withdrawal. 285 Wis.2d 451, 467, footnote 5.

The Wisconsin Supreme Court has reaffirmed that it is good practice for a plea colloquy to address NGI plea withdrawal. State v. Burton, 2013 WI 61, 349 Wis.2d 1, 832 N.W.2d 611.

1. SM 30 Waiver And Forfeiture Of Counsel, etc., provides a suggested inquiry and findings for the waiver of the right to counsel.

2. **Consultation with victims**. This question is intended to comply with the requirements of § 971.08(1)(d), which reads as follows: "(d) Inquire of the district attorney whether he or she has complied with s. 971.095(2)."

Section 971.095 is titled: "Consultation with and notices to victim." Subsection (2) imposes a duty on the district attorney to offer all victims who have requested it "an opportunity to confer with the district attorney concerning the prosecution of the case and the possible outcomes of the prosecution, including potential plea agreements and sentencing recommendations."

The Committee concluded that this inquiry should be made at the beginning of the plea acceptance hearing. If the prosecutor has not complied with § 971.095(2), that fact should be disclosed as early as possible. If the prosecutor has complied as required, establishing that fact at the beginning of the proceeding should satisfy not only the obligation set forth in § 971.08(1)(d) but also the obligation in § 971.315 to make the same inquiry if the plea agreement calls for dismissal of charges:

> **971.315 Inquiry upon dismissal**. Before a court dismisses a criminal charge against a person, the court shall inquire of the district attorney whether he or she has complied with s.

971.095(2).

See footnote 15 regarding plea agreements calling for dismissal of charges.

3. **Identifying the maximum penalty**. The maximum penalty must be explained at the time the plea is accepted, even if it has been explained at earlier stages of the proceedings. State v. Bartelt, 112 Wis.2d 467, 334 N.W.2d 91 (1983). A complete description of the charge and the penalty may be done in the following manner:

> "Do you understand that you are charged with burglary?"
> "And do you understand that the maximum penalty for burglary is 12 ½ years of imprisonment, composed of 7 ½ years of initial confinement and 5 years extended supervision, and a fine of $25,000?"

In State v. Sutton, 2006 WI App 118, 294 Wis.2d 330, 718 N.W.2d 146, the court held that advice is not required about the maximum term of initial confinement on a bifurcated sentence; advice on the maximum term of imprisonment is sufficient.

In State v. Douglas, 2018 WI App 12, 380 Wis.2d 389, 908 N.W.2d 466, plea withdrawal was ordered because the trial court and counsel provided erroneous information on the maximum sentence.

When the defendant entered his guilty plea in State v. Finley, 2016 WI 63, 370 Wis.2d 402, 882 N.W.2d 761, he was erroneously informed (both by the circuit court and in the plea questionnaire/waiver of rights form) that his maximum exposure was nineteen and one half years. Finley was sentenced to the actual maximum of twenty-three and one half years imprisonment, and he later sought to withdraw his plea. The court of appeals sent the case back and the trial court reduced the sentence to nineteen and one half years. Finley went back to the court of appeals; the court ordered that he be allowed to withdraw his plea. The Supreme Court affirmed:

> ¶ 95 . . . Finley is entitled to withdraw his plea: The circuit court misinformed Finley of the potential punishment he faced if convicted, information the circuit court was required to give the defendant; and the State failed to prove that when Finley entered his plea he knew the potential punishment he faced if convicted.

The decision included a "Glossary" of sentencing terms apparently intended to encourage uniformity in conducting the plea colloquy. Section 971.08 requires advising on the "potential punishment," which according to the Glossary, is the same as the maximum statutory penalty [including any penalty enhancements].

When the defendant entered his guilty plea in State v. Cross, 2010 WI 70, 326 Wis.2d 492, 786 N.W.2d 464, he, his lawyer, and the trial court all thought that the applicable maximum imprisonment he faced was 40 years. In fact, the correct maximum was 30 years imprisonment – 20 confinement and 10 ES. He was originally sentenced to 25 years confinement with 15 years ES. He moved to withdraw his plea. The trial court denied the motion but reduced the sentence to 20 years confinement and 10 years ES. The Wisconsin Supreme Court affirmed:

> ¶ 4 We hold that where a defendant is told that he faces a maximum possible sentence that is higher, but not substantially higher, than that authorized by law, the circuit court has not violated the plea colloquy requirements outlined in Wis. Stat. § 971.08 and our Bangert line of

cases. In other words, where a defendant pleads guilty with the understanding that he faces a higher, but not substantially higher, sentence than the law allows, the circuit court has still fulfilled its duty to inform the defendant of the range of punishments. Therefore, the defendant is not entitled to an evidentiary hearing, and plea withdrawal remains in the discretion of the circuit court and will not be disturbed unless the defendant shows that it is necessary to correct a manifest injustice.

The decision overrules State v. Harden, 2005 WI App 252, 287 Wis.2d 871, 707 N.W.2d 173 and withdraws language in State v. Quiroz, 2002 WI App 52, ¶16, 251 Wis.2d 245, 641 N.W.2d 715, which held the defendant was not required to show he would have pled differently if he had known the correct maximum.

All applicable penalty enhancers should be included in the description of the maximum penalty, such as repeater allegations under § 939.62, the increased penalty for committing a crime while armed under § 939.63, etc. The previous versions of this Special Material recommended that if conviction would require that a consecutive sentence be imposed, that fact should also be disclosed. 2001 Wisconsin Act 109 repealed all mandatory consecutive sentence provisions except one: § 946.43(2m)(b) relating to assaults by prisoners.

A trial court in accepting a guilty plea is not required to specifically inform the defendant that the crime is a felony or misdemeanor because this is not part of the "nature of the charge." The court noted that one way to describe "the nature of the charge" is to read from the appropriate jury instructions, which typically do not include the word "felony" or "misdemeanor." State v. Robles, 2013 WI App 76, 348 Wis.2d 325, 833 N.W.2d 184.

"Direct" and "Collateral" Consequences

The general rule is that advice on "direct" but not "collateral" consequences of conviction is required at the time a plea is accepted. A "direct consequence" is "one that has a definite, immediate, and largely automatic effect on the range of defendant's punishment." State v. Bollig, 2000 WI 6, ¶16, 232 Wis.2d 561, 605 N.W.2d 199. "Collateral consequences are indirect and do not flow from the conviction." State v. Byrge, 2000 WI 101, ¶61, 237 Wis. 2d 197, 614 N.W.2d 477. The following have been found to be "collateral consequences":

- mandatory DNA surcharge; applying the "intents/effects" test, the surcharge was not enacted with punitive intent and did not have a punitive effect. State v. Williams, 2018 WI 59, 381 Wis.2d 61, 912 N.W. 2d 373. Also see, State v. Frieboth, 2018 WI App 46, 383 Wis.2d 733, 916 N.W. 2d 643.

- requirement to register as a sex offender. Bollig, supra. [However, the court found that lack of knowledge of the registration requirement was a fair and just reason for a motion to withdraw a plea prior to sentencing.] Also see, State v. [Charles] Brown, 2004 WI App 179, 276 Wis.2d 559, 687 N.W.2d 543, where plea withdrawal was allowed because misinformation regarding sex offender registration went to the heart of the agreement.

- the possible revocation of probation for a sex offender who entered an Alford plea and therefore may not make the admission of guilt required for participation in treatment programs. State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 579 N.W.2d 698 (1998).

- potential commitment as a "sexually violent person" under Chapter 980. State v. Myers, 199 Wis.2d 391, 544 N.W.2d 609. [But see, State v. Nelson, 2005 WI App 113, 282 Wis.2d 502, 701 N.W.2d 32: the defendant's lack of knowledge of the possible Chapter 980 commitment was a fair and just reason for a motion to withdraw a plea prior to sentencing. Also see, State v. [Charles] Brown, 2004 WI App 179, 276 Wis.2d 559, 687 N.W.2d 543, where plea withdrawal was allowed because misinformation regarding a possible Chapter 980 commitment went to the heart of the agreement.]

- lifetime GPS monitoring is not "punishment," and, therefore, not a direct consequence that Muldrow had to be informed of prior to his plea. State v. Muldrow, 2018 WI 52, 381 Wis.2d 492, 912 N.W.2d 74.

- possible transfer to an out-of-state prison. State v. Parker, 2001 WI App 111, 244 Wis.2d 145, 629 N.W.2d 77.

- ineligibility for federal health care benefits under 42 USC 1320. State v. Merten, 2003 WI App 171, 266 Wis.2d 588, 668 N.W.2d 750.

- federal firearms restriction for those convicted of misdemeanor offenses involving domestic violence. State v. Kosina, 226 Wis.2d 482, 595 N.W.2d 464 (1999).

- deportation issues based on the defendant's own misunderstanding of his status [where the court gave the required advice]. State v. Rodriguez, 221Wis.2d 487, 585 N.W.2d 701 (1998).

- unavailability of parole and good time under Truth In Sentencing. State v. Plank, 2005 WI App 109, 282 Wis.2d 520, 699 N.W.2d 235.

Even though advice on matters in the list above is not directly required, the Committee recommends that obvious and serious collateral consequences of the guilty plea should be disclosed. The most common is probably the possible revocation of probation, parole, or extended supervision. Also see footnote 9, below, regarding the required advice on the prohibition on possession of a firearm by a convicted felon.

Care should be taken to assure that the defendant understands what the maximum statutory penalty is, as distinguished from the sentence likely to be imposed, the date of parole eligibility, the likely date of parole release, or the mandatory release date on the sentence. Confusion about parole eligibility, for example, is sometimes claimed as a basis for withdrawing a plea, usually without success. See State v. Birts, 68 Wis.2d 389, 228 N.W.2d 351 (1975), which held that trial courts should not attempt to describe parole consequences as a part of the plea acceptance procedures.

In State v. Byrge, 2000 WI 101, 237 Wis.2d 197, 614 N.W.2d 477, the court recognized a different rule where a court exercises its authority to determine parole eligibility for life sentences under s. 973.014 under the pre-Truth In Sentencing system. "In this circumstance, parole eligibility is a direct consequence of the plea." 2000 WI 101, ¶4. Thus, "in the narrow circumstance in which a circuit court has statutory authority under s. 973.014(2) to fix the parole eligibility date, the circuit court is obligated to provide the defendant with parole eligibility information before accepting the plea." 2000 WI 101, ¶4.

4. Repeater statutes; penalty enhancers; mandatory minimums

Repeater statutes, penalty enhancers, and related provisions were reduced in number by 2001 Wisconsin Act 109. The following remain in force:

- § 939.615 Lifetime supervision of serious sex offenders. [See Wis JI Criminal 980.]

- § 939.616 Mandatory minimum sentence for certain child sex offenses. [First created as § 939.617 by 2005 Wisconsin Act 430; changed to § 939.616 by the Revisor when 2005 Wisconsin Act 433 created another § 939.617.] Requires a mandatory minimum sentence for certain violations of § 948.02(1) and § 948.025(1).

- § 939.617 Minimum sentence for certain child sex offenses: creates presumptive minimum sentences for violation of certain child sex offenses that are not sexual assaults: § 948.05, § 948.075, and § 948.12. Created by 2005 Wisconsin Act 433.

- § 939.618 Mandatory minimum sentence for repeat serious sex crimes: provides increased penalties for persons with prior convictions under § 940.225(1) or (2). If the prior and the current conviction are for violating § 940.225(1) the maximum term of imprisonment is life without parole or extended supervision. In other situations covered by the statute, there is a mandatory minimum sentence of 3 years and 6 months for the second violation. [This is former § 939.623, renumbered, retitled, and revised by 2005 Wisconsin Act 433.]

- § 939.619 Mandatory minimum sentence for repeat serious violent crimes: provides a mandatory minimum sentence of 3 years and 6 months for violation of §§ 940.03 or 940.05 if there is a prior conviction for those crimes or a crime punishable by life imprisonment. [This is former § 939.624, renumbered and retitled by 2005 Wisconsin Act 433.]

- § 939.6195 Mandatory minimum sentence for repeat firearm crimes: requires that the term of confinement for a bifurcated sentence be at least 4 years.

- § 939.62 Increased penalty for habitual criminality: the regular "repeater" provisions are in subs. (1) and (2).

- § 939.62(2m): mandatory sentence of life without parole for a "persistent repeater." This applies to "serious child sex offenses" ("Two Strikes") and to "serious felonies" ("Three Strikes").

- § 939.621 Increased penalty for certain domestic abuse offenses: provides a penalty increase of up to 2 years for certain domestic abuse offenses. [See Wis JI Criminal 983 and 984].

- § 939.63 Penalties; use of a dangerous weapon: provides for increases in the maximum sentence if a person commits a crime while possessing, using, or threatening to use a dangerous weapon. [See Wis JI-Criminal 990].

- § 939.632 Penalties; violent crime in a school zone: provides a 5 year penalty increase for certain "violent crimes" that are felonies and a 3 month penalty increase for certain "violent crimes" that are misdemeanors. [See Wis JI Criminal 992.]

- § 939.635 Increased penalty for certain crimes against children committed by a child care

provider: provides for a 5-year increase in the maximum penalty for specified crimes against a child. [See Wis JI-Criminal 2115].

- § 939.645 Penalties; crimes committed against certain people or property: this is the so-called Hate Crimes Law. It provides a 5 year penalty increase for felonies; it increases the maximum sentence to two years for Class A misdemeanors; and, it increases the maximum sentence to one year in jail for misdemeanors other than a Class A misdemeanor. [See Wis JI-Criminal 996 and 996A].

Also note that Chapter 961 has its own repeater provision for controlled substance offenses [see § 961.48] and several penalty enhancer provisions [see §§ 961.46, 961.49, and 961.495].

Finally, Chapter 980, Sexually Violent Persons, allows commitment after the completion of a prison sentence for persons found to be "sexually violent persons." See Wis JI-Criminal 2501 - 2503. This has been labeled a "collateral consequence." See the list in footnote 3.

The Committee does not believe that the trial judge is required to explain all of these provisions to the defendant during the plea acceptance procedure. However, when a penalty enhancer is charged, the maximum penalty is affected and should be disclosed on the record. Advice on the mandatory minimum sentence under § 939.616 Mandatory minimum sentence for certain child sex offenses, is required. State v. Thompson, 2012 WI 90, 342 Wis.2d 674, 818 N.W.2d 904.

Section 971.08(1)(c) requires advice on deportation consequences. See footnote 8, below.

5. If the reading of the charging document is waived, assure that the waiver appears in the record.

6. **Personal Inquiry**. It is a personal inquiry of the defendant that is required. The court must assure that the defendant's own responses appear on the record.

Personal inquiry is required even though the defendant is represented by competent counsel. The personal inquiry requirement is one of the major emphases of the cases that have required the formal plea procedures. In State v. Ernst, 43 Wis.2d 661, 170 N.W.2d 713 (1969), the Wisconsin Supreme Court specifically recognized that "under Boykin v. Alabama, Wisconsin courts can no longer indulge in the presumption" that counsel has fulfilled his or her duty of proper representation. 43 Wis.2d 661, 674. Whether or not one agrees with the conclusion or its assumptions about counsel's role, it is clear that the burden of assuring that a defendant understands the nature and effect of the plea has been unequivocally imposed on the trial judge. This was reaffirmed in State v. Brown, 2006 WI 100, 293 Wis.2d 594, 716 N.W.2d 906, where the court recognized that the U.S. Constitution can be satisfied by reliance on counsel's representations [see, Bradshaw v. Stumpf, 545 U.S. 175 (2005)]. The court noted, that "[s]ince Bangert, however, we have interpreted Wis. Stat. § 971.08 to require a court to obtain more direct confirmation of a defendant's understanding before accepting a plea." 2006 WI 100, ¶56, footnote 26.

If the plea is tendered by counsel, it is important that the defendant personally acknowledge that the plea is the defendant's own decision. The same practice should be followed at any other time during the plea acceptance procedure when counsel answers a question that has been directed to the defendant.

In State v. Burns, 226 Wis.2d 762, 594 N.W.2d 799 (1999), the court affirmed a conviction where the defendant was never directly asked "How do you plead?" and did not state his plea on the record. However, the court "urges circuit courts to follow the usual and strongly preferred practice of asking defendants

directly and personally in open court and on the record how they plead to the charged offenses and of entering the pleas on the record." 226 Wis.2d 762, 765. SM 32, and question no. 1 in particular, was cited with approval.

If the defendant refuses to answer the questions that constitute the plea acceptance colloquy, the plea should not be accepted. See, State v. Minniecheske, 127 Wis.2d 234, 378 N.W.2d 283 (1985).

With respect to misdemeanor cases, § 971.04(2) provides that defendants may authorize their attorney in writing to act on their behalf in any manner and may "be excused from attendance at any or all proceedings." This conflicts with § 971.08(1)(a) which requires that the court must address the defendant personally before accepting a plea of guilty or no contest, and makes no exception for misdemeanors. The court of appeals dealt with the conflict in State v. Krause, 161 Wis.2d 919, 927, 469 N.W.2d 241 (Ct. App. 1991), holding that both statutes should be given effect:

> While a misdemeanant need not be present at a plea hearing, we conclude that the remaining requirements of 971.08, Stats., are equally applicable in the case of misdemeanors as in felonies.

Apparently, the court must conduct an inquiry of counsel to determine if the defendant personally is making a voluntary and understanding plea.

7. **No Contest and Alford Pleas**. If the defendant pleads "no contest" or "Alford," the court should make it clear to the defendant that, for the purposes of the criminal proceeding, the plea will have the same effect as an unequivocal plea of guilty. State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 632, 579 N.W.2d 698 (1998). The full plea acceptance procedures should be followed for no contest pleas, which may be entered only "subject to the approval of the court." § 971.06(1)(c). An Alford plea is a guilty plea accompanied by a claim of innocence, which the court may reject if it concludes that the plea is contrary to the public interest or the interest of justice. State v. Garcia, 192 Wis.2d 845, 859, 532 N.W.2d 111 (1995). In State v. Williams, 2000 WI App 123, 237 Wis.2d 591, 614 N.W.2d 11, the court of appeals implied that a judge's flat refusal to accept an Alford plea because "I have just made a policy that I will not accept one" would be error. However, the alleged error was considered waived in that case.

The acceptance and effects of no contest and Alford pleas are discussed in SM 32A, No Contest and Alford Pleas. [Garcia, supra, cited SM 32A with approval.]

The material in brackets provides a definition of the no contest and Alford pleas and attempts to assure that the defendant understands that those pleas result in an unequivocal judgment of guilty. The Committee was prompted to add the material by the decision in State v. Garcia, supra, where the Wisconsin Supreme Court reaffirmed that "the circuit courts of Wisconsin may, in their discretion, accept Alford pleas." The court cited SM 32A with approval with respect to its recommendation that:

> judges . . . ask defense counsel on the record whether counsel has discussed the consequences of the plea with the defendant and if so, whether the defendant has expressed his understanding of those consequences.
> 192 Wis.2d 845, 858 59.

Further, the court added the following in a footnote:

> Although not required to make the plea acceptable, including a definition of an Alford plea on the guilty plea questionnaire may help to further document the defendant's understanding of the

> plea. We invite the Wisconsin Jury Instruction Committee to consider making such a change on the form.
> 192 Wis.2d 845, 860, at footnote 6.

The additions to the text of SM 32 are intended to address these concerns.

8. **Deportation, exclusion from admission, denial of naturalization**. This advice is in bold because it is expressly required by § 971.08(1)(c), which provides that before the court accepts a plea of guilty or no contest, it shall:

> Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

Section 971.06(3) prohibits any inquiry into the citizenship status of the defendant: "At the time a defendant enters a plea, the court may not require the defendant to disclose his or her citizenship status."

The required warning must be given at the time the plea colloquy is conducted. Giving the warning at the arraignment is not a substitute for what the statute clearly requires. State v. Vang, 2010 WI App 118, 328 Wis.2d 251, 789 N.W.2d 115.

There has been extensive litigation regarding whether plea withdrawal is required where the advice on immigration consequences was not given or not given precisely as required by the statute. The advice for the judge accepting a plea, however, should be clear: give the warning in the words of the statute. Motions to withdraw guilty pleas are also frequently based on ineffective assistance of counsel. See cases collected at the end of this footnote. In Padilla v. Kentucky, 559 U.S. 356 (2010), the court held that the right to effective assistance of counsel extends to advise on deportation consequences.

In State v. Reyes Fuerte, 2017 WI 104, 378 Wis.2d 504, 904 N.W.2d 773, the Wisconsin Supreme Court found that the advice given by the trial judge on immigration consequences fell short of what § 971.08(1)(c) requires in two ways: it referred to "resident" instead of "citizen" and failed to mention "denial of naturalization." The court held, however, that harmless error analysis applies to this situation and concluded that the error was harmless:

> ¶41 We hold that, under the circumstances of this case, the circuit court's errors in giving the plea advisement required by Wis. Stat. § 971.08(1)(c) are harmless. Reyes Fuerte knew of the potential immigration consequences because his counsel went over the plea waiver form, which contains a substantially similar advisement, with him in Spanish. The failure to bring any ineffective assistance claim under Padilla further indicates that counsel did inform Reyes Fuerte of the potential immigration consequences of his plea. Finally, the two immigration consequences relevant to Reyes Fuerte were raised by the circuit court, such that he had knowledge of those potential consequences. To allow him to withdraw his plea now would be to allow him to "manipulate [Wisconsin's] criminal justice system in order to circumvent the immigration laws;" we cannot accept that the legislature intended to, or actually did, write § 971.08(2) to have such a result. State v. Issa, 186 Wis. 2d 199, 212, 519 N.W.2d 741 (Ct. App. 1994) (Fine, J., concurring).

Reaching this conclusion required the overruling of State v. Douangmala, 2002 WI 62, 253 Wis. 2d

173, 646 N.W.2d 1:

> ¶36 In light of the foregoing, we hold that Douangmala was objectively wrong because it failed to consider the mandatory language in Wis. Stat. §§ 971.26 and 805.18 and thus overrule it. Additionally, we reinstate Chavez, Issa, Lopez, and Garcia as valid law and binding precedent.

The court still encouraged reading the statutory script verbatim:

> ¶19 Before we begin our analysis, we take a moment to remind circuit court judges that simply reading the language of the advisement from Wis. Stat. § 971.08(1)(c) is by far the best option. The use of quotation marks (such as those in § 971.08(1)(c)) is "an unusual and significant legislative signal" that should be given effect by circuit courts. State v. Garcia, 2000 WI App 81, ¶16, 234 Wis. 2d 304, 610 N.W.2d 180. In this instance, those quotation marks are best given effect by reading the advisement as written in the statute. See id. Though, as a result of this opinion, harmless error now applies as a "safety net" for circuit courts, the best practice remains reading the exact language of the statute. Id.

State v. Douangmala, 2002 WI 62, 253 Wis.2d 173, 644 N.W.2d 891, was overruled by Reyes Fuerte. In it, the court answered "yes" to the following question: "If a circuit court fails to give the deportation warning required by § 971.08(1)(c) when accepting a guilty or no-contest plea, is a defendant entitled to withdraw the plea later upon a showing that the plea is likely to result in the defendant's deportation, regardless of whether the defendant was aware of the deportation consequences of the plea at the time the defendant entered the plea?" The court said that the result is compelled by the specific terms of § 971.08(2).

Reyes Fuerte reinstated the following cases as "valid law and binding precedent": State v. Chavez, 175 Wis.2d 366, 498 N.W.2d 887 (Ct. App. 1993); State v. Issa, 186 Wis.2d 199, 519 N.W.2d 741 (Ct. App. 1994); State v. Lopez, 196 Wis.2d 725, 539 N.W.2d 700 (Ct. App. 1995); and, State v. Garcia, 2000 WI App 81, 234 Wis.2d 304, 610 N.W.2d 180.

In State v. Garcia, 2000 WI App 81, ¶1, 234 Wis.2d 304, 610 N.W.2d 180, the court held that "a trial court is required to personally address the defendant in the express words of the statute," referring to s. 971.08(1)(c). Question 3 uses the express words of § 971.08(1)(c).

Also see State v. Issa, 186 Wis.2d 199, 519 N.W.2d 741 (Ct. App. 1994), ordering withdrawal of a plea where the trial judge relied on a written plea acceptance form instead of personally addressing the defendant to assure understanding of deportation consequences.

In State v. Rodriguez, 221 Wis.2d 487, 585 N.W.2d 701 (Ct. App. 1998), the trial court addressed the defendant as required by § 971.08(1). The defendant later sought to withdraw the plea, claiming his misunderstanding of his citizenship status meant that his plea was not voluntarily and intelligently made. The court of appeals held that in this context the deportation consequences were "collateral" and the defendant's own mistake about them did not require withdrawal of the plea.

In State v. Mursal, 2013 WI App 125, ¶16, 351 Wis.2d 180, 839 N.W.2d 173, the court applied the "substantial compliance" doctrine: an immigration advisement substantially complied with § 971.08 if it explained all the elements of the statute; minor linguistic differences that don't change the meaning of the advice do not require plea withdrawal.

In State v. Valadez, 2016 WI 4, 316 Wis.2d 332, 874 N.W.2d 514, when the trial court accepted the

defendant's pleas [in 2004 and 2005] it did not include advice on immigration consequences. In 2013, she moved to withdraw her pleas under § 971.08(2). Valadez was a lawful permanent resident and there were no plans to deport her. However, if she left the country and sought to reenter, she would be denied readmission. The court held that she had shown exclusion from admission was likely, satisfying the requirements of § 971.08(2), and was entitled to withdraw her plea. The decision did not resolve the question whether any time limits apply to motions under § 971.08(2).

In State v. Ortiz-Mondragon, 2015 WI 73, 364 Wis.2d 1, 866 N.W.2d 717, the defendant sought to withdraw a no contest plea, alleging ineffective assistance of counsel – specifically, the failure to advise that deportation would be mandatory rather than "a possibility." The supreme court concluded that counsel did not perform deficiently. Because federal immigration law is not "succinct, clear, and explicit" in providing that Ortiz Mondragon's substantial battery offense constituted a crime involving moral turpitude, his attorney "need[ed] [to] do no more than advise [him] that pending criminal charges may carry a risk of adverse immigration consequences." ¶5.

In State v. Shata, 2015 WI 74, 364 Wis.2d 1, 866 N.W.2d 717, the defendant made a similar claim, specifically, that counsel was ineffective for failing to advise that deportation would be mandatory rather than "a strong chance." The trial court denied withdrawal but the court of appeals reversed. The supreme court concluded plea withdrawal was not warranted:

. . . Shata is not entitled to withdraw his guilty plea because he did not receive ineffective assistance of counsel. Specifically, Shata's attorney did not perform deficiently. Shata's attorney was required to "give correct advice" to Shata about the possible immigration consequences of his conviction. Padilla, 559 U.S. at 369. Shata's attorney satisfied that requirement by correctly advising Shata that his guilty plea carried a "strong chance" of deportation. Shata's attorney was not required to tell him that his guilty plea would absolutely result in deportation. In fact, Shata's deportation was not an absolute certainty. Executive action, including the United States Department of Homeland Security's exercise of prosecutorial discretion, can block the deportation of deportable aliens. ¶5.

In State v. Villegas, 2018 WI App 9, 380 Wis.2d 246, 908 N.W.2d 198, a motion to withdraw a guilty plea was denied: counsel was not ineffective in failing to inform the defendant that his plea would render him inadmissible to the United States and ineligible for Deferred Action for Childhood Arrivals (DACA). [The trial court did give the advice required by § 971.08.]

9. **Possession of a firearm**. Section 973.176(1) requires providing this information at the time of sentencing. The Committee concluded that it is a good practice, though not required, to include it at the time the plea is accepted as well.

Section 973.176(1) was created by 1989 Wisconsin Act 142 (effective date: March 31, 1990) and reads as follows:

FIREARM POSSESSION Whenever a court imposes a sentence or places a defendant on probation regarding a felony conviction, the court shall inform the defendant of the requirements and penalties under § 941.29.

Section 941.29 makes it a Class G felony for a convicted felon to possess a firearm. The maximum term of imprisonment for a Class G felony is ten years: an initial term of confinement of 5 years and 5 years extended supervision. [2001 Wisconsin Act 109 repealed the former penalty structure, which increased the penalty for a second offense.]

Caution should be exercised where a plea agreement purports to avoid the ban on firearm possession. In Koll v. DOJ, 2009 WI App 74, 317 Wis.2d 753, 769 N.W.2d 69, the court held that the Wisconsin Department of Justice was correct in refusing to issue a gun permit to a person convicted of disorderly conduct in a domestic context, even though the plea agreement in the case was specifically tailored to characterize the offense as "non-domestic disorderly conduct" to avoid the collateral consequence of the federal ban on gun possession. However, in an unpublished opinion in a companion case [State v. Koll, 2008AP1403-CR] the court ordered withdrawal of Koll's plea because "Koll was actively misinformed as to a collateral consequence of his plea agreement and because the misinformation went to the heart of the plea agreement."

10. **Right to vote**. The text regarding the right to vote is based on CR-227.

11. **Restitution**. In State v. Dugan, 193 Wis.2d 610, 534 N.W.2d 897 (Ct. App. 1995), the court held that warning a guilty plea defendant that restitution may be required is not a mandatory component of the plea acceptance colloquy. But, in a footnote, the court stated:

> . . . we nonetheless think it the better practice for a sentencing court to include the [restitution] warning when taking a plea and to include the warning on the Moederndorfer questionnaire. 193 Wis.2d 610, 624, at footnote 7.

Section 973.20(1r) provides in part:

> When imposing sentence or ordering probation for any crime, . . . the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing, or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record.

12. The suggested questions should be modified to fit the case at hand and the preference of the trial judge. Some or all of the questions may be eliminated altogether if a similar inquiry has already been conducted to, for example, set bail, evaluate a waiver of counsel, etc. Additional questions will often be suggested by the defendant's responses.

13. Plea Agreements. If there is a plea agreement, it is recommended that it be put in writing and that the written description be made part of the record. If there is not a written agreement, it is essential that the agreement be carefully and completely described on the record. State ex rel. White v. Gray, 57 Wis.2d 17, 203 N.W.2d 638 (1973); State v. Lee, 88 Wis.2d 239, 26 N.W.2d 268 (1979).

Concessions to others; "Package agreements." The court must be alert for indications that the plea agreement contemplates concessions to a relative or close friend. This type of agreement "bears particular scrutiny by a trial or reviewing court conscious of the psychological pressures upon an accused such a situation creates." State ex rel. White v. Gray, 57 Wis.2d 17, 29, 203 N.W.2d 638 (1973). These agreements also must be reviewed from the point of view of whether they are in the public interest. State ex rel. White v. Gray, 57 Wis.2d 17, 29 30. Also see Seybold v. State, 61 Wis.2d 227, 212 N.W.2d 146 (1973).

Regarding "package plea agreements," see State v. Goyette, 2006 WI App 178, 295 Wis.2d 359, 722 N.W.2d 731. A "package plea agreement" refers to "a plea agreement that is contingent on two or more

codefendants all entering pleas according to the terms of the agreement. If one defendant does not enter a plea according to the agreement, the State is not bound by the agreement with respect to any of the defendants." 2006 WI App 178, ¶1. The court acknowledged that "package plea agreements carry with them the risk that one of the defendants will be improperly pressured into entering a plea," id. at ¶31, but found that any pressure felt in that case was not improper but was "self-imposed coercive element." See, Craker v. State, 66 Wis.2d 222, 223 N.W.2d 872 (1974).

Charges "dismissed outright." State v. Frey, 2012 WI 99, 343 Wis.2d 358, 817 N.W.2d 436, concluded that "dismissed outright" has no particular meaning for sentencing or plea agreement purposes and reaffirmed the standard rule on what may be considered at sentencing: the sentencing court may consider dismissed charges for proper purposes; the defendant should have the opportunity to "refute the purported inaccuracies of the facts underlying the dismissed charges." In the context of plea agreements, "dismissed charges do not have a static meaning. They are a product of the parties' negotiations and they mean what the parties intend them to mean" subject to the exception "that a plea agreement involving one or more dismissed charges cannot limit what the judge may consider at sentencing." ¶¶77, 78.

"Conditional" pleas. Plea agreements sometimes attempt to provide the defendant with the right to appeal adverse pretrial rulings. These attempts at a "conditional guilty plea" do not confer upon defendants any right to appeal they do not otherwise have. Section 971.31(10) allows appeals of orders denying motions to suppress evidence or motions challenging the admissibility of a statement of the defendant notwithstanding the guilty plea. No other adverse pretrial rulings may be appealed after a plea of guilty, including those relating to the constitutionality of a statute or denying or granting a motion in limine. Review of those issues is waived by a guilty plea. State v. White, 112 Wis.2d 178, 332 N.W.2d 756 (1983); State v. Riekkoff, 112 Wis.2d 119, 332 N.W.2d 744 (1983). The two cases emphasize that there were no "conditional" guilty pleas in Wisconsin and attempts to create them will not be given effect by appellate courts. However, pleas entered on the assumption that they are "conditional" may be subject to withdrawal as not having been voluntarily and intelligently made. This was the result in both White and Riekkoff: the defendant was allowed to withdraw the plea. Thus, in reviewing plea agreements and in accepting pleas generally, the court should be alert for indications that the parties may be trying to create a "conditional" plea.

Limits on sentencing advocacy. Wisconsin cases illustrate the apparent popularity of plea agreements that relate in some way to limitations on sentencing information or advocacy. Prosecutors may agree "not to oppose" a particular sentence or "to remain silent" at sentencing. One danger is that these agreements may conceal relevant information from the sentencing judge. "A plea agreement which does not allow the sentencing court to be appraised of relevant information is void [as] against public policy." State v. Naydihor, 2004 WI 43, Par. 21, 270 Wis.2d 585, 678 N.W.2d 220 (quoting State v. Ferguson, 166 Wis.2d 317, 324, 479 N.W.2d 241 (Ct. App. 1991). Also see the discussion in SM 34 Sentencing Procedures, Standards, And Special Issues, section VII.B. The general rule is clear: The parties cannot agree to limit the information the sentencing judge will consider. Also see, State v. McQuay, 154 Wis.2d 116, 452 N.W.2d 377 (1990).

14. **Advising that the court is not bound by the agreement**. In State v. Hampton, 2004 WI 107, ¶42, 274 Wis.2d 379, 683 N.W.2d 14, the court held:

> The essence of the mandate is that the court must engage in a colloquy with the defendant on the record at the plea hearing to ascertain whether the defendant understands that the court is not bound by a sentencing recommendation from the prosecutor or any other term of the defendant's plea agreement. The plea colloquy is defective if it fails to produce an exchange on

the record that indicates that the defendant understands the court is free to disregard recommendations based on a plea agreement for sentencing.

Question 16 was modified in 2007 to address the Hampton requirement more directly than the previous version did.

[See footnote 15, below, where the issue of the court and plea agreements is discussed in more depth.]

15. **Plea Agreements and the Trial Judge.** It is the firm policy in Wisconsin that trial judges not involve themselves in plea bargaining. State v. Wolfe, 46 Wis.2d 478, 175 N.W.2d 216 (1970); State v. Erickson, 53 Wis.2d 474, 192 N.W.2d 872 (1972). A 2003 decision of the court of appeals re-emphasized this rule: ". . . we adopt a bright-line rule barring any form of judicial participation in plea negotiations before a plea agreement has been reached." State v. [Corey] Williams, 2003 WI App 116, ¶ 1, 265 Wis.2d 229, 666 N.W2d 58. But see, State v. Hunter, 2005 WI App 5, 278 Wis.2d 419, 692 N.W2d 256: "the Williams rule does not require automatic plea withdrawal whenever a court expresses its view of the strength of the State's case or advises a defendant to consider to the advisability of pursuing a disposition short of trial."

To assure that this policy is carried out, and to assure the integrity of the sentencing function (see Erickson, supra), the judge should make it clear to the defendant that the prosecutor's recommendations about the sentence are not binding on the court and that the court is free to impose the maximum sentence allowed by statute for the offense. See footnote 14, supra.

Advising that a plea agreement will not be followed. Some Wisconsin judges prefer the practice of letting the defendant know if a plea agreement recommends a disposition that the judge finds to be unacceptable and afford the defendant the opportunity to withdraw the guilty plea at that point. (Judges who follow this practice need to modify, or omit, questions 15 and 16.) This is similar to the practice recognized by the ABA Standards For Criminal Justice, which allows the parties to give advance notice of the plea agreement to the judge and allows the judge to indicate whether he or she would concur in the agreement if such concurrence is consistent with the material disclosed in the presentence report. Section 3.3, ABA Standards Relating To The Plea Of Guilty. Also see Rule 11(c) of the Federal Rules Of Criminal Procedure. The Wisconsin Supreme Court has declined to adopt this practice as a statewide requirement. Melby v. State, 70 Wis.2d 368, 234 N.W.2d 634 (1975).

The Wisconsin Supreme Court reviewed the issue in State v. [Adrian] Williams, 2000 WI 78, 236 Wis.2d 293, 613 N.W.2d 132. The defendant in this appeal asked the court "to adopt a new rule of procedure, which would require that if a trial judge anticipates exceeding the state's sentence recommendation under a plea agreement, the trial judge must inform the defendant of that fact and allow the defendant to withdraw his or her plea." ¶1. The court denied the request, reaffirming the traditional rule against judicial participation in the plea agreement process. [Also see, In re the Amendment of Rules, 128 Wis.2d 422 (1986), where the court rejected a petition of the Wisconsin Judicial Council that asked the court to adopt rules for a similar process.]

But see, State v. Marinez, 2008 WI App 105, 313 Wis.2d 490, 756 N.W.2d 570, where the court held that a trial judge may indicate that a plea agreement will not be followed and allow the defendant to withdraw the plea. The court reads the Williams decision, supra, as holding that this procedure should not be required and not that the practice is forbidden.

Promises not to charge or to dismiss or reduce pending charges. While the trial judge is clearly

not bound by the prosecutor's recommendations as to sentence, promises to drop pending charges or not to bring potential charges are largely beyond the judge's control. Promises not to pursue uncharged offenses are, of course, generally beyond judicial scrutiny. And, prosecutors are allowed great discretion in making decisions about the dismissal or reduction of pending charges as part of plea agreements. See, for example, United States v. Cowan, 524 F.2d 504 (5th Cir. 1975), and United States v. Ammidown, 497 F.2d 617 (D.C. Cir. 1973). However, a trial court retains the authority to refuse to grant a motion to reduce or dismiss charges in limited situations: ". . . (p)rosecutorial discretion to terminate a pending prosecution in Wisconsin is subject to the independent authority of the trial court to grant or refuse a motion to dismiss 'in the public interest.'" State v. Kenyon, 85 Wis.2d 36, 45, 270 N.W.2d 160 (1978).

The rule regarding "refusal to dismiss in the public interest" was reaffirmed in State v. Conger, 2010 WI 56, 325 Wis.2d 664, 797 N.W.2d 341. The court held that "a circuit court must review a plea agreement independently and may, if it appropriately exercises its discretion, reject any plea agreement that does not, in its view, serve the public interest." ¶3. While what constitutes the public interest "is a consideration that is not capable of precise outlines . . . [and] the factors that a court may weigh . . . will vary from case to case. One appropriate factor among many may well be the viewpoint of law enforcement. . ." ¶4 [The primary concern in the case was a plea agreement calling for the reduction of felony charges to misdemeanors.]

For an application of the Kenyon standard, and a conclusion that a trial court erred in refusing to grant a prosecutor's motion to dismiss, see State v. Rivera-Hernandez, Nos. 2018AP311-CR & 2018AP312-CR, unpublished slip op. (WI App Feb. 20, 2019). A similar conclusion was reached in a federal case originating in Wisconsin, In Re United States Of America [U.S. v. Bitsky], 545 F.3d 450 (7th Cir. 2003).

Section 971.315 requires that "[b]efore a court dismisses a criminal charge against a person, the court shall inquire of the district attorney whether he or she has complied with s. 971.095(2)." See footnote 2, supra.

Limits on sentencing advocacy. Certain types of plea agreements may indicate the need to assure that defendants understand what they have bargained for. This is increasingly common in situations where the agreement involves a prosecutor's commitment to make no recommendation as to sentence or "not to oppose" a particular sentence that the defendant may argue for. If the prosecutor promises to make no recommendations but the presentence report recommends a substantial sentence, has the defendant received what he has bargained for? Literally, he has, if the prosecutor has in fact not argued for the substantial sentence, but as a practical matter, the agreement is not being carried out. The trial judge may have a limited role to play in this situation: in determining whether the defendant understands the plea agreement, it may be appropriate to clarify that the prosecutor's agreement regarding sentence binds only the prosecutor and not the court or the person who may prepare the presentence report. See cases cited in footnote 13, above.

16. Read-ins. If the plea agreement includes "read-ins," the description of the agreement must include them. Austin v. State, 49 Wis.2d 727, 183 N.W.2d 56 (1971). The offenses which are "read in" should be identified as accurately as possible to avoid later questions about the scope of the prosecutor's promise not to charge the other offenses. The text regarding read-ins is based on that found in CR-227.

In State v. Sulla, 2016 WI App 46, 369 Wis.2d 405, 880 N.W.2d 659, the defendant sought to withdraw his no contest pleas on the ground that he did not understand the effect a read-in charge could have at sentencing – even though the plea questionnaire and the judge's colloquy addressed the topic. The trial court denied his motion without a hearing; the court of appeals remanded the case for a hearing on Sulla's

claim. The supreme court reversed the court of appeals, concluding that no hearing was required and that the record of the plea hearing established that Sulla was fully advised of the effect of the read-ins. Two justices concurred, urging that special care be taken in this situation because, as with Alford pleas, there is a need for additional clarification – citing SM-32A, which addresses no contest and Alford pleas, as a model.

In State v. Straszkowski, 2008 WI 65, 310 Wis.2d 259, 750 N.W.2d 835, the defendant sought to withdraw his guilty plea, claiming he did not know that he was admitting that he committed crimes that were read in. The court held that plea withdrawal was not required and sought to clarify the nature of read-ins:

> ¶5 Although the case law on read-in charges is neither consistent nor clear, a proper reading of the history of Wisconsin's read-in procedure demonstrates that it is not a critical component of a read-in charge that the defendant admit guilt of the charge (or that the defendant's agreement to read in the charge be deemed an admission of guilt) for purposes of sentencing. In sum, no admission of guilt from a defendant for sentencing purposes is required (or should be deemed) for a read-in charge to be considered for sentencing purposes and to be dismissed. To avoid confusion, prosecuting attorneys, defense counsel, and circuit courts should hereafter avoid (as they did in the instant case) the terminology "admit" or "deemed admitted" in referring to or explaining a defendant's agreement to read in a dismissed charge. A circuit court should advise a defendant that it may consider read-in charges when imposing sentence but that the maximum penalty of the charged offense will not be increased; that a circuit court may require a defendant to pay restitution on any read-in charges; and that the State is prohibited from future prosecution of the read-in charge.
>
> ¶6 Although we hold that no admission of guilt from a defendant is required for a read-in offense to be dismissed and considered for sentencing purposes, this decision does not bar a circuit court from accepting a defendant's admission of guilt of a read-in charge. This decision does not address what plea colloquy duties a circuit court might have with respect to such an admission, the issue the defendant raises. Our narrow holding is that an admission of guilt is not required by our read-in procedure and that the circuit court should avoid the terminology "admit" or "deemed admitted" in referring to or explaining a read-in charge for sentencing purposes except when a defendant does admit the read-in charge.

NOTE: In some cases, the plea agreement may call for an admission to uncharged offenses or dismissed charges as in, for example, sexual assault cases where the intent is to acknowledge all victims.

17. **Possibility of probation revocation**. Advice on the consequences of probation revocation is not expressly required by Wisconsin case law, but the Committee recommends that it be included to assure that defendants fully understand the potential penalty they are facing. See State v. James, 176 Wis.2d 230, 232 33, 500 N.W.2d 345 (Ct. App. 1993): "in accepting a negotiated plea for probation, the trial court should but is not required to advise the defendant of the potential maximum term to which he or she would be subjected in the event probation is revoked."

18. **Coercion**. The essence of the "coercion" aspect of a plea's voluntariness is that "[w]hen the defendant is not given a fair or reasonable alternative to choose from, the choice is legally coerced." Rahhal v. State, 52 Wis.2d 144, 151, 187 N.W.2d 800 (1971). The Wisconsin cases have distinguished "self-imposed coercive elements" which do not affect the voluntary nature of the plea: religious beliefs and family desires, Craker v. State, 66 Wis.2d 222, 223 N.W.2d 872 (1974); desire to avoid implicating the

defendant's wife, Drake v. State, 45 Wis.2d 226, 172 N.W.2d 664 (1969). Also see State ex rel. White v. Gray, 57 Wis.2d 17, 203 N.W.2d 638 (1973).

In State v. Basley, 2006 WI App 253, 298 Wis.2d 232, 726 N.W.2d 671, the alleged source of coercion was defense counsel's threat to withdraw on the morning of trial. The case was remanded for a hearing on the defendant's motion to withdraw his plea.

19. **Understanding the elements of the crime charged**. Like establishing the factual basis for the plea (see footnote 26), establishing that the defendant understands the crime charged need not be pursued in any single, set manner. Martinkoski v. State, 51 Wis.2d 237, 186 N.W.2d 302 (1971); State v. Bagnall, 61 Wis.2d 297, 212 N.W.2d 122 (1973). The court must "determine a defendant's understanding of the nature of the charge and establish that the defendant has an awareness of the essential elements of the crime." State v. McKee, 212 Wis.2d 488, 491, 569 N.W.2d 93 (1997), citing State v. Bangert, 131 Wis.2d 246, 389 N.W.2d 12 (1986). McKee rejected the defendant's argument that the trial court was required to specify which aspect of his conduct supported which of the charges against him. If the "essential elements" are identified in the plea colloquy, Bangert does not require that the court define or explain those elements. State v. Trochinski, 2002 WI 56, 253 Wis.2d 38, 644 N.W.2d 891.

In State v. Brown, 2006 WI 100, 293 Wis.2d 594, 716 N.W.2d 906, the court ordered withdrawal of a guilty plea because the trial court did not address the facts or elements of the crimes in a manner sufficient to establish that the defendant understood the charges. The court extensively reviewed Bangert [referred to as "a timeless primer"] and again strongly encouraged courts to follow the full plea acceptance procedures as outlined in SM-32.

Methods. Bangert, supra, identified several methods that can be used to ascertain the defendant's understanding of the nature of the charges:

1) summarize the elements of the crime by reading from the appropriate jury instructions or from the applicable statute;

2) ask defense counsel whether he or she explained the nature of the charge to the defendant and request that counsel summarize the extent of the explanation, including a reiteration of the elements;

3) expressly refer to the record or other evidence of the defendant's understanding established before the plea hearing, including any signed statements.
131 Wis.2d 246, 268.

"Elements" outside the offense definition. The Committee recommends advising on all elements of the crime to which the plea is entered, including elements that are incorporated by reference in the offense definitions. One example is a crime requiring sexual contact – the definition of sexual contact requires that the touching be for a sexual purpose, an element that is sometimes overlooked. See, for example, State v. Nichelson, 220 Wis.2d 214, 582 N.W.2d 460 (1998), where plea withdrawal was ordered because the colloquy did not indicate that the defendant understood the State had to prove that the defendant's purpose in touching the child was his own sexual gratification. The same result was reached in State v. Jipson, 2003 WI App 222, 267 Wis.2d 467, 671 N.W.2d 18. Also see, State v. Bollig, 2000 WI 16, 232 Wis.2d 561, 605 N.W.2d 199: advice on the "purpose" element should have been given but the error was cured by other facts in the record. Also see, State ex rel Patel v. State, 2012 WI App 117, 344 Wis.2d 405, 824 N.W.2d 862 (in a child enticement case based on intent to engage in sexual contact, the purpose of the touching is

an element of the crime; however, coram nobis is not the proper remedy for addressing the trial court's failure to identify that element during the plea colloquy).

There are other similar situations:

- attempts – the elements of the intended crime must be included.
- felony murder – the elements of the underlying felony must be included.
- bail jumping based on commission of a new crime – the elements of the new crime must be included,

There is authority to the contrary with respect to at least two crimes. State v. Steele, 2011 WI App 34, 241 Wis.2d 269, 625 N.W.2d 595, involved a plea to burglary with intent to commit a felony. The court of appeals held that the failure to specify the intended felony in the colloquy was not a defect because the nature of the specific felony was not an essential element of the burglary charge. ¶9. State v. Hendricks, 2018 WI 15, 379 Wis.2d 549, 906 N.W.2d 666, involved a plea to child enticement based on the intent to engage in sexual contact. The supreme court held that the failure to specify the elements of sexual contact in the colloquy was not a defect because it was not an essential element of the child enticement charge.

Despite the decisions in Hendricks and Steele holding that plea withdrawal is not required where there is arguably a shortfall in the elements addressed in the colloquy, the Committee concluded that the preferred plea acceptance practice is to include them.

Inconsistencies between the plea questionnaire and the oral colloquy. In State v. Brandt, 226 Wis.2d 610, 594 N.W.2d 759 (1999), the defendant sought to withdraw his plea because a written form that was used was inaccurate as to the elements of the crime. However, the trial court conducted a complete and accurate oral colloquy. The supreme court concluded that "where . . . a circuit court ignored the plea questionnaire in its colloquy concerning the elements of the crimes, the adequacy of that colloquy rises or falls on the circuit court's discussion at the plea hearing. In such cases, the adequacy or deficiency of the plea questionnaire is not at issue because it does not constitute the basis on which the plea is accepted." 226 Wis.2d 610, ¶24.

20. **Special issues**. The duty to inquire may extend beyond the statutorily defined elements of the offense. So-called penalty enhancers, such as committing a crime while armed with a dangerous weapon (§ 939.63), should be included in the description of the "elements" of the crime. (See footnote 4, supra, for a complete list of penalty enhancers.)

Likewise, especially complicated issues relating to the charge should also be explored. For example, if the defendant is charged as an aider and abettor, the court should make it clear that if the plea is accepted, the defendant stands in exactly the same position as the one who directly committed the crime. See Nash v. Israel, 707 F.2d 298 (7th Cir. 1983). The plea colloquy must address party to crime liability in order to show that the defendant had the necessary understanding of the crime charged. State v. Howell, 2007 WI 75, ¶¶44-51, 301 Wis.2d 350, 734 N.W.2d 48; State v.[James] Brown, 2006 WI 10, ¶55, 293 Wis.2d 594, 716 N.W.2d 906. But see, State v. [Calvin] Brown, 2012 WI App 139, ¶15, 345 Wis.2d 333, 824 N.W.2d 916, holding that advice on party to crime liability would have been superfluous where the facts showed that the defendant directly committed the crime (even though the charge referred to party to crime).

Defenses. Inquiry into defenses which are fairly raised by the facts known to the judge is recommended at this point in the plea acceptance procedure. For example, if, in a battery case, there is evidence that might support a claim of self-defense, the court should inquire to assure that it has at least

been considered by the defendant and defense counsel. Case law has discussed this issue in connection with the factual basis requirement. See footnote 26.

In State v. Ravesteijn, 2006 WI App 250, 297 Wis.2d 663, 727 N.W.2d 53, the defendant challenged his guilty plea to kidnapping for ransom on the ground that he was not advised by the court that the penalty could be reduced from a Class B to a Class C felony if the victim was released without permanent physical injury. The court of appeals apparently holds that the plea was valid, but:

> ¶31. . . . . Ravesteijn's unknowing waiver of the opportunity to reduce the charge to a Class C felony and thereby reduce his potential punishment resulted in manifest injustice. Resentencing is all that is necessary to correct the injustice done here. Therefore the sentence imposed pursuant to Wis. Stat. § 940.31(2)(a), a Class B felony, is set aside and vacated. The cause is remanded for a determination of whether Ravesteijn is guilty of a Class B or Class C felony.

In State v. Lackershire, 2007 WI 74, 288 Wis.2d 609, 707 N.W.2d 891, the court held there was a defect in establishing a factual basis for a guilty plea to second degree sexual assault of a child, where the defendant claimed to be the victim of a sexual assault by the "child." The court held that being a victim constitutes a defense and that the trial court should have explored that issue as part of the factual basis inquiry: ". . . If the defendant was raped, the act of having sexual intercourse with a child does not constitute a crime. § 948.01(6)." ¶29. The court relied on State v. Olson, 2000 WI App. 158, 238 Wis.2d 74, 616 N.W.2d 144, to conclude that the entire definition of sexual intercourse in § 948.01(6) is modified by the phrase "by the defendant or upon the defendant's instruction." Thus, sexual intercourse resulting from being forced to engage in it by the other party is not "by the defendant or upon the defendant's instruction."

21. **Equivocal or vague responses**. If the defendant denies an element of the crime, or equivocates about its existence, a careful inquiry must be made to assure that the defendant actually wants to plead guilty to that crime. The denial or vague response may be an indication that the defendant is not certain about admitting guilt. Responses of that nature should not be considered the equivalent of an express intention to plead no contest or to enter an Alford plea. See the discussion in SM 32A regarding the special considerations in accepting no contest and Alford pleas.

If, after further inquiry, the defendant persists in denying an essential element, the court should not accept the guilty plea (unless an Alford plea is expressly being pursued). Johnson v. State, 53 Wis.2d 787, 193 N.W.2d 659 (1972); State v. Stuart, 50 Wis.2d 66, 183 N.W.2d 155 (1971).

22. The material in brackets was added in 1995 in part as a response to the decision in State v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995), see footnote 7, supra.

The Committee does not encourage or recommend the routine acceptance of Alford or no contest pleas. The alternatives provided are intended to assure that, if the trial court decides to accept those pleas, the defendant clearly understands the consequences and that a complete record is made of that understanding.

23. **Waiver of trial-related rights**. State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), reaffirmed the requirement that the trial court make a record of the defendant's understanding of the constitutional rights being waived by the plea. The court also stated:

> Henceforth, we will also require as a function of our supervisory powers that state courts at the plea hearing follow the provisions set forth in Wis JI-Criminal SM-32 (1985), Part V, Waiver of

> Constitutional Rights, or specifically refer to some portion of the record or communication between defense counsel and defendant which affirmatively exhibits defendant's knowledge of the constitutional rights he will be waiving. The court must then as before, ascertain whether the defendant understands he will be waiving certain constitutional rights by virtue of his guilty or no contest plea. 131 Wis.2d 246, 271 72.

[NOTE: What Bangert refers to as "Part V" is numbered "VI." in this version.]

In State v. Pegeese, 2019 WI 60, 387 Wis.2d 119, 928 N.W.2d 590, the Wisconsin Supreme Court concluded that courts are not required to address each constitutional right that is waived:

¶4 . . . We further decline to exercise our superintending authority to impose a specific requirement that at a plea hearing circuit courts must individually recite and specifically address each constitutional right being waived and then otherwise verify the defendant's understanding of each constitutional right being waived.

However, the decision refers to SM-32 in footnote 8 at ¶41:

8. Though today we do not require circuit courts to recite any particular magic words when conducting a plea colloquy, circuit courts should be mindful of the suggested plea colloquy in Wis JI–Criminal SM-32 (2007). See Bangert, 131 Wis. 2d at 268 (stating that circuit courts can use Wis JI–Criminal SM-32 (1985) as one method of fulfilling the requirements under Bangert).

There must be assurance that the defendant is personally waiving trial-related constitutional rights, even if a written plea acceptance form is used. See State v. Moederndorfer, 141 Wis.2d 823, 416 N.W.2d 627 (Ct. App. 1987) and State v. Hansen, 168 Wis.2d 749, 485 N.W.2d 74 (Ct. App. 1992). If the defendant attempts to enter a no contest plea but refuses to waive any constitutional rights, the plea should not be accepted. See State v. Minniecheske, 127 Wis.2d 234, 378 N.W.2d 283 (1985).

The material in this section was revised in 2019 to make it more consistent and understandable. No change in substance was intended.

24. Trial courts may wish to change the wording of the first part of question 23 for Alford pleas. The following is suggested:

> "By entering an Alford plea, you are conceding that the State has strong evidence that you committed the crime and, thus, ..."

25. **Entry of the plea**. Note that SM-32 advises that the plea be "entered" at this point, but not "accepted." The distinction is an important one, because jeopardy attaches upon the acceptance of the plea. State v. Comstock, 168 Wis.2d 915, 947, 485 N.W.2d 354 (1992). The procedures set forth to this point are intended to assure that the plea is voluntarily and understandingly made. Before formally accepting the plea, the court must also be satisfied that a factual basis exists.

26. **Factual Basis**. In Ernst v. State, 43 Wis.2d 661, 170 N.W.2d 713 (1969), the Wisconsin Supreme Court held that the then-existing procedures of Rule 11 of the Federal Rules of Criminal Procedure were required in state courts as a matter of federal constitutional law, citing Boykin v. Alabama, 395 U.S. 238 (1969). [It is now clear that Rule 11 procedures are not constitutionally required in state practice. State v. Bangert, supra, footnote 20, at 259 60.] The text of what is now Rule 11(b)(3) is the source of the "factual

basis for the plea" requirement: "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."

The statutory requirement in Wisconsin is that the court "make such inquiry as satisfies it that the defendant in fact committed the crime charged." Section 971.08(1)(b). It may be helpful to view the factual basis as requiring that facts be presented to support a finding that each element of the crime is present.

Wisconsin cases have referred to the purpose of the factual basis as "determining whether the facts, if proved, constitute the offense charged and whether the defendant's conduct does not amount to a defense." Edwards v. State, 51 Wis.2d 231, 236, 186 N.W.2d 193 (1971). In State v. Black, 2001 WI 31, 242 Wis.2d 126, 624 N.W.2d 363, the court held that:

> . . . a factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one. ¶16

Two justices dissented, citing the earlier cases like Edwards for the "does not constitute a defense" rule. The majority apparently accepted this as a general rule, but concluded it did not apply on the facts of the Black case.

In State v. Lackershire, 2007 WI 74, 288 Wis.2d 609, 707 N.W.2d 891, the court held there was a defect in establishing a factual basis for a guilty plea to second degree sexual assault of a child, where the defendant claimed to be the victim of a sexual assault by the "child." The court held that being a victim constitutes a defense and that the trial court should have explored that issue as part of the factual basis inquiry. See the discussion in footnote 20, supra.

The Committee recommends that the trial court inquire into defenses that are fairly raised by the facts relied on to establish the factual basis for the plea.

27. **Factual Basis for a Related Crime**. In most cases, a factual basis is established for the crime to which the plea is entered. Sometimes, usually in the context of a plea bargain, a plea is offered to a crime that does not closely match the conduct which the factual basis establishes. For example, a defendant may plead guilty to a disorderly conduct charge in a case originally charged as theft or burglary. In the Committee's judgment, it should be sufficient if a factual basis is shown for a more serious offense that is related to the defendant's conduct. This should be the case even if a true greater-and-lesser included offense relationship does not exist. A flexible approach is especially important in light of the strict "statutory elements" test used to analyze lesser included offenses. See, for example, Randolph v. State, 83 Wis.2d 663, 266 N.W.2d 334 (1978). Also see, SM-6, Jury Instructions On Lesser Included Offenses.

This conclusion is arguably inconsistent with part of the description of the factual basis requirement in Ernst v. State, 43 Wis.2d 661, 170 N.W.2d 713 (1969). Ernst quoted Federal Rule 11 and McCarthy v. United States, 394 U.S. 459 (1969), in stating that the record must show that the conduct which the defendant admits, ". . . constitutes the offense charged in the indictment or information, or an offense included therein to which the defendant is pleading guilty." (Emphasis added.) Taken literally, this would mean, for example, that on a negotiated plea of guilty to disorderly conduct arising out of theft, the court could not accept the plea since disorderly conduct is not a lesser included offense of theft. It is the opinion of the Committee, however, that the Wisconsin Supreme Court did not intend to so confine or narrow guilty plea practice and that the requirements of Ernst are met if the trial court satisfies itself that the plea is

voluntarily and understandingly made and that a factual basis is shown for either the offense to which the plea is offered or to a more serious charge reasonably related to the defendant's conduct. Two decisions of the Wisconsin Court of Appeals reach different results on this issue.

In State v. Harrell, 182 Wis.2d 408, 513 N.W.2d 676 (Ct. App. 1994), the defendant was charged with three counts of first degree sexual assault of a child; another count was added after the preliminary examination. A plea agreement was reached whereby the defendant entered a no contest plea to one count of second degree sexual assault of a child and one count of third degree sexual assault. The parties agreed to use the complaint as the factual basis. The defendant moved to withdraw his plea after sentencing, claiming that he was not advised he was waiving his right to a unanimous jury and that no factual basis was established for the third degree sexual assault offense because there was no showing of "without consent." The court of appeals rejected both claims. As to the factual basis issue, the court noted that more flexibility is allowed when there is a plea bargain. It is enough if a factual basis is shown for the offense to which the plea is entered or for a more serious offense reasonably related to that offense. In a footnote, the court indicated its decision "adopts in part the reasoning of the Wisconsin Jury Instruction Committee," citing SM 32. 182 Wis.2d 408, 418.

In State v. Harrington, 181 Wis.2d 985, 512 N.W.2d 261 (Ct. App. 1994), the defendant was charged with burglary and agreed to plead no contest to felony theft. The probable cause statement in the complaint was not changed. The parties stipulated that the complaint furnished a factual basis for the plea and the defendant was found guilty of felony theft. On appeal, the court found that the complaint furnished a factual basis for burglary but not for felony theft because there were no facts regarding the value of the stolen property. The court said that the state pointed to no authority for the proposition that a factual basis for the more serious offense is sufficient and granted relief to the defendant. SM 32 was not mentioned. The relief granted was to remand for sentencing on misdemeanor theft – not withdrawal of the plea, citing State v. White, 85 Wis.2d 485, 271 N.W.2d 97 (1978).

Harrell and Harrington flatly contradict one another. The conflict was not reviewed: the petition to review in Harrell was dismissed as untimely; no petition to review was filed in Harrington. No published decision has resolved this conflict although two decisions have appeared to accept the Harrell rule. In State v. Smith, 202 Wis.2d 21, 549 N.W.2d 232 (1996), the court held that an Alford plea could not be accepted to a crime that it was "legally impossible" for him to commit. "Strong proof of guilt" could not be found in that situation because the crime to which the plea was entered required that the victim be under the age of 16 and it was undisputed that the victim was 16 years old. The court acknowledged the Harrell decision, but found it inapplicable in this situation because there could not be "strong proof" of the age element of the crime. In State v. West, 214 Wis.2d 468, 571 N.W.2d 196 (Ct. App. 1997), the court of appeals declined to apply Harrell because the crime to which the plea was offered and the crime for which a factual basis was offered had the same penalty. Thus, the court held, there was no factual basis for the crime of conviction or for a more serious offense.

In light of this history, the Committee reaffirms its conclusion that it should be sufficient "that a factual basis is shown for either the offense to which the plea is offered or to a more serious charge reasonably related to the defendant's conduct." Trial judges should be cautious of offers to "stipulate to the complaint" as the factual basis, where the plea is to a different offense than the one charged in the complaint.

28. **Alford pleas – "strong evidence of guilt."** To accept an Alford plea, the court must find that the evidence the State would offer at trial constitutes "strong proof of guilt." State v. Garcia, 192 Wis. 2d 845, 859 60, 532 N.W.2d 111 (1995). Also see, State v. Johnson, 105 Wis.2d 657, 663, 314 N.W.2d 897 (Ct. App. 1991). "The requirement of a higher level of proof in Alford pleas is necessitated by the fact that

the evidence has to be strong enough to overcome a defendant's 'protestations' of innocence." State v. Smith, 202 Wis.2d 21, 27, 549 N.W.2d 232 (1996). "'Strong proof of guilt' is not the equivalent of proof beyond a reasonable doubt, but it is 'clearly greater than what is needed to meet the factual basis requirement under a guilty plea.'" State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 645, 579 N.W.2d 698 (1998), citing State v. Smith, supra.

The Alford decision used the phrase "strong evidence of guilt," while the Wisconsin decisions tend to use "strong proof of guilt." The Committee does not believe there is a significant difference between "evidence" and "proof" in this context; the term "strong evidence of guilt" is used in the Special Material.

29. Factual basis – methods. Edwards v. State, 51 Wis.2d 231, 186 N.W.2d 193 (1971); Morones v. State, 61 Wis.2d 544, 213 N.W.2d 31 (1972). Accepted methods are listed in the text accompanying notes 31 34. The same rule applies to Alford pleas, which do not require any specific method for establishing a factual basis showing strong proof of guilt. State v. Nash, 2020 WI 85, ¶¶36-39, 47-49, 394 Wis.2d 238, 951 N.W.2d 404.

Some courts follow a practice of personally addressing defendants to establish the factual basis, or of asking defendants if they agree with the facts established by the state. It may not be possible to require defendants to incriminate themselves, even though the guilty plea is being entered. In a different context, the Wisconsin Supreme Court held that the privilege against self-incrimination survives a plea of guilty and continues at least until sentencing. State v. McConnohie, 121 Wis.2d 57, 358 N.W.2d 256 (1984). Also see, Mitchell v. U.S., 526 U.S. 314 (1999): neither a guilty plea nor making statements at the plea colloquy waive the 5th Amendment privilege.

The relationship between determining the factual basis and the defendant's agreement that a factual basis exists was considered in State v. Thomas, 2000 WI 13, 232 Wis.2d 714, 605 N.W.2d 836. The court held that "the defendant need not admit to the factual basis in his or her own words; the defense counsel's statements suffice." 232 Wis.2d 714, ¶18. "All that is required is for the factual basis to be developed on the record – several sources can supply the facts." 232 Wis.2d 714, ¶20. "[A] judge may establish the factual basis as he or she sees fit, as long as the judge guarantees that the defendant is aware of the elements of the crime, and the defendant's conduct meets those elements." 232 Wis.2d 714,¶22.

Not only is a full confession not required, a guilty plea may be accepted even if the defendant maintains innocence. North Carolina v. Alford, 400 U.S. 25 (1970); State v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995). See footnote 24, supra. [For a discussion of the acceptance and effects of an "Alford plea, see SM 32A, No Contest And Alford Pleas. SM 32A emphasizes that before an Alford plea is accepted, the judge take care to insure that there is strong evidence of guilt and that the defendant clearly wants to plead guilty despite his claim of innocence, with full understanding of the charge, of its consequences, and with the advice of competent counsel.]

30. Edwards, supra, 51 Wis.2d 231, 236.

31. Edwards, Morones, supra. But see Christian v. State, 54 Wis.2d 447, 195 N.W.2d 470 (1972), holding, in absence of stipulation of parties, that while the record of the preliminary did show the critical facts of the case, alone it would not have been enough to establish factual basis for the plea.

32. Edwards, supra; Spinella v. State, 85 Wis.2d 494, 271 N.W.2d 91 (1978).

33. Bressette v. State, 54 Wis.2d 232, 194 N.W.2d 635 (1972); State v. Jackson, 69 Wis.2d 266, 230

N.W.2d 832 (1975); and Levesque v. State, 63 Wis.2d 412, 217 N.W.2d 317 (1974).

34. Craker v. State, 66 Wis.2d 222, 223 N.W.2d 872 (1974).

35. Even if there is a stipulation to the factual basis, the court must find that facts are established which are sufficient to support all the required elements of the crime.

36. **Repeater provisions**. Repeater provisions can be an issue at three different stages of the plea acceptance procedure: 1) when the maximum penalty for the offense is identified – see footnote 3, supra, recommending that "all applicable penalty enhancers should be included in the description of the maximum penalty, such as repeater allegations under § 939.62. . ."; 2) when the defendant's understanding of the crime charged is determined – see footnote 19, supra, advising that this duty may extend beyond the statutorily defined elements of the offense to things like penalty enhancers; and, 3) when the factual basis for the plea is established – question 31 was added to meet this need, not only to assure the validity of the plea but also to provide the proof of repeater status required before sentencing.

Adding a question like number 31 was suggested by the court of appeals in State v. Goldstein, 182 Wis.2d 251, 261, 513 N.W.2d 631 (Ct. App. 1994):

One simple and direct question to the defendant from either the prosecutor or the trial judge asking whether the defendant admits to the repeater allegation will, in most cases, resolve the issue. We suggest that trial judges include this question in their colloquy with the defendant at the plea hearing (if there is one) or, otherwise, at the time of sentencing.

The Wisconsin Supreme Court has given similar advice in a case involving sentencing as a repeater after a jury trial: "The trial court may ask the defendant the direct question while observing the defendant's criminal record before him whether the defendant was convicted on a particular date of a specific crime. . . ." State v. Farr, 119 Wis.2d 651, 659, 350 N.W.2d 640 (1984).

Question 31 is modeled after the one suggested in Farr.

37. In the Committee's judgment, it should be sufficient if a factual basis is shown for a more serious offense that is related to the defendant's conduct. See the discussion in footnote 27, supra.

38. It is at this point that the plea is formally accepted. This is when jeopardy attaches. See State v. Comstock, discussed in footnote 25, supra.

39. In the usual case, the court states that the defendant is adjudged convicted immediately after the finding of guilty is made. However, practices are common which stop short of a finding of guilt or entry of a judgment of conviction. The court should accept the plea but defer making a finding of guilt. Section 961.47, Conditional Discharge for Possession as First Offense, authorizes this sort of procedure. Persons found guilty of possession of a controlled substance under § 961.41(3g)(b), and who have not previously been convicted of a crime involving controlled substances, are eligible for special disposition under this section. No judgment of conviction is entered, and the defendant avoids a criminal conviction if probation is successfully completed. (Section 961.47 states that a "judgment of guilt" is not entered. The Committee believes "judgment of guilt" is the equivalent of "judgment of conviction.")

SM-32A NO CONTEST AND ALFORD PLEAS

CONTENTS

I. The Pleas Compared

Guilty pleas are recognized as substitutes for the adjudication of guilt by trial for two reasons: the plea constitutes a waiver of trial by the accused (sometimes characterized as a consent to the entry of judgment); and the plea constitutes an express admission that the defendant committed the act charged. The no contest plea and the Alford plea both lack an express admission of guilt. With a no contest plea, the defendant refuses to admit guilt (or admits guilt solely for the purposes of the instant criminal proceeding). With an Alford plea, the defendant expressly maintains innocence while choosing to plead guilty.

The legitimacy of both pleas has been recognized by the courts. But special caution is required of the trial judge who considers accepting either a no contest or an Alford plea. It must be assured that the defendant knows what he or she is doing and that the apparent conflict between the refusal to admit guilt and the consent to entry of judgment is expressed on the record and acknowledged.

The terms "no contest plea" and "Alford plea" are sometimes used interchangeably. However, the Alford case clearly dealt with a guilty plea, not a plea of no contest, so there are two different entities. An Alford plea goes beyond a no contest plea in the sense that the former involves an outright claim of innocence while the latter involves something less than an express admission of guilt. [Cited with approval in State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 632, 579 N.W.2d 698 (1998).]

While there may be a conceptual difference between the two pleas, for purposes of accepting the pleas, any such difference "is of no constitutional significance . . ., for the constitution is concerned with practical consequences, not the formal categorizations of state law." North Carolina v. Alford, 400 U.S. 25, 37 (1970). [For reference to a complete hybrid, a "no contest plea with a claim of innocence," see Estate of Safran, 102 Wis.2d 79, 306 N.W.2d 27 (1981).]

II. Plea Of No Contest

A. Description

Historically labeled "nolo contendere," the correct title for this plea is now "no contest." The essential characteristics of the no contest plea are:

1. when accepted by the court it constitutes an admission of guilt for the purposes of the case which supports a judgment of conviction and is in that respect equivalent to a plea of guilty; and
2. the plea cannot be used collaterally against the defendant, as, for example, in a

later civil action.
Lee v. State Board of Dental Examiners, 29 Wis.2d 330, 334, 139 N.W.2d 61 (1966).

B. Effect Of A No Contest Plea

1. A no contest plea supports a fully effective criminal conviction

Whatever the distinction between a no contest plea and a guilty plea, it does not carry over to the conviction. "A judgment of conviction based on a plea of nolo contendere is a conviction which contains all the consequences of a conviction based on a plea of guilty or a verdict of guilty. There is no difference in the nature, character or force of a judgment of conviction depending upon the nature of the underlying plea." Lee, supra, 29 Wis.2d 330, 335. But see § 908.03(22) discussed below.

Thus, a conviction following a no contest plea is a full-blown criminal conviction for all purposes, such as later invocation of repeater statutes (State v. Suick, 195 Wis. 175, 217 N.W. 743 (1928); State v. Brozosky, 197 Wis. 446, 222 N.W. 311 (1928)) and revocation of a professional license (State v. Lee, supra).

2. Collateral use of a no contest plea is prohibited

The usual distinction between a guilty plea and a no contest plea is that a guilty plea constitutes an express admission of guilt which can be used against the defendant in collateral proceedings while a no contest plea is an admission only for the purposes of the criminal case and cannot be collaterally used. This distinction is recognized and preserved in the Wisconsin Rules of Evidence.

Section 904.10 forbids the later use of no contest pleas, offers to plead no contest, and statements made in connection with those pleas or offers:

> 904.10 Offer to plead guilty; no contest; withdrawn plea of guilty. Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.

Section 908.03(22) recognizes that the hearsay rule does not exclude evidence of criminal judgments offered to prove facts essential to the judgment but provides an

exception for judgments of conviction based on no contest pleas:

> 908.03 Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> . . . .
> (22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of no contest, adjudging a person guilty of a felony as defined in §§ 939.60 and 939.62(3)(b), to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against person other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Evidence of criminal judgments not based on no contest pleas may be inadmissible in Wisconsin on other-than-hearsay grounds. See Estate of Safran, 102 Wis.2d 79, 306 N.W.2d 27 (1981).

Thus, the defendant whose no contest plea is accepted is assured that the plea, statements made in connection with it, and the judgment entered upon it will all be inadmissible in later civil actions or other collateral proceedings. The conviction, however, is admissible to prove the fact of conviction itself. See discussion above.

C. Acceptance Procedures For No Contest Pleas

1. Guilty plea procedures apply

The same acceptance procedures are required for pleas of no contest as are required for guilty pleas. Section 971.08 applies to both types of pleas, requiring personal inquiry of the defendant to determine that the plea is made voluntarily and supported by a factual basis.

Wisconsin cases also tend to lump both pleas together when discussing acceptance procedures and the standards for withdrawing a plea. See, for example, State v. Galvan, 40 Wis.2d 679, 162 N.W.2d 622 (1968); State v. Schill, 93 Wis.2d 361, 286 N.W.2d 836 (1980); State v. Lee, 88 Wis.2d 239, 276 N.W.2d 268 (1979). If a no contest plea is accompanied by a refusal to answer the questions constituting the plea acceptance colloquy and a refusal to waive trial related rights, the plea should not be accepted. See State v. Minniecheske, 127 Wis.2d 234, 378 N.W.2d 283 (1985).

2. The court should assure that the defendant understands the consequences of

the plea

It appears that some defendants view the no contest plea as an indication of lesser culpability than a plea of guilty. [See State v. Morse, 2005 WI App 223, ¶11, 287 Wis.2d 369, 706 N.W.2d 152, where the defendant sought to withdraw a no contest plea because the trial court failed to "dispel his misconception that he would receive a lesser sentence for pleading no contest." The motion was denied.] Trial courts accepting no contest pleas may be well advised to point out to the defendant that for purposes of the criminal case, the no contest plea is the basis for a criminal conviction that carries the full weight and force of a conviction resulting from a guilty plea or a jury finding of guilt. The conviction may be the basis for later criminal repeater charges or for collateral consequences such as revocation of professional license. See discussion above.

D. Court Authority To Reject No Contest Pleas

1. Court approval is required

Section 971.06 provides that a defendant may enter a no contest plea "subject to the approval of the court." This is consistent with Wisconsin case law, which has characterized the no contest plea as one which the defendant "may not interpose as a matter of right. It is received at the discretion of the court." State v. Suick, 195 Wis. 175, 177, 217 N.W. 743 (1928). Also see State v. Erickson, 53 Wis.2d 474, 476, 192 N.W.2d 872 (1972), where the court recognized the trial court's authority to refuse to accept a no contest plea because the offense was a felony with a possibility of imprisonment. At common law, there was apparently some dispute over the propriety of a no contest plea in cases involving imprisonment. There is now no doubt about the plea's suitability for even the most serious felonies. See State v. Suick, 195 Wis. 175, 217 N.W. 743 (1928), and Hudson v. United States, 272 U.S. 451 (1926).

2. Guides to the exercise of discretion

Neither statutes nor case law identify the factors that are to guide the judge's exercise of discretion in deciding whether to receive a no contest plea. The practice in the state appears to vary widely. Some courts accept no contest pleas routinely without inquiring into the reasons for the plea. Other courts discourage no contest pleas by requiring that a rational explanation support the offer of the plea. Some courts routinely accept the pleas in misdemeanors but require a reason in felonies.

Section 971.06(1)(c) recognizes that a defendant may plead no contest "subject to the approval of the court." It is likely that the court "approval" referred to in the statute requires an exercise of discretion which weighs the plea in light of the public interest and the

interests of justice. As with any exercise of discretion, this requires the court to consider proper factors, reach a conclusion, and explain the basis for the conclusion.

The specific factors that may be considered cannot be exhaustively listed and are likely to depend on the facts and circumstances of each case. One consideration may be whether the preference for a no contest plea is based solely on a factual dispute that is relevant only to possible future civil litigation and not to the criminal charge (e.g., the exact value of stolen property). Another consideration may be whether the no contest plea might affect the defendant's eligibility for postconviction treatment programs. Some programs for sex offenders, for example, require a complete admission of guilt, evidenced by a guilty plea, as a precondition for acceptance into the treatment program. See, for example, State v. Carrizales, 191 Wis.2d 85, 528 N.W.2d 29 (Ct. App. 1995), where a defendant who had entered a no contest plea was terminated from a sex offender treatment program because he would not admit committing the sexual assault upon which his conviction was based. Also see State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 579 N.W.2d 698 (1998) discussed below, making the same point with respect to Alford pleas.

Section 971.095(2) requires the district attorney to confer with victims "concerning the prosecution of the case and the possible outcomes of the prosecution, including potential plea agreements and sentencing recommendations." The statute does not specify whether the victim's interest should influence the decision to accept a no contest plea.

Statements made in the context of the no contest pleas, the plea itself, and the judgment resulting from the plea are all inadmissible in later civil actions. §§ 904.10, 908.03(22). By contrast, the guilty plea is admissible in later civil actions, and the criminal judgment based on a guilty plea is not excluded by the hearsay rule. § 908.03(22).

III. The Alford Plea

A. Description

In North Carolina v. Alford, 400 U.S. 25 (1970), the U.S. Supreme Court recognized the constitutionality of accepting a guilty plea even though the defendant maintains innocence. Alford's guilty plea to second degree murder allowed him to escape the death penalty that might have been imposed if he had been convicted of first degree murder after a trial. His plea was found to be constitutional because the record showed he knew what he was doing and that there was a strong factual basis for the plea.

The term "Alford plea" is now used to identify the situation where defendants plead guilty but maintain their innocence. The legitimacy of the plea in Wisconsin was first recognized in State v. Johnson, 105 Wis.2d 657, 314 N.W.2d 897 (Ct. App. 1981). In State

v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995), the Wisconsin Supreme Court reaffirmed that "the circuit courts of Wisconsin may, in their discretion, accept Alford pleas." The court noted that the plea gives the defendant a valuable option:

> A defendant may wish to plead guilty yet publicly maintain his innocence to avoid ridicule or embarrassment, such as where the charge is sexual assault of children. . . . Other times he might plead guilty while protesting his innocence because he does not think the jury will believe his claim of self-defense or accident.
> 192 Wis.2d 845, 857.

The court concluded that Alford pleas are acceptable as long as the defendant fully understands the consequences and the record shows the "strong evidence of guilt" that must support the plea. [See the discussion in section C., below.]

B. Effect

While statutes and case law address the effect of a no contest plea, there is no statutory authority describing the effect of the Alford plea. It seems logical to treat both pleas the same way.

1. An Alford plea supports a fully effective criminal conviction

There is no doubt that an Alford plea supports a fully effective criminal judgment. This is especially clear since a true Alford plea is a plea of guilty. [Cited with approval in State ex rel. Warren v. Schwarz, 219 Wis.2d 615, footnote 9, 579 N.W.2d 698 (1998).] Thus, the arguments for treating differently a conviction following a no contest plea (which have been rejected in the no contest situation) do not even apply to an Alford plea.

2. What rules apply to the collateral use of an Alford plea?

If a defendant enters a true Alford plea, that is, a guilty plea joined with a claim of innocence, what limits are there on the collateral use of the resulting conviction? It could be argued that because the plea is technically one of "guilty," that the special rules dealing with no contest pleas do not apply.

Apart from the technical arguments that could be made, it appears to be the better practice to treat an Alford plea as a no contest plea for collateral purposes. The basis for treating a no contest plea differently than a guilty plea is the defendant's refusal to make a full admission of guilt. In an Alford plea, the defendant not only refuses to make a full admission of guilt but also expressly claims innocence. It would be illogical to restrict the collateral use of the no contest conviction, where there has been a limited admission of

guilt, while placing no limits on the Alford conviction, where a claim of innocence has been made. The Wisconsin Supreme Court cited the committee's conclusion on this issue with approval in State v. Nash, 2020 WI 85, ¶34, 394 Wis. 2d 238, 951 N.W.2d 404.

Thus, the Alford plea conviction should be treated as follows:

1) the conviction is complete and unequivocal; it can be the basis for later repeater charges, suspension of a professional license, etc.
2) the plea is not an admission for collateral purposes;
3) statements made in connection with the plea are not admissible for collateral purposes; and
4) the conviction should be treated the same as a conviction following a no contest plea under sec. 908.03(22).

C. Acceptance Procedures

1. Guilty plea procedures apply

The rule for accepting Alford pleas is that regular guilty plea acceptance procedures apply, but special care must be taken. (See discussion below.)

The fact that an Alford plea is being submitted ought to be disclosed to the court as early as possible and usually is so disclosed. However, in a regular guilty plea case, the defendant may sometimes indicate hesitation about admitting guilt or may make statements that sound like claims of innocence. The court should fully explore such hesitation or statements, to assure that the defendant in fact understands what he or she is doing. A regular guilty plea should not be converted into an Alford plea without an express, unequivocal decision to that effect on the part of the defendant.

2. Special care is required

While Alford pleas are constitutionally acceptable and regular guilty plea procedures may be used, special care must be taken in two respects:

– it must be clear that the defendant fully understands the charge and the effect of the plea; and
– there must be strong evidence of guilt.

a. The defendant's understanding

Alford held that a guilty plea may be accepted in the absence of an express admission

of guilt if the defendant "voluntarily, knowingly, and understandingly consent[s] to the imposition of a prison sentence . . . [and] intelligently concludes that his interests require entry of a guilty plea." 400 U.S. 25, 37. The regular guilty plea acceptance procedures are already designed to assure that any guilty plea is voluntarily and intelligently made. However, in the Alford situation, it is recommended that the court address special questions to defendants to assure that they understand that if the plea is accepted, an unequivocal criminal judgment will be entered – a judgment that will allow imposition of the same penalties that could follow a regular guilty plea.

The court should also ask defense counsel to make a statement on the record to show that the nature and consequences of the Alford plea were thoroughly discussed with the defendant and what the defendant's understanding of that discussion was.

In State v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995), the court cited the preceding advice with approval:

> Competent counsel can easily explain the Alford plea. Moreover, defendants in Wisconsin are protected by procedural safeguards of sec. 971.08, Stats., and by material developed for the circuit courts by the Wisconsin Jury Instructions Committee specifically for Alford pleas. . . . [T]he Committee materials direct circuit judges to ask defense counsel on the record whether counsel has discussed the consequences of the plea with the defendant and if so, whether the defendant has expressed his understanding of those consequences.
> 192 Wis.2d 845, 858.

Further, the court added the following in a footnote:

> Although not required to make the plea acceptable, including a definition of an Alford plea on the guilty plea questionnaire may help to further document the defendant's understanding of the plea. We invite the Wisconsin Jury Instruction Committee to consider making such a change on the form.
> 192 Wis.2d 845, 860, at note 6.

The following is included in the text of SM-32, Accepting A Plea of Guilty, to address these concerns:

> IF THE DEFENDANT ANSWERS "NO CONTEST" OR "ALFORD," THE COURT SHOULD ADDRESS THE DEFENDANT AND DEFENSE COUNSEL AS FOLLOWS:

["A plea of no contest means that you do not contest the state's ability to prove the facts necessary to constitute the crime."]

["An Alford plea is a guilty plea accompanied by a claim of innocence."]

["Do you understand that for the purposes of this proceeding, (a plea of no contest) (an Alford plea) will have the same effect as a plea of guilty? And that, if accepted, it will result in a conviction that carries the same character and force as a conviction resulting from a plea of guilty?"]

["Counsel, have you discussed the consequences of the plea with the defendant and do you believe the defendant understands them?"]

b. "Strong evidence of guilt"

For all guilty pleas, a "factual basis" for the plea must be established. A precise evidentiary burden has never been assigned to "factual basis." The factual basis should be sufficient to satisfy the court that the defendant in fact committed the crime to which the plea is entered. § 971.08(1)(b). What it takes to so satisfy the judge will vary depending on the circumstances of each case, so the lack of a precise evidentiary standard is understandable.

With an Alford plea, the court must be satisfied that there is "strong evidence of actual guilt." North Carolina v. Alford, 400 U.S. 25, 37 (1970). This standard was adopted in Wisconsin in State v. Johnson, 105 Wis.2d 657, 663-664, 314 N.W.2d 897 (Ct. App. 1981), (referring to "strong proof of guilt"). This standard was affirmed by the Wisconsin Supreme Court in State v. Garcia, 192 Wis.2d 845, 858, 532 N.W.2d 111 (1995): ". . . the plea is acceptable where the trial court determines that strong proof guilt has been shown."

The Supreme Court has also elaborated on the nature of and reasons for this requirement. "'Strong proof of guilt' is not the equivalent of proof beyond a reasonable doubt, but it is 'clearly greater than what is needed to meet the factual basis requirement under a guilty plea.'" State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 645, 579 N.W.2d 698, quoting State v. Smith, 202 Wis.2d 21, 27, 549 N.W.2d 232 (1996), and State v. Spears, 147 Wis.2d 429, 435, 433 N.W.2d 595 (Ct. App. 1988). For a traditional guilty plea, the record must show that the conduct the defendant admits constitutes the offense charged or an included offense to which the defendant pleads guilty. Because a defendant who enters an Alford plea expressly claims to be innocent, the record must reflect a "strong proof of guilt" to "overcome" or "substantially negate" the defendant's "protestations of innocence." Warren, 219 Wis.2d at 645 & n.17; Smith, 202 Wis.2d at 27; Johnson, 105 Wis.2d at 663, 664; Alford, 400 U.S. at 37-38. "We require that the record reflect a strong

proof of guilt not to convince the defendant of his or her guilt; rather, it is constitutionally required to ensure that the defendant is knowingly, intelligently, and voluntarily entering a plea that will result in a judgment of conviction, despite the defendant's claims of innocence." State v. Nash, 2020 WI 85, ¶35, 394 Wis. 2d 238, 951 N.W.2d 404, citing Garcia, 192 Wis. 2d at 857-60.

Although an Alford plea requires a more substantial factual basis than a traditional guilty plea, a court need not use a particular method or insist on the presentation of specific evidence (such as live testimony, oral statements of relevant witnesses, or other documentary evidence) to establish the factual basis. Nash, 394 Wis. 2d 238, ¶¶36-39, 47-49. Instead, as with a traditional guilty plea, what constitutes an adequate record is determined based on the facts and circumstances of the particular case, and that determination is left to the discretion of the circuit court. Id., ¶¶36-38, citing State v. Thomas, 2000 WI 13, ¶20, 232 Wis.2d 714, 605 N.W.2d 836 ("All that is required is for the factual basis to be developed on the record—several sources can supply the facts."). Thus, a factual basis may be established by witness testimony, or a prosecutor reading police reports, or a summary of evidence from the prosecutor. Johnson, 105 Wis. 2d at 659-60, 664-65 (the state's recital of evidence it would present at re-trial, as well as evidence offered at first trial that ended in a hung jury); Spears, 147 Wis.2d at 438-40 (testimony of witnesses called by the state at the plea hearing and summary of expected testimony of other witnesses); Warren, 219 Wis.2d at 646-47 (preliminary hearing testimony of the victim and a police officer); Nash, 394 Wis.2d 238, ¶¶40-45 (details in criminal complaint, prosecutor's summary of the evidence, and other-acts evidence offered for admission at trial). Further, because Alford pleas are often the result of plea negotiations, a court may not need to go to the same length to determine the factual basis as it would when there is not a negotiated plea. Nash, 394 Wis.2d 238, 36.

While the court need not use any "magic words" when determining whether there is strong proof of guilt, Nash, 394 Wis.2d 238, ¶36, by keeping the heightened standard in mind and attending to its requirements a court can assure that an Alford plea is validly entered and rests on a sound basis despite the "difficulty posed by an Alford plea in relation to the factual basis requirement." Smith, 202 Wis.2d at 27. An example of the factual basis problem may be seen in the Spears decision, which extensively discusses whether the "evidence" was sufficient to establish the "conduct evincing a depraved mind" element of what was then called second degree murder (now, first degree reckless homicide). The majority and dissenting opinions disagree about whether "strong proof" of this troublesome element was presented, illustrating the difficulty in resolving the inherent contradiction presented by a guilty plea accompanied by a claim of innocence.

c. "Heightened diligence" in sex offense cases

In State ex rel. Warren v. Schwarz, 219 Wis.2d 615 579 N.W.2d 698 (1998), the court called "for heightened diligence on the part of circuit courts in accepting Alford pleas—particularly in cases involving sex offenses . . . An inherent conflict arises when a charged sex offender enters an Alford plea: the offender cannot maintain innocence under the Alford plea and successfully complete the sex offender treatment program, which requires the offender to admit guilt." ¶72. The court added:

> ¶ 75. Should the circuit courts in their discretion decide to accept Alford pleas in such cases, we strongly advise them to give Alford-pleading defendants an instruction at the time of the plea that their protestations of innocence extend only to the plea itself, and do not serve as a guarantee that they cannot subsequently be punished for violating the terms of their probation which require an admission of guilt. Because of the unique nature of Alford pleas, circuit courts accepting such pleas should take extra care to ensure that defendants understand that in order to successfully complete the treatment program, they will be required to admit guilt. Such instructions will avert any misconceptions by defendants that the Alford plea provides any "promises" or "guarantees" of what is constitutionally appropriate probationary treatment. ¶75.

D. Court Authority To Reject An Alford Plea

The Alford decision held that a guilty plea coupled with a claim of innocence was not unconstitutional. State v. Johnson and State v. Garcia both held that an Alford plea was not inconsistent with Wisconsin law relating to guilty pleas. However, Alford, Johnson, and Garcia do not require a court to accept an Alford plea.

1. Court approval is required

The Alford decision explicitly recognized that a trial court is not required to accept an Alford plea:

> Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, see Lynch v. Overholser, 369 U.S., at 719, 8 L Ed 2d 220 (by implication), although the States may by statute or otherwise confer such a right. Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence. Cf. Fed. Rule Crim. Proc. 11, which gives a trial judge discretion to "refuse to accept a plea of guilty. . . ." We need not now delineate the scope of that discretion. 400 U.S. 25, 38, n.11.

Garcia reaffirmed that a "circuit court may reject the plea if it concludes that the plea is contrary to the public interest or the interests of justice." 192 Wis.2d 845, 859 (citing this Special Material with approval). A concurring opinion by Justice Abrahamson advised circuit courts to seek "to resolve the conflict between the waiver of trial and the claim of innocence." 192 Wis.2d 845, 868. A concurring opinion by Justice Wilcox concluded that "an Alford plea is a troubling way to finalize the criminal judicial process. I recommend that the trial courts in this state act with great reticence when confronted with an Alford plea."
192 Wis.2d 845, 868.

2. Guides to the exercise of discretion

Wisconsin has not chosen to limit the court's authority to accept or reject Alford pleas. Thus, the trial judge confronted with an Alford plea is entitled to exercise discretion in deciding whether to accept it. In many respects, this exercise of discretion will be like that involved in deciding whether to accept a no contest plea (see discussion above).

A refusal to accept an Alford plea should be supported by a clear statement of the factors that persuaded the court to exercise its discretion in that manner. In State v. Williams, 2000 WI App 123, 237 Wis.2d 591, 614 N.W.2d 11, the court of appeals implied that a judge's flat refusal to accept an Alford plea because "I have just made a policy that I will not accept one" would be error. However, the alleged error was considered waived in that case.

COMMENT

SM-32A was originally published in 1985 and revised in 1995 and 2019. This revision was approved by the Committee in February 2021; it provided a general updating.

The primary changes made in the 1995 revision were those reflecting the decision of the Wisconsin Supreme Court in State v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995).

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SM-32B ACCEPTING A PLEA OF GUILTY: USE OF WRITTEN FORM

The following questions are suggested for use when a written form is employed to furnish a record that a plea is made voluntarily and understandingly.

Many courts have developed written forms for accepting guilty pleas. A sample form is provided as Appendix I to this Special Material. It includes all the questions that are included in the full oral acceptance procedure recommended in SM-32.

The use of a written form was approved in State v. Moederndorfer, but the court added that the trial court should personally question the defendant concerning the form. The court referred to "making a record that the defendant had sufficient time prior to the hearing to review the form, had an opportunity to discuss the form with counsel, had read each paragraph, and had understood each one."[1]

The sample questions that follow are intended to comply with the Moederndorfer decision. Also included are questions to be directed at defense counsel.

THE COURT TO THE DEFENDANT:

(Mr.) (Ms.) _____, I have here a form entitled (state caption on form). It appears to have your signature on the last page (and your initials on each paragraph).

1. Did you sign and initial this form?
2. When did you do that?
3. Have you read the form?
4. Do you believe you understand what is in the form?
5. Do you have any questions about it?
6. Have you used any drugs, alcohol, or medication today?

[AT THIS POINT REVIEW THE FORM AND FOLLOW UP ON ANY ITEMS THAT MAY RAISE A QUESTION ABOUT THE UNDERSTANDING OF THE PLEA]

7. Did you talk this over with your lawyer?

8. Did you discuss what is in this form and what is being recommended here?

9. Do you understand that by pleading guilty you are giving up the constitutional rights detailed in the form?

10. Did you have enough time to talk with your lawyer?

11. Do you have any questions now about the form or about your plea of guilty?

THE COURT TO DEFENSE COUNSEL:

12. (Mr.) (Ms.) _____, as the lawyer for the defendant, have you had ample opportunity to confer with the defendant with regard to this plea of guilty?

13. Have you reviewed the (state caption on form) with the defendant?

14. Are you satisfied that the defendant understands the charge(s), the elements thereof, and the possible consequences of an adjudication of guilt?

15. And, are you satisfied the defendant is knowingly, intelligently waiving (his) (her) constitutional rights?

[16. And are you satisfied that the defendant understands the enhanced penalty that can be imposed if the court accepts the plea(s) of guilty as a repeater?]

17. Based upon your own independent investigation, are you satisfied that there is an ample factual basis to warrant the court's acceptance of the tendered pleas?

THE COURT TO THE DEFENDANT:

18. (Mr.) (Ms.) _____, you have heard what your lawyer has told me. Is there anything that you wish to disagree with or ask questions about?

19. Are you satisfied with the representation you received from your lawyer up to this point?

20. And is there anything that I may have asked you that you now upon reflection wish to modify or change in any way?

21. Do you want the court to accept your plea(s) of guilty at this time?

COMMENT

Special Material 32B was originally published in 1985. This revision was approved by the Committee in August 1992.

1. The use of a written plea acceptance form was approved in State v. Moederndorfer, 141 Wis.2d 823, 416 N.W.2d 627 (Ct. App. 1987):

> Personal colloquy by verbally following the provisions of SM-32 is not mandatory. The trial court may instead refer to some portion of the record or some communication between defense counsel and defendant. Any one of these alternatives is proper so long as the alternative used exhibits defendant's knowledge of the constitutional rights waived.

141 Wis.2d 823, 827

The court found that the written form used in the case was sufficient, that the court conducted a full personal inquiry about the defendant's understanding of the form, and that there is nothing inherently wrong about using a form – to the contrary, using a form may be preferable:

> People can learn as much from reading as listening, and often more. In fact, a defendant's ability to understand the rights being waived may be greater when he or she is given a written form to read in an unhurried atmosphere, as opposed to reliance upon oral colloquy in a supercharged courtroom setting. A trial court can accurately assess a defendant's understanding of what he or she has read by making a record that the defendant had sufficient time prior to the hearing to review the form, had an opportunity to discuss the form with counsel, had read each paragraph, and had understood each one.

141 Wis.2d 823, 828

A guilty plea was vacated despite the use of a written form in State v. Hansen, 168 Wis.2d 749, 485 N.W.2d 74 (Ct. App. 1992). The defect was the trial court's failure to address the defendant personally to ascertain his understanding of the constitutional rights being given up by the guilty plea:

> . . . the colloquy was limited to whether Hansen had gone over the Moederndorfer form with his attorney before he signed it and whether Hansen understood the form. We conclude that such limited personal colloquy is not the substantive kind of personal exchange between the trial court and the defendant which Bangert, sec. 971.08, Stats., and Moederndorfer require.
>
> While our approval of the Moederndorfer form certainly lessened the extent and degree of the colloquy otherwise required between the trial court and the defendant, it was not intended to eliminate the need for the court to make a record demonstrating the defendant's understanding that the plea results in the waiver of the applicable constitutional rights. The record made in Moederndorfer is demonstrative. Although the personal colloquy there was also brief, it nonetheless established the defendant's understanding that, by entering the plea, he was giving up the rights detailed in the form. Moederndorfer, 141 Wis.2d at 828-29 n.1, 416 N.W.2d at 630. This is a subtle, but important, requirement.

168 Wis.2d 749, 755-56

Question number 9 above is believed to satisfy the Hansen requirement.

APPENDIX I GUILTY PLEA ACCEPTANCE FORM

[SPECIAL MATERIAL WITHDRAWN]

COMMENT

This Special Material was originally published as SM-32B in 1985. It was revised and published as SM-32B APPENDIX in 1992 and revised in 1995. Its withdrawal was approved by the Committee in 2019.

The use of court form CR-227 is now required for plea acceptance.

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SM-33 INFORMATION ON POSTCONVICTION RELIEF

[WITHDRAWN]

COMMENT

SM-33 was originally published in 1974 and revised in 1980, 1981, 1982, 1983, and 1985. It was withdrawn by the Committee in 2010.

See § 973.18 and the form adopted by the Judicial Conference: CR-233 Notice of Right to Seek Postconviction Relief. Section 971.025(1) provides: "In all criminal actions proceedings . . . the parties and court officials shall use the standard court forms adopted by the judicial conference under s. 758.18."

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SM-33A INSTRUCTION TO BE USED ON DENIAL OF ANY POSTCONVICTION MOTION (OTHER THAN § 974.06)

[WITHDRAWN]

COMMENT

SM-33A was originally published in 1974 and revised in 1980 and 1981. It was withdrawn by the Committee in October 1991.

The Committee withdrew this special material for several reasons: giving such advice is not required by case law or statute; appellate procedure is sufficiently technical that it is difficult to give complete and accurate information to a defendant; and, probably because of the preceding reasons, the advice was apparently rarely, if ever, used.

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SM-33B INSTRUCTION TO BE USED ON DENIAL OF A POSTCONVICTION MOTION UNDER § 974.06

[WITHDRAWN]

COMMENT

SM-33B was originally published in 1974 and revised in 1980 and 1981. It was withdrawn by the Committee in October 1991.

The Committee withdrew this special material for several reasons: giving such advice is not required by case law or statute; appellate procedure is sufficiently technical that it is difficult to give complete and accurate information to a defendant; and, probably because of the preceding reasons, the advice was apparently rarely, if ever, used.

The situation addressed by this special material is even more complex because the § 974.06 motion is considered civil in nature. § 974.06(6) Thus, the relevant rules are as follows:

- § 809.30(2)(L) provides that appeals under § 974.06 are governed by the procedures for civil appeals.
- § 808.04(1) states the general rule for civil appeals: 45 or 90 days, depending on whether written notice of the order denying relief was received.
- § 808.04(5) provides a special 120-day rule for "a person imprisoned on a criminal sentence against whom a civil final judgment or order is rendered.".

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SM-34 SENTENCING PROCEDURE, STANDARDS, AND SPECIAL ISSUES

This Special Material outlines the procedures and standards recommended for use at sentencing. It also discusses several issues of importance to sentencing.

CONTENTS

I. The Basic Requirements for the Sound Exercise of Discretion

In McCleary v. State, 49 Wis.2d 263, 182 N.W.2d 512 (1971), the Wisconsin Supreme Court held that a trial judge, when imposing a sentence upon a defendant, must on the record explain the reasons for the imposition of the particular sentence given as well as outline on the record the basic facts relied upon or taken into consideration during the sentencing deliberations.

As the McCleary court said at page 281, ". . . requisite to a prima facie valid sentence is a statement by the trial judge detailing his reasons for selecting the particular sentence imposed." The court then went on to say that a trial judge must ". . . state the facts on which he predicates his judgment, and . . . give the reasons for his conclusion."[1]

The sound exercise of discretion requires the consideration of a variety of factors (see the discussion at page 4, below). Of these, the primary factors "are the gravity of the offense, the character of the offender, and the need for protection of the public." Elias v. State, 93 Wis.2d 278, 286 N.W.2d 559 (1980). "In other words, a 'sentencing court must assess the crime, the criminal, and the community, and no two cases will present identical factors.'" State v. Halbert, 147 Wis.2d 123, 128, 432 N.W.2d 633 (Ct. App. 1988), citing In re Judicial Administration: Felony Sentencing Guidelines, 120 Wis.2d 198, 201, 353 N.W.2d 793 (1984).

The sentencing court must not approach the sentencing "with an inflexibility that bespeaks a made-up mind," as shown by a trial court's statement that it never granted probation for drug offenses. State v. Halbert, supra at 128, citing State v. Martin, 100 Wis.2d 326, 302 N.W.2d 58 (Ct. App. 1981). Considering the sentencing decision before the sentencing hearing and reaching tentative conclusions about the sentence does not violate these principles. State v. Varnell, 153 Wis.2d 334, 450 N.W.2d 524 (Ct. App. 1989).

The cases attempting to articulate a rule against a "mechanistic sentencing approach," while technical to some extent, reflect an underlying sentencing principle of great importance. Making it clear that the sentencing court has considered all the facts of the individual case is extremely important to giving defendants, victims, and the public the sense that they have been treated fairly.

II. Sentencing Standards

A judge should always tailor the sentence to fit the particular circumstances of the case and the individual characteristics of the defendant. There are certain standards, however, which should be followed by the judge when deciding on a sentence.

A. The Minimum Amount of Confinement

In Neely v. State, 47 Wis.2d 330, 334, n. 8, 177 N.W.2d 79 (1970), and again in McCleary v. State, supra at 276, the Wisconsin Supreme Court quoted with approval Standard 2.2 of the ABA Standards Relating to Sentencing Alternatives and Procedures, which states:

> The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.[2]

Further, in Bastian v. State, 54 Wis.2d 240, 247-49, n.1, 194 N.W.2d 687 (1972), the Wisconsin Supreme Court expressly adopted Standard 1.3 of the ABA Standards Relating to Probation:

> Criteria for granting probation.
>
> (a) The probation decision should not turn upon generalizations about types of offenses or the existence of a prior criminal record, but should be rooted in the facts and circumstances of each case. The court should consider the nature and circumstances of the crime, the history and character of the offender, and available institutional and community resources. Probation should be the sentence unless the sentencing court finds that:
>
> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
>
> (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
>
> (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed.
>
> (b) Whether the defendant pleads guilty, pleads not guilty or intends to appeal is not relevant to the issue of whether probation is an appropriate sentence.[3]

B. Repeal of the Wisconsin Sentencing Guidelines

Wisconsin employed a system of advisory sentencing guidelines from 1985 through 1995. 1995 Wisconsin Act 27 repealed the statutes that referred to the Sentencing Commission and the sentencing guidelines [§§ 15.104(17), 973.01, and 973.011-.012, 1993 Wis. Stats., were all repealed with an effective date: July 29, 1995.]

C. Factors to Consider

When imposing a sentence, judges should first outline on the record the basic facts taken into consideration in the sentencing deliberations. In State v. Tew, 54 Wis.2d 361, 367-68, 195 N.W.2d 615 (1972), the Wisconsin Supreme Court listed some of the factors which may be properly considered in sentencing:

- a past record of criminal offenses;
- a history of undesirable behavior patterns;
- the defendant's personality, character, and social traits;
- the results of a presentence investigation;
- the vicious or aggravated nature of the crime;
- the degree of the defendant's culpability;
- the defendant's demeanor at trial;
- the defendant's age, educational background, and employment record;
- the defendant's remorse, repentance, and cooperativeness;
- the defendant's need for close rehabilitative control; and
- the rights of the public.

Several additional factors have been recognized as appropriate considerations by case law or statutes:

- the effect of the crime on the victim (including rehabilitative needs);[4]
- the victim's statement (see § 972.14(3) discussed below);
- juvenile record;[5]
- read-ins;[6]
- false testimony during trial;[7]
- failure to name accomplice after disclosure of existence of co-conspirator;[8] and
- conduct relating to charges for which the defendant was acquitted.[9]

There are a number of factors that are not to be considered in imposing sentence:

- exercise of constitutional rights, such as the right to a trial,[10] the privilege against self-incrimination,[11] or the right to present a defense;[12]
- beliefs and associations protected by the First Amendment, unless a reliable connection is established between the criminal conduct and those beliefs and associations;[13]
- refusal to admit guilt;[14] and
- the amount of credit that will be due for pretrial confinement.[15]

The list of proper and improper factors suggests a potentially elusive distinction relating to the general proposition that it is proper to give favorable consideration to the remorse and cooperation that accompany a plea of guilty. The same principles that forbid penalizing the defendant for going to trial instead of pleading guilty, or for presenting a good faith, though unsuccessful, defense, are recognized as prohibiting the imposition of a harsher sentence solely because the defendant refuses to admit guilt. Thus, the defendant can be rewarded for showing remorse but is not to be penalized for refusing to admit guilt. This distinction was directly addressed by the Wisconsin Supreme Court in Scales v. State, 64 Wis.2d 485, 219 N.W.2d 286 (1974). In Scales, the court acknowledged that a posttrial confession of guilt and an expression of remorse may be considered in mitigation of sentence but held that it does not follow that lack of remorse may properly be considered as a basis for an increased sentence. If the defendant has chosen to exercise the right against self-incrimination, the defendant may not be penalized for it, even after a jury's determination of guilt.[16]

D. Standards for Consecutive Sentences

Section 973.15(2) provides in part that "the court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously." Specific standards for deciding when sentences on multiple counts should be ordered to run consecutively to one another are not further addressed in the statutes and have not been adopted by the appellate courts. A summary of the law is provided in State v. Johnson, 178 Wis.2d 42, 51-2, 503 N.W.2d 575 (Ct. App. 1993):

> . . . [M]ore than fifteen years ago the supreme court "recommended" that the ABA standards for consecutive sentencing "be given consideration as a guideline" in Wisconsin. But the court has never pursued the matter further; indeed, it has repeatedly declined to adopt the standards. . . . [citations omitted]

> . . . thus, under existing law, whether to impose consecutive, as opposed to concurrent, sentences is, like all other sentencing decisions, committed to the trial court's discretion.

There are a variety of technical constraints applicable to the imposition of consecutive sentences, most arising when periods of probation are also involved. Section 973.15(2)(a) provides that the court may provide that a sentence may be ordered to be consecutive "to any other sentence imposed at the same time or previously." Problems arise because ordering a term of probation has not been considered a "sentence." State v. Maron, 214 Wis.2d 384, 571 N.W.2d 454 (Ct. App. 1997); Prue v. State, 63 Wis.2d 109, 216 N.W.2d 43 (1974). Thus, for example, a term of imprisonment may not be made consecutive to a term of probation or to jail time served as a condition of probation. See State v. Maron, 214 Wis.2d 384, 394-5, and cases cited therein.

III. The Presentence Investigation Report

The presentence investigation report is not only of great value at sentencing, but also plays an important role after sentence is imposed. If the defendant is placed on probation, the report becomes the probation agent's primary source of information. The agent will use the report in determining what special conditions of supervision to impose and in determining what level of supervision is required. If the probationer violates the conditions of supervision, the information in the report may also influence the decision whether or not to pursue revocation proceedings.

If the defendant is sentenced to imprisonment or is incarcerated after probation revocation proceedings, the presentence report becomes part of the person's correctional treatment file and is consulted by corrections staff whenever decisions are made about how the person will serve the sentence and what the conditions of confinement will be. Decisions about security classification, institutional assignment, job assignment, and eligibility for educational, vocational, and treatment programs, are made with reference to the presentence report.

Perhaps most importantly, the presentence report becomes part of the file consulted by the parole board when parole release decisions are made. Even after the person is released on parole, the report may be used by the parole agent in determining conditions of parole, the level of supervision, and the need for pursuing revocation proceedings.

A defendant has the due process right to be sentenced on the basis of true and correct information and the presentence report is the primary means of communicating this information to the court. But neither due process nor the right to counsel under the 5th or 6th Amendment requires that counsel be allowed to be present when the defendant is interviewed by the presentence preparer. State v. Perez, 170 Wis.2d 130, 487 N.W.2d 630 (Ct. App. 1992) [re: a due process claim]; State v. Knapp, 111 Wis.2d 380, 330 N.W.2d 242 (Ct. App.), cert. denied, 464 U.S. 834 (1983) [re: a 5th and 6th Amendment claim].

A. When to Order a Presentence Report

Wis. Stat. § 972.15(1) provides that after conviction, the court may order a presentence investigation, "except that the court may order an employe of the department to conduct a presentence investigation only after a conviction for a felony." Although this statute gives a trial court discretion not to order a presentence report in any particular case, the Wisconsin Supreme Court has urged and encouraged trial courts to use this sentencing aid. See Bruneau v. State, 77 Wis.2d 166, 174, 252 N.W.2d 347 (1977). The ABA Standards for Criminal Justice call for a presentence investigation and report in the following circumstances:

> . . . where incarceration for one year or more is a possible disposition, where the defendant is less than twenty-one years old, or where the defendant is a first offender, unless the defendant or defense counsel waives production of the report and the court specifically finds that it has sufficient information to exercise the discretion accorded to it.

Standard 18-5.1(b).

B. Defense Access to the Presentence Report

Section 972.15(2) provides:

> When a presentence investigation report has been received the judge shall disclose the contents of the report to the defendant's attorney and to the district attorney prior to sentencing. When the defendant is not represented by an attorney, the contents shall be disclosed to the defendant.

There has been disagreement about whether this statute required that the presentence report be personally disclosed to the defendant. Counsel clearly had the obligation to review the report with the defendant, but in some courts there was reluctance to disclose the report for the defendant's direct review. This situation has been clarified by the decision of the Wisconsin Court of Appeals in State v. Skaff, 152 Wis.2d 48, 447 N.W.2d 84 (Ct. App. 1989). The court held that § 972.15(2) should not be read to deny access to the represented defendant: "the legislature could not have intended that a defendant appearing without counsel had greater rights to his PSI than a defendant who appeared with counsel." 151 Wis.2d 48, 57. The court went beyond the statutory grounds, however, to hold that access is guaranteed by constitutionally-based due process considerations: "to deny Skaff timely access to his PSI, pursuant to court order, is to prejudicially deny him an essential factor of due process, i.e., a procedure conducive to sentencing based on correct information." 151 Wis.2d 48, 57.

The importance of defense review of the presentence report was emphasized in State v. Anderson, 222 Wis.2d 403, 410, 588 N.W.2d 75 (Ct. App. 1998), where a case was remanded to the trial court for resentencing based on ineffective assistance of counsel:

> . . . Anderson disputed the important and relevant portions of PSI. Having done that, it was trial counsel's further duty to see that the accuracy of those matters was fully resolved by a proper hearing. Counsel did not do this. As a result, the trial court relied on certain of these disputed portions of the PSI without first resolving the accuracy of the allegations. We hold that Anderson was prejudiced by this process.

C. Discovering Errors in the Report

Defense counsel will often bring alleged errors in the report to the court's attention. If that is not done, the Committee believes that the court should ask counsel whether any errors were discovered. It should be counsel's responsibility to review the report carefully and thoroughly with the defendant to determine whether it contains errors that could be prejudicial to the defendant either at sentencing or in the correctional process.

D. Correcting the Inaccurate Report

If the importance of the presentence report after sentencing is acknowledged, and if one purpose of allowing the defendant access to the report is to afford the chance to discover and correct inaccuracies, it follows that any errors found in the report should be corrected. It may require some care and follow-through to assure that corrections are actually made. A simple statement from the court that certain information is in error and will not be relied upon is usually not sufficient to achieve actual correction of the report. Multiple copies are likely to be in existence and it may be advisable for the court to order directly that all copies be corrected in the manner designated by the court.

IV. Explaining the Sentence; a Suggested Format

A. In General

Before pronouncing sentence, the court must make two inquiries relating to the rights of victims at sentencing: the inquiry of the district attorney described in § 972.14(2m); and a determination whether a victim wishes to make a statement to the court. These obligations are discussed in Section V., below.

Pronouncing sentence typically begins by setting forth the factors considered on the record; the judge should then, based on these facts, explain and give reasons for the type of sentence or custody imposed upon the defendant. Ordinarily, the type of sentence or custody will consist of either probation, a fine, common jail confinement with or without Huber privileges, or imprisonment. The judge should explain why the type of sentence or custody imposed is deemed appropriate and why a less severe sentence is considered inappropriate.

Lastly, the judge should explain and give reasons for the length or duration of the custody imposed and the amount of the fine if a fine is part of the disposition. For example, if a maximum prison sentence is imposed, the judge should explain why the maximum sentence is appropriate and why a sentence of a lesser number of years is considered inappropriate. The justification for the length of the sentence should always be set forth in the record, as well as the reasons for not imposing a sentence of lesser duration.

B. A Sentencing Format

The Committee believes that the requirements relating to the sound exercise of sentencing discretion can be carried out effectively if a format like the following is used to explain the court's sentencing decision.

Judges often rely on notes in preparing for sentencing and in articulating the rationale for the sentence imposed. Parties are not entitled to access to these notes in the context of postconviction proceedings.[17]

Before pronouncing sentence, the court should have made the inquiry of the district attorney described in § 972.14(2m) and ascertained whether a victim wishes to make a statement [discussed below]. The defendant and defense counsel should have reviewed the presentence report and the court should have asked whether there are any errors in the presentence report or any omissions of significant material. The oral pronouncement of sentence should then include the following:

1. Identify the offense or offenses for which sentence is to be imposed.
2. Identify the maximum penalty, including any penalty enhancers.
3. Identify the recommendations of the prosecutor, defense counsel, and the presentence report.
4. Identify information relating to impact of the crime on the victim.
5. Explain the general objectives that a criminal sentence may address:
   - protection of the community
   - punishment
   - rehabilitation of the defendant
   - deterrence of others
6. Identify the general objectives of greatest importance in this case.
7. Identify the factors that were considered in arriving at the sentence and indicate how they influenced the decision.
8. If probation is rejected, indicate why.
9. Conclude with the statement that based on all these factors, the designated sentence is imposed, stating clearly:
   - what the term of years is
   - how the sentence relates to other sentences imposed at the same time or previously (concurrent or consecutive)
   - the number of days sentence credit due under § 973.155
10. Inform the defendant of the restrictions on firearm possession under § 941.29.[18]
11. If applicable, inform the defendant of the restrictions on child sex offenders working with children under § 973.034[19] and sex offender reporting requirements under § 973.048.[20]
12. Advise the defendant of the right to seek postconviction relief.[21]

At the conclusion of the sentencing proceeding, the court should assure that the judgment of conviction accurately reflects the sentence imposed.

C. A Sample Sentencing Pattern

The following is a sentencing pattern that, in the Committee's judgment, employs a logical and complete sequence in covering all the essential steps in the sound exercise of sentencing discretion.

In the case of State versus _____, Case No. _____, the defendant has been convicted of the crime of _____ upon a (guilty verdict by the jury) (trial by the court) (plea of guilty). Defendant is now before the court for the purposes of sentencing.

The maximum penalty for _____ is _____. The presentence author recommends _____. The defendant requests _____.

On sentencing the following witnesses for the state appeared: _____ _____. The following witnesses for the defense appeared: _____ _____. (Identify letters or other material submitted to the court.) (Identify information relating to impact of the crime on the victim.) (No corrections to the presentence report were noted.) (Corrections to the presentence report are as follows: _____.)

(State summary of the offense.)

In deciding the defendant's sentence (disposition), the court considers the following:

(A) Seriousness of the offense
1. Dangerousness – actual/potential
2. Injuries
3. Effects of the crime – temporary/permanent
4. Amounts involved

(B) Character of the defendant
1. Age, education, and health of defendant
2. Record – juvenile record, adult record, and pending charges
3. Status – married, children
4. Demeanor, remorse, personality, truthfulness (defendant as a witness)

(C) Needs of society
1. Is defendant good risk?
2. Does community need protection?
3. Deterrent effect of sentence
4. Moral need for punishment

(a) You are hereby sentenced to the Wisconsin State Prisons for an indeterminate period not more than _____ years, or
(b) You are hereby sentenced to the Wisconsin State Prisons for an indeterminate term not more than _____ years, stayed for _____ years during which time you are on probation with the following terms.
(c) Sentence is withheld and you are hereby placed on probation for a period of _____ years under the following conditions.

Fine, if any, costs, and surcharges.

_____ is entitled to sentence credit under § 973.155 in the amount of _____ days. _____ is ordered to pay restitution in the amount of _____.

For felonies, advise the defendant that § 941.29 makes it a Class E felony for a person convicted of a felony to possess a firearm.[22]

If applicable, inform the defendant of the restrictions on child sex offenders working with children under § 973.034 and sex offender reporting requirements under § 973.048.[23]

Advise on the right to seek postconviction relief.[24]

V. Victim Participation in Sentencing

Considering the impact of the crime on the victim and allowing the victim to address the court are mandatory. Article I, § 9 of the Wisconsin Constitution provides in part that "This state shall ensure that crime victims have . . . the opportunity to make a statement to the court at disposition. . ." This right is implemented by two statutes imposing obligations on the court. One obligation is to inquire of the district attorney; the other obligation is to determine whether victims wish to provide information to the court.

A. Obligation to Inquire of the District Attorney

This obligation is imposed by § 972.14(2m), which reads as follows:

> Before pronouncing sentence, the court shall inquire of the district attorney whether he or she has complied with s. 971.095(2) and with sub. (3)(b), whether any of the victims of a crime considered at sentencing requested notice of the date, time and place of the sentencing hearing and, if so, whether the district attorney provided to the victim notice of the date, time and place of the sentencing hearing.

The reference to "s. 971.095(2)" is to the general duty of the district attorney to offer all victims "who have requested the opportunity an opportunity to confer with the district attorney concerning the prosecution of the case and the possible outcomes of the prosecution, including potential plea agreements and sentencing recommendations." The reference to "sub. (3)(b)" is to § 972.14(3)(b), which requires the district attorney to "make a reasonable attempt" to contact victims and inform them of their right to make a statement at sentencing.

Complete compliance with these obligations can, in the Committee's judgment, be achieved by asking the following questions of the district attorney:

- whether he or she has complied with the victim notice and consultation law – § 971.095(2); and

- whether he or she has made a reasonable attempt to contact victims of a crime to be considered at sentencing* to inform them of their right to make a statement in court or to submit a written statement to be read in court. [As required by § 972.14(3)(b)]; and

- whether any of the victims of a crime to be considered at sentencing requested notice of the date, time, and place of the sentencing hearing; and, if so,

- whether he or she provided to the victim notice of the date, time, and place of the sentencing hearing.

*"Crime considered at sentencing" is defined in § 972.14(1)(ag) as "any crime for which the defendant was convicted and any read-in crime. . . ."

B. Court Determination Whether Victims Wish to Provide Information

The second obligation is imposed by § 972.14(3)(a), which provides:

> Before pronouncing sentence, the court shall determine whether a victim of a crime considered at sentencing wants to make a statement to the court. If a victim wants to make a statement, the court shall allow the victim to make a statement in court or to submit a written statement to be read in court. The court may allow any other person to make or submit a statement under this paragraph. Any statement under this paragraph must be relevant to the sentence.

Compliance with this obligation can, in the Committee's judgment, be achieved by addressing all those present in the courtroom and:

- asking whether any victim of a crime considered at sentencing wants to make a statement to the court; and

- stating that if a victim wants to make a statement, the court will allow an oral statement in court or the submission a written statement.

The application of § 972.14(3)(a) was originally limited to felony cases; that restriction was repealed by 1995 Wisconsin Act 77 [effective date: July 1, 1996].

Subsection (1)(b) of § 972.14 provides a cross-reference for the definition of "victim." "Victim" has the meaning provided in § 950.02(4), which is: "a person against whom a crime has been committed."

As the statute clearly states, the victim (or the victim's family member in a homicide case) must be allowed to make a statement at sentencing. The only limitation on the statement is that the statement must be relevant to the sentence. One type of information that appears clearly to be relevant is that relating to the impact of the crime on the victim or the victim's family.

First, "the vicious or aggravated nature of the crime" has long been considered to be one of the factors properly considered at sentencing. State v. Wells, 51 Wis.2d 477, 187 N.W.2d 328 (1971).

Further, several statutes allow, or even require, the court to consider victim impact information. One of the specified rights in § 950.04, titled, "Basic Bill of Rights for Victims and Witnesses," is that found in subsection (2m):

> To have the court provided with information pertaining to the economic, physical and psychological effect of the crime upon the victim of a felony and have the information considered by the court.

This right is implemented by two other provisions. Section 972.15, relating to the presentence report, includes subsec. (2m), which reads as follows:

> The person preparing the presentence investigation report shall attempt to contact the victim to determine the economic, physical and psychological effect of the crime on the victim. The person preparing the report may ask any appropriate person for information. This subsection does not preclude the person who prepares the report from including any information for the court concerning the impact of a crime on the victim.

The implementation is completed by subsec. (4) of § 973.013, which provides that "[i]f information under § 972.15(2m) has been provided in a presentence investigation report, the court shall consider that information when sentencing the defendant."

It is possible for sentencing proceedings to become highly emotional and for victim impact statements to contribute to that situation. To minimize potential problems, it may be helpful to remind those speaking on the victim's behalf that their comments are to be directed to the court, not to the defendant, and are to be delivered with due respect to the dignity and formality of the proceedings.

Consideration of victim impact information was challenged in State v. Horn, 126 Wis.2d 447, 461 (1985), where the defendant characterized it as "irrelevant, inflammatory and prejudicial." The court of appeals held there was no abuse of discretion in considering the victim impact information, noting that it is specifically authorized by § 972.15. Also see State v. Jones, 151 Wis.2d 488, 444 N.W.2d 760 (Ct. App. 1989), holding that it is appropriate to consider the "rehabilitative needs of the victim" in imposing sentence. It is not error for the presentence report to go beyond impact information and refer to victims' wishes as to the specific sentence to be imposed; but, like recommendations from other sources, they will be accepted only if the court "can independently conclude that the recommended sentence is appropriate in light of the acknowledged goals of sentencing as applied to the facts of the case." State v. Johnson, 158 Wis.2d 458, 465, 463 N.W.2d 352 (Ct. App. 1990).

The United States Supreme Court has considered the use of victim impact information in two death penalty cases. In Booth v. Maryland, 482 U.S. 496 (1987), the court held that the Eighth Amendment prohibited a capital sentencing jury from considering victim impact evidence. Booth was overruled in Payne v. Tennessee, 501 U.S. 808 (1991):

> Victim impact statement is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing

> authorities. We think the Booth Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. . . .
>
> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.

The Booth decision had not been applied to noncapital cases by the United States Supreme Court and the Wisconsin Court of Appeals has explicitly declined to extend Booth to noncapital cases. See State v. Scherreiks, 153 Wis.2d 510, 451 N.W.2d 759 (Ct. App. 1989). With its overruling by Payne, the Booth rationale clearly has no application to Wisconsin sentencing practice.

VI. The Defendant's Presence and Right to Allocution

Section 971.04(1)(g) provides that the defendant shall be present at "the pronouncement of judgment and the imposition of sentence." In State v. Koopmans, 210 Wis. 2d. 670, 563 N.W.2d 528 (1997), the court held that this provision is mandatory and nonwaivable in felony cases. It requires the defendant's presence at sentencing even if the defendant was present at the beginning of the trial but was voluntarily absent without permission of the court thereafter. See § 971.04(3). Subsection (2) of § 971.04 allows a defendant in a misdemeanor case to be excused from attendance at any or all stages of the proceedings, including sentencing. But the misdemeanor defendant may be excused only "with leave of the court," indicating this is a discretionary decision on the part of the trial judge.

Section 972.14(2) provides that before pronouncing sentence, the court shall afford the "defendant an opportunity to make a statement with respect to any matter relevant to sentence." It is important to afford defendants this right because it may be the only time during the entire proceeding when they have the chance to relate their side of the story. Along these lines, courts should be alert for statements made during "allocution" that may indicate that a guilty plea was not knowingly made. For example, assume that a defendant who has entered a guilty plea to burglary as a party to the crime states at sentencing that he should be given some leniency because he was asleep in the back seat of the car at the time of the crime and did not know his friends planned to commit a burglary. This indicates that the defendant did not understand the facts necessary to constitute the crime of burglary and casts doubt on the validity of the plea. This should have come up at the time the plea was accepted, but the opportunity for allocution may lead defendants to be more forthcoming about how their actions match up with the charge, and courts should be alert for statements at sentencing that cast doubt on the plea.

VII. Sources and Accuracy of Information

Subject to the general limitation that proper factors be considered, the sentencing court may rely on a broad range of information. Two of the potential problems that may arise represent opposite sides of the same coin: attempts by the parties to withhold information and attempts by nonparties to bring information to the judge's attention. An additional question is whether unconstitutionally obtained evidence may be considered.

A. Information from Nonparties

Recent developments emphasize the propriety of affording the victim a chance to be heard at sentencing, but what about unsolicited advice from persons not directly concerned with the criminal case? A common manifestation of this problem is the correspondence people sometimes direct to the sentencing court. The Committee recommends that all correspondence of this type be filed and disclosed to the prosecutor and defense. The court should clearly indicate whether or not the information was relied on when sentence is imposed.

B. Plea Agreements Relating to Sentencing Information or Advocacy

Plea agreements relating to sentence recommendations are apparently quite common. For example, the defendant may agree to plead guilty to a crime with a 10-year maximum penalty in return for the prosecution agreement to recommend a sentence of 5 years. These agreements are considered to be legitimate as long as the defendant understands that the prosecutor's recommendation is not binding on the sentencing judge.

Recent Wisconsin cases illustrate a related type of plea agreement, one where the prosecutor agrees "not to oppose" a particular sentence or "to remain silent" at sentencing. The danger with these agreements is that they may result in concealing from the sentencing judge information which is highly relevant to sentencing. Wisconsin appellate courts have made it clear that it is improper to conceal relevant information from the sentencing judge and that plea agreements which purport to do so are invalid because they are contrary to public policy. A recent case illustrating this situation is State v. McQuay, 154 Wis.2d 116, 452 N.W.2d 377 (1990) [reversing 148 Wis.2d 823, 436 N.W.2d 905 (Ct. App. 1989)]. McQuay entered an "Alford" plea to 5 counts of sexual assault. The plea agreement called for the dismissal of 24 other sexual assault charges and further provided that they would not be considered at sentencing. The presentence report, however, contained 10 pages of information on the dismissed charges. The sentencing judge said he did not consider the 24 other charges, but noted that if he could "there wouldn't be enough years for this Court to give you." McQuay challenged the sentence on appeal, claiming the plea agreement was breached when the presentence report contained information on the dismissed charges. The court of appeals vacated the judgment on the grounds that the plea agreement not to reveal relevant information to the sentencing judge was void – it is "against public policy and cannot be respected by the courts." 148 Wis.2d 823, 826.

The Wisconsin Supreme Court reversed, disagreeing with the factual conclusion that the agreement had called for withholding information from the judge. The supreme court read the agreement as a promise by the prosecutor to recommend to the sentencing court that it not consider the dismissed counts in imposing sentence. As such, it was a valid agreement and was not breached. The supreme court did not disagree with the court of appeals' legal conclusion that an agreement to withhold information is void as against public policy.

State v. Jorgensen, 137 Wis.2d 163, 404 N.W.2d 66 (Ct. App. 1987), illustrates the same problem with respect to a plea agreement that called for the state to "remain silent" at sentencing. At the sentencing hearing, the prosecutor interrupted defense counsel to call attention to a "factual discrepancy" in defense counsel's description of the facts of the offense. The court of appeals found that this statement was not a breach of the plea agreement and also held that any plea agreement that would call for the prosecutor to remain silent, regardless of the accuracy of statements made at sentencing, would be unenforceable as violating public policy. [Also see State v. Moederndorfer, 141 Wis.2d 823, 416 N.W.2d 627 (Ct. App. 1987): plea agreement to remain silent was not breached when state corrected the defendant's misstatement about the disposition of a codefendant's case.]

The general rule is clear: the parties cannot agree to limit the information the sentencing judge will consider.

Another problem with agreements calling for the prosecutor to remain silent is the difficulty in determining whether the agreement is complied with when information is provided by another government-related source. For example, what if the prosecutor remains silent but the presentence report recommends a harsh sentence? This problem may relate more directly to withdrawal of a guilty plea than to imposition of sentence, but the sentencing court should be alert to indications that this problem may exist.

C. Considering Unconstitutionally Obtained Evidence

In State v. Rush, 147 Wis.2d 225, 432 N.W.2d 688 (Ct. App. 1988), the court of appeals held that evidence suppressed because it was seized in violation of the 4th Amendment may be considered at sentencing. "We see no basis for a claim that consideration of the suppressed evidence at sentencing will inspire or encourage illegal searches. . . . Applying the exclusionary rule to sentencing would also unduly restrict a trial court's access to a broad range of evidence in determining a proper sentence." 147 Wis.2d 225, 230.

A leading federal case, however, indicates that there may be situations where the Fourth Amendment exclusionary rule might be applied to sentencing. In Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968), the court excluded illegally seized evidence at sentencing because the illegal search was conducted after the regular criminal investigation was finished for the purpose of finding contraband and enhancing the possibility of a heavier sentence. LaFave, Search and Seizure, § 1.6(f), p. 137 (West 1987).

It is not clear whether the Rush rule would be applied to statements obtained in violation of the 5th or 6th Amendment. There may be two aspects to this problem. The first question is whether the 5th or 6th Amendment limits on interrogation apply to presentence interviews conducted to obtain sentencing information.

In Estelle v. Smith, 451 U.S. 454 (1981), the United States Supreme Court held that Miranda and the 6th Amendment required that a defendant be given warnings and enjoy the assistance of counsel at a psychiatric interview later used against the defendant at the penalty phase of a death penalty trial. In State v. Knapp, 111 Wis.2d 380, 330 N.W.2d 242 (Ct. App. 1983), the defendant argued that Estelle requires the presence of counsel under the 6th Amendment and Miranda warnings at an interview preceding the preparation of the presentence report.

On the Miranda issue, the court of appeals distinguished Estelle and concluded that warnings are not necessary.

> Unlike the situation in Estelle, the purpose of a presentence investigation is not to generate evidence to be used by the state in proving an essential element of its case against the accused. Rather, presentence reports are designed to gather information concerning a defendant's personality, social circumstances and general pattern of behavior, so that the judge can make an informed sentencing decision. The interview does not involve the accusatorial atmosphere characterized by the stationhouse confrontation in Miranda or the psychiatric examination on "future dangerousness" at issue in Estelle. Therefore, the Miranda safeguards should not be required.

111 Wis.2d 380, 386.

Knapp's argument based on the 6th Amendment right to counsel was also rejected, the court holding that Estelle did not require the presence of counsel, just the opportunity to get advice before the interview occurred.

Therefore, under Knapp, there can be no 5th or 6th Amendment violation at a presentence interview. There would be no grounds for arguing that an exclusionary rule based on the 5th or 6th Amendment could apply at the sentencing stage with respect to statements made during the presentence interview.

A second question is whether statements obtained outside a presentence interview, such as during a regular pretrial interrogation session, are admissible at sentencing if obtained in violation of 5th or 6th Amendment rights. Neither the United States Supreme Court nor the Wisconsin appellate courts have decided this question. Estelle v. Smith held that using such statements at sentencing was unconstitutional because they did incriminate the defendant in the sense of determining his punishment. Of course, Estelle v. Smith was a capital case, an important distinction that has been the basis for rules limited to the death penalty context.

VIII. Denying and Setting Parole Eligibility

There are three situations where a sentencing court is required or allowed to deny parole eligibility or to set a later parole eligibility date than called for by the generally applicable statute. This authority relates only to the "eligibility" date, that is, the date when the defendant may first be considered for parole release. The date of actual release on parole will continue to be determined by the Parole Commission.

A. Denying Parole for a "Persistent Repeater" – § 939.62(2m)

"Persistent repeater" is the term used to refer to those who are subject to imprisonment without the possibility of parole. The term originally applied only to those covered by the Wisconsin "three strikes" provision; 1997 Wisconsin Act 326 added certain offenders who have two convictions for certain child sex offenses.[25]

Subsection (2m)(a)2m. of § 939.62, originally enacted as part of the original "three strikes" provision, identifies the crimes that are considered to be "serious felonies." Subsection (2m)(b)1. provides that a person is a "persistent repeater" if he or she "has been convicted of a serious felony on 2 or more separate occasions at any time preceding the serious felony for which he or she presently is being sentenced. . . ."

Subsection (2m)(a)1m. of § 939.62, created by Act 326, identifies the crimes that are considered to be "serious child sex offenses." Subsection (2m)(b)2. provides that a person is a "persistent repeater" if he or she "has been convicted of a serious child sex offense on at least one occasion at any time preceding the date of violation of the serious child sex offense for which he or she presently is being sentenced. . . ."

If the person qualifies as a "persistent repeater" under either of these standards, the sentence for the serious felony or serious child sex offense for which he or she is presently being sentenced "is life imprisonment without the possibility of parole." § 939.62(2m)(c).

The constitutionality of the statute's original "three strikes" provisions was upheld in State v. Lindsey, 203 Wis.2d 423, 554 N.W.2d 215 (Ct. App. 1996).

The "persistent repeater" allegation must be included in the charging document and proven in the same manner as a regular repeater allegation. See, § 973.12(1). If it is properly alleged and proven, the sentence of life without parole is mandatory; there is no exercise of discretion on the part of the sentencing court.

Even though the life without parole sentence is mandatory, the defendant must still be accorded the statutory right to allocution. State v. Lindsey, 203 Wis.2d 423, 446.

B. Setting Parole Eligibility in Class A Felonies – § 973.014

The authority for setting the parole eligibility date for persons convicted of Class A felonies was created by 1987 Wisconsin Act 412, with an effective date of July 1, 1988. The primary provision is § 973.014,[26] which, as amended by 1995 Wisconsin Act 48 provides as follows:

> 973.014 Sentence of life imprisonment; parole eligibility determination; extended supervision eligibility determination. (1) Except as provided in sub. (2), when a court sentences a person to life imprisonment for a crime committed on or after July 1, 1988, but before December 31, 1999, the court shall make a parole eligibility determination regarding the person and choose one of the following options:
>
> (a) The person is eligible for parole under § 304.06(1).
>
> (b) The person is eligible for parole on a date set by the court. Under this paragraph, the court may set any later date than that provided in § 304.06(1), but may not set a date that occurs before the earliest possible parole eligibility date as calculated under § 304.06(1).
>
> (c) The person is not eligible for parole. This paragraph applies only if the court sentences a person for a crime committed on or after August 31, 1995, but before December 31, 1999.
>
> . . .
>
> (2) When a court sentences a person to life imprisonment under s. 939.62(2m)(c), the court shall provide that the sentence is without the possibility of parole or extended supervision.[27]

Subsection (1)(c) was created in 1995 to make it clear that a court could flatly deny parole eligibility. The original version of § 973.014 lacked a grant of that specific authority; the Wisconsin Court of Appeals held that the sentencing court was required to set a date certain and could not deny eligibility outright. State v. Setagord, 187 Wis.2d 340, 523 N.W.2d 124 (Ct. App. 1994). On remand in the Setagord case, the sentencing court then set a parole eligibility date that exceeded the defendant's life expectancy. A second appeal followed. The Wisconsin Supreme Court held that "§ 973.014(1)(b) unambiguously grants the circuit court discretion to impose a parole eligibility date beyond a defendant's expected lifetime." State v. Setagord, 211 Wis.2d 397, 565 N.W.2d 506 (1997). With the creation of sub. (1)(c) courts can now provide that a sentence is to be without the possibility of parole and need not resort to the strategy of setting a date that the defendant could not be expected to reach.

Subsection (2) refers to the sentencing of "persistent repeaters" under § 939.62(2m), which requires a mandatory sentence of life imprisonment without the possibility of parole. ["Persistent repeater" is the formal title for Wisconsin's "three strikes" law.]

Section 973.014 is silent regarding criteria for making the parole eligibility decision. The Wisconsin Supreme Court has held that the "factors that a sentencing court considers when imposing a sentence are the same factors that influence the determination of parole eligibility." State v. Borrell, 167 Wis.2d 749, 774, 482 N.W.2d 883 (1992), cited with approval in State v. Setagord, 211 Wis.2d 397, 416, 565 N.W.2d 506 (1997). Thus, it appears to the Committee that a court should refer to the regular criteria applicable to sentencing and try to relate them to the period of time that ought to elapse before the defendant sees the parole board rather than to the usual questions of prison or probation and, if prison, how long a term.

Note that the statute requires a specific finding in every Class A felony case. Unless the court orders that the defendant shall not be eligible for parole under sub. (1)(c), a determination must be made that parole eligibility will be as provided in § 304.06(1) or that eligibility will be at a later date than would be provided by following § 304.06(1). Section 304.06(1) establishes regular parole eligibility for a

Class A felony at about 13 years, 4 months – 20 years, less the 1/3 reduction under § 302.11(1) (for what used to be called "good time").

Credit for presentence confinement under § 973.155 is not required to be awarded against a parole eligibility set by the court under § 973.014. State v. Chapman, 175 Wis.2d 231, 499 N.W.2d 223 (Ct. App. 1993). State v. Seeley, 212 Wis.2d 75, 567 N.W.2d 897 (Ct. App. 1997).

C. Setting Parole Eligibility in "Serious Felonies" – § 973.0135

A provision similar to § 973.014 is found in § 973.0135, Sentence for certain serious felonies; parole eligibility determination. This provision requires the court to set a parole eligibility date for certain offenders in other than Class A felonies. The statute applies to a person who is being sentenced for a "serious felony" and who has previously been convicted of a "serious felony" and sentenced to more than one year of imprisonment. Crimes that qualify as a "serious felony" are specified in sub. (1)(b). They are the same as those specified as "serious felonies" under § 939.62(2m)(a)2m. for purposes of the "persistent repeater" or "three strikes" law.

Section 973.0135 applies to sentences imposed for crimes committed on or after April 21, 1994, and requires the court to make a parole eligibility determination by choosing one of two options set forth in sub. (2):

> (a) The person is eligible for parole under s. 304.06(1).
> (b) The person is eligible for parole on a date set by the court. Under this paragraph, the court may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 304.06(1) and may not set a date that occurs later than two-thirds of the sentence imposed for the felony.

This section does not apply if the current "serious felony" is a crime punishable by life imprisonment; in that situation, § 973.014 will apply. The effect of § 973.0135(2)(b) is to allow a court to set a parole eligibility date that falls at a point after the regular eligibility date [25% of the sentence imposed] and not later than the date for mandatory release [two-thirds of the sentence imposed]. Regardless of the action taken by the sentencing court as to parole eligibility, persons convicted of a "serious felony" are now subject to only a "presumptive" mandatory release date. The parole commission decides whether to deny presumptive mandatory release. See § 302.11(1g)(b).[28]

IX. Stay of Execution of Sentence

Section 973.15(8) specifies the situations where execution of a sentence may be stayed:

> (8) (a) The sentencing court may stay execution of a sentence of imprisonment or to the intensive sanctions program only:
>
> 1. For legal cause;
> 2. Under § 973.09(1)(a); or
> 3. For not more than 60 days.
>
> (b) If a court sentences a person under s. 973.03(5)(b), this subsection applies only to the first period of imprisonment.

"Legal cause" under sub. (a)1. has been interpreted to mean for the purpose of allowing the defendant to pursue within the Wisconsin court system some relief against the sentence or conviction. Reinex v. State, 51 Wis. 152 (1881); Weston v. State, 28 Wis.2d 136, 135 N.W.2d 820 (1965). A stay to allow the defendant's release while a federal habeas corpus petition is pursued is not authorized in Wisconsin. State v. Shumate, 107 Wis.2d 460, 319 N.W.2d 834 (1981).

The "for legal cause" basis for staying execution of sentence was applied in State v. Szulczewski, 216 Wis.2d 494, 574 N.W.2d 660 (1998), in a case where a person already subject to a commitment as not guilty by reason of mental disease or defect was convicted of a crime and faced criminal sentencing. The trial court sentenced the person to five years in prison and ordered that the sentence begin immediately, concluding that immediate commencement of the criminal sentence was required by § 973.15. The supreme court held that the commitment could provide "legal cause" for stay of execution of sentence under § 973.15(8)(a)1. The sentencing court may exercise discretion in determining whether to stay execution of the new prison sentence, balancing the purposes of the commitment with the traditional purposes of criminal sentencing: deterrence, rehabilitation, retribution, and segregation.

Subsection (a)3. was created in response to State v. Braun, 100 Wis.2d 77, 301 N.W.2d 180 (1981), which held that in the absence of special statutory authorization, Wisconsin courts lacked authority to grant a delay to allow a defendant to put his affairs in order. Subsection (a)3. apparently authorizes that type of stay, although it would be limited to 60 days. The Attorney General has advised that it is not permissible to stay a jail sentence beyond the 60 day limit recognized in sub. (a)3. because of jail overcrowding. OAG 39-87, July 13, 1987.

X. Resentencing After a Successful Appeal

In State v. Carter, 208 Wis.2d 142, 560 N.W.2d 256 (1997), the Wisconsin Supreme Court clarified the standard that applies when it is necessary to resentence a defendant who has successfully appealed the initial conviction or sentence. A sentencing court in that situation is to "consider all information relevant about a defendant, including information about events and circumstances either that the sentencing court was unaware of at the initial sentencing or that occurred after the initial sentencing." 208 Wis.2d 141, 146. The decision resolved a conflict between two decisions of the court of appeals: State v. Pierce, 117 Wis.2d 83, 342 N.W.2d 776 (Ct. App. 1983), held that an increased sentence could be supported by reference to the fact that the defendant had been arrested for two batteries committed after the initial sentencing; State v. Solles, 169 Wis.2d 556, 485 N.W.2d 457 (Ct. App. 1992), held that a resentencing court could not consider information favorable to the defendant that occurred after the initial sentence was imposed. Carter overruled Solles.

The Carter decision also rejected the distinction proposed by the state that would have treated differently cases where the entire conviction was reversed and cases where just the sentence was vacated. Carter held that both cases are to be treated the same: when resentencing is required for any reason, the initial sentencing is a nullity and ceases to exist. The court's role is the same at resentencing as at the initial sentencing and the court should have complete, accurate and current information. 208 Wis.2d 141, 154.

Carter leaves intact the basic principle applicable to resentencing after successful appeal: the defendant is not to receive a harsher sentence as punishment for the successful exercise of the right to appeal. Due process principles protect against vindictiveness by requiring that a harsher sentence must be

"based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 208 Wis.2d 141, 148, quoting North Carolina v. Pearce, 395 U.S. 711, 726 (1969). Also see State v. Stubbendick, 110 Wis.2d 693, 329 N.W.2d 399 (1983).

COMMENT

SM-34 was originally published in 1976 and revised in 1990 and 1991. This revision was approved by the Committee in February 1999 and involved a general updating and the addition of new material at sections II.D., V., VIII., IX., and X.

1. The American Bar Association Standards for Criminal Justice were reenacted in a second edition in 1980. This provision was reenacted as Standard 20-2.3(c), with the exception of the last sentence which was deleted.

2. The equivalent provision in the second edition of the ABA Standards (see note 1, supra) is Standard 18-2.2(a), Sentencing Alternatives and Procedures:

> (a) The sentence imposed in each case should call for the minimum sanction which is consistent with the protection of the public and the gravity of the crime. In determining the gravity of the offense and the public's need for protection, sentencing authorities best serve the public interest and the appearance of justice when they give serious consideration to the goal of sentencing equality and the need to avoid unwarranted disparities.

The revised standard deletes reference to "the rehabilitative needs of the defendant" as a criteria for deciding when confinement is called for. See note 3, below.

3. This standard was revised in the 1980 edition of the ABA Standards and is found in part in Standard 18-2.5(c):

> (c) A sentence not involving total confinement is to be preferred in the absence of affirmative reasons to the contrary. Examples of legitimate reasons for the defendant selection of total confinement in a given case are:
>
> > (i) Confinement is necessary in order to protect the public from further serious criminal activity by the defendant; or
> > (ii) Confinement is necessary so as not to unduly depreciate the seriousness of the offense and thereby foster disrespect for the law.
>
> On the other hand, neither community hostility to the defendant nor the apparent need of the defendant for rehabilitation or treatment provides acceptable reasons for imposing a sentence of total confinement.

Former Standard 1.3(b) appears at Standard 18-2.3(vi) of the second edition, without change.

4. Sections 973.013(4) and 972.15(2m); State v. Jones, 151 Wis.2d 488, 444 N.W.2d 760 (Ct. App. 1989). See Sec. V., this Special Material.

5. Sections 48.35(1)(b) and 938.35(1)(a); Lange v. State, 54 Wis.2d 569, 196 N.W.2d 680 (1972); State v. Johnson, 105 Wis.2d 657, 314 N.W.2d 897 (Ct. App. 1982).

6. Austin v. State, 49 Wis.2d 727, 183 N.W.2d 56 (1971).

7. United States v. Grayson, 438 U.S. 41 (1978). Grayson reaffirmed that it is not permissible to impose an added term for suspected perjury. However, the defendant's false testimony is considered relevant to the defendant's prospects for rehabilitation and therefore may be relied on by the sentencing judge to determine the appropriate sentence. The Wisconsin rule appears to be the same. See Lange v. State, cited above, note 5, and Zastrow v. State, 62 Wis.2d 381, 215 N.W.2d 426 (1974).

8. State v. Olson, 127 Wis.2d 412, 380 N.W.2d 375 (Ct. App. 1985). Also see Roberts v. United States, 445 U.S. 552 (1980), where the court held that a defendant's refusal to name his suppliers in a drug conspiracy was properly considered at sentencing. In Roberts, the defendant made no claim before the sentencing judge that his refusal was based on concerns of self-incrimination or fears of physical retaliation. Had it been, the argument would have "merited serious consideration. . . . But the mere possibility of unarticulated explanations or excuses for antisocial conduct does not make that conduct irrelevant to the sentencing decision." 445 U.S. 552, 559.

9. In State v. Bobbitt, 178 Wis.2d 11, 503 N.W.2d 11 (Ct. App. 1993), the defendant was tried on charges of attempted first degree intentional homicide while armed, robbery, and false imprisonment. The jury acquitted him of the attempted homicide charge and convicted him on the others. In sentencing, the court referred to the violence that accompanied the robbery; the violence had been the basis for the attempted homicide charge. The court of appeals concluded that "the trial court did not misuse its discretion when it considered the violent conduct surrounding the attempted homicide for which Bobbitt was acquitted." 178 Wis.2d 11, 18.

The Bobbitt result is consistent with statements in prior Wisconsin cases, but there was no express authority on the issue. [See, for example, State v. Marhal, 172 Wis.2d 491, 501-04, 493 N.W.2d 758 (Ct. App. 1992), concluding that there would have no error even if the trial court in that case had considered the defendant culpable of a more serious crime where the jury returned a verdict on a lesser included offense.] The United States Supreme Court has reached the same conclusion in a case challenging provisions of the Federal Sentencing Guidelines which allow consideration of acquittal conduct. United States v. Watts, 518 U.S. 148 (1997).

10. Hanneman v. State, 50 Wis.2d 689, 184 N.W.2d 896 (1971); Kubart v. State, 70 Wis.2d 94, 233 N.W.2d 404 (1975); Jung v. State, 32 Wis.2d 541, 145 N.W.2d 684 (1966); and United States v. Wiley, 267 F.2d 453 (7th Cir. 1959), 278 F.2d 500 (7th Cir. 1960).

11. Scales v. State, 64 Wis.2d 485, 219 N.W.2d 286 (1974); Williams v. State, 79 Wis.2d 235, 255 N.W.2d 504 (1977).

12. See Kubart v. State, and United States v. Wiley, cited in note 10, supra. It is proper, however, to consider a wholly frivolous defense and the defendant's conduct at trial. Finger v. State, 40 Wis.2d 103, 161 N.W.2d 272 (1968); Lange v. State, cited in note 5, supra.

13. Several Wisconsin cases have discussed claims by defendants that the sentencing court improperly considered religious or political beliefs or associations. The general rule appears to be that beliefs and associations protected by the First Amendment may not be considered at sentencing unless a reliable connection is established between the criminal conduct and the defendant's beliefs and associations.

The United States Supreme Court addressed the issue in connection with capital sentencing in Dawson v. Delaware, 503 U.S. 159 (1992). Evidence was introduced relating to the defendant's membership in the Aryan Brotherhood, a white supremacist prison gang. The court did not hold that consideration of that evidence was banned in all cases, but found that the state had failed to show how it was connected to any matter relevant to sentencing.

The Wisconsin Court of Appeals has addressed this issue several times. In State v. Fuerst, 181 Wis.2d 903, 512 N.W.2d 243 (Ct. App. 1994), the court found that the sentencing court's remarks about the defendant's lack of religious beliefs and failure to attend church constituted an erroneous exercise of discretion. It is not improper "to include information about religious beliefs and practices in presentence reports as part of the description of the defendant's 'whole person,'" 181 Wis.2d 903, 913, but that information cannot be relied on in sentencing unless a relationship is established between those beliefs and the criminal conduct.

In State v. Marsh, 177 Wis.2d 643, 502 N.W.2d 899 (Ct. App. 1993), the defendant claimed his sentencing was tainted by the inclusion of evidence that he studied Odinism, the white supremacy religion of the Vikings, and possessed other material relating to the Ku Klux Klan, Nazi Germany, and the National Association for the Advancement of White People. The state conceded that some of this information was improperly considered because it was unrelated to the crime, but the court of appeals found it was harmless error.

In State v. J.E.B., 161 Wis.2d 655, 469 N.W.2d 192 (Ct. App. 1991), the court of appeals upheld the sentencing court's consideration of information showing that the defendant read books including graphic descriptions of adults having sexual contact with children. Although the books are presumably protected by the First Amendment, a sufficient relationship was shown between them and the defendant's criminal activity – sexual assault of a child.

Both Fuerst and J.E.B. apply a test articulated in United States v. Lemon, 723 F.2d 922, 936 (D.C. Cir. 1983): "due process at sentencing requires that before a court may consider a defendant's associations, there must be some identifiable link between those associations and the crime for which the defendant was convicted."

14. See note 16, below.

15. The intent of this statement is to emphasize that the sentence should not be structured as to negate the effect of § 973.155 which requires credit against the sentence for time spent in presentence confinement. The Wisconsin Supreme Court has identified the procedure that should be followed:

> . . . trial judges are first to determine and impose an appropriate sentence independently of any time previously served. Only then should time served be determined and become relevant to the

> final sentence imposed on the conviction. The time previously served should not be a factor in the exercise of sentencing discretion. . . .

State v. Walker, 117 Wis.2d 579, 586, 345 N.W.2d 413 (1984). Also see Struzik v. State, 90 Wis.2d 357, 279 N.W.2d 922 (1979), and Klimas v. State, 75 Wis.2d 244, 249 N.W.2d 285 (1977), requiring the same procedure.

Recent decisions of the Wisconsin Court of Appeals have continued to list "pretrial confinement" as one of the many permissible sentencing factors. See, for example, State v. Jones, 151 Wis.2d 488, 495, 444 N.W.2d 760 (Ct. App. 1989), and State v. Larsen, 141 Wis.2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). However, these cases have not explicitly focused on the issue that is of concern here. They appear simply to have repeated the long list of permissible sentencing factors that can ultimately be traced to cases that preceded the clarification of the right to credit for presentence confinement and the jail credit statute. Thus, the procedure set forth in Walker ought to be followed. (Awarding credit for presentence confinement is discussed in SM-34A, Determining Sentence Credit Under § 973.155.)

16. Also see State v. Fuerst, 181 Wis.2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994), citing State v. Wickstrom, 118 Wis.2d 339, 348 N.W.2d 183 (Ct. App. 1984) for the proposition that "a sentencing court does not erroneously exercise its discretion by noting a defendant's lack of remorse as long as the court does not attempt to compel an admission of guilt or punish the defendant for maintaining his innocence."

17. In State v. Panknin, 217 Wis.2d 200, 204, 579 N.W.2d 52 (Ct. App. 1998), the court concluded that "irreversible harm would be done to the judicial process by opening the private notes of the court to litigants." The court also suggested a method for handling notes:

> A judge's personal notes should not be placed in the clerk of court's file. It is too easy for a clerk to become distracted and forget to seal the notes; or, there is nothing preventing a person reviewing the file from opening sealed notes. A better practice is to keep a personal filing cabinet for notes in chambers. A court can use file folders labeled with the case number or keep notes on the computer's hard drive using the case number for the file name. The confidential nature of the notes is secure if the court keeps them in chambers and out of the public court file.

217 Wis.2d 200, 204, at footnote 2.

18. 1989 Wisconsin Act 142 (effective date: March 31, 1990), created § 973.033 to read:

> Sentencing; restriction on firearm possession. Whenever a court imposes a sentence or places a defendant on probation regarding a felony conviction, the court shall inform the defendant of the requirements and penalties under s. 941.29.

Section 941.29 makes it a Class E felony for a convicted felon to possess a firearm.

19. Section 973.034 provides:

> Whenever a court imposes a sentence or places a defendant on probation regarding a conviction under s. 940.22(2) or 940.225(2)(c), if the victim is under 18 years of age at the time of the

offense, or a conviction under s. 948.02(2), 948.025(1), 948.05(1), 948.06 or 948.07(1), (2), (3) or (4), the court shall inform the defendant of the requirements and penalties under s. 948.13.

Section 948.13 makes it a Class C felony for a person previously convicted of a "serious child sex offense" to "engage in an occupation or participate in a volunteer position that requires him or her to work or interact primarily and directly with children under 16 years of age."

The requirement that courts inform defendants at sentencing and the new criminal offense under § 948.13 both apply to offenses committed on or after May 6, 1997, the effective date of 1995 Wisconsin Act 265 which created both statutes.

20. Section 973.048(1) provides that when a court sentences or places on probation a person convicted of a designated sex offense, "the court shall require the person to comply with the reporting requirements under s. 301.45. Subsection (2) of § 973.048 provides that when a person is sentenced or placed on probation for any violation of "ch. 940, 944 or 948 or ss. 943.01 to 943.15, the court may require the person to comply with the reporting requirements under s. 301.45 if the court determines that the underlying conduct was sexually motivated, as defined in s. 980.01(5), and that it would be in the interest of public protection to have the person report under s. 301.45."

The reference to "s. 301.45" is to the statute requiring that sex offenders register with the department of corrections. The effective date of § 973.048 is June 1, 1997.

21. Section 973.18(2) requires that the trial judge personally inform the defendant at the time of sentencing of the right to seek postconviction relief and, if indigent, the right to the assistance of the state public defender. See SM-33, Information on Postconviction Relief.

22. See note 18, supra.

23. See notes 19 and 20, supra.

24. See note 21, supra.

25. The effective date of 1997 Wisconsin Act 326 was July 16, 1998. Section 15 of the Act provides that "the treatment of section 939.62(2m)(b)2. of the statutes first applies to serious child sex offenses committed on the effective date of this subsection, but does not preclude the counting of other serious child sex offenses as prior serious child sex offenses for sentencing a person as a persistent repeater under section 939.62(2m)(b)2. of the statutes, as created by this act."

26. The constitutionality of § 973.014 as originally enacted was upheld in State v. Borrell, 167 Wis.2d 749 482 N.W.2d 883 (1992).

27. The references restricting applicability to offenses committed " before December 31, 1999" recognize that the "truth in sentencing" system created by 1997 Wisconsin Act 283 is scheduled to take effect on that date. "Extended supervision" is a component of that system.

28. The provision for "presumptive" mandatory release was created at the same as § 973.0135. See 1993 Wisconsin Act 194. Both provisions apply to sentences for offenses committed on or after April 21, 1994.

SM-34A DETERMINING SENTENCE CREDIT UNDER SECTION 973.155

CONTENTS

I. Introduction

Wisconsin Stat. § 973.155(1) establishes the basic rule governing sentence credit: An offender is entitled to sentence credit for time he or she spent in custody in connection with the course of conduct for which sentence is imposed. In addition, § 973.155(2) requires a sentencing court to make a specific finding of the number of days for which sentence credit is to be granted to an offender under § 973.155 and to include that finding in the judgment of conviction. The purpose of this Special Material is to assist the court in making a proper determination of sentence credit.

A sentencing court must give credit accorded by the statute because an offender may not serve more time than that for which he is sentenced.[1] Sentence credit has the effect of reducing the amount of time the offender serves in jail or, for bifurcated sentences, in prison under the term of confinement before reaching the date on which he or she is released to the term of extended supervision. That is because, with one exception,[2] when credit is granted an offender's sentence is computed as having begun as many days before the date of sentencing as days credit have been granted. For example, an offender sentenced to 10 years of imprisonment, consisting of five years of confinement and five years of extended supervision, and entitled to six months of credit will be released to extended supervision four years, six months from the date of sentencing.

The basic rule for determining credit is easily stated, but its application can be difficult, particularly in situations in which an offender has multiple cases with different periods of pretrial custody and concurrent or consecutive sentences. To help the sentencing court understand and apply the basic rule, this Special Material proceeds as follows. First, it explains the basic rule governing sentence credit. Next, it discusses procedural and technical aspects of making a credit determination. It then provides a detailed explanation of the basic rule used to determine the number of days for which credit is due. After that explanation, it discusses situations that arise with some regularity, and illustrates, with reference to case law, if available, how to determine credit in those situations. Finally, it provides information about correcting a finding of sentence credit.

II. The Basic Rule

The basic rule for determining sentence credit is set forth in § 973.155(1) and (1m), which read as follows:

> **(1)(a)** A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct

for which sentence was imposed. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:

1. While the offender is awaiting trial;
2. While the offender is being tried; and
3. While the offender is awaiting imposition of sentence after trial.

(b) The categories in par. (a) and sub. (1m) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. 302.113 (8m), 302.114 (8m), 304.06 (3), or 973.10 (2) placed upon the person for the same course of conduct as that resulting in the new conviction.

(1m) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody as part of a substance abuse treatment program that meets the requirements of s. 165.95 (3), as determined by the department of justice under s. 165.95 (9) and (10), for any offense arising out of the course of conduct that led to the person's placement in that program.

The basic rule, then, is that entitlement to sentence credit depends on the offender having been in custody in connection with the course of conduct for which sentence is imposed.[3] A defendant seeking sentence credit has the burden of demonstrating both custody and its connection with the course of conduct for which the sentence was imposed.[4] Entitlement does not depend on the offender's inability to post bond.

The focus of this Special Material is the determination of sentence credit for days spent in custody up to the date of sentencing, as identified in the three periods of time listed in § 973.155(1)(a).[5] It will also address credit when imposing sentence in sentence withheld – probation ordered cases, which may include time the offender spent in custody while on probation.

III. Procedure for Making the Finding of Sentence Credit in All Cases

A. Tell the parties to be prepared to address sentence credit at sentencing

A great saving of judicial time and energy can be realized if an accurate determination of sentence credit is made at the time the judgment of conviction is entered, when the facts

are fresh, records are available, and the defendant and counsel are present to address the issue. Therefore, the court should require the parties to be prepared to address the sentence credit issue at the time of sentencing. Disputes about the number of days for which credit is due should be anticipated and settled before judgment is entered, by stipulation[6] or, if necessary, further hearing. Accurate information and the informed participation of prosecutor and defense counsel are essential.

B. Make a finding after the proper disposition has been determined

In all cases, the court should first follow its usual procedure to determine the appropriate disposition. After the decision as to type and length of disposition has been made, the finding of the number of days for which sentence credit is due should be made.[7]

C. Make a finding in every case

The finding regarding sentence credit should be made in every case, including those where the disposition is probation or the sentence is to home detention under § 973.03(4).[8] Although § 973.155 does not explicitly require that the sentence credit determination be made in cases where sentence is withheld and probation ordered, making the finding in probation cases will document the finding of credit due up to the date of disposition and make it available if probation is later revoked. (NOTE: The finding on the original judgment will relate only to the credit due as of the date of that judgment; additional credit may also be appropriate at the time of revocation for custody during the revocation process. The consideration of other periods of time in the sentence withheld – probation ordered and revoked case is discussed below, in Section V.B.)

In a case in which the disposition is probation and the court orders jail time as a condition under § 973.09(4), any sentence credit the court grants does not have to be credited against the condition time, although the court has discretion to do so.[9]

D. Make the finding in terms of a number of days

The defendant is entitled to a day of sentence credit for each calendar day during which he or she spent at least part of the day in custody. State v. Johnson, 2018 WI App 2, 379 Wis.2d 684, 906 N.W.2d 704, 2018 WI App 2, ¶8. The only exception to this rule is that the defendant is not entitled to sentence credit for the day on which he or she is sentenced because the Department of Corrections counts that day toward the service of the sentence. State v. Kontny, 2020 WI App 30, ¶¶10-12, 392 Wis. 2d 311, 943 N.W.2d 923. Only the number of days for which credit is due should be determined by the court. That number should be entered on the judgment of conviction. The standard judgment of

conviction form adopted by the Judicial Conference and mandated for use under § 971.025(1) includes a blank for entering a finding of the number of days of credit.

The finding should be in terms of the number of days and should not be expressed as weeks, months, years, or fractions thereof. The sentencing court should not determine the date sentence is to commence. The prison registrar or jail custodian will compute the sentence. As noted in the Introduction, the sentence will be computed as though it had begun as many days before the date of sentencing as days credit have been granted. That is, the sentence of an offender sentenced by the court on May 1, and entitled to 30 days sentence credit, will be computed as though it began on April 1. The date on which the offender is eligible for release will be calculated by the prison registrar or jail custodian as though the sentence had begun April 1.

E. If no credit is due, make that finding

The court should make a specific finding even when it determines that no credit is due. Insert "No" or "0" in the blank provided for the sentence credit finding. This will avoid future questions about whether credit was considered.

F. Apply the credit to the sentence being served

When sentence credit is applied at the time of sentencing, the circuit court should apply sentence credit to the term of incarceration.[10] For instance, if an offender is entitled to credit applicable to charges for which he receives both an imposed sentence and a stayed sentence, the credit must be applied to the imposed sentence.[11]

IV. An Explanation of the Basic Rule

The basic rule established by § 973.155 is that an offender is entitled to sentence credit if the person was (A) in custody and the custody was (B) in connection with (C) the course of conduct for which sentence is imposed. If one of these requirements is not met, the defendant is not entitled to credit.

A. In custody…

"In custody" is not defined in § 973.155, but the Wisconsin Supreme Court has held that "for purposes of sentence credit an offender's status constitutes custody whenever the offender is subject to an escape charge for leaving that status." State v. Magnuson, 2000 WI 19, ¶31, 233 Wis.2d 40, 606 N.W.2d 536.

This means the inquiry into whether an offender was in "custody" begins with the definition of "custody" provided in the escape statute, § 946.42(1)(a)1. In the majority of cases, application of that definition will be sufficient. In some cases, however, the court may also have to consider whether the offender was in a status that subjected him or her to an escape charge for leaving that status.

1. "Custody" based on liability under the escape statute

a. "Custody" as defined in § 946.42(1)(a)1.

Section 946.42(1)(a)1. provides that "custody" includes without limitation the following:

> a. Actual custody of an institution, including a juvenile correctional facility, as defined in s. 938.02 (10p), a secured residential care center for children and youth, as defined in s. 938.02 (15g), a juvenile detention facility, as defined in
> s. 938.02 (10r), a Type 2 residential care center for children and youth, as defined in s. 938.02 (19r), a facility used for the detention of persons detained under
> s. 980.04 (1), a facility specified in s. 980.065, or a juvenile portion of a county jail.[12]
>
> b. Actual custody of a peace officer or institution guard.
>
> bm. Actual custody or authorized physical control of a correctional officer.
>
> c. Actual custody or authorized physical control of a probationer, parolee, or person on extended supervision by the department of corrections.
>
> e. Constructive custody of persons placed on supervised release under ch. 980.
>
> f. Constructive custody of prisoners and juveniles subject to an order under s. 48.366, 938.183, 938.34 (4d), (4h), or (4m), or 938.357 (4) or (5)(e) temporarily outside the institution whether for the purpose of work, school, medical care, a leave granted under s. 303.068, a temporary leave or furlough granted to a juvenile, or otherwise.

g. Custody of the sheriff of the county to which the prisoner was transferred after conviction.

h. Custody of a person subject to a confinement order under s. 973.09(4).

The following situations are within this definition of custody:

- Detention in the county jail before bail is set or thereafter;
- Detention in the county jail during nonworking hours as a condition of bail release or probation;[13]
- Detention in jail in another state when that detention results at least in part from a Wisconsin warrant;[14]
- Time spent in secure juvenile detention pending a waiver to adult court, when jurisdiction is waived and an adult sentence is imposed;[15]
- Time spent at an in-house rehabilitation center when "temporarily outside the [jail] for the purpose of medical care."[16]

b. "Custody" based on unauthorized departure from certain correctional settings

Under Magnuson a person who is in a correctional program that does not constitute "custody" under the definition in § 946.42(1)(a) is still entitled to credit if the statute that creates the correctional program allows for an escape charge for unauthorized departure from the program. Magnuson, 233 Wis.2d 40, ¶¶26-30. In most cases this basis for "custody" will not come into play, as the correctional programs covered by the definition are for offenders who have already been sentenced. Nonetheless, such claims may arise in cases where an offender was in custody on more than one case or charge, so the court and counsel should be aware of the programs that are covered. They include:

- The community residential confinement program under § 301.046;
- The intensive sanctions program under § 301.048;

- Jail labor off the institution grounds under § 302.37(4);
- Home detention under § 302.425;
- Prison labor off the institution grounds under § 303.03;
- Work release plans for prison inmates under § 303.065; and
- County work camps under § 303.10;
- Placement of a juvenile offender in a setting specified under §§ 938.357(4)(a), 938.533(3)(a), 938.538(4)(a), and 938.539(1).

2. Participation in certain AODA programs covered by § 973.155(1m)

Under § 973.155(1m), a person is entitled to credit "for all days spent in custody as part of a substance abuse treatment program that meets the requirements of s. 165.95(3), as determined by the Office of Justice Assistance under s. 165.95(9) and (10) for any offense arising out of the course of conduct that led to the person's placement in that program." The substance abuse treatment programs referred to are those mandated for participants in a qualified "treatment" court.

The Committee concluded that the standard for determining whether the person's status constituted "custody" for purposes of sub. (1m) is the same standard that applies under sub. (1): If the offender was subject to an escape charge for leaving the status, sentence credit should be granted for time spent in that status. Further, § 973.155(1m) is clear that credit for the time the offender was in the treatment program may be applied only to the sentence for the offense being handled in the treatment court.

3. Custody during competency proceeding commitments.

Under Wis. Stat. § 971.14(2)(a), a person committed to a mental health facility for an inpatient competency examination is deemed to be in custody under § 973.155 while he or she is in the facility. Under Wis. Stat. § 971.14(5)(a)3., the days a person spends in a commitment for competency treatment, whether inpatient or outpatient, are also considered days spent in custody under § 973.155.

4. Situations not considered to constitute "custody"

Not included within the definitions of "custody" for sentence credit purposes are the following situations:

- Conditions of release on bond that do not involve spending parts of each day in the county jail;[17]

- Voluntary participation in drug, alcohol, or other treatment programs even though the offender may not be completely free of all restraint on his liberty during such program,[18] unless the program is covered under § 973.155(1m);

- Home detention under a federal consent decree designed to reduce jail overcrowding;[19]

- Time spent on electronic monitoring as a condition of probation.[20]

- Time spent in the community after the person reports to jail but is turned away due to overcrowding or after the person is released early from a period of confinement, even though the person was turned away or released early through no fault of his or her own.[21]

B. …in connection with…

1. Determining whether a connection exists

The requirement that custody be "in connection with" the course of conduct means simply that the custody must be, at least in part, the result of a legal status (arrest, bail, Department of Corrections hold, court order, etc.) stemming from the course of conduct for which sentence is being imposed. If the offender was under restraint for reasons related to the course of conduct, credit is required.[22]

The connection between the custody and the conduct for which sentence is imposed must be a factual connection, not just a "procedural" or "tangential" one.[23] For example, the fact that an offender is sentenced in multiple cases at the same time does not create a connection between custody and the sentences imposed.[24]

Where there are multiple charges an offender's custody may be "in connection with" one charge but not another. Thus, the filing of a detainer against someone already in custody on other charges does not result in "custody" on the charges covered by the detainer.[25] Similarly, an offender is in general not entitled to sentence credit under § 973.155 for custody that is being served in satisfaction of another unrelated criminal sentence.[26]

For example, if an offender serving a sentence for theft is charged with battery to another inmate, his custody is connected only to the theft sentence, not to the battery charge, as long as he is serving that theft sentence.[27]

As another example, assume a person is released on personal recognizance on one charge but later is arrested on a different charge and remains in custody as a result of an inability to post cash bail. When sentenced, the person is entitled to credit only on the sentence for the charge on which he was held in custody. This is true even if the charge on which he was in custody was bail jumping based on a violation of the conditions of the personal recognizance bond in the other case.[28]

2. A connection between custody and a charge may be "severed"

When an offender has multiple charges, a period of custody may initially be connected to all of the charges, but an event relating to one of the charges may "sever" that connection. Once the connection between custody and a particular charge is severed, the offender no longer earns credit toward that charge.

The most common way for a connection between custody and multiple charges to be severed is by sentencing on one of the charges. For instance, assume a person is arrested and held in custody in two separate cases, A and B. If he is sentenced in Case A before he is sentenced in Case B, the sentencing in Case A severs the connection between the custody and Case B, and he is in custody solely for the conviction in Case A. Thus, the person is not entitled to credit toward Case B for any time in custody after being sentenced in Case A.[29]

Another common way for the connection between custody and pending charges to be severed is for the offender to commence serving a previously imposed and stayed sentence after revocation of probation or be returned to prison after revocation of extended supervision. In those situations, relevant statutes provide that the offender commences the previously imposed sentence upon entering the prison system.[30]

C. …the course of conduct for which sentence is being imposed

The use of "course of conduct" rather than a more limited term, such as "offense" or "crime," suggests that credit is to extend to periods of custody that may not have been caused by the specific crime for which sentence is ultimately imposed. Credit is required in at least four situations which raise the "course of conduct" issue:

1. Where several crimes were charged as a result of a single course of conduct, but the offender is convicted of only one crime. Thus, an offender held in custody as a result of charges of theft, burglary, and battery, all resulting from a single incident, must receive sentence credit even if he is convicted of only one of the crimes charged;

2. Where offenses for which the person spent time in custody are "read in" for purposes of sentencing in another case, the offender is entitled to credit for the custody on the read-in offenses, regardless of whether the read-in offenses are factually connected to the course of conduct for which sentence was imposed;[31]

3. Where the offender is convicted of a crime which is a lesser included offense of the crime originally charged. Thus, an offender is entitled to credit if he was arrested for and charged with armed robbery even if he is convicted of the lesser included crime of theft; and

4. Where the offender is held in custody on a probation, parole, or extended supervision hold which is issued due to the course of conduct for which sentence is imposed. (See § 973.155(1)(b).) Credit will be due toward both the sentence for the course of conduct and the sentence in the case in which the hold was issued up to the time the defendant begins serving one of the sentences, unless the sentences are consecutive.[32]

Note, however, that "course of conduct" does not mean "criminal episode." In State v. Tuescher, 226 Wis.2d 465, 595 N.W.2d 443 (Ct. App. 1999), the court held "a defendant earns credit toward a future sentence while serving another sentence only when both sentences are imposed for the same specific acts." Id., 479.[33]

V. Applying the Basic Rule in Common Situations

A. The credit determination to make at the time of original disposition in all cases

The determination to be made at the time of original disposition in all cases is the period of time the offender spent in custody in connection with the course of conduct up to the date of sentencing. The statute identifies three periods of time, namely, those occurring:

1) while the offender is awaiting trial;
2) while the offender is being tried; and
3) while the offender is awaiting imposition of sentence after trial.

B. Imposing sentence after probation has been revoked in a sentence withheld case

1. Determining sentence credit at the time of sentencing after revocation

The basic procedure outlined above should have been followed when the original disposition was ordered in the sentence withheld – probation ordered case. If probation is revoked and an offender is returned to court for imposition of sentence, another sentence credit determination must be made. Three separate periods of time are relevant to the new sentence credit determination:

- Days in custody prior to original disposition – this finding should be the judgment of conviction entered at the time of original disposition;

- Days in custody after original disposition and through the date of probation revocation (for example, conditional jail time, holds, or sanction time) – this finding should be in the revocation order and warrant issued by the department or in the revocation summary provided by the department; and

- Days in custody after revocation, awaiting imposition of sentence – this finding must be made by the sentencing court.

2. "Custody" during the period of probation

Questions may arise about what constitutes "custody in connection with the course of conduct" in the sentence withheld case. These relate primarily to whether certain restrictive situations constitute "custody." It is clear that time spent in jail awaiting revocation should be credited. But restrictions on an offender during the probationary period raise questions:

a. Jail time as a condition of probation

Section 973.155 is not explicit about whether sentence credit is required for time spent in the county jail as a condition of probation. However, the definition of "custody" under the escape statute expressly covers time spent in jail as a condition of probation.[34] That means the offender was in custody while serving that condition time and is therefore entitled to credit for that time toward a sentence imposed after revocation of probation.

b. Time in a treatment facility as a condition of probation

If a probationer spent time in, for example, a drug treatment facility, he or she will be entitled to credit for that time if one of the following applies:

1. The person's status was such that he or she was in "custody" under the standard discussed above in Section IV.A 1, because the offender was subject to an escape charge for leaving the status.

2. The treatment program is covered under § 973.155(1m) as discussed in Section IV.A 2.

C. Sentence credit in multiple sentence situations

Proper determination of sentence credit can be complex in cases where several sentences are involved. The possible situations and relationships are endless.

Problems can be minimized if the court informs itself about the credit applicable to any previously imposed sentence and ensures that each judgment for the sentences it imposes has a finding of sentence credit. This can most easily be achieved by requiring the parties to come to court prepared to discuss and settle the sentence credit issue.

In light of the basic rule discussed above, in Section IV, the Committee recommends the following guiding principles in multiple sentence situations:

- When sentence A is to run concurrently with sentence B, the custody credited to sentence A must be factually connected to the course of conduct for which sentence A is imposed.

- When sentence A is to run consecutively to sentence B, the custody factually connected to sentence A is credited to the sentence only if the custody has not already been credited to sentence B. The aim is to credit the total sentence (consisting of all consecutive sentences put together) with one day for each day spent in custody without duplication of credit for time in custody in connection with more than one of the sentences.

1. Concurrent sentences

When concurrent sentences are imposed for offenses arising from the same course of conduct, sentence credit is to be determined as a total number of days and is to be credited against each sentence imposed. Credit against each sentence is required because credit against only one sentence would be negated by the concurrent sentence. Thus, if the credit was not awarded against both sentences, the offender would not receive the credit to which he is entitled.[35]

However, if concurrent sentences are imposed for offenses that do not arise out of the same course of conduct, the court must determine which sentence any specific period of time in custody should be credited against. As noted above in Section IV.B.2, as a general rule sentencing on one charge severs the connection between the custody and other pending charges. Thus, when custody is in connection with multiple, unrelated charges, credit should be granted on all concurrent sentences imposed for the charges up to the time the defendant begins serving one of the sentences. The amounts may not be equal. Also, the fact that concurrent sentences are imposed at the same time does not serve to transform custody connected to one case into custody connected to another case.[36]

Examples of concurrent sentence situations follow.

a. Multiple counts in a single judgment

Concurrent Sentence Example 1
Smith was arrested for two burglaries, charged in a two-count information, and convicted of both charges on the same day. He spent one year in jail awaiting disposition. He was sentenced to serve five years of imprisonment on each count, the sentences to run concurrently with one another.

The judgment of conviction should order that credit is due for 365 days pursuant to § 973.155.

When the judgment reaches the prison, the registrar will credit each of the concurrent sentences with 365 days, thus computing the sentences as though they had begun 365 days earlier.

b. Sentences on unrelated charges for which different amounts of credit are due

Concurrent Sentence Example 2
Johnson is arrested and charged with a burglary and remains in custody for 10 days before posting bail. He is later arrested for a new burglary and remains in custody, unable to post bail. 150 days after his second arrest, he is convicted of both charges and given two years of imprisonment on each count, concurrent.

The judgment of conviction on the first burglary should order that credit is due for 10 days, while the judgment for the second conviction should order 150 days of credit.

This illustrates one of those situations where the periods of time for which credit is due on unrelated concurrent sentences will not line up with each other. Some credit will be due on one sentence and a different amount of credit will be due on another.

In these cases, the registrars shall properly compute the credit ordered against each sentence. Taking the above example, if a defendant is entitled to 10 days of credit on one two-year sentence and 150 days of credit on a concurrent two-year sentence, the registrar will compute each sentence separately and the defendant's controlling sentence will be the two-year sentence with the lesser amount of credit.

c. A sentence imposed to run concurrently with a sentence imposed earlier

In this situation, the determinative questions are the existence of a connection between any of the offender's time in custody and the offense for which sentence is being imposed and, if there is a connection, whether it was ever "severed."

Concurrent Sentence Example 3
Sauk County officials suspected Smith of committing an armed robbery in Sauk County and discover that he is serving a sentence in the Wisconsin State Prison on another charge. Sauk County filed a detainer at the prison. Six months later, Smith is convicted on the Sauk County charge and is sentenced to a term of imprisonment of 10 years, to run concurrently to the sentence he was already serving.

The judgment of conviction in Sauk County should indicate that Smith is entitled to no sentence credit under § 973.155. All the time Smith spent in custody after the filing of the Sauk County charge was spent in service of the previously imposed sentence on an unrelated charge. Thus, there was never a connection between the Sauk County case and Smith's custody, so no additional credit is required.[37]

Concurrent Sentence Example 4
Smith is arrested and charged on the same day in two separate cases, A and B, each arising from a different course of conduct. Unable to post cash bail, he remains in custody. Ninety days after his arrest he is convicted and sentenced in Case A. Sixty days later he is convicted and sentenced in Case B. The sentence is ordered to run concurrently with the sentence in Case A.

The sentencing in Case A severed the connection between Smith's custody and Case B. Thus, his custody after the first 90 days was due solely to the sentence in Case A, and the judgment of conviction in Case B should give credit only for the first 90 days.[38]

Concurrent Sentence Example 5
Smith was convicted of burglary and sentenced to five years of imprisonment, but execution of the sentence was stayed and he was placed on probation. He committed another burglary while on probation and was taken into custody. A probation hold was imposed, and bail, which he could not post, was set on the

new charge. He was convicted of the new charge and sentenced to five years of imprisonment, to run concurrently with the sentence underlying the probation, as probation had been revoked at the same time. He spent 180 days in custody.

The judgment of conviction on the new charge should order that credit be granted for 180 days spent in custody. The department's revocation order should also reflect that 180 days credit is due on the sentence underlying the revoked probation.

When the judgment and the revocation order reach the prison, the registrar will credit each sentence with 180 days, by computing each sentence as though it had begun 180 days earlier.

(NOTE: This example assumes that no credit was due on the sentence underlying the probation for time spent in custody prior to the original sentencing on that charge. If such credit was due, it should be reflected on the original judgment of conviction and in the revocation order and would be credited by the registrar against only the first sentence.)

Concurrent Sentence Example 6

Smith was convicted of burglary; sentence was withheld and he was placed on probation. He committed another burglary while on probation and was taken into custody. A probation hold was imposed, and bail, which he could not post, was set on the new charge. His probation was revoked and after 180 days in custody he was sentenced after revocation to four years of imprisonment. Ninety days later he was convicted of the new burglary charge and sentenced to four years of imprisonment, to run concurrently with the four-year sentence imposed for the first burglary.

The judgment of conviction on the new burglary charge should order that credit be granted for 180 days spent in custody before being sentenced after revocation for the first burglary. Smith is not entitled to the additional 90 days he was in custody after the sentencing in the first case because that sentencing severed the connection between his custody and the new charge.[39]

While the credit on each judgment will be equal, the second sentence will control Smith's release date because as of the date of sentencing in the second case, he had served 90 more days of the first sentence.

(NOTE: This example also assumes that no credit was due on the sentence underlying the probation for time spent in custody prior to the original sentencing on that charge. If such credit was due, it should be reflected on the original judgment of conviction and in the revocation order and would be credited by the registrar against only the first sentence.)

Concurrent Sentence Example 7

While Smith is on extended supervision he is arrested for a new offense. He is held in custody on an ES hold and on cash bail on the new offense. Three months after his arrest his ES is revoked, and a month after revocation, he is returned to the prison system to commence reconfinement time. Two months after being returned to prison he is convicted and sentenced for the new offense and given a concurrent sentence.

The offender's custody was connected to both the ES case and the new offense until the time he was returned to prison. The return to prison severed the connection between the offender's custody and the new offense. Because the sentence for the new offense is concurrent, however, the offender is entitled to credit toward that sentence for the time between his arrest and his return to prison.[40]

Whether an offender subject to multiple charges or revocations awaits resolution of pending matters in jail or prison, whether cases are resolved at the same time or at wide intervals, or whether one case or the other is first resolved is often fortuitous. Practices differ from county to county, based on local court calendars, whether the offender will waive revocation or plead guilty, and even whether the local detention facility has available space.[41] These practices may result in disparate results in similar cases or may allow "persons to manipulate the system to their advantage" (as by delaying the revocation of probation, parole, or extended supervision).[42] Trial courts should be as fully informed as possible about each case so that unfair results can be avoided. If different judges are involved, it will be unlikely that each judge will be aware of the sentence credit situation in the other case when completing his or her own judgment, but the judge imposing the second sentence should try to become informed of the credit awarded against the first sentence.

d. Concurrent sentences imposed after revocation of probation and revocation of a deferred entry of judgment agreement

Concurrent Sentence Example 8

Smith is arrested and charged with a felony and two misdemeanors arising out of the same course of conduct. He is placed on probation for the misdemeanors and is subject to a deferred entry of judgment agreement on the felony, and is free on bond with respect to the felony. He is later taken into custody and placed on a probation hold, and both probation and the deferred entry of judgment agreement are revoked. After being in custody for 75 days on the hold and while awaiting revocation of probation, he is sentenced after revocation on the misdemeanors and sentenced on the felony. The court imposes concurrent sentences on all three counts.

The judgment of conviction should indicate that Smith is entitled to 75 days of credit on all three sentences even though he was not on probation for the felony because the custody was in connection for the course of conduct for which all three sentences were imposed.[43]

Note that if the felony arose from a course of conduct different from that of the misdemeanors, the custody for any probation hold, or while awaiting probation, revocation would not be connected to the felony unless the bond on the felony was revoked or amended in a way that also kept the person in custody.

2. Consecutive sentences

The objective with consecutive sentences is to assure that credit is awarded against one, but only one, of the consecutive sentences.[44] In situations where consecutive sentences are imposed by different judges, there will have to be some communication between the two courts to assure that sentence credit is properly ordered. This can most easily be achieved by requiring the parties to come to the sentencing hearing prepared to identify any sentence credit awarded on any previously imposed sentences.

Examples of common consecutive sentence situations follow.

a. Multiple counts in a single judgment

Consecutive Sentence Example 1
Smith was arrested for two armed robberies, charged in a two-count information, and convicted of both charges on the same day. He spent one year in jail awaiting disposition. He is sentenced to serve 10 years of imprisonment on each count, the sentences to run consecutively to one another. The judgment of conviction should order that 365 days credit be granted.

If an offender with multiple charges is entitled to credit that is applicable to all of the charges and is given an imposed sentence on one charge and a consecutive imposed and stayed sentence on the others, the credit must be awarded against the first imposed sentence.[45]

b. Sentence to run consecutively to a sentence imposed by another court

Consecutive Sentence Example 2
Smith is arrested for an armed robbery in Dane County. An armed robbery charge is already pending in Sauk County, but Smith had been released on bail. He spends one year in Dane County jail awaiting trial and is then convicted and sentenced to 10 years of imprisonment, with sentence credit ordered for the one year he spent in jail. He pleads guilty to the Sauk County charge and is sentenced to 10 years of imprisonment, to run consecutively to the Dane County charge. Sauk County had lodged a detainer against Smith in Dane County.

The Dane County judgment should order that credit be granted for the 365 days spent in Dane County jail. When the sentencing takes place in Sauk County, the judge must be informed of the sentence and sentence credit ordered in the Dane County judgment. This should be done by the parties, who should come to the Sauk County sentencing prepared to address the sentence credit issue, ideally with a copy of the Dane County judgment.

The Sauk County judge would not order credit for the time spent in custody in Dane County, even though that custody may have been due in part to the Sauk County detainer, because the detainer is insufficient to establish a connection between the Dane County custody and the Sauk County case.[46] When the defendant reaches the institution, his total sentence will be computed as though it had begun 365 days earlier.

(NOTE: There may be other periods of custody allocable solely to the Sauk County case for which credit may be due in the Sauk County judgment.)

c. Multiple sentences with differing amounts of credit

Consecutive Sentence Example 3
Roberts is arrested for a theft and, after remaining in custody for 30 days, is released on bail. He is later arrested for a burglary and remains in custody until he is sentenced in both cases 60 days later. He is sentenced to two years of imprisonment for the theft and six years of imprisonment for the burglary, to run consecutively to the theft sentence.

The judgment of conviction for the theft conviction should include 30 days of sentence credit, while the judgment of conviction for the burglary conviction should order 60 days of sentence credit. Thus, the total consecutive sentences of eight years are reduced by the total of 90 days Roberts spent in custody before sentencing on the two cases.

d. Sentence to run consecutively to a sentence imposed following revocation of probation

Consecutive Sentence Example 4
Smith was convicted of armed robbery in 2010 and placed on probation; sentence was withheld. He was entitled to no sentence credit as a result of that episode. In 2011, he commits another armed robbery. A probation hold is filed against him and he is charged with the new offense. He spends one year in jail awaiting trial and revocation. He is sentenced on the new charge first and receives a 10-year sentence, with credit ordered for the one year. He then comes before the judge who imposed the original probation. A 10-year consecutive sentence is imposed.

The judgment imposed first should order credit for the one year spent in custody. The judge imposing the sentence following revocation of probation must be informed about the sentence and sentence credit ordered in the first judgment and should order no credit for time spent in custody that was awarded as credit on the first judgment.

(NOTE: If Smith had received an imposed and stayed sentence originally, or was on parole or extended supervision, the Department of Corrections would give credit on the stayed sentence or the sentence for which Smith was on parole or extended supervision for all time in custody on the new offense until the person is received at or returned to prison. Thus, in these circumstances, the judge who imposes a consecutive sentence on the new

offense (which was the basis for revoking probation, parole, or extended supervision) should not grant credit for any custody on the new offense.[47])

VI. Correcting Sentence Credit Errors[48]

6. Since the effective date of § 973.155 in 1978, it has been required that the sentence credit determination be made part of the judgment of conviction as a finding by the court. As stressed above in Section III.A., judicial time and energy may be saved if courts require accurate information at the time of sentencing and impress upon the parties the importance of making the credit determination at that time. Even when this is done, however, the credit determination may turn out to be wrong and need correction. Correcting an erroneous credit determination is required even if the defendant stipulated to that determination. State v. Kontny, 2020 WI App 30, 392 Wis.2d 311, ¶¶7-9, 943 N.W.2d 923. See also, State v. Slater, 2021 WI App 88, 400 Wis. 2d 93, 968 N.W.2d 93.

If a determination was not made in the judgment, past practice has been to first petition the Department of Corrections for credit. When a determination has been made part of the judgment, any change in that determination requires an amendment of the judgment. While administrative change of the sentence credit finding might be more convenient, a finding in a judgment simply may not be amended by administrative action.

In cases where court action is required to correct a judgment, the correction process can be simple and efficient. A number of different procedural designations could be applied to the request for correction. Regardless of how the request is categorized, it should follow the general format described below.

1. An application to correct the sentence credit determination should be made in the sentencing court.

2. The application should specify the additional credit that is being requested – e.g., to change the sentence credit determination from 50 to 75 days.

3. The application should specify the nature of each separate period of custody for which credit is being claimed – e.g., 10 days in the Wood County jail after arrest and before transfer to Dodge County; 15 days in a mental health facility while competency to stand trial was being evaluated.

4. The application should identify the reason for each period of custody and must show that it was "connected with the course of conduct for which sentence was imposed."

5. Attached to the application should be confirmation by the person having custody of the offender for each period which verifies both the duration and the reason for the custody.

6. A copy of the application should be sent to the district attorney.

7. A hearing is not required but may be ordered in the discretion of the court.

8. If the sentence credit determination is corrected, an amended judgment should be prepared which reflects the proper sentence credit. The amended judgment should be promptly sent to the institution having custody of the offender.

It may happen that an error in the initial determination of sentence credit is not discovered and corrected until after an offender has served the custody portion of the sentence and has been released on parole or extended supervision. The judgment of conviction should still be amended because the additional credit reduces the offender's sentence and, therefore, the amount of time remaining on parole or extended supervision. The amended judgment should be sent to the records office of the Department of Corrections' Division of Community Corrections, which is responsible for supervision of offenders on parole or extended supervision.

The judgment should also be amended even if the error is not discovered and corrected until after the offender's parole or extended supervision has been revoked and the offender reincarcerated under § 302.11(7) or reconfined under § 302.113(9). The additional credit must be applied to reduce the length of reincarceration or reconfinement the offender serves as well as the total length of the remaining sentence.[49]

9. If the application to correct the sentence credit determination is denied, an order to that effect should be entered, and a copy sent to the person who filed the application.

Circuit courts are sometimes asked to address sentence credit requests made by offenders who were sentenced in Wisconsin and later transferred to other jurisdictions—for instance, due to a warrant or detainer. The basic rule described above also applies to these cases: To be granted credit, the offender must have been in custody in connection with the course of conduct for which the Wisconsin sentence was imposed.[50]

That the offender was in custody is typically not disputed in these cases. Instead, the issue is whether that custody was in connection with the Wisconsin case. Because the basic rule of § 973.155 applies, whether an offender sentenced Wisconsin who is made available to another jurisdiction remains in custody in connection with the Wisconsin case will

depend on whether an event in the other jurisdiction severs the connection between custody and the Wisconsin case. The event that will most likely sever the connection will be the imposition of a sentence in the other jurisdiction, though, as in Wisconsin, the nature of the sentence imposed in the other jurisdiction will affect the offender's entitlement to credit.[51]

Determining credit in these situations will therefore require obtaining as much information as possible about not only the amount time the offender was in custody, but also the reasons for the offender's transfer to the other jurisdiction, the nature and disposition of the proceedings in that jurisdiction, when any sentence was imposed, whether the sentence was consecutive or concurrent, and whether credit was given in the other jurisdiction.

COMMENT

SM-34A was originally published in 1982 and revised in 1985, 1988, 1991, 1995, 2013, 2016, 2018, 2019, 2021, and 2023. This revision was approved by the Committee in October 2023; added to the comment.

1. State v. Carter, 2010 WI 77, ¶51, 327 Wis.2d 1, 785 N.W.2d 516 (quoting State v. Ward, 153 Wis.2d 743, 745, 452 N.W.2d 158 (Ct. App. 1989), and State v. Beets, 124 Wis.2d 372, 379, 369 N.W.2d 382 (1985)). Also see, State v. Obriecht, 2015 WI 66, ¶23, 363 Wis.2d 816, 867 N.W.2d 387.

2. The exception is that when a court imposing a life sentence establishes a specific date for parole eligibility under § 973.014(1)(b), time spent in custody prior to sentencing is not credited against that parole eligibility date. State v. Chapman, 175 Wis.2d 231, 499 N.W.2d 222 (Ct. App. 1993). While the court may consider the amount of credit as a factor in setting the eligibility date, the date set by the court governs. State v. Seeley, 212 Wis.2d 75, 83-88, 567 N.W.2d 897 (Ct. App. 1997).

Section 973.014(1)(b) applies only to offenses committed before December 31, 1999, when Truth-in-Sentencing took effect. However, the Truth-in-Sentencing legislation created § 973.014(1g)(a)2., which allows a court imposing a life sentence for an offense committed on or after December 31, 1999, to set a date on which the person is eligible to petition for supervised release under § 302.114(5). No published decision has addressed whether time spent in custody before sentencing should be credited against the extended supervision eligibility date set by a court, but the Committee concludes that under the rationales of Chapman and Seeley the time in custody would not be credited.

3. State v. Obriecht, 2015 WI 66, ¶23, 363 Wis.2d 816, 867 N.W.2d 387.

4. State v. Villalobos, 196 Wis.2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995).

5. Note that the statute qualifies this listing of three periods of time with the phrase "without limitation by enumeration." Thus, periods of time not listed may be creditable under § 973.155.

6. As noted in Section VI, a defendant's stipulation to a specific amount of credit does not prevent the defendant from seeking additional credit in a subsequent motion. State v. Kontny, 2020 WI App 30, ¶¶7-9, 392 Wis. 2d 311, 943 N.W.2d 923. See also State v. Slater, 2021 WI App 88, 400 Wis. 2d 93, 968 N.W.2d 740.

7. In State v. Walker, 117 Wis.2d 579, 345 N.W.2d 413 (1984), the Wisconsin Supreme Court identified the procedure that should be followed: The appropriate sentence is to be determined independently of any time previously served; only then should sentence credit be determined. For a more complete discussion see note 15, SM-34, Sentencing Procedure, Standards, And Special Issues (© 1999).

The awarding of sentence credit is a judicial function that requires a court to reach its own conclusion about the amount of sentence credit to be awarded and to explain its findings and reasoning on the record. While the court may seek assistance from its court clerk in collecting information that may be relevant to the credit determination, the awarding or denial of sentence credit is the duty of the court, not the court clerk. State v. Kitt, 2015 WI App 9, 359 Wis.2d 592, 859 N.W.2d 164.

8. Section 973.03(4)(b) expressly provides for sentence credit for periods of home detention.

9. In State v. Avila, 192 Wis.2d 870, 532 N.W.2d 423 (1995), the Wisconsin Supreme Court rejected the claim that principles of equal protection require that a period of jail time ordered as a condition of probation be reduced to reflect time spent in jail prior to trial because of indigency. The court also rejected the defendant's claim that his condition of probation jail time should be credited for prison time served pursuant to a conviction later reversed. The court held that the applicable statute, § 973.04, applied only to credit against subsequent "sentences" and that jail time as a condition of probation is not a sentence. Avila did not involve a claim that § 973.155 applied, but the same result should follow: that statute also requires credit only against "sentences"; time in jail ordered as a condition of probation is not a "sentence."

10. State v. Obriecht, 2015 WI 66, ¶24, 363 Wis.2d 816, 867 N.W.2d 387.

11. State v. Wolfe, 2001 WI App 66, 242 Wis. 2d 426, 625 N.W.2d 655. See also § 973.155(3) (computing custody as if it were served time in the institution to which the defendant has been sentenced).

12. State ex rel. Thorson v. Schwarz, 2004 WI 96, ¶¶16-29, 274 Wis.2d 1, 681 N.W.2d 914, held that a person detained or committed under Chapter 980 is not in "custody" for purposes of § 973.155. In 2005 Wis. Act 434, § 45, however, the definition of "custody" under the escape statute was amended to cover detention under Chapter 980. See § 946.42(1)(a)1.a. and 1.e. (referring to facilities under §§ 980.04(1) and 980.065 and to supervised release under Chapter 980). The amendments to § 946.42(1)(a) took effect August 1, 2006. Thus, as of that date, a person detained or committed under Chapter 980 is in "custody" for purposes of § 973.155, effectively superseding Thorson's holding to the contrary. Note, however, that Thorson also held a person's custody under Chapter 980 is not "in connection with" the predicate offense for the commitment; that holding is not changed by the amendments to the definition of "custody" in § 946.42. See note 25, below.

13. Credit is to be granted for time spent in jail as a condition of probation based both on the holding in State v. Gilbert, 115 Wis.2d 371, 340 N.W.2d 511 (1983), and on the fact that 1995 Wis. Act 154 amended the definition of "custody" in § 946.42(1)(a) to include custody in jail as a condition of probation.

As to bail release, note that §§ 969.02(3)(d) and 969.03(1)(e) allow a court to set a condition of bail release that requires a defendant to return to custody after specified hours.

14. Credit should be granted when, for example, a Wisconsin offender is arrested in Illinois on a Wisconsin warrant even if the offender is also being held on Illinois charges, unless or until the offender begins serving a sentence on the Illinois charges. State v. Carter, 2010 WI 77, ¶¶31-40, 58-72, 82, 327 Wis.2d 1, 785 N.W.2d 516. Credit should not be granted when a Wisconsin offender, already in custody on Illinois charges, has a Wisconsin "hold" or detainer filed against him. This is consistent with the conclusion that filing a detainer against one already in custody in Wisconsin does not result in "custody" under § 973.155 on the charge which is the subject of the detainer. See note 27, below.

A prior version of SM-34A (© 1995) stated that a person was in "custody" in another state only if his or her custody was based exclusively on a Wisconsin warrant. This conclusion was rejected in State v. Carter, 2007 WI App 255, ¶¶11-25, 306 Wis.2d 450, 743 N.W.2d 700, aff'd, 2010 WI 77, ¶40, 327 Wis.2d 1, 785 N.W.2d 516, and was removed in the 2014 version of SM-34A.

15. State v. Baker, 179 Wis.2d 655, 508 N.W.2d 40 (Ct. App. 1993).

16. State v. Sevelin, 204 Wis.2d 127, 554 N.W.2d 521 (Ct. App. 1996). Credit is not required where jail time as a condition of probation is stayed and the person is hospitalized for treatment. State v. Edwards, 2003 WI App 221, 267 Wis.2d 491, 671 N.W.2d 371.

17. A person required to remain in his home during all nonworking hours as a condition of bail pending appeal, is not entitled to credit for the period of home detention on the sentence imposed after the appeal was decided. State v. Pettis, 149 Wis.2d 207, 441 N.W.2d 247 (Ct. App. 1989).

18. See the discussion of State v. Cobb, 135 Wis.2d 181, 400 N.W.2d 9 (Ct. App. 1986). In Cobb, the court held that credit was properly denied to a probationer who was ordered, as a condition of probation, to spend either one year in jail or go to a drug abuse treatment center. He chose to participate in a drug treatment program and successfully completed it. When his probation was revoked, he sought credit for the time her spent in the program. The court held that credit was not required because there was no evidence of "custody" – defining that term, by reference to the escape statute, as "physical detention by an institution, institution guard or peace officer." 135 Wis.2d 181, 185. As discussed above in Section IV.A.1 and 2, after Cobb was decided the supreme court clarified that for purposes of sentence credit "custody" is defined not solely by physical detention, but by whether the offender is subject to an escape charge for leaving whatever status or setting her or she was in. Magnuson, 233 Wis.2d 40, ¶31.

19. In State v. Harris, 168 Wis.2d 168, 483 N.W.2d 808 (Ct. App. 1992), the court held that there was no authority to grant credit for time served in a home detention program ordered under the auspices of a federal consent decree.

20. State ex rel. Simpson v. Schwarz, 2002 WI App 7, 250 Wis.2d 214, 640 N.W.2d 527.

21. State v Friedlander, 2019 WI 22, 385 Wis. 2d 612, 923 N.W.2d 849. Friedlander sought credit for time he spent in the community after he was released from a prison sentence when he should instead haven been transferred to a county jail to serve time as a condition of probation in another case. The court of appeals concluded that Friedlander was entitled to credit for the time he was in the community through no fault of his own, citing State v. Riske, 152 Wis. 2d 260, 448 N.W.2d 260 (1989), and State v. Dentici,

2002 WI App 77, 251 Wis. 2d 436, 643 N.W. 2d 180. Riske and Dentici held that a defendant who reported to jail to serve a sentence but was turned away due to overcrowding was entitled to credit for the time he was at liberty. The decisions adopted an equitable doctrine recognized in other jurisdictions that a person erroneously released from custody continues to serve his or her sentence.

The supreme court reversed the court of appeals' grant of credit to Friedlander and overruled Riske and Dentici. The supreme court concluded that Riske and Dentici are inconsistent with the bright-line rule that a person must be subject to an escape charge to be in "custody" for the purposes of § 973.155. Under that rule, it is irrelevant to a sentence credit determination that a person at liberty through no fault of his or her own. Friedlander, 385 Wis. 2d 612, ¶¶24-42.

22. A defendant held "in part" on unsatisfied cash bail on the principal charge and an unrelated charge was in custody in connection with the principal charge up until disposition of the unrelated charge. State v. Harr, 211 Wis.2d 584, 596-97, 568 N.W.2d 307 (Ct. App. 1997). Harr applied State v. Gavigan, 122 Wis.2d 389, 362 N.W.2d 162 (Ct. App. 1984) (citing a prior version of SM-34A) and State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985) (approving the reasoning in Gavigan).

In some cases a person facing multiple charges arising out of the same course of conduct may be placed on probation for some of the charges and be subject to deferred entry of judgment agreement on other of the charges. If the person is taken into custody on a probation hold, that custody is also considered to be in connection with the charge that is subject to the deferred entry of judgment agreement. State v. Zahurones, 2019 WI App 57, ¶¶13-17, 389 Wis. 2d 69, 934 N.W.2d 905.

See also State v. (Elandis) Johnson, 2009 WI 57, ¶27, 318 Wis.2d 21, 767 N.W.2d 207 (in deciding whether an offender is entitled to credit under § 973.155, the court must determine whether the person was in custody and "whether all or part of the 'custody' for which credit is sought was 'in connection with the course of conduct for which sentence was imposed'"); State v. Hintz, 2007 WI App 113, ¶8, 300 Wis.2d 583, 731 N.W.2d 646 (credit must be awarded under § 973.155(1)(b) for time in custody on an extended supervision hold if the hold was "at least in part" due to the conduct resulting in the new conviction); State v. Thomas, 2021 WI App 59, 399 Wis. 2d 165, 963 N.W.2d 927 (credit must be awarded under Wis. Stat. § 973.155(1)(a) toward a state criminal sentence for time in custody on a federal supervision hold if the hold was due in part to the conduct resulting in the state sentence). Cf. State v. Thompson, 225 Wis.2d 578, 593 N.W.2d 875 (Ct. App. 1999) (offender was in custody in connection with an adult charge while confined under a juvenile commitment because the adult charge led to revocation of juvenile supervision and confinement in juvenile facility).

In State v. (Marcus) Johnson, 2007 WI 107, 304 Wis.2d 318, 735 N.W.2d 505, the defendant argued for a broad interpretation of the "in connection with" language in § 973.155 based in part on the statement in the paragraph to which this note is appended that custody "must be, at least in part, the result of a legal status . . . stemming from the course of conduct for which sentence is being imposed." Id., ¶68. The supreme court rejected Johnson's "expansive interpretation" as contrary to applicable case law, in particular State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985), where, once the offender began serving a sentence on one charge, it was irrelevant that he was also awaiting trial on another charge. Id., ¶69. Because SM-34A discusses and incorporates the holdings of the applicable case law, including Beets, the Committee concluded the court's rejection of Johnson's argument did not require a revision of the language of SM-34A.

23. State v. Beiersdorf, 208 Wis.2d 492, 498, 561 N.W.2d 749; (Ct. App. 1997); State v. Floyd, 2000

WI 14, ¶¶15-17, 232 Wis.2d 767, 606 N.W.2d 155; State v. (Elandis) Johnson, 2009 WI 57, ¶33, 318 Wis.2d 21, 767 N.W.2d 207; State v. Harrison, 2020 WI 35, ¶¶36-46, 391 Wis. 2d 161, 942 N.W.2d 310 (holding that the sentences the defendant was serving consecutively to previously imposed sentences in other cases were not factually connected to the course of conduct for which the previous sentences were imposed; thus, when the consecutive sentences were vacated, the defendant was not entitled to have the time in custody on the vacated consecutive sentences credited toward the previously imposed sentences); State v. Lira, 2021 WI 81, ¶¶29-32, 399 Wis. 2d 419, 966 N.W.2d 605 (where an offender previously sentenced in Wisconsin is serving a sentence in another state is returned to Wisconsin to address new, unrelated Wisconsin cases or offenses, his custody here was not factually connected with his Wisconsin sentences and was not entitled to credit on his Wisconsin sentences for time in custody back in Wisconsin). See also State ex rel. Thorson v. Schwarz, 2004 WI 96, ¶34, 274 Wis.2d 1, 681 N.W.2d 914, which held that time spent in the Wisconsin Resource Center pending a Chapter 980 commitment trial is not "in connection with" the sentence on a criminal offense that served as one of the predicates for the Chapter 980 petition.

24. State v. (Elandis) Johnson, 2009 WI 57, 318 Wis.2d 21, 767 N.W.2d 207. See also note 36, below.

25. "Custody" as used in § 973.155 must result "from the occurrence of a legal event, process, or authority which occasions, or is related to, confinement on the charge for which the defendant is ultimately sentenced." State v. Demars, 119 Wis.2d 19, 26, 349 N.W.2d 708 (Ct. App. 1984) (communication of a detainer which carried no custodial mandate was not sufficient to establish connection with the case in which the detainer was filed); State v. Nyborg, 122 Wis.2d 765, 768, 364 N.W.2d 553 (Ct. App. 1985) (same); State v. Villalobos, 196 Wis.2d 141, 147-48, 537 N.W.2d 139 (Ct. App. 1995) (entry in a jail log indicating an outstanding arrest warrant from another county was not "occurrence of a legal event, process, or authority" sufficient to establish connection between basis for custody and charges for which warrant was issued). Cf. State v. Carter, 2007 WI App 255, ¶¶14-18, 306 Wis.2d 450, 743 N.W.2d 700, aff'd as modified as to number of days of credit granted, 2010 WI 77, ¶¶9, 33-34, 81-82, 327 Wis.2d 1, 785 N.W.2d 516 (arrest of defendant in Illinois on Wisconsin warrant established a connection between custody and Wisconsin course of conduct).

26. State v. Gavigan, 122 Wis.2d 389, 393, 362 N.W.2d 162 (Ct. App. 1984) (citing a prior version of SM-34A). The reasoning in Gavigan was approved by the supreme court in State v. Beets, 124 Wis.2d 372, 380-81, 369 N.W.2d 382 (1985). See also State v. Carter, 2010 WI 77, ¶37, 327 Wis.2d 1, 785 N.W.2d 516 ("once a defendant is actually serving the sentence on a charge, the defendant is not entitled to credit for presentence custody toward sentences on unrelated charges, although trial may be pending on the separate charges at the time the defendant is serving the first sentence."). See also State v. Lira, 2021 WI 81, ¶¶29-32, 399 Wis. 2d 419, 966 N.W.2d 605 (where an offender previously sentenced in Wisconsin is serving a sentence in another state is returned to Wisconsin to address new, unrelated Wisconsin cases or offenses, his custody here was not factually connected with his Wisconsin sentences and was not entitled to credit on his Wisconsin sentences for time in custody back in Wisconsin).

27. An offender's custody may preclude establishment of a connection with a course of conduct even if the custody is not due to service of a criminal sentence. In State v. Riley, 175 Wis.2d 214, 498 N.W.2d 884 (Ct. App. 1993), the defendant escaped from jail confinement ordered as a condition of probation. He was eventually arrested after committing a new crime during the period of escape. He was returned to jail to continue serving the original condition-of-probation confinement and cash bail was set on the new charge, which Riley did not post. At the completion of the condition of probation confinement, Riley was sentenced on the new charge. The court of appeals held that credit for the time spent in jail as a condition of the original probation was not due against the new sentence because § 973.155 "does not authorize credit

for a term of confinement ordered [as a consequence] for prior criminal activity irrespective of whether that confinement is a condition of probation or as the result of a sentence after revocation of probation." Id., 220-21, citing State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985). See also State v. Villalobos, 196 Wis.2d 141, 144-46, 537 N.W.2d 139 (Ct. App. 1995) (applying Riley to similar facts).

Further, a defendant already in custody under a juvenile commitment was not entitled to credit toward an adult battery charge he committed while confined in a juvenile correctional institution based on a previous unrelated delinquency adjudication. State v. (Marcus) Johnson, 2007 WI 107, 304 Wis.2d 318, 735 N.W.2d 505. Because Johnson's juvenile commitment order pre-existed the battery charge, it precluded the creation of a connection between Johnson's custody and the battery charge. Id., ¶63. Nor was a connection created when Johnson's commitment was later extended based in part on the conduct giving rise to the battery charge because, the court concluded, the commitment would have been extended even if the battery had not occurred. Id., ¶71. The court distinguished State v. Thompson, 225 Wis.2d 578, 593 N.W.2d 875 (Ct. App. 1999), [cited above, in note 22,] on the grounds that Thompson's custody was both connected to the new charge, which had been a basis for the revocation of juvenile supervision, and was for treatment in the juvenile system, not continuing punishment of the original offense. Id., ¶¶45-55.

Note, however, that custody under a civil commitment for contempt does not preclude a connection between the custody and a pending criminal charge. Unlike a person serving a sentence, as in Beets, jail time as a condition of probation, as in Riley, or a juvenile commitment, as in (Marcus) Johnson, a person confined under a civil contempt commitment would not necessarily be in custody absent the pending criminal charge because the person may obtain release by meeting the contempt commitment's purge conditions. State v. Trepanier, 2014 WI App 105, ¶¶20-21, 357 Wis.2d 662, 855 N.W.2d 465.

28. In State v. Beiersdorf, 208 Wis.2d 492, 561 N.W.2d 749 (Ct. App. 1997), the defendant posted a personal recognizance bond on a sexual assault charge and remained on that bond until his sentencing. He was, however, held in custody on cash bond on later charges of bail jumping based on violations of the recognizance bond in the sexual assault case. He was sentenced to prison on the sexual assault charge; his sentence on the bail jumping charge was imposed and stayed and he was placed on probation, to run consecutively to the prison sentence for sexual assault. The court of appeals concluded Beiersdorf was in custody only "in connection with" the course of conduct for which sentence was imposed and stayed. Thus, no credit is due on the prison sentence for sexual assault.

29. State v. Gavigan, 122 Wis.2d 389, 362 N.W.2d 162 (Ct. App. 1984) (discussed in detail in note 34, below); State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985) (discussed in detail in note 39, below). While sentencing on one charge may be the most common event that will sever the connection, it is not the only one. In State v. Harr, 211 Wis.2d 584, 596, 568 N.W.2d 307 (Ct. App. 1997), the court concluded that the offender's commitment under § 971.17 after being found not guilty by reason of mental disease or defect severed the connection between his custody and an unrelated pending charge.

Not every event that creates an independent basis for legal custody "severs" the connection between an offender's custody and a pending criminal case. To sever the connection, the event must have put the offender in a status that would keep the offender in custody even in the absence of the criminal case. For instance, in State v. Trepanier, 2014 WI App 105, 357 Wis.2d 662, 855 N.W.2d 465, an offender who was already in custody on cash bail in a criminal case was found in contempt for failing to pay a fine in an unrelated case and ordered to be held in custody under the contempt order unless he met the purge condition. The subsequent contempt order did not sever the connection between the custody and the criminal case because, unlike the offender in Beets, who would have been in custody under the sentence imposed even

in the absence of the pending criminal case, Trepanier could have obtained release from the contempt order by satisfying the purge conditions. Id., ¶¶15-21.

In addition, being on bond on a charge that is subject to a deferred entry of judgment agreement does not "sever" the connection between that count and other counts in the case for which the person is placed on probation. State v. Zahurones, 2019 WI App 57, ¶¶18-28, 389 Wis. 2d 69, 934 N.W.2d 905.

30. State v. Slater, 2021 WI App 88, 400 Wis. 2d 93, 698 N.W.2d 740 (citing Wis. Stat. § 973.10(2)(b) governing imposed and stayed sentences); State v. Presley, 2006 WI App 82, 292 Wis. 2d 734, 715 N.W.2d 713, and State v. Davis, 2017 WI App 55, 377 Wis. 2d 678, 901 N.W.2d 488 (citing Wis. Stat. § 304.072(4) governing persons revoked from parole or extended supervision).

31. State v. Floyd, 2000 WI 14, ¶32, 232 Wis.2d 767, 606 N.W.2d 155. The court in Floyd disclaimed reliance on the "in connection with the course of conduct" language in § 973.155 and instead relied on the phrase "related to an offense for which sentence was imposed," finding the unique nature of read-in offenses made them "related" to offenses for which a defendant is sentenced for purposes of § 973.155(1).

Floyd limits its holding to offenses that are "read in" for sentencing purposes. 232 Wis.2d 767, ¶30. Thus, Floyd does not require credit to be given for custody related to every offense that a judge "considers" at sentencing. See State v. Piggue, 2016 WI App 13, 366 Wis.2d 605, 875 N.W.2d 663. In Piggue, the defendant was in custody on a sexual assault charge when he tried to persuade the victim not to testify against him. He was acquitted of the sexual assault, but was then charged with and convicted of witness intimidation. The judge considered the sexual assault allegations when sentencing Piggue on the intimidation charge, so Piggue argued that Floyd required the time he spent in custody on the sexual assault charges to be credited toward the intimidation sentence. The court of appeals held that Floyd should not be extended beyond its express limitation to "read-in" offenses. 366 Wis.2d 605, ¶¶12-13.

The Supreme Court of Wisconsin reaffirmed Floyd in State v. Fermanich, 2023 WI 48, 407 Wis.2d 693, 991 N.W.2d 340. In Fermanich, the defendant was arrested in Oneida County after stealing three trucks in Langlade County within a span of two hours. Fermanich remained in custody in Oneida County due to his inability to post cash bail, during which time additional charges were filed against him in Langlade County, where he was granted a signature bond. Subsequently, the cases from both counties were consolidated, and Fermanich pleaded guilty to one charge from Langlade County and two from Oneida County, leading to the dismissal of all other charges. Upon violating the terms of his probation, Fermanich was sentenced to 18 months of initial confinement. Applying Floyd, the Supreme Court ruled that Fermanich should receive 433 days of sentence credit for the time he spent in custody related to the Oneida County charges, which were dismissed and read-in, but still considered alongside the Langlade County charge for which the circuit court ultimately sentenced him. Id. at ¶16.

32. As noted above, in Section IV.B.2 of this Special Material, once a person begins serving one of the sentences, his "custody" is no longer "in connection with" the other pending charge. Credit on the sentence for that pending charge will be due only for the days when both charges were pending, prior to the commencement of the other sentence. State v. Beets, 124 Wis.2d 372, 369 N.W.2d 352 (1985). For cases applying Beets to offenders who are revoked from extended supervision for new charges and given a sentence on the new charges concurrent to the sentence on which supervision was revoked, see State v. Hintz, 2007 WI App 113, 300 Wis.2d 583, 731 N.W.2d 646; State v. Presley, 2006 WI App 82, 292 Wis.2d 734, 715 N.W.2D 713; and State v. Davis, 2017 WI App 55, 377 Wis.2d 678, 901 N.W.2d 488. For a case applying Beets to an offender who was on probation with an imposed and stayed sentence and whose

probation was revoked for new charges for which he received a concurrent sentence, see State v. Slater, 2021 WI App 88, 400 Wis. 2d 93, 698 N.W.2d 740.This situation is discussed below, Section V.C.1.c, this Special Material. For a discussion of credit in consecutive sentence situations, see below, Section V.C. (intro.) and 2, this Special Material.

33. The defendant in Tuescher won a new trial on an attempted homicide charge arising out of an incident involving a burglary and shooting. The attempted homicide conviction was reversed, and while it was being relitigated he remained in custody serving the sentences imposed for two other charges arising out of the incident. After he was convicted and sentenced again on the attempted homicide, Tuescher sought credit toward the new sentence for his time in custody between winning the new trial and being resentenced. The defendant was not entitled to the credit because during that time he was serving the sentences imposed on the charges which were not retried. 226 Wis.2d 465, 467.

34. See Wis. Stat. § 946.42(1)(a)1.h., and State v. Gilbert, 115 Wis.2d 371, 340 N.W.2d 511 (1983). The question of credit for time spent in jail as a condition of probation was an open one at the time SM-34A was originally published. That version recommended that credit be granted for such time. The Committee's conclusion was adopted in Gilbert, which held that the plain meaning of § 973.155 required that credit be given: "there is no basis for interpreting the statute as excluding custody as a condition of probation from the statute's coverage." 115 Wis.2d 371, 377.

Because jail time as a condition of probation is not a sentence, any "good time" the circuit court allowed the offender to earn while serving the conditional jail time is not eligible for sentence credit under 973.155(4); that statute provides for sentence credit to include "good time" only for sentences of one year or less. State ex rel Baade v. Hayes, 2015 WI App 71, 365 Wis.2d 174, 870 N.W.2d 478.

35. This principle was cited with approval and applied in State v. Ward, 153 Wis.2d 743, 452 N.W.2d 158 (Ct. App. 1989).

36. State v. (Elandis) Johnson , 2009 WI 57, ¶¶50-60, 318 Wis.2d 21, 767 N.W.2d 207, criticized a prior version of SM-34A (© 1995) that referred to crediting equally all concurrent sentences "imposed at the same time or for offenses arising from the same course of conduct." The court found this formulation "unfortunate" because it was "too broad" and had led to the belief that when concurrent sentences are imposed at the same time, any credit is to be applied against each of the sentences imposed regardless of whether the custody was factually connected to each sentence. Noting that the "unfortunate" passage was more understandable, if still inaccurate, when read in context with the examples in the Special Material, the court made it clear that any custody applied to any given sentence must also be factually connected to that sentence. Id., ¶¶61-68. As applied to Johnson's case, the court held:

> ¶47 Calculating the correct number of days that need to be credited to each of Johnson's concurrent sentences requires that we examine separately each sentence and the time spent in presentence custody "in connection with" each sentence. We cannot, as Johnson's argument attempts to do, conflate all the concurrent sentences imposed on the same day and make a credit determination as if there were only one overall sentence imposed.

The language criticized in (Elandis) Johnson was removed in the 2014 version of SM-34A.

37. When credit has been granted against an earlier sentence which was completely served before sentencing on a new offense, no credit against the new sentence is required. State v. Morrick, 147 Wis.2d

185, 432 N.W.2d 654 (Ct. App. 1988); State v. Amos, 153 Wis.2d 257, 280, 450 N.W.2d 503 (Ct. App. 1989); State v. Jackson, 2000 WI App 41, ¶19, 233 Wis.2d 231, 607 N.W.2d 338.

See also State v. Rohl, 160 Wis.2d 325, 466 N.W.2d 208 (Ct. App. 1991) (defendant not entitled to credit for time served in California while he was on Wisconsin parole because he had received full credit for the time toward the sentence he completed in California); State v. Martinez, 2007 WI App 225, 305 Wis.2d 753, 741 N.W.2d 280 (reaching the same conclusion with respect to time served in a federal institution); State v. Coles, 208 Wis.2d 328, 559 N.W.2d 599 (Ct. App. 1997) (a defendant who was sentenced on one count to a "time served" sentence that used all his pretrial credit was not entitled to any of that credit toward a sentence on a second count because the sentence on the second count was effectively consecutive).

38. State v. Gavigan, 122 Wis.2d 389, 362 N.W.2d 162 (Ct. App. 1984). Gavigan committed a robbery on September 15, 1982. About 24 hours later, he led police on a high speed chase that resulted in a charge of fleeing an officer. Thirty-nine days after his arrest, he pleaded guilty to the fleeing charge and was sentenced to six months in jail. One hundred and seven days later Gavigan was sentenced on the robbery – a three-year sentence to run concurrently with the six-month sentence on the misdemeanor. The trial judge gave 39 days credit on the three-year sentence.

Gavigan claimed he should also receive credit for the 107 days that followed the misdemeanor sentence but preceded the robbery sentence. The court of appeals affirmed the denial of credit for the 107 days, holding that the custody was not "in connection with" the robbery charge – it was attributable solely to the misdemeanor conviction.

39. See State v. Beets, 124 Wis.2d 372, 369 N.W.2d 352 (1985). Beets was convicted of drug offenses and placed on probation with sentence withheld. He was arrested on a burglary charge and held in custody for that charge. Within a few days, a probation hold was added. The hold was based on the burglary charge.

Seventy-eight days after his arrest, Beets' probation was revoked and two concurrent three-year sentences were imposed. He received credit for the 78 days and went to prison.

One hundred and ninety-two days after his prison sentence began, Beets was sentenced on the burglary. He received a three-year sentence concurrent with the sentence he was already serving. He received 78 days credit for the time spent in custody before the first sentence was imposed (when both the revocation and the burglary charge were pending).

Beets sought credit for the 192 days that elapsed after his first prison sentence began, while the burglary charge was pending.

The supreme court affirmed the trial court's denial of credit, holding that confinement after the first sentence was imposed could not be "in connection with" the pending burglary charge. Thus, § 973.155 does not require credit, because the charges resulting in the first sentence and the pending charges were not "related." The court stated that "unless the acts for which the first and second sentences are imposed are truly related or identical, the sentencing on one charge severs the connection between the custody and the pending charges." Id., 383.

The rule in Beets that sentencing on a related charge "severs the connection" was applied in State v.

Abbott, 207 Wis.2d 624, 558 N.W.2d 927 (Ct. App. 1996). Abbott committed a battery while serving a sentence under the Division of Intensive Sanctions (DIS) program. He received a sanction of 89 days in jail. Later, he pled guilty to the battery and was sentenced. The court of appeals held Abbott was not entitled to credit on the battery sentence for time spent in jail for the DIS sanction. Any connection between the two sentences was severed when Abbott began serving the DIS sanction. See also State v. Hintz, 2007 WI App 113, ¶7 n.3, 300 Wis.2d 583, 731 N.W.2d 646 (applying Beets to offender revoked from extended supervision for new charges and given a sentence on new charges concurrent to sentence on which supervision was revoked).

However, Beets does not mean every sentencing "severs" the connection between custody and charges unrelated to the one on which the sentence is imposed. In State v. Yanick, 2007 WI App 30, 299 Wis.2d 456, 728 N.W.2d 365, the defendant was serving six months of confinement as a condition of probation for an OWI offense. While serving that condition time he was sentenced in an unrelated case. That sentence began running while he was serving condition time and was longer than the condition time.

When his probation on the OWI was revoked, he was entitled to credit toward the revocation sentence for the condition time despite the fact much of that time was concurrent to the sentence in the unrelated case:

> ¶22 To the extent the State is suggesting that Beets holds that service of a sentence on crime A always "severs" time in custody owing to crime B for purposes of awarding sentence credit on the sentence for crime B, we disagree. Beets addressed a particular type of status--time in custody serving a sentence and awaiting disposition on a separate crime. Beets does not address service of a sentence and concurrent service of custody time pursuant to a disposition, which is the sort of concurrent custody time at issue here.

Because Yanick was ultimately sentenced for the OWI for which he was confined as a condition of probation, his custody was factually connected to the course of conduct for which sentence was imposed. See also State v. (Elandis) Johnson, 2009 WI 57, ¶¶42-44, 318 Wis.2d 21, 767 N.W.2d 207 (discussing Yanick).

If an offender is in custody on a federal supervision hold based on state criminal charges and later receives a sentence for the state charges that is concurrent to the federal sentence, the offender is entitled to credit toward the state sentence for time spent in custody until the imposition of sentence in the federal case, which severed the connection between custody and the state charges. State v. Thomas, 2021 WI App 59, 399 Wis. 2d 165, 963 N.W.2d 927.

40. State v. Hintz, 2007 WI App 113, 300 Wis.2d 583, 731 N.W.2d 646. Hintz asked only for confinement up to his reconfinement hearing, which for purposes of § 973.155 is essentially a sentencing hearing. See State v. Presley, 2006 WI App 82, 292 Wis.2d 734, 715 N.W.2d 713. Courts no longer determine the amount of reconfinement after revocation of extended supervision, so the reconfinement hearing is not the point at which the offender's sentence begins running again; instead the sentence resumes running when the person is returned to prison. Wis. Stat. § 304.072(4). State v. Davis, 2017 WI App 55, 377 Wis.2d 678, 901 N.W.2d 488.

41. Depending on the situations, sentences begin to run or resume running at different times.

a) Sentences to confinement commence on the date of imposition. Wis. Stat. § 973.15(1). This

provision covers situations in which sentence was originally withheld and probation imposed.

b) Following revocation of probation in the imposed-and-stayed-sentence-probation-imposed case, the sentence commences when the offender arrives at the prison. The revocation date is irrelevant. Wis. Stat. § 973.10(2)(b). See also State v. Slater, 2021 WI App 88, 400 Wis. 2d 93, 968 N.W.2d 740.

c) Sentences of revoked parolees or persons on extended supervision resume running on the date the person is received at the correctional institution. Wis. Stat. § 304.072(4). See also State v. Presley, 2006 WI App 82, 292 Wis. 2d 734, 715 N.W.2d 713; State v. Davis, 2017 WI App 55, 377 Wis. 2d 678, 901 N.W.2d 488.

42. State v. Beets, 124 Wis.2d 372, 383, 369 N.W.2d 382 (1985).

43. State v. Zahurones, 2019 WI App 57, 389 Wis. 2d 69, 934 N.W.2d 905.

44. The Wisconsin Supreme Court approved of this general principle in State v. Boettcher, 144 Wis.2d 86, 423 N.W.2d 533 (1988), reversing 138 Wis.2d 292, 405 N.W.2d 767 (Ct. App. 1987). The essential dates and facts were as follows:

4/12/86	Boettcher, on probation with a three year stayed sentence, is arrested for a new offense; a probation hold is imposed.
4/22/86	Initial appearance on new charge; signature bond on new charge; probation hold remains in effect so Boettcher remains in custody.
7/23/86	Probation is revoked and the three year stayed sentence takes effect – on that sentence, credit for all days in custody from 4/12 through 7/23 (110 days) is awarded; sentence is imposed on new offense – 1 year to run consecutively to the other sentence – and no credit for time in custody is given.

The court of appeals held that additional credit should have been given on the sentence for the new crime for the 10 days between 4/12 and 4/22 – the time after arrest and before he was "released" on a signature bond for the new offense. (Of course, he was not released; he remained in custody on the probation hold.) The court reasoned that he was "in custody" on the new offense for this period and credit must be given against the eventual sentence on that offense. This is the case even though he received credit for that 10-day period on the other sentence resulting from the revoked probation.

The supreme court reversed the court of appeals, concluding "that dual credit is not permitted – that the time in custody is to be credited to the sentence first imposed – and that, where the sentences are consecutive, the total time to be served is thus reduced by the number of days in custody as defined by sec. 973.155, Stats. Credit is to be given on a day for day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively." 144 Wis.2d 86, 87.

This holding is consistent with SM-34A, which the court cited with approval:

> We agree with, and endorse, the position of the Wisconsin Criminal Jury Instructions Committee's language in SM-34A V.B., where, in discussing consecutive sentences, it

concludes:

> "The objective with consecutive sentences is to assure that credit is awarded against one, but only one, of the consecutive sentences." 144 Wis.2d 86, 101.

The Boettcher rule also applies where a sentence has already been served: "The core idea of Boettcher is that 'dual credit is not permitted' where a defendant has already received credit against a sentence which has been, or will be, separately served." State v. Jackson, 2000 WI App 41, ¶19, 233 Wis.2d 231, 607 N.W.2d 338. See also State v. Coles, 208 Wis.2d 328, 334, 559 N.W.2d 599 (Ct. App. 1997) (a defendant who was sentenced on one count to "time served" in an amount equal to his pretrial credit was not entitled to any credit on the prison sentence imposed for a second count; the prison sentence was consecutive to the "time served" sentence because the "time served" sentence was completed upon pronouncement of sentence); State v. Rohl, 160 Wis.2d 325, 466 N.W.2d 208 (Ct. App. 1991) (applying Boettcher to deny defendant credit for time served in California while he was on Wisconsin parole before his Wisconsin parole was revoked; because his parole was not revoked until after he was released in California and returned to Wisconsin, his post-revocation Wisconsin sentence was consecutive, not concurrent, to the California sentence); State v. Martinez, 2007 WI App 225, 305 Wis.2d 753, 741 N.W.2d 280 (reaching the same conclusion with respect to time served in a federal institution before the person's Wisconsin parole was revoked).

Further, the Boettcher rule applies when one of several concurrent sentences is vacated and, after resentencing, is ordered to run consecutively to the previously imposed sentences with which it was originally running concurrent. State v. Lamar, 2011 WI 50, ¶¶35-37, 334 Wis.2d 536, 799 N.W.2d 758. Lamar was serving two concurrent sentences. He successfully challenged his conviction, but by the time he did so one of the sentences was finished. After he was reconvicted, the court imposed a new sentence, ordered it to run consecutively to any other sentence, and denied Lamar credit for the time he had served on the sentence that discharged before his conviction was vacated. The supreme court affirmed, holding "the time for which Lamar seeks credit was served on a separate, non-concurrent sentence. If Lamar received the sentence credit he seeks, he would receive dual credit from two consecutive sentences [for the same period of time]. As this court held in Boettcher, defendants are not entitled to receive this dual credit on a consecutive sentence." 334 Wis.2d 536, ¶37 (citing a previous version of this Special Material). The court also concluded that § 973.04 – which requires credit for confinement previously served when a sentence is vacated and a new sentence imposed – was not inconsistent with application of Boettcher and that denial of the credit did not violate the prohibition against double jeopardy. 334 Wis.2d 536, ¶¶35, 43-50.

Finally, the Boettcher rule applies to cases in which an offender is seeking credit against consecutive sentences for a period of pretrial custody in two separate cases. State v. Trepanier, 2014 WI App 105, ¶14, 357 Wis.2d 662, 855 N.W.2d 465. Trepanier was in custody in both a pending criminal case and a civil commitment for contempt. When he was sentenced in the criminal case the judge ordered the sentence to run consecutively to the civil commitment. Boettcher did not preclude awarding credit for the time Trepanier was in both pretrial custody for the criminal case and custody under the civil commitment because the custody for the civil commitment was not pretrial custody. Id., ¶¶12-14.

45. State v. Wolfe, 2001 WI App 66, 242 Wis.2d 426, 625 N.W.2d 655.

46. See note 25, above.

47. Note, however, that if supervision has not yet been revoked, ordering the credit for the new offense may be required. In State v. (Eliseo) Brown, 2010 WI App 43, 324 Wis.2d 236, 781 N.W.2d 244, the defendant was held in custody in connection with a Wisconsin case and an Illinois parole hold. He was sentenced in Wisconsin first, and given a sentence consecutive to any other sentence. The circuit court denied him credit for his custody time on the theory Illinois might grant it to him, and thus give him improper "double credit." The court of appeals held it must be applied to the Wisconsin sentence, as the question of "double credit" was not ripe because Illinois had not revoked his parole yet, and to deny credit on this sentence might mean he would never get it at all.

48. This section discusses the modification or correction of a sentence to reflect sentence credit where none, or an allegedly inadequate amount, had originally been given. See State v. Amos, 153 Wis.2d 257, 279-82, 450 N.W.2d 503 (Ct. App. 1989), for a case where a sentence was amended to eliminate sentence credit to which the defendant was not entitled.

49. State v. Obriecht, 2015 WI 66, ¶¶33-36, 42-47, 363 Wis.2d 816, 867 N.W.2d 387. Obriecht addressed the application of credit to an offender reincarcerated under § 302.11(7), which governs parole revocation, but § 302.113(9), which governs extended supervision revocation, is essentially identical to § 302.11(7). Thus, the Committee concludes Obriecht's holding will also apply to offenders who have been reconfined under § 302.113(9).

50. State v. Lira, 2021 WI 81, ¶35, 399 Wis. 2d 419, 966 N.W.2d 605 (when a "convicted offender" is "made available to another jurisdiction," sentence credit toward the offender's Wisconsin sentence must conform to "the terms of s. 973.155).

51. For example, if the offender is serving a Wisconsin sentence and the other jurisdiction imposes a concurrent sentence, the Wisconsin sentence would continue to run—just as would be the case if the offender serving a sentence imposed in one county in Wisconsin was given a new, concurrent sentence in another Wisconsin county. If the other jurisdiction imposes a consecutive sentence, that would sever the connection between the offender's custody and the Wisconsin case until the offender is returned to Wisconsin to complete the sentence imposed here. Cf. Lira, 399 Wis. 2d 419, ¶¶33. It might also be the case that the offender's custody in the other jurisdiction before being sentencing there should be credited to the Wisconsin sentence because the offender was not given any credit for that time toward the sentence in the other jurisdiction.

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SM-35 INCREASED PENALTY FOR HABITUAL CRIMINALITY — § 939.62

CONTENTS

Scope

This Special Material addresses issues arising in implementing Wisconsin's "repeater" statute – § 939.62. The formal title for the provision is "increased penalty for habitual criminality," but the commonly used term "repeater" is employed here. This addresses the generally applicable repeater provisions set forth in subsections (1), (2), and (3) of § 939.62.[1] Not addressed is the "persistent repeater" provision in § 939.62(2m)[2] or the several crime-specific repeater provisions that now exist.[3]

Issues arise at several stages of the criminal prosecution: when repeater status is alleged in the charging document; when a plea of guilty is accepted; when proof of repeater status is made; when the trial court makes the formal finding of repeater status; and when the repeater-enhanced sentence is imposed. There are also substantive issues concerning the timing of offenses and convictions, how the repeater statute's time periods are affected by periods of incarceration, and how the repeater statute is applied to specific statutory violations.

I. Alleging Repeater Status

A. Before Arraignment or Plea

If the State seeks to establish that a defendant is a repeat offender and thus eligible for an enhanced sentence, it must allege the defendant's prior convictions "in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea." § 973.12(1).

The Wisconsin Supreme Court has recognized that the time of arraignment or plea acceptance is "the cut-off point after which time a defendant can no longer face exposure to repeater enhancement for the crime" charged. State v. Martin, 162 Wis.2d 883, 900, 470 N.W.2d 900 (1991). This cut-off point is strict and applies regardless of the type of plea entered by the defendant. When a repeater allegation is improperly added after the deadline, it is of no effect and must be vacated. Proof of prejudice is irrelevant. Finally, the portion of § 973.12(1) which allows for time to investigate the defendant's possible prior convictions before a plea is accepted does not extend the period for alleging repeater status beyond the time of arraignment or plea acceptance or entry. Martin, 162 Wis.2d 883, 906.

B. Amending a Repeater Allegation

A charging document may be amended after arraignment or plea acceptance to correct

an error in the portion dealing with repeater status if the amendment does not prejudice the defendant. In State v. Gerard, 189 Wis.2d 505, 509, 525 N.W.2d 718 (1994), the court allowed the correction of the portion of the information which dealt with the extent of the penalty because that portion was not required by § 973.12(1) and because the amendment did not prejudice the defendant. An amendment of this type is not prohibited by § 973.12(1) because the allegation of a defendant's prior convictions will still have been made prior to arraignment and plea acceptance. Therefore, the amendment will be allowed unless there is prejudice to the defendant.

Applying Martin and Gerard, the Wisconsin Court of Appeals has held that "where the information correctly alleges a defendant's repeater status, a post-arraignment amendment to the information does not violate § 973.12 as long as it does not affect the sufficiency of the notice to the defendant concerning his or her repeater status." State v. Campbell, 201 Wis.2d 777, 785, 549 N.W.2d 501 (Ct. App. 1996).

A post-arraignment or post-plea amendment to the charging document alleging a provable prior conviction after the State failed to prove the prior conviction included in the original charging document will not be allowed. An amendment of that sort violates due process because the defendant has not been sufficiently notified of possible punishment at the time of arraignment or plea. State v. Wilks, 165 Wis.2d 102, 110, 477 Wis.2d 632 (Ct. App. 1991).

C. Dismissal and Refiling

When a repeater allegation has not been timely filed, or if there is an error in the allegation, the State may move for dismissal of the complaint without prejudice and, if the motion is granted, issue a new complaint that includes a proper repeater allegation. State v. Larsen, 177 Wis.2d 835, 839-40, 503 N.W.2d 359 (Ct. App. 1993).

II. Methods of Establishing Repeater Status; When it Must be Established

Before sentencing a defendant to the enhanced periods set forth in § 939.62, the prior convictions serving as a basis for the penalty increase must be "admitted by the defendant or proved by the State." Wis. Stat. § 973.12. As elaborated by the case law discussed below, this statute provides that the prior convictions can be established in either of the two ways:

(a) by the defendant's **personal** admission of the priors; or (b) by proof of the priors by reference to an official record, preferably by furnishing the court with copies of the judgment of conviction.

A. By the Defendant's Personal Admission

An admission of the prior convictions by the defendant is the simplest, surest way to establish the existence of the convictions. The admission must be made by the defendant personally, on the record. An admission may not "be inferred nor made by a defendant's attorney, but rather, must be a direct and specific admission by the defendant." State v. Koeppen, 195 Wis.2d 117, 127, 536 N.W.2d 386 (Ct. App. 1995) (Koeppen I), citing State v. Farr, 119 Wis.2d 651, 659, 350 N.W.2d 640 (1984). The admission must contain specific reference to the date of the conviction and any period of incarceration, if relevant to application of § 939.62 (see below, Sec. III. A and C). State v. Saunders, 2002 WI 107, ¶22, 255 Wis.2d 589, 649 N.W.2d 263.

In guilty plea cases, it is sufficient to cover this step with a specific question during the plea acceptance colloquy. SM 32, Accepting A Plea Of Guilty, includes the following question:

"Were you convicted of (name of offense) on (date)?"

Adding a question like this was suggested by the court of appeals in State v. Goldstein, 182 Wis.2d 251, 261, 513 N.W.2d 631 (Ct. App. 1994):

> One simple and direct question to the defendant from either the prosecutor or the trial judge asking whether the defendant admits to the repeater allegation will, in most cases, resolve the issue. We suggest that trial judges include this question in their colloquy with the defendant at the plea hearing (if there is one) or, otherwise, at the time of sentencing.

The Wisconsin Supreme Court has given similar advice in a case involving sentencing as a repeater after a jury trial:

> The trial court may ask the defendant the direct question while observing the defendant's criminal record before him whether the defendant was convicted on a particular date of a specific crime. . . .

Farr, 119 Wis.2d at 659.

The question in SM-32 is modeled after the one suggested in Farr.

B. By Copy of the Judgment of Conviction or Other Official Record

If the defendant does not provide a direct personal admission of the prior conviction, then the State must prove the existence and date of the conviction beyond a reasonable doubt. Saunders, 255 Wis. 2d 589, ¶¶20, 51.

The best, most direct method of proving prior convictions is to provide a certified copy of the judgment(s) of conviction. Saunders, 255 Wis. 2d 589, ¶¶24, 55. An uncertified copy may also suffice. Id., ¶¶25-31, 34. Other documents may also be used. Section 973.12(1) provides in part as follows:

> An official report of the F.B.I. or any other governmental agency of the United States or of this or any other state shall be prima facie evidence of any conviction or sentence therein reported.

Any official report specific enough to identify the defendant, the crimes, and the date of the convictions is sufficient. See Farr, 119 Wis.2d at 660. A presentence report qualifies if the repeater allegation was expressly contemplated by the writer of the report; the date of the relevant prior conviction is included in the report; and the report contains sufficient indications that the writer independently verified the prior conviction from sources other than the complaint. State v. Caldwell, 154 Wis.2d 683, 693–95, 454 N.W.2d 13 (Ct. App. 1990).

Section 939.62(3)(a) excludes motor vehicle offenses under chs. 341 to 349 as qualifying prior convictions for § 939.62 sentencing enhancement. However, if a defendant has previously been convicted of a criminal offense involving a motor vehicle—for instance, under §§ 940.09 and 940.10—that conviction will be listed on the defendant's Department of Transportation driving transcript. A certified DOT transcript is sufficient to prove prior convictions for purposes of sentence enhancement under the traffic code. State v. Spaeth, 206 Wis.2d 135, 153, 556 N.W.2d 728 (1996). The standard for establishing prior convictions for sentence enhancement in traffic cases is lower than under § 939.62, Saunders, 255 Wis. 2d 589, ¶¶32-33, and there is no case addressing the use of a DOT transcript to prove a prior conviction for purposes of § 939.62. Nonetheless, the Committee concludes that the standards for assessing the sufficiency of a presentence report or other official report under § 973.12 would apply to the use of a DOT transcript if it is offered as proof of a prior conviction for purposes of § 939.62.

By contrast, Consolidated Court Automation Programs (CCAP) reports are not sufficient to establish prima facie proof of a qualifying conviction for purposes of sentencing a defendant as a repeater. State v. Bonds, 2006 WI 83, ¶42, 292 Wis.2d 344,

717 N.W.2d 133 (a CCAP report is neither the official record of a criminal case nor a copy of the actual judgment of conviction).

Note that once a defendant has been found guilty of an alleged qualifying conviction, whether upon entry of a plea or return of verdict, the defendant has been "convicted" for purposes of § 939.62 even if he or she has not yet been sentenced. State v. Wimmer, 152 Wis. 2d 654, 449 N.W.2d 621 (Ct. App. 1989). In the event a judgment of conviction has not yet been entered for the alleged qualifying offense because the defendant has not yet been sentenced, proof of existence of conviction will require some other kind of court record—for instance, a transcript of the plea, a copy of the verdict forms, or minute sheets.

Proof of the prior conviction is not governed by the formal rules of evidence applicable at trial. Saunders, 255 Wis.2d 589, ¶¶36-46; Wis. Stat. § 911.01(4)(c). The state may satisfy the proof requirement by asking the court to take judicial notice of court records in the same county and supplying the necessary information. Wis. Stat. § 902.01(2)(b) and (4); State v. Koeppen, 2000 WI App 121, ¶¶35-37, 237 Wis. 2d 481, 614 N.W.2d 530 (Koeppen II). Regardless of the evidence submitted to prove the qualifying conviction, if the defendant objects to its accuracy or reliability the State may need to submit supplemental proof to establish beyond a reasonable doubt the existence of the conviction. The court must look at and weigh the totality of the evidence to determine if the State has satisfied its burden. Saunders, 255 Wis.2d 589, ¶¶52-53.

Finally, the existence of the prior convictions must be established **before** sentence is actually imposed. If the defendant did not personally admit the convictions at the time of the plea or went to trial, the court may ask for an admission at the sentencing hearing. Koeppen I, 195 Wis.2d at 130; Goldstein, 182 Wis.2d at 261. If the defendant has not admitted the convictions, the State may rely on proof that was submitted as evidence or otherwise entered in the record either before or at sentencing. Saunders, 255 Wis.2d 589, ¶48; State v. Kashney, 2008 WI App 164, 314 Wis.2d 623, 761 N.W.2d 762. However, if the State relies on the use of judicial notice, it must do so prior to sentencing despite § 902.01(6), which provides that judicial notice may ordinarily be taken at any stage of the proceeding. Koeppen I, 195 Wis.2d at 131 (the use of judicial notice at a postconviction proceeding to correct the failure to prove prior convictions at sentencing is not effective because it is too late).

III. Substantive Issues

A. Timing of Offenses and Convictions

A defendant will be eligible for enhanced punishment as a repeat offender "if the actor

was convicted of a felony during the 5 year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. . . ." § 939.62(2); State v. Midell, 40 Wis.2d 516, 527, 162 N.W.2d 54 (1968); Goldstein, 182 Wis.2d at 259. The date the judgment or judgments of conviction were entered determine the date for measuring the 5 year period. State v. Mikrut, 212 Wis.2d 859, 569 N.W.2d 765 (Ct. App. 1997).

B. Misdemeanor Convictions

The phrase "convicted of a misdemeanor on three separate occasions," as used in § 939.62(2), does not require that three misdemeanor convictions occur in three separate court appearances. State v. Wittrock, 119 Wis.2d 664, 674, 350 N.W.2d 647 (1984). The focus is on the quantity of crimes committed and not the date of each conviction. "Whenever a misdemeanant is convicted of a fourth misdemeanor which was committed subsequent to the convictions of three prior misdemeanors, the defendant's sentence may be enhanced by the repeater statute." Id.

Because the focus is on the quantity of misdemeanors committed, a defendant's sentence may be enhanced even if the three misdemeanors serving as the basis for repeater status were committed as part of a single incident or transaction. State v. Hopkins, 168 Wis.2d 802, 810, 484 N.W.2d 549 (1992). "[T]hree convictions of misdemeanors during the five-year period satisfies the statute, regardless of when the misdemeanors were committed." Id.

In the Committee's judgment, a misdemeanor conviction expunged under § 973.015 cannot be the basis for a repeater finding. Section 939.62(2) requires that "convictions remain of record and unreversed"; an expunged conviction does not "remain of record."[4]

C. Periods of Incarceration

When a court calculates the 5 year period between the commission of the present offense and the conviction of any prior offenses, "time which the actor spent in actual confinement serving a criminal sentence shall be excluded." § 939.62(2).

The charging document need not include the period of incarceration served by the defendant even if the period between the commission of the present crime and the defendant's prior conviction(s) is greater than 5 years. State v. Squires, 211 Wis.2d 873, 879, 565 N.W.2d 309 (Ct. App. 1997).

Where the period between the commission of the present crime and the conviction for any prior crimes exceeds five years and the defendant had been imprisoned during that period, the length of the period of confinement must either be admitted by the defendant or proved by the State. State v. Goldstein, 182 Wis.2d at 260 (the defendant's admission that he spent "10 months, about" in prison was inadequate to satisfy the proof of the element).

The Wisconsin Court of Appeals has suggested the use of the following question to obtain an adequate admission from the defendant: "For what period of time was the defendant incarcerated as a result of the conviction?" Zimmerman, 185 Wis.2d at 559.

If an adequate admission cannot be obtained from the defendant, the State must prove the period of incarceration in the same way it is required to prove the defendant's prior convictions. Goldstein, 182 Wis.2d at 260 61.

IV. Sentencing

Section 939.62 applies only where the court wishes to impose a sentence beyond the statutory maximum for the crime of which the defendant was convicted. So, even if repeater status was properly alleged and proved, the penalty increases come into play only if the sentencing judge imposes a sentence in excess of the regular maximum for the crime. If the court imposes a sentence within the regular statutory range, it is error to attribute any part of that sentence to repeater status under § 939.63. Harris, 119 Wis.2d at 625. Relying on the § 939.62 to enhance a sentence within the statutory maximum is an abuse of discretion and a specific increase imposed for repeater status will be dropped from the sentence. Id. See also State v. Vinson, 183 Wis.2d 297, 313-15, 515 N.W.2d 314 (Ct. App. 1994).

However, a sentencing judge's mistaken reference to a defendant's status as a repeat offender will not automatically constitute an abuse of discretion. If the judge offers specific findings upon which the sentence was based and does not specifically state that the sentence is being enhanced due to the repeat offender statute, an abuse of discretion will not be found even if the judge mistakenly refers to the defendant as a repeat offender or if the judge correctly refers to the defendant as a repeat offender but imposes a sentence below the statutory maximum. Farr, 119 Wis.2d at 661-63.

A. Correctly Stating a Repeater Sentence

The factfinding for proof of prior convictions is to be done by the trial court. Block v. State, 41 Wis.2d 205, 211, 163 N.W.2d 196 (1968). If the court desires to impose a sentence greater than the regular statutory maximum, it must "make a finding that the

defendant is a repeater." State v. Harris, 119 Wis.2d 612, 619-20, 350 N.W.2d 633 (1984). The findings must specifically articulate the basis for the repeater status on the facts on record. Id.

Section 939.62(1) provides that if a person qualified as a repeater, maximum sentences are increased as follows:

- a maximum term of imprisonment of one year or less may be increased to not more than 2 years.

- a maximum of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.

- a maximum of more than ten years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 10 years if the prior conviction was for a felony.

If the defendant's status as a repeater under § 939.62 has been properly alleged and proved, and if the sentencing court has concluded that a sentence in excess of the regular statutory maximum is appropriate, the sentence should be correctly stated on the record and reflected in the judgment of conviction. The court should state that the defendant's status as a repeater has been established, identify the increased sentence that § 939.62 allows, and then state the sentence that is being imposed. Again, the term of years imposed must be in excess of that authorized by the statutory maximum for the crime and within the increased penalty allowed by § 939.62. The court should not indicate that any particular portion of the sentence is attributed to the defendant's repeater status, but a statement to that effect will not constitute reversible error. See § 973.12(2) and State v. Upchurch, 101 Wis.2d 329, 335, 305 N.W.2d 57 (1981), cited in Harris, 119 Wis.2d 612, 625.

B. Multiple Counts; Consecutive or Concurrent Sentences

If a defendant is being sentenced for multiple counts and is a repeat offender, the sentence for all or any of the separate counts may be increased accordingly. Melby v. State, 70 Wis.2d 368, 384, 234 N.W.2d 634 (1975).

The imposition of consecutive sentences is not a condition to the use of an enhanced penalty under § 939.62, Stats. State v. Davis, 165 Wis.2d 78, 83, 477 N.W.2d 307 (Ct. App. 1991). The phrase "maximum term of imprisonment," as used in § 939.62, refers only to each individual crime and does not contemplate the total sentence for multiple count

convictions. Therefore, each count in a multiple count conviction may be enhanced under § 939.62, even if the individual sentences are imposed concurrently. Id.

C. Probation

The maximum term of probation is the maximum term of imprisonment for the crime. If the maximum term of imprisonment is increased under § 939.62(1), the maximum term of probation is increased accordingly. State v. Wicks, 168 Wis.2d 703, 706-07, 484 N.W.2d 378 (Ct. App. 1992).

D. Correcting an Improper Repeater Sentence

Section 973.13 provides that if a sentence is wrongly enhanced under § 939.62, (as by a failure to prove repeater status) the excess portion of the sentence will be void and the sentence commuted without further proceedings. This may be done either by an appellate court or by the trial court in a postconviction proceeding. Theriault, 187 Wis.2d at 133; Zimmerman, 185 Wis.2d at 559; State v. Holloway, 202 Wis.2d 694, 551 N.W.2d 841 (Ct. App. 1996).

If a trial court in a postconviction proceeding determines that the defendant's prior convictions were not properly proved, the court may correct the sentence by removing the excess portion and may also amend other portions of the sentence. Holloway, 202 Wis.2d at 698. Therefore, if a sentencing court is forced to correct the sentence under § 973.13, it may resentence the defendant "if the premise and goals of the prior sentence have been frustrated" by the need to commute the sentence. Id. at 700. In Holloway, the trial court reduced a sentence due to a failure to prove the defendant's prior convictions, but then altered the sentences from concurrent to consecutive. The court of appeals affirmed that the sentencing court acted lawfully.

V. Application to Specific Crimes

A. Attempt – § 939.32

The penalty for an attempt (of other than a Class A felony) is half the penalty allowed for the completed crime. § 939.32(1). Because § 939.62 is considered a penalty enhancer and not a crime in itself, it is not subject to the halving provisions of the attempt statute, § 939.32(1). Therefore, if a defendant who qualifies as a repeat offender is convicted of an attempt, the "maximum penalty for the underlying crime is halved and then that penalty may be enhanced under § 939.62." State v. Bush, 185 Wis.2d 716, 725 26, 519 N.W.2d 645 (Ct. App. 1994).

B. Controlled Substance Offenses – § 961.48

Section 961.48 provides for enhanced penalties for second or subsequent offenses under Chapter 961. It fulfills the same legislative purpose as does § 939.62. State v. Ray, 166 Wis.2d 855, 872, 481 N.W.2d 288 (Ct. App. 1992). Therefore, if a defendant is eligible for penalty enhancement under both § 961.48 and § 939.62, the sentence may be enhanced under either section but not under both. Id. at 873.

C. Contempt of Court – Punitive Sanction – § 785.04

Contempt of court for which a punitive sanction is imposed under § 785.04 is not a crime, and therefore, is not subject to the penalty-enhancing provisions of § 939.62. State v. Carpenter, 179 Wis.2d 838, 842-43, 508 N.W.2d 69 (Ct. App. 1993) applying McGee v. Racine County Circuit Court, 150 Wis.2d 178, 441 N.W.2d 308 (Ct. App. 1989).

D. Possession of a Firearm by a Felon – § 941.29

Section 941.29 states that "any person previously convicted of a felony who possesses a firearm is guilty of a Class E felony." This statute does not create a "penalty enhancer" but rather creates a distinct crime. State v. Jones, 142 Wis.2d 570, 576, 419 N.W.2d 263 (Ct. App. 1987). Therefore, the two year maximum penalty applicable to violations of § 941.29 may be enhanced under § 939.62. Id.

E. Use of a Dangerous Weapon – § 939.63

Section 939.63 states that the maximum term of imprisonment for a crime may be increased if "a person commits a crime while possessing, using or threatening to use a dangerous weapon." Sections 939.62 and 939.63 may both be used to enhance the maximum term of imprisonment for a single crime. State v. Pernell, 165 Wis.2d 651, 658, 478 N.W.2d 297 (Ct. App. 1991). If the sentencing court wishes to use both § 939.62 and § 939.63 to increase the maximum term of imprisonment for a single crime, § 939.63 must be applied first. The amount of enhancement available under § 939.62 should then be determined (based on the maximum term of imprisonment for the underlying crime plus the amount already enhanced under § 939.63). Id. at 658 59.

COMMENT

SM-35 was approved by the Committee in February 1998 and revised in 2022. This revision was approved by the Committee in October 2023; it corrected a statutory error to align with the most up-to-date language.

1. The text of subs. (1), (2), and (3) of § 939.62 follow. As to sub. (2m), see note 2, below.

(1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed (except for an escape under s. 946.42 or a failure to report under s. 946.425) the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

(a) A maximum term of one year or less may be increased to not more than 3 years.

(b) A maximum term of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.

(c) A maximum term of more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 10 years if the prior conviction was for a felony.

(2) The actor is a repeater if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. It is immaterial that sentence was stayed, withheld or suspended, or that the actor was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded.

[NOTE: Sub. (2m) is not included.]

(3) In this section, "felony" and "misdemeanor" have the following meanings:

(a) In case of crimes committed in this state, the terms do not include motor vehicle offenses under chs. 341 to 349 and offenses handled through proceedings in the court assigned to exercise jurisdiction under chs. 48 and 938, but otherwise have the meanings designated in s. 939.60.

(b) In case of crimes committed in other jurisdictions, the terms do not include those crimes which are equivalent to motor vehicle offenses under chs. 341 to 349 or to offenses handled through proceedings in the court assigned to exercise jurisdiction under chs. 48 and 938. Otherwise, felony means a crime which under the laws of that jurisdiction carries a prescribed maximum penalty of imprisonment in a prison or penitentiary for one year or more. Misdemeanor means a crime which does not carry a prescribed maximum penalty sufficient to constitute it a felony and includes crimes punishable only by a fine.

2. Section 939.62(2m) contains what is commonly referred to as the "three strikes" provision. The formal title is "persistent repeater."

3. Repeater statutes are proliferating. The following provide increased penalties for repeated commission of specific crimes and are not addressed in this Special Material.

- § 939.621 Increased Penalty for Certain Domestic Abuse Offenses: provides a penalty increase of up to 2 years for domestic abuse offenses committed within 72 hours of arrest for a domestic abuse offense.

- § 939.626 Increased Penalty; Repeat Child Sex Crimes: provides a 10 year penalty increase for a second violation of §§ 948.02, 948.05, 948.06, 948.07, or 948.08.

Several other statutes refer to an "increased penalty" in their titles, but in fact provide for a minimum sentence, not an increase of the maximum. See, for example, § 939.623 Increased Penalty; Repeat Serious Sex Crimes [five-year minimum sentence]; § 939.624 Increased Penalty; Repeat Serious Violent Crimes [five-year minimum sentence]; § 939.635 Penalties; Assault Or Battery In Secured Juvenile Correctional Facility [five-year minimum sentence].

Finally, there is a series of statutes providing for a penalty increase where a crime is committed under certain circumstances: while armed with a dangerous weapon; while identity is concealed; etc. These have the effect of creating an additional element of the crime and most are addressed by jury instructions presenting the additional fact as a special question for the jury:

- § 939.625 Gang Crime Penalty Enhancer: provides a penalty increase of 5 years for gang-related criminal activity [see Wis JI-Criminal 985].

- § 939.63 Penalties; Use Of A Dangerous Weapon: provides for penalty increases if a person commits a crime while possessing or using a dangerous weapon [see Wis JI-Criminal 990].

- § 939.632 Penalties; Violent Crime in a School Zone: provides a 5-year penalty increase for certain "violent crimes" that are felonies and a 6 month penalty increase for certain "violent crimes" that are misdemeanors (changing their status from a misdemeanor to a felony). There is no jury instruction.

- § 939.64 Penalties; Use of Bulletproof Garment: provides a 5 year penalty increase for felonies committed while wearing a bulletproof garment [see Wis JI-Criminal 993].

- § 939.641 Penalties; Concealing Identity: provides a 5 year penalty increase for felonies committed while identity is concealed; increases the maximum sentence to one year in jail for misdemeanors [see Wis JI-Criminal 994].

- § 939.645 Penalties; Crimes Committed Against Certain People or Property: this is the so-called Hate Crimes Law; it provides a 5 year penalty increase for felonies and increases the maximum sentence to one year in jail for misdemeanors [see Wis JI-Criminal 996, 996.1].

- § 939.648 Penalty; Terrorism: provides a 10 year penalty increase for crimes involving "terrorism." There is no jury instruction.

- § 939.646 Penalty; Crimes Committed Using Information Obtained From The Sex Offender

Registry: provides for a 6 month increase on misdemeanors and a 5 year increase for felonies if the crime was committed using information obtained from the sex offender registry under § 301.46. There is no jury instruction.

- § 939.648 Penalty; Terrorism: provides a 10 year penalty increase for crimes involving "terrorism."

Also note that Chapter 961 has its own repeater provision for controlled substance offenses [see § 961.48]. See the discussion at sec. V., B., this Special Material.

4. For discussion of misdemeanor expunction under § 973.015, see SM 36, Misdemeanors; Special Disposition Under Section 973.015.

SM-36 SPECIAL DISPOSITION UNDER SECTION 973.015 C EXPUNCTION[1]

The following is suggested as a framework for deciding whether or not a defendant should receive alternative disposition under § 973.015(1m)(a)1.[2]

AT THE TIME OF SENTENCING,[3] THE COURT SHALL, IF REQUESTED BY THE DEFENDANT OR DEFENDANT'S COUNSEL, AND MAY, ON THE COURT'S OWN MOTION, DETERMINE WHETHER THE DEFENDANT SHOULD BE AFFORDED SPECIAL DISPOSITION UNDER § 973.015.

I. An Offender is Eligible for § 973.015(1m)(a)1. Disposition if:

A. The offender was under the age of 25 at the time the offense was committed;

B. The offense is

1. a misdemeanor

2. a Class H felony and

a. the person has not been convicted of a prior felony, and
b. the felony is not a violent offense as defined in s. 301.048(2)(bm), and
c. the felony is not a violation of s. 940.32, s. 948.03(2), (3), or (5)(a)1., 2., 3., or 4., or of s. 948.095.

3. a Class I felony and

a. the person has not been convicted of a prior felony, and
b. the felony is not a violent offense as defined in s. 301.048(2)(bm), and
c. the felony is not a violation of s. 948.23(1)(a)

C. The court determines that the offender will benefit and society will not be harmed by the disposition.[4]

II. Ordering Special Disposition under § 973.015(1m)(a)1.

If the sentencing judge determines that special disposition under § 973.015(1m)(a)1. is appropriate, the judge should state the finding on the record as follows:

"The court finds that the defendant has been convicted of an offense for which the maximum penalty is imprisonment for six years or less and that the defendant was under age 25 at the time the offense was committed. The court also finds that the defendant will benefit and that society will not be harmed by special disposition under § 973.015(1m)(a)1."

"THEREFORE IT IS ORDERED, pursuant to § 973.015(1m)(a)1., that upon successful completion[5] of the sentence imposed, as evidenced by receipt by this court (of payment of the fine and costs) (of a certificate of discharge from the (detaining) (probationary) (authority)), the clerk of court shall expunge[6] the record without further order of this court."

III. Rejecting Special Disposition under § 973.015(1m)(a)1.

If the defendant has requested special disposition under § 973.015(1m)(a)1. and the judge determines that the disposition is not appropriate, the judge should make a specific statement on the record that the disposition was considered and state the reasons for rejecting it:

"Special disposition available under Wis. Stat. § 973.015(1m)(a)1. has been considered. The court has determined that such disposition is not appropriate because

(the offender will not benefit because (specify) (and) (society will be harmed because (specify)).

COMMENT

SM-36 was originally published in 1979 and revised in 1991, 1995, 1998, 2010, and 2013. This revision was approved by the Committee in April 2018; it involved editorial changes to the text, updating statutory references, and adding case law references to the Comment.

Section 973.015 was created by Chapter 39, § 711m, Laws of 1975, as a companion to the Youthful Offenders Act, Chapter 54, Wis. Stat., which has been repealed (Chapter 418, Laws of 1977).

This Special Material outlines the standards for discretionary expunction under § 973.015(1m)(a)1. Expunction is required under § 973.015(1m)(a)2. "if the offense was a violation of § 942.08 (2)(b), (c), or (d) or (3) and the person was under the age of 18 when he or she committed it." Section 942.08 defines the offense of "invasion of privacy." Subsection (1m)(a)2. was created by 2003 Wisconsin Act 50 [effective date: September 5, 2003]. A third expunction option is provided by sub. (2m), created by 2013 Wisconsin Act 362 [effective date: April 25, 2014]. It applies to victims of trafficking who were convicted of violating § 944.30, Prostitution.

2009 Wisconsin Act 28 expanded the scope of § 973.015. The statute originally allowed expunction of misdemeanor convictions committed by persons under the age of 21. Act 28 amended the statute to change the age limit to "under the age of 25" and to extend applicability to all offenses for which the maximum penalty is 6 years or less (with some exceptions). The changes first apply to sentencing orders that occur on the effective date of Act 28 – July 1, 2009. (Sections 9309 and 9400, Act 28.)

Thus, the expunction authorized by § 973.015(1m)(a)1. now applies to all Class H and I felonies committed by persons under age 25, subject to exceptions set forth in new sub. (1)(c):

- it is not applicable to Class H felonies if

    - the defendant has a prior felony conviction, or
    - the crime is a "violent offense" under § 301.048(2)(bm)*, or
    - the crime is a violation of

        - § 940.32 [Stalking]
        - § 948.03(2), (3) or (5)(a)1., 2., 3., or 4. [Physical abuse of a child] or
        - § 948.095 [Sexual assault by school staff person]

- it is not applicable to Class I felonies if

    - the defendant has a prior felony conviction, or
    - the crime is a "violent offense" under § 301.048(2)(bm)*, or
    - the crime is a violation of § 948.23(1)(a) [Concealing the death of a child]

* The reference to a "violent offense under § 301.048(2)(bm)" is to the intensive sanctions statute, which lists more than 50 crimes that are deemed violent offenses. Of the crimes listed, only a few are Class H or I felonies.

NOTE: The standard for the court to use to determine whether expunction should be ordered remains the same: the person must successfully complete the sentence; and the person will benefit from expunction and society will not be harmed.

1. "Expunction" is the proper noun form of the verb "expunge." However, the use of "expungement" is common and § 973.015 is often referred to as "the expungement statute." See, for example, State v. Leitner, 2001 WI App 172, ¶1, 247 Wis.2d 195, 633 N.W.2d 207. The Wisconsin Supreme Court has noted: "There are two different words for the noun form of 'expunge'; we use 'expunction,' but 'expungement' is also used. To be clear, 'expungement' and 'expunction' mean the same thing." State v. Arberry, 2018 WI 7, ¶1, footnote 2, 379 Wis.2d 254, 905 N.W.2d 811.

2. Section 973.015 does not create a new type of sentence as such, but provides for the possibility of record expunction after completion of a sentence. It comes into play after an offender has been convicted and sentenced under standard procedure.

Ordering expunction is within the discretion of the sentencing judge since the statute provides: ". . . the court may order at the time of sentencing. . . ." (Emphasis added.) The court should consider disposition under § 973.015 and make a record of its decision, whenever the defendant requests it. The court may also consider disposition under this section on its own motion but need not consider it in every case where there is no request by the defendant or counsel.

A court commissioner does not have the authority to order expunction. State v. Michaels, 142 Wis.2d 172, 417 N.W.2d 415 (Ct. App. 1987).

Expunction under § 973.015 does not extend to judgments in forfeiture actions. Kenosha County v. Frett, 2014 WI App 127, 359 Wis.2d 246, 858 N.W.2d 397. The attorney general has concluded "that circuit courts in the State of Wisconsin do not possess the inherent or implied powers, in the absence of authorizing or enabling statutes, to order the destruction or expunction of criminal conviction records." 70 Op. Att'y Gen. 115, 120 (1981).

3. In State v. Matasek, 2014 WI 27, 353 Wis.2d 601, 846 N.W.2d 811, the supreme court affirmed a decision of the court of appeals which held that a trial court's decision whether or not to order expunction under § 973.015 is to be made at the time of sentencing. Under that view, the statute does not allow the trial court to leave the issue open until the defendant successfully completes the sentence. The supreme court stated:

> We interpret the phrase "at the time of sentencing" in Wis. Stat. § 973.015 to mean that if a circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the sentencing proceeding. ¶6.

In State v. Arberry, 2018 WI 7, ¶5, 379 Wis.2d 254, 905 N.W.2d 811, the court reaffirmed the conclusion in State v. Matasek: ". . . a defendant may not seek expunction after sentence is imposed because both the language of Wis. Stat. § 973.015 and Matasek require that the

> determination regarding expunction be made at the sentencing hearing." Further, a motion for modification of sentence does not create a second "time of sentencing"; the term refers only to the original imposition of sentence. ¶17.

4. See § 973.015(1m)(a)1. Except for stating the standard "the person will benefit and society will not be harmed," § 973.015 contains no guidelines for the judge to apply in deciding whether to order special disposition. Since the statute says only that the court "may order" special disposition at the time of sentencing, the Committee concluded that the decision lies entirely within the discretion of the sentencing judge, applying those standards that are generally applicable to the sentencing decision. Also see, State v. Helbricht, 2017 WI App 5, 373 Wis.2d 203, 891 N.W.2d 412.

5. "Successful completion" involves paying a fine, serving a jail sentence, or completing a period of probation and not being convicted of a subsequent offense (see § 973.015(1m)(b)).

In State v. Ozuna, 2017 WI 64, 376 Wis.2d 1, 898 N.W.2d 20, the defendant was issued a certificate discharging him from probation. The certificate had two boxes – both of which were checked – one indicating that probation was successfully completed and the other that he had not satisfied a "no alcohol" condition. He was denied previously-ordered expunction because he did not "successfully complete" probation. The supreme court concluded that expunction was properly denied – completing probation without revocation does not mean that all conditions were satisfied, and "successful completion" requires that those conditions be satisfied. The court noted that the form has been changed – it now has two boxes: "successfully completed" and "not successfully completed."

In State v. Hemp, 2014 WI 129, 359 Wis.2d 320, 856 N.W.2d 811, the supreme court reversed a decision of the court of appeals which held that Hemp's successful completion of his sentence did not automatically entitle him to expungement: while the controlling authority must issue the certificate of discharge, the court of appeals held that Hemp was responsible for doing the latter and he failed to do so in a timely manner. The supreme court reversed:

> ¶4 First, we hold that the successful completion of probation automatically entitled Hemp to expungement. Second, we hold Wis. Stat. § 973.015 is unambiguous and places no burden on Hemp to petition for expungement within a certain period of time because the duty to forward the certificate of discharge rests solely with the "detaining or probationary authority." Finally, we hold the circuit court improperly exercised its discretion when it reversed the decision it made at sentencing to find Hemp eligible for expungement.

6. Section 973.015 does not define "expunge." The word literally means "to destroy or obliterate; it implies not a legal act, but a physical annihilation." (Black's Law Dictionary, Revised 4th Edition.) On November 3, 1997, the Wisconsin Supreme Court issued Order No. 97-07, dealing with expunction of court records. The order created SCR 72.06 to read as follows:

> 72.06 Expunction
>
> When required by statute or court order to expunge a court record, the clerk of the court shall do all of the following:

(1) Remove any paper index and nonfinancial court record and place them in the case file.
(2) Electronically remove any automated nonfinancial record, except the case number.
(3) Seal the entire case file.
(4) Destroy expunged court records in accordance with the provisions of this chapter.

While this order clarifies the procedure to be followed by the clerk of courts in dealing with a record ordered expunged, there is little authority in Wisconsin relating to the consequences of expunged convictions. In State v. Anderson, 160 Wis.2d 435, 466 N.W.2d 681 (Ct. App. 1991), the court held that a conviction ordered expunged under § 973.015 cannot be used to impeach the credibility of the convicted person. [Anderson also held that the statute required physical destruction of the court record, a conclusion apparently overruled by SCR 72.06.]

The Committee concluded that a conviction expunged under § 973.015 may not be used as a prior offense for purposes of the general repeater statute, § 939.62. Section 939.62(2) requires that prior convictions "remain of record and unreversed." In the Committee's judgment, an expunged conviction does not "remain of record." This conclusion was also reached by the Wisconsin Supreme Court in State v. Leitner, below.

The Wisconsin Supreme Court has held that "§ 973.015 does not direct district attorneys or law enforcement agencies to expunge their records documenting the facts underlying an expunged record of conviction. We further conclude that the circuit court may consider, when sentencing an offender, the facts underlying a record of conviction expunged under § 973.015." State v. Leitner, 2002 WI 77, ¶48, 253 Wis.2d 449, 646 N.W.2d 341. The court also recognized that "expunging the court record provides substantial advantages to the offender. An expunged record of a conviction cannot be considered at a subsequent sentencing; an expunged record of a conviction cannot be used for impeachment at trial under § 906.09(1); and an expunged record of a conviction is not available for repeater sentence enhancement." 2002 WI 77, ¶39. The Wisconsin Court of Appeals applied Leitner in State v. Allen, 2015 WI App 96, ¶38, 373 Wis.2d 98, 890 N.W.2d 245: ". . . a sentencing court must be permitted to consider all the facts underlying an expunged criminal conviction, and not just those underlying the crime itself."

SM-39 BAIL AFTER CONVICTION; STAY OF EXECUTION OF SENTENCE

[WITHDRAWN]

COMMENT

SM-30A was originally published as SM-30A in 1985. It was renumbered SM-39 in 1987. It was withdrawn by the Committee in 1995.

Bail after conviction is addressed at CR-2-9, Wisconsin Judicial Benchbook, Volume I.

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SM-40 COURT'S INSTRUCTION TO DEFENDANT AT ARRAIGNMENT AND BEFORE ACCEPTANCE OF A PLEA OF GUILTY ON SEX CRIMES CHARGE

[WITHDRAWN]

COMMENT

SM-40 was originally published in 1974 and revised in 1978. It was withdrawn in 1991.

This Special Material provided advice to a defendant charged with certain sex crimes and subject to specialized treatment under provisions found in Wis. Stat. Ch. 975. The sex crimes program was repealed by Chapter 184, Laws of 1979. No person could be committed under Chapter 975 after July 1, 1980. § 975.01(1). Therefore, there is no use for this Special Material after that date.

The legislation repealing the sex crimes program also extended a sentencing option to those persons committed under the Sex Crimes Law. They may petition the committing court for the imposition of a criminal sentence to replace the Chapter 975 commitment. See SM-41, Resentencing Persons Committed Under The Sex Crimes Law.

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SM-41 SENTENCING PERSONS COMMITTED UNDER THE SEX CRIMES LAW

[WITHDRAWN]

COMMENT

SM-41 was published in 1987. It was withdrawn by the Committee in 2010.

This Special Material outlined the procedure under § 975.17, which allowed persons committed under Chapter 975, the Sex Crimes Law, to petition the court for imposition of a criminal sentence to replace the Chapter 975 commitment. Chapter 975 commitments were repealed by Chapter 117, Laws of 1979, effective July 1, 1980.

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SM-45 INQUIRY IN CONFLICT OF INTEREST CASES

This Special Material is intended to implement decisions of the Wisconsin Supreme Court requiring that the trial court make an inquiry when facts indicate a potential conflict of interest on the part of defense counsel. The obligation first applied to cases where codefendants were represented by the same lawyer, State v. Kaye, 106 Wis.2d 1, 14, 315 N.W.2d 337 (1982),[1] and was later expanded to all cases where a conflict of interest may arise, State v. Miller, 160 Wis.2d 646, 467 N.W.2d 118 (1991).[2]

Where an inquiry is required, it has two purposes: to elicit sufficient facts to determine whether an actual conflict or a serious potential conflict exists; and if a conflict exists, to determine whether the defendant may waive the right to conflict-free representation.

I. Cases in Which an Inquiry is Required

A. Multiple representation

State v. Kaye held that an inquiry is required: ". . . whenever the same attorney or law firm represents more than one defendant in the same criminal case." The rule was reaffirmed in State v. Miller, supra, and in State v. Dadas, 190 Wis.2d 340, 526 N.W.2d 818 (Ct. App. 1994).[3]

1. Federal Rule 44(c), after which the Kaye requirement was modeled, requires an inquiry when defendants are represented by attorneys "associated in the practice of law."

2. An inquiry should be made whether counsel is retained or appointed.[4]

3. Inquiry is required in both felonies and misdemeanors.

4. The inquiry is not limited to cases expected to go to trial[5] but is required to assure effective assistance of counsel in regard to all matters beyond the initial appearance and setting of pretrial release.

B. Other conflict of interest situations

The primary cases reaching the appellate courts have involved multiple representation, but conflict of interest concerns can also arise where defense counsel has previously participated in the prosecution of the defendant[6] or represents or has represented a witness for the state.[7] In either situation, the trial court should conduct an inquiry into the existence of an actual conflict.[8]

II. Inquiry Whether a Conflict Exists

A. Standard

The court must first determine whether an actual or serious potential conflict exists.

Cases have elaborated upon the standard in multiple representation cases, concluding that there is an actual conflict of interest where incriminating information voluntarily supplied by one client is used to provide evidence of another client's criminal activities, expose another client to potential criminal prosecution, or provide justification for a sentencing recommendation or a sentence.[9] Counsel could face a conflict of interest in several different situations: in pursuing plea negotiations for one client; cross-examining one of the clients at trial; or pursuing a line of defense for one client that might implicate another.[10]

In conflict situations not involving multiple representation, similar concerns are involved, all relating to the central question: is counsel able to give undivided loyalty to the client.

B. Timing

Inquiry regarding the existence of an actual conflict of interest or of a serious potential conflict should be made at the arraignment in misdemeanors and as early as possible in felonies. In felonies, waiting until the arraignment is too late. The inquiry should be conducted:

1. In open court (generally, but see below).

2. On the record.

3. With the participation of the prosecutor.

Evidence of possible conflict of interest could arise at any time during the case; if so, an inquiry should be conducted then.

C. In chambers inquiry

If the initial inquiry indicates a possibility of conflict of interest, a more detailed inquiry is required. If the detailed inquiry would result in disclosures to the prosecutor that would be unfairly prejudicial to the defendant, inquiry should be in chambers, on the record, with defendant and defense counsel. The prosecutor may be excluded. If a detailed inquiry would result in information coming to the trial judge's attention that would be unfairly prejudicial to the defendant, the inquiry may be conducted before a different judge.

III. Inquiry of Defense Counsel

Adequately investigating the conflict of interest issue may require making inquiry of defense counsel.

A. Standards relating to conflict of interest

The Wisconsin Rules of Professional Conduct for Attorneys address conflict of interest in two sections. See SCR 20:1.7, Conflict of interest: general rule, and SCR 20:1.8, Conflict of interest: prohibited transactions.

Specific duties of defense counsel are elaborated upon by Sec. 4-3.5(b) of the ABA Standards. This standard was adopted in State v. Kaye, 106 Wis.2d 1, 15:[11]

> (b) Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear that:
>
> (i) no conflict is likely to develop;
>
> (ii) the several defendants give an informed consent to such multiple representation; and

(iii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that an attorney sometimes encounters in defending multiple clients. In some instances, accepting or continuing employment by more than one defendant in the same criminal case is unprofessional conduct.

B. Questions to ask defense counsel

1. Has counsel considered the possibility of conflict?

2. What investigation has counsel undertaken to see whether conflict exists?

3. What discussion or explanation of conflict has there been with the client?

C. The court should strongly advise against multiple representation

IV. Inquiry of Defendants

If a conflict is found to exist, it may be waived by the defendant after a proper inquiry is made by the court. This requires addressing the defendant personally, in the same manner as a guilty plea.

An inquiry like the following is suggested:

COURT: "Your right to a fair trial guarantees that you have the right to be represented by counsel. In the circumstances of this case, one part of that right to counsel may be in conflict with another part of that right.

"You do have the right to counsel of your own choice. That is, you have the right to select your own lawyer and to be represented by that lawyer. At the same time, you have the right to be represented by a lawyer who has undivided loyalty to you; that is, your lawyer should have only your interests at heart with no conflicting reason for not representing your interests as vigorously as possible.

[THE FOLLOWING TWO PARAGRAPHS APPLY ONLY TO THE MULTIPLE REPRESENTATION CASE.][12]

"It is the right to counsel with no conflict of interest that is at stake here. Because your lawyer is undertaking to represent both you and your codefendant,

there is the potential for a conflict of interest. A lawyer seeking to represent two defendants in the same case unavoidably faces the possibility that the duty to one client may conflict with the duty to the other. A conflict can arise in many different situations: plea negotiations; deciding what witnesses to call and how to question them; deciding whether either defendant should testify; making opening and closing arguments in court; and in other situations. And if both you and your codefendant are convicted, it will be especially difficult for the lawyer to represent both of you effectively at sentencing without arguing that one of you deserves more blame than the other.

"Conflict of interest arises in many different ways and is difficult to detect or foresee. As a result, the law strongly prefers that a lawyer represent only one person. However, the law also recognizes that a person accused of crime has the right to be represented by the lawyer of his choice and therefore allows you to give up the right to counsel who represents only you.

"You should discuss these problems with your lawyer, and you should feel free to discuss them with another lawyer if you want to. If, after carefully considering possible problems which may arise, you wish to continue to be represented by your present lawyer, the court will consider your request. The court will be in recess until you have had a full opportunity to consider this with your lawyer and decide this important matter."

AFTER ALLOWING A REASONABLE PERIOD OF TIME FOR THE DEFENDANT(S) TO CONSIDER THE CONFLICT OF INTEREST PROBLEM, MAKE THE FOLLOWING INQUIRY ON THE RECORD.

"Do you wish to continue with your present lawyer?"

[IF THE ANSWER IS "NO," NO FURTHER INQUIRY IS NECESSARY.]

"Have you had enough time to consider the possible conflict of interest problem?"

"Have you discussed possible conflicts in your case with your lawyer?"

"Do you have any questions about the conflict of interest problem?"

"Please explain what the term "conflict of interest" means to you."

[CONTINUE ASKING ABOUT THE DEFENDANT'S PERCEPTION OF THE CONFLICTS PROBLEM UNTIL SATISFIED THAT THE DEFENDANT IS AWARE OF AND UNDERSTANDS THE VARIOUS RISKS INVOLVED.]

"In spite of these possible problems, do you wish to continue to be represented by (name of lawyer) ?"

V. Waiver of the Right to Separate Counsel

A. The waiver must be free, voluntary, and understanding

1. It is like a guilty plea or a waiver of jury trial.

2. Inquiry into educational background, etc., may be necessary.[13]

B. If there is a valid waiver, the defendant may continue with joint representation subject to review by the court. See section VI, below.

VI. Rejecting the Waiver; Disqualifying Counsel

A trial court has the authority to disqualify counsel, even over the defendant's objection and proffered waiver of the right to conflict-free representation, when an actual or serious potential conflict of interest exists.[14]

The court must first have determined that an actual or serious potential conflict exists after conducting the inquiry outlined above. The court should be alert to any possibility that the state is seeking to manufacture the conflict to eliminate a particular lawyer as an adversary. When there is any evidence of this, it should be carefully explored in the record.[15]

Once an actual or serious potential conflict is established, the decision to disqualify counsel resides in the sound discretion of the trial court. Factors to consider include:[16]

(1) whether client and counsel have a close relationship or one of long duration;

(2) whether counsel has performed substantial work in the case;

(3) whether an alternative lawyer of like ability could be obtained; and,

(4) whether disqualification would cause unacceptable delay.

COMMENT

SM-45 was originally published in 1982 and revised in 1989, 1991, and 1995. This revision, which involved a general updating and expanded SM-45 to apply to conflict of interest generally, was approved by the Committee in August 1999.

1. In State v. Kaye, the Wisconsin Supreme Court held:

> . . . we will require trial courts to conduct an inquiry whenever the same attorney or law firm represents more than one defendant in the same criminal case. The court should inquire of the defendants and their attorney at the arraignment as to the possibility for actual conflicts of interest. The judge should ensure that the defendants understand the potential conflicts and determine whether they want separate counsel. If the defendants insist on being represented by the same counsel, after being fully advised of the potential problems, the trial judge should permit such multiple representation. However, this determination should not be made unless it is clear the defendants have made a voluntary and knowing waiver of their right to separate counsel.

106 Wis.2d 1, 14.

Kaye arose in connection with a defendant's postconviction claim that he was denied effective assistance of counsel at sentencing because his lawyer also represented a codefendant. Though Kaye had not objected to the multiple representation in the trial court, he argued at the postconviction stage that his lawyer was precluded from arguing that Kaye was less culpable than the codefendant because the lawyer also represented the codefendant. The Wisconsin Supreme Court denied relief on the ground that Kaye failed to show "that an actual conflict of interest adversely affected his lawyer's performance," citing Cuyler v. Sullivan, 446 U.S. 335, 348 (1980), in which the United States Supreme Court established the standard for evaluating claims of ineffectiveness of counsel based on conflict of interest. However, the court in Kaye established the requirement for an inquiry by the trial court in order to avoid having problems like this arise in the future.

[Note that a different standard applies to evaluating claims of ineffective assistance of counsel in multiple representation cases. The test is whether "an actual conflict of interest adversely affected performance." This is in contrast to the test in all other situations, which involves two questions: (1) was performance of counsel deficient; and (2) if so, was there prejudice. Strickland v. Washington, 466 U.S. 668 (1984). In the multiple representation situation, prejudice is presumed "if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3120 (1987), citing Strickland, supra, 466 U.S. at 692, and Cuyler, supra, 446 U.S. at 348, 350.]

The rule announced in Kaye is modelled after Rule 44(c) of the Federal Rules of Criminal Procedure. Rule 44(c) provides:

(c) Joint Representation. Whenever two or more defendants have been jointly charged

> pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

The commentary to the federal rule offers a helpful discussion of the scope and nature of the multiple representation problem.

2. In Miller, the court reaffirmed the rule in State v. Kaye, supra, as to multiple representation cases, but stated the obligation to conduct an inquiry more broadly: ". . . a circuit court should make an inquiry . . . when counsel represents codefendants in the same criminal case or when a question of conflict of interest is raised in any criminal case about an accused's counsel of choice." 160 Wis.2d 646, 660-61.

3. In State v. Dadas, 190 Wis.2d 340, 526 N.W.2d 818 (Ct. App. 1994), the court of appeals reaffirmed the need for a trial court to conduct a colloquy with the defendant(s) in all cases where one lawyer represents more than one defendant. Noting that State v. Kaye, supra, did not identify the remedy to be applied where a required colloquy is not conducted, the court of appeals decided it should "independently review the record to ascertain from the facts and circumstances if there was an actual conflict of interest." 190 Wis.2d 340, 346.

4. Multiple representation concerns should rarely come up in cases involving appointed counsel, since the State Public Defender is under a statutory obligation to enact rules relating to conflict of interest. See § 977.02(6).

5. See, for example, § 968.45(1), relating to witnesses before a grand jury, which reads in part as follows:

> . . . . If the prosecuting officer, attorney for a witness or a grand juror believes that a conflict of interest exists for an attorney or attorneys to represent more than one witness before a grand jury, the person so believing may make a motion before the presiding judge to disqualify the attorney from representing more than one witness before the grand jury. A hearing shall be held upon notice with the burden upon the moving party to establish the conflict.

6. State v. Love, 227 Wis.2d 60, 594 N.W.2d 806 (1999), reversing 218 Wis.2d 1, 579 N.W.2d 277 (Ct. App. 1998): defense counsel was a former prosecutor who had represented the state at Love's original sentencing two years earlier. The court of appeals held that the appearance of a conflict was so strong that nothing more is required to warrant a remand for resentencing with different counsel. The supreme court reversed, holding that an inquiry into the presence of an actual conflict of interest is required in the serial representation case. Also see State v. Cobbs, 221 Wis.2d 101, 548 N.W.2d 709 (Ct. App. 1998): defense counsel had previously worked as a prosecutor in a case involving the defendant five years earlier; there was no actual conflict or a serious potential conflict of interest.

7. State v. Street, 202 Wis.2d 534, 551 N.W.2d 830 (Ct. App. 1996): defense counsel had an actual conflict of interest because counsel was also representing a detective – who was the lead

investigator in the criminal prosecution of Street – in the detective's divorce.

8. In State v. Love, note 6, supra, the Wisconsin Supreme Court held that the same inquiry should be conducted in the serial representation case that Kaye requires for the multiple representation case. The court emphasized that the key to addressing these potential problems is early disclosure to the trial court:

> In extending Cuyler-Kaye standards to serial representation, we are bound to extend also the requirement that all potential conflicts of interest that result from an attorney switching sides be made known to the court as soon as feasible before trial so that the court can inform the affected parties and conduct an appropriate inquiry.

227 Wis.2d 60, 79.

9. State v. Dadas, 190 Wis.2d 340, 347-48, 526 N.W.2d 818 (Ct. App. 1994).

10. These were examples recognized in State v. Miller, supra, 160 Wis.2d 646, 659.

11. The ABA standard cited in the text and adopted in Kaye recognizes that an attorney who undertakes multiple representation may be engaging in unprofessional conduct. For a case where multiple representation was the basis for discipline of an attorney, see Disciplinary Proceedings Against Eisenberg, 117 Wis.2d 332, 344 N.W.2d 169 (1984).

12. The two paragraphs that follow in the text are intended to describe the conflict of interest that exists where one lawyer represents more than one defendant. In other conflict cases, a similar description of the nature of the conflict should be provided.

13. SM-30, **WAIVER OF COUNSEL**, suggests general questions that relate to the defendant's ability to make an understanding and voluntary waiver of counsel. The same questions may be useful in connection with the waiver of conflict-free counsel. Also see SM-32, **ACCEPTING A PLEA OF GUILTY**, for similar questions about educational background, drug use, etc.

14. In Wheat v. United States, 486 U.S. 153 (1988), the United States Supreme Court dealt with the question whether a federal district court could decline a defendant's waiver of the right to conflict-free representation. Wheat was charged with crimes relating to a drug distribution enterprise. He sought to substitute for his lawyer by bringing in a different lawyer who also represented two others charged with crimes related to the same drug enterprise. The trial judge refused to allow the substitution, finding that there was an irreconcilable conflict of interest that could not be waived, despite the defendant's willingness to do so. Wheat appealed on the ground that the refusal to accept his waiver deprived him of his right to be represented by counsel of his choice. The Supreme Court upheld the action of the trial court, holding that "where a court finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented." This applies to cases involving potential as well as actual conflicts. The trial court "must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court."

In State v. Miller, 160 Wis.2d 646, 467 N.W.2d 118 (1991), the Wisconsin Supreme Court adopted

the Wheat rule:

> We conclude that the circuit court may, in its discretion, disqualify counsel of a criminal accused, even over the accused's objection and proffered waiver of the right to conflict-free representation, when an actual or a serious potential for conflict of interest exists.

160 Wis.2d 646, 650.

The court overruled any language in State v. Kaye, supra, that could be interpreted as prohibiting a circuit court from exercising this authority.

15. In State v. Miller, supra, the court repeated the caution set forth in Wheat that trial courts be alert to the possibility that the government may seek to create a conflict of interest to eliminate a defense lawyer who may be a formidable adversary. The Wisconsin Supreme Court "repeat[ed] these admonitions so that circuit courts will be sensitive to the motives of the prosecutors and carefully explore this issue on the record in the exercise of its discretion to disqualify counsel." 160 Wis.2d 646, 654.

16. These factors were acknowledged in State v. Miller, supra, 160 Wis.2d 646, 659.

SM-50 COMPETENCY TO PROCEED

The following Special Material outlines the procedures relating to a criminal defendant's competency to proceed as those procedures are set forth in sections 971.13 and 971.14, Wisconsin Statutes. The material takes into account the changes in those statutes made by legislation through the end of the 2021-22 legislative session.

CONTENTS

I. The Legal Standard for Incompetency

Section 971.13(1) provides: "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." (Emphasis added.)

A. "Lacks substantial mental capacity"

The phrase "lacks substantial mental capacity" replaced the former statute's "as a result of mental disease or defect is unable. . ." Thus, there is no need to identify a particular mental disease as the source of the alleged difficulty. The co-reporters for the Judicial Council committee that drafted the current competency statutes state:

> Not every defendant with a clinically recognized mental disorder is incompetent to stand trial. The legal standard is whether the defendant has the present mental capacity to understand the proceedings and assist in his or her own defense. The new legislation does not change this standard. It does clarify, however, that a defendant should not be considered incompetent to proceed merely because he or she requires medication to maintain legal competency.

Fosdal and Fullin, "Wisconsin's New Competency to Stand Trial Statute," Wisconsin Bar Bulletin (Oct. 1982) p. 11.

The term "lacks substantial mental capacity" can include mental retardation as the basis for an incompetency finding. In State v. Garfoot, 207 Wis.2d 215, 227-28, the Wisconsin Supreme Court made the following comments in connection with a suggestion noted in the state's argument that mental retardation alone may not warrant a finding that the defendant is not competent to stand trial:

> The State is correct in that mental retardation in and of itself is generally insufficient to give rise to a finding of incompetence to stand trial. However a defendant may be incompetent based on retardation alone if the condition is so severe as to render him incapable of functioning in critical areas.

B. "To understand the proceedings or to assist in his or her own defense"

This part of the standard has been part of Wisconsin law since 1965. The constitutional standard was stated as follows in Dusky v. United States, 362 U.S. 402 (per curiam, 1960): ". . . the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as a factual understanding of the proceedings against him." The Wisconsin Supreme Court

has held that § 971.13(1) codifies the Dusky standard. State v. Garfoot, supra, 207 Wis.2d 215, 226.[1]

The same standard for competency applies at any stage of the proceedings. A higher or more demanding standard is not required for the decision to withdraw a plea of not guilty by reason of mental disease or defect. State v. Byrge, 225 Wis.2d 702, 712, 594 N.W.2d 388 (Ct. App. 1999).

C. Rationale for the competency rule

The rule against trying a person who is not competent is grounded in due process: it violates fundamental fairness to prosecute a defendant who is not able to fully exercise his or her constitutional procedural rights. Further, "a defendant's full assistance and cooperation has been traditionally thought essential to developing the 'true facts' of the case." State ex rel. Matalik v. Schubert, 57 Wis.2d 315, 322, 204 N.W.2d 13 (1973).

D. Competency and related issues

It is often the defendant's courtroom behavior, inability to understand procedures, or difficulty in getting along with counsel that first gives reason to doubt competency to proceed. These problems may indicate other issues as well. These related issues are discussed briefly below.

1. Competency and criminal responsibility

Competency to stand trial is concerned with the defendant's mental condition at the time of the trial. Only the mental conditions that affect the ability to understand the proceedings and assist in the defense are at issue.

Criminal responsibility (or the "insanity defense") differs in two important respects. First, it is concerned with the defendant's mental condition at the time of the offense. Second, it is concerned with the effect of that mental condition on the defendant's ability to tell right from wrong or to conform his or her conduct to what the law requires.

A person with serious mental problems may present both competency to proceed and insanity defense issues, only one of them, or neither one. Trial courts should be alert for indications that either issue needs to be pursued and keep in mind the different time frames and abilities that each issue involves.

Courts sometimes order that competency and criminal responsibility evaluations be conducted at the same time or order an inpatient criminal responsibility examination.

There is no statutory authority for an inpatient examination of a defendant's criminal responsibility. Trying to combine that examination with a competency evaluation causes problems for the examiners because there usually is not enough time to conduct both of them.

2. Competency and self-representation

This Special Material is concerned with competency to proceed in cases where the defendant is represented by counsel.[2] Occasionally, the competency of defendants who seek to represent themselves is questioned. Competency to stand trial is not the same as competency to proceed pro se. Pickens v. State, 96 Wis.2d 549, 567, 292 N.W.2d 601 (1980). In State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), the Wisconsin Supreme Court reaffirmed the Pickens rule and reversed a decision of the court of appeals that had held that separate inquiry into "competence for self-representation" was no longer required.

Extensive discussion of waiver of counsel, self-representation, and related issues is beyond the scope of this Special Material. But because these issues often arise in conjunction with competency to stand trial questions, a few considerations relating to the competency inquiry should be emphasized.

First, whether or not the defendant is represented by counsel, the court must determine if there is "reason to doubt" the defendant's competency to proceed. If there is "reason to doubt," the examination procedures set forth in subsecs. (1)-(3) of § 971.14 and outlined in this Special Material should be followed. If the court determines that the defendant is not competent to proceed, a commitment under § 971.14(5) should follow.

Second, if the defendant is found to be competent to proceed and wishes to proceed pro se, the court must determine if the defendant is making a knowing and voluntary waiver of the right to counsel. If the waiver is valid, a further inquiry must be made to determine whether the defendant "possesses the minimal competency necessary to conduct his own defense." Pickens, 96 Wis.2d 549 at 569, reaffirmed in Klessig, 211 Wis.2d 194, 212. For a complete discussion, see SM 30 WAIVER AND FORFEITURE OF COUNSEL; SELF-REPRESENTATION; STANDBY COUNSEL; "HYBRID REPRESENTATION"; COURT APPOINTMENT OF COUNSEL.

3. Competency and amnesia

Amnesia by itself does not mean that a defendant is not competent to stand trial. Questions relating to amnesia may be raised by a request for a competency evaluation and, as to the competency issue, the regular standard applies. A defendant may suffer from amnesia and be competent under this standard. In those cases, Wisconsin courts have

adopted a six-part test to determine whether the defendant – competent but claiming amnesia – can receive a fair trial. See State v. McIntosh, 137 Wis.2d 339, 404 N.W.2d 557 (Ct. App. 1987), and State v. King, 187 Wis.2d 548, 523 N.W.2d 159 (Ct. App. 1994).

4. Chapter 980 sexually violent person commitments

Section 971.14 once applied to chapter 980 commitments pursuant to Wis. Stat. § 980.05(1m) (2003-04). The previous version of § 980.05(1m) provided: "At the trial to determine whether the person who is the subject of a petition under § 980.02 is a sexually violent person, all rules of evidence in criminal actions apply. All constitutional rights available to a defendant in a criminal proceeding are available to the person." However, § 980.05(1m) was repealed by 2005 Wis. Act 434, §§ 101, 131(1) [effective August 1, 2006]. Therefore, because competency evaluations under § 971.14 are limited to criminal case defendants, they no longer apply to prisoners against whom a ch. 980 petition has been filed.

The Wisconsin Court of Appeals affirmed this in In Re Commitment of Luttrell, 2008 WI App 93, 312 Wis.2d 695, 754 N.W.2d 249 when it held that a prisoner eligible for commitment under § 980.05(5) did not have a due process right to a competency evaluation under § 971.14. The court concluded that a ch. 980 action is a civil commitment, not a criminal prosecution, thus a prisoner against whom a ch. 980 petition has been filed is not a criminal case defendant. Luttrell, supra, at ¶7. Although a successful ch. 980 petition results in continued confinement, prisoners determined to be sexually violent persons are confined for treatment purposes, not for punishment. Id. at ¶9.

II. When and How Is Competency Raised?

A. May be raised at any time

1. In the trial court

Competency may be raised at any time between the filing of charges and the pronouncement of judgment. While questions about competency are usually raised before trial, it can become an issue after trial but before sentencing. State v. McKnight, 65 Wis.2d 582, 223 N.W.2d 550 (1974).

2. During postconviction proceedings

In State v. Debra A.E., 188 Wis.2d 111, 523 N.W.2d 727 (1994), the Wisconsin Supreme Court addressed the standards and procedures to be used when competency is raised during postconviction proceedings. First, the court noted that the procedures set forth in §§ 971.13 and 971.14 govern competency determinations only through the sentencing

stage of a criminal trial and that they do not require circuit courts to rule on competency during postconviction relief proceedings. 188 Wis.2d 111, 128 & n.14. However, when the question of competency is raised in the circuit court at the postconviction stage, the court has the power to consider the question and should use the same "reason to doubt standard" employed under § 971.14. 188 Wis.2d 111, 131 & n.17. The court may use its discretion to determine how the competency evaluation should be made; if a hearing is held, the court should be guided by § 971.14 to the extent feasible. 188 Wis.2d 111, 131-32. The standard for the competency decision is as follows: ". . . a defendant is incompetent to pursue postconviction relief . . . when he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding." 188 Wis.2d 111, 126.

Because § 971.14(4) governs competency determinations only through the sentencing stage of a criminal trial and no other statutory section governs the standard of proof and the allocation of the burden of persuasion on the competency/incompetency issue during a postconviction proceeding, the burden of proof applicable during such proceedings has been established by case law. In State v. Daniel, 2015 WI 44, 362 Wis.2d 74, 862 N.W.2d 867, the supreme court held that when the issue of a defendant's competency is raised, and the state contends the defendant is competent, it has the burden of proving competency by a preponderance of the evidence.

If the court finds that a defendant is not competent at the postconviction stage, "the court's goal is to fashion a process through which circuit courts and counsel can manage the postconviction relief . . . while protecting defendants' fair opportunity for postconviction relief and promoting the effective administration of the judicial system. . . [O]rdinarily this process need not include a court order for treatment to restore competency. Meaningful postconviction relief can be provided even though a defendant is incompetent." 188 Wis.2d 111, 129 30. The court identified the following alternatives for the court to apply as appropriate:

(1) continuation of postconviction relief proceedings – defense counsel should initiate or continue postconviction relief on a defendant's behalf when any issues rest on the record, do not necessitate the defendant's assistance or decision making, and involve no risk to the defendant;

(2) continuances or enlargement of time limits for postconviction relief [if issues do necessitate the defendant's assistance or decision making];

(3) appointment of temporary guardians – upon defense counsel's request, to make the decisions the law requires the defendant to make; and

(4) permitting defendants who regain competency to raise issues at a later proceeding

that could not have been raised earlier because of incompetency.

188 Wis.2d 111, 133-36.

In State v. Scott, 2018 WI 74, 382 Wis.2d 476, 488, 914 N.W.2d 141, the supreme court reinforced Debra A.E.'s observation that postconviction competency proceedings will "ordinarily … not include a court order for treatment to restore competency," 188 Wis. 2d at 130. The court held that the circuit court acted prematurely when it ordered the defendant to be medicated to competency "without first determining whether and to what extent postconviction proceedings could continue despite the defendant's incompetency." Scott, 382 Wis.2d 476, ¶26. Scott requires a circuit court to follow the mandatory procedures established in Debra A.E. before it may order a non-dangerous but incompetent defendant involuntarily medicated for the purpose of conducting a postconviction proceeding. Scott, 382 Wis.2d 476, ¶21-26. See also Debra A.E., 188 Wis.2d 111, 131- 36.

If an involuntary medication order is entered during postconviction proceedings, the defendant may appeal the order as a matter of right under § 808.03(1) and is entitled to an automatic stay of the medication order pending appeal. Scott, 382 Wis.2d 476, ¶42-44; State v. Green, 2022 WI 30, ¶¶18-36, 401 Wis.2d 542, 973 N.W.2d 770 (holding that Scott's automatic stay rule does not apply to pretrial involuntary treatment orders). The State may seek to lift an automatic stay pending appeal under the standard set forth in State v. Gudenschwager, 191 Wis. 2d 431, 529 N.W.2d 225 (1995), as modified by the court in Scott. 382 Wis.2d 476, ¶¶45-48.

3. During probation revocation proceedings

In State ex rel. Vanderbeke v. Endicott, 210 Wis.2d 503, 563 N.W.2d 883 (1997), the Wisconsin Supreme Court set forth the procedure to be employed when competency is raised during a probation revocation proceeding.

If an administrative law judge has reason to doubt the probationer's competency, the revocation proceeding is to be stayed until a competency determination can be made. An administrative law judge having reason to doubt a probationer's competency shall promptly forward a written request for a competency determination to the circuit court in the county in which the probationer was sentenced. The request shall be accompanied by a copy of the papers on file in the revocation proceeding and the administrative law judge's written statement explaining the grounds for finding reason to doubt the probationer's competency.

Upon receipt of the written request from an administrative law judge, the circuit court shall determine the probationer's competency. The procedures for determining competency to proceed at trial, set forth in § 971.14, shall be followed to the extent practicable.

4. Retrospective evaluation of a defendant's competency to stand trial

The ability to conduct a retrospective determination of a defendant's competency to stand trial is inherently difficult. However, in State v. Johnson, 133 Wis.2d 207, 225, 395 N.W.2d 176 (1986), the court of appeals determined that "the mere passage of time may not make the effort meaningless" if there is sufficient evidence in the record derived from the trial. By analyzing the applicable legal and medical records, along with a current medical evaluation, the court determined that it was possible to produce "a hindsight picture of Johnson's competency at the time of trial." Id. at 225.

If the circuit court concludes that a meaningful inquiry can be held, it must then hold a competency hearing. If the circuit court finds that a meaningful hearing cannot be held, or if it finds that the accused was incompetent during the trial, then it must vacate the judgment of conviction and order a new trial. Because "retrospective determinations of competency are factual determinations," they will be upheld "unless totally unsupported by facts in the record and, therefore, clearly erroneous." See State v. Smith, 2016 WI 23, ¶30, 367 Wis.2d 483, 878 N.W.2d 135; See also, State v. Byrge, 2000 WI 101, ¶33, 237 Wis.2d 197, 614 N.W.2d 477; State v. Garfoot, 207 Wis.2d 214, 224-25, 558 N.W.2d 626 (1997); Wis. Stat. § 805.17(2).

B. "Reason to doubt" the defendant's competency

Section 971.14(1r)(a) requires that a competency inquiry be made "whenever there is reason to doubt a defendant's competency to proceed." Defendants who may be incompetent cannot waive the right to have the court determine their capacity to stand trial. Pate v. Robinson, 383 U.S. 375, 384 (1966).

C. Who may raise the issue?

1. Defense counsel

Defense counsel usually raises the competency issue and may do so either by written motion or orally, on the record, in court. If defense counsel has reason to doubt the defendant's competency, counsel must bring the issue to the trial court's attention. Failure to do so constitutes ineffective assistance of counsel. State v. Johnson, 133 Wis.2d 207, 395 N.W.2d 176 (1986). In Johnson, defense counsel had letters from a psychiatrist and a psychologist expressing serious doubts about the defendant's competency but made the "strategic decision" to withhold the letters from the court. The defendant was convicted, but the conviction was reversed on the ground that counsel's failure to raise the competency issue constituted ineffective assistance of counsel as a matter of law. ". . . [W]here defense counsel has a reason to doubt the competency of his client to stand trial, he must raise the issue with the trial court. The failure to raise the issue of competency makes the counsel's

representation fall below an objective standard of reasonableness. . . . We believe that considerations of strategy are inappropriate in mental competency situations. Thus, we hold that strategic considerations do not eliminate defense counsel's duty to request a competency hearing." 133 Wis.2d 207, 220 21.

In State v. Meeks, 2003 WI 104, 263 Wis.2d 794, 666 N.W.2d 859, the Wisconsin Supreme Court held that a lawyer who formerly represented the defendant could not testify about his or her perceptions of the former client's competency when competency was raised in a new prosecution. [See discussion at Sec. IV. A.1., below.] The court adopted what is characterized as the minority view on this issue and admitted that it creates a tension with the Johnson decision. The court did not overrule Johnson, pointing out that:

> The attorney is merely obligated to "raise the issue [of competency] with the trial court." Johnson, 133 Wis.2d at 220. There is no requirement that the attorney testify about his or her reasons for raising the issue or the opinions, perceptions, or impressions that form the basis for his or her reason to doubt the client's competence. Meeks, 263 Wis.2d 794, ¶46.

2. Defendant

Defendants may occasionally try to raise the competency issue themselves, even if defense counsel has not. In these situations, courts may wish to conduct an inquiry to establish whether the defendant's competency is the problem as opposed to difficulty in getting along with defense counsel or simply dissatisfaction with defense counsel.

3. Prosecutor

The prosecutor may also choose to raise the competency issue. In these cases, courts should be aware that in some instances, criminal charges followed by a prosecutor's raising the defendant's competency to proceed have been used as a substitute for initiating civil commitment proceedings under Chapter 51.

4. Court – sua sponte

Even if competency is not raised by the parties, a court has a duty to make an inquiry into competency whenever the defendant's conduct gives rise to "reason to doubt." Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966).

D. Basis for "reason to doubt" competency

A statement by the defendant or defense counsel to the effect that the defendant cannot understand the proceedings may not be enough to trigger a full competency inquiry and is

not sufficient if negated by the defendant's actions, such as preparing motions that show an understanding of the proceedings. State v. McKnight, 65 Wis.2d 582, 223 N.W.2d 550 (1974). The claim should be supported by facts, such as the defendant's demeanor, medical history, the presence of irrational behavior, any prior medical opinions on competency to stand trial, etc. While defense counsel's representations need not be accepted without question, the United States Supreme Court has recognized that doubt expressed by the one with the closest contact with the defendant "is unquestionably a factor which should be considered." Drope v. Missouri, 420 U.S. 162, 177 n.13 (1975). If competency is not raised in open court, the presentation of a written motion (often captioned "Motion for Competency Evaluation") is an effective method for calling the issue to the court's attention.

In some cases, the "reason to doubt" competency will be obvious. In more difficult cases, it may be necessary to conduct an evidentiary hearing to help the court decide whether the full competency inquiry should be ordered.

In State v. Weber, 146 Wis.2d 817, 433 N.W.2d 583 (Ct. App. 1988), the court reviewed the "reason to doubt" standard in light of four factors: a statement by the defendant's first lawyer that he had "some question" regarding competency; the defendant's demeanor in the courtroom, specifically his silence and responses to certain questions; a civil mental commitment several years earlier; and statements by the defendant's second lawyer at sentencing to the effect that the defendant was under psychiatric care. The court concluded that these factors did not, individually or in combination, establish a "reason to doubt" competency.

E. Probable cause determination

When the court is satisfied that there is reason to doubt the defendant's competency, an examination of the defendant is to be ordered but only after a finding that it is probable that the defendant committed the offense charged.

1. Unnecessary, if after preliminary examination

If the question about competency arises after the preliminary examination, a further probable cause determination is not required. § 971.14(1r)(b).

2. From the complaint, unless the defendant avers the complaint is false

If competency is raised before the preliminary examination in a felony case (or at any time before the verdict is returned in a misdemeanor), the court may not order a competency evaluation until satisfied that it is probable that the defendant committed the offense charged.

The probable cause finding may be based solely upon the criminal complaint unless the defendant "submits an affidavit alleging with particularity that the averments of the complaint are materially false," in which case a hearing must be ordered. § 971.14(1r)(c).

3. Hearing on probable cause

The hearing is limited to the issues and witnesses required for determining probable cause. The defendant may call and cross examine witnesses. The rules of evidence do not apply. § 911.01(4)(c).

Section 971.14(1r)(c) allows the receipt of testimony over the telephone at the probable cause hearing: "Upon a showing by the proponent of good cause under § 807.13(2)(c), testimony may be received into the record of the hearing by telephone or live audiovisual means."

If the court finds that probable cause is not established, the charge shall be dismissed without prejudice, and the defendant shall be released (subject to being held in custody or continued on bail for not more than 72 hours pending the issuance of a new complaint – see § 971.31(6)). If the court finds that probable cause exists, an examination is ordered. § 971.14(1r)(c).

III. The Competency Examination

A. Ordering the examination

1. Appointing examiners

"One or more" examiners are to be appointed; they need not be psychiatrists but must have "the specialized knowledge determined by the court to be appropriate." § 971.14(2)(a). This is a change from prior law, which required that examiners be "physicians."

2. Outpatient examinations preferred

A defendant released on bail may not be ordered to have an inpatient examination unless the defendant fails to cooperate in the examination or the examiner informs the court that inpatient observation is necessary to an adequate examination. § 971.14(2)(b).

If the defendant is not released on bail, outpatient examinations are required unless "an inpatient examination is determined by the court to be necessary." § 971.14(2)(a).

3. Inpatient examinations

If an inpatient examination is found to be necessary, the defendant may be committed to "a suitable mental health facility" for up to 15 days. § 971.14(2)(a) and (c). The facility may request one 15 day extension if it can show good cause why the examination cannot be completed within the original period. § 971.14(2)(c).

The Department of Health Services determines where the evaluations take place. § 971.14(2)(am):

> Notwithstanding par. (a), if the court orders the defendant to be examined by the department or a department facility, the department shall determine where the examination will be conducted, who will conduct the examination and whether the examination will be conducted on an inpatient or outpatient basis. Any such outpatient examination shall be conducted in a jail or a locked unit of a facility. In any case, under this paragraph in which the department determines that an inpatient examination is necessary, the 15 day period under par. (c) begins upon the arrival of the defendant at the inpatient facility. If an outpatient examination is begun by or through the department, and the department later determines that an inpatient examination is necessary, the sheriff shall transport the defendant to the inpatient facility designated by the department, unless the defendant has been released on bail.

The court must arrange for the transportation of in-custody defendants to the examining facility and back to the jail. § 971.14(2)(d).

Time spent at an inpatient facility for a competency examination is time for which sentence credit is due under § 973.155 if the defendant is eventually convicted and sentenced. § 971.14(2)(a).

4. The commitment order for an examination

The commitment order should be executed completely and clearly. Use of the officially adopted circuit court form is required. § 971.025(1). The form is CR205 (revised February 2017), available on the state court website: http://www.wicourts.gov/. It should indicate the name of the defense counsel[3] and the prosecutor since examiners often wish to consult with the lawyers in conducting the examination. The examiners also find it helpful if the commitment order is accompanied by documents that provide more information about the defendant and the offense. The criminal complaint should be attached to the commitment order in all cases. When available, the following materials are also helpful:

- police reports

- record of previous convictions or arrests
- a presentence report from other recent cases
- any other clinical records the prosecutor may have.

This additional material is especially important for inpatient examinations since they must be completed within 15 days.

5. Examiner's duties

The examiner shall personally observe and examine the defendant and shall have access to treatment records. § 971.14(2)(e). "Treatment records" are defined in § 51.30(1)(b).

6. Medication and treatment during the examination period

Section 971.14(2)(f) provides that a defendant may receive voluntary treatment during the examination period. This "clarifies that a defendant on examination status may receive voluntary treatment but, until committed under sub. (5) may not be involuntarily treated or medicated unless necessary for the safety of the defendant or others. See s. 51.61(1)(f), (g), (h), and (i)." Judicial Council Committee's Note, 1981. Also, see State ex rel. Jones v. Gerhardstein, 141 Wis.2d 710, 416 N.W.2d 823 (1987), discussed in Sec. V.B., below.

7. Examination by other experts

Section 971.14(2)(g) provides that the defendant may be examined at any time by other experts chosen by the defendant or by the prosecution. These experts must be allowed reasonable access to the defendant. The examinations are limited to competency purposes.

B. The examiner's report

The requirements for the report and its contents are specified in § 971.14(3).

1. Time limits for filing

Section 971.14(2)(c) establishes the following time limits:

a. Outpatient examinations: within 30 days of the ordering of the examination.

b. Inpatient examinations: within 15 days of the ordering of the examination (unless the single permissible 15-day extension has been ordered, in which case within 30 days).[4]

2. Contents

Section 971.14(3) requires that the report contain the following:

a. Description of the examination.

b. Identification of the persons interviewed, the specific records reviewed, and any tests administered.

c. The clinical findings of the examiner.

d. The examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and assist in his or her defense, including the facts and reasoning, in reasonable detail, upon which that opinion is based.

e. If the report indicates the defendant lacks competency, the examiner's opinion regarding the likelihood that the defendant, if provided treatment, may be restored to competency within 12 months (or the maximum sentence for the most serious offense with which the defendant is charged, whichever is less).

f. If sufficient information is available, the examiner's opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment. [Sub. (3)(dm).]

Section 971.14(3)(e) further requires that the report contain "the facts and reasoning, in reasonable detail" for the findings and opinions set forth in c. through f., above.

3. Filing and distribution

The report is to be filed with the court (§ 971.14(3)), and the "court shall cause copies of the report to be delivered forthwith to the district attorney and defense counsel, or the defendant personally if not represented by counsel." § 971.14(4)(a).

"Upon the request of the sheriff or jailer charged with care and control of the jail in which the defendant is being held . . . , the court shall cause a copy of the report to be delivered to the sheriff or jailer." § 971.14(4)(a).

The report shall not be otherwise disclosed prior to the hearing on competency. § 971.14(4)(a).

IV. The Judicial Determination Regarding Competency

Competency to stand trial is a legal issue to be decided by the court. A finding is not to be made on the basis of rubber stamping the expert's report. State ex rel. Haskins v. Dodge County Court, 62 Wis.2d 250, 264, 214 N.W.2d 575 (1974). Stated another way, the ultimate legal conclusion of competency to stand trial is a judicial rather than medical determination. State v. Smith, 2016 WI 23, ¶52, 367 Wis.2d 483, 878 N.W.2d 135.

A. The hearing on competency

1. The need for an evidentiary hearing

A full evidentiary hearing is not always required since the statutes allow the district attorney, the defendant, and the defense counsel to "waive their respective opportunities to present other evidence on the issue." § 971.14(4)(b). In State v. Guck, 176 Wis.2d 845, 500 N.W.2d 910 (1993), the court held that § 971.14(4)(b) does not require a personal statement by a defendant waiving the evidentiary hearing. In Guck, defense counsel stated in the trial court that he had discussed the report and the right to a hearing with the defendant and that the defendant wished to waive the hearing. The court concluded that "the Legislature did not intend to require a personal statement by a criminal defendant waiving the opportunity to present evidence on the issue of competency under sec. 971.14(4)(b)." 176 Wis.2d 845, 855.

Though Guck makes it clear that the statute does not require a personal statement by the defendant, the Committee continues to recommend as good practice that the court personally inquire of the defendant whether he or she concurs in the waiver. A simple question at this stage may help to forestall a later, more cumbersome inquiry into the effectiveness of defense counsel.

Section 971.14(4)(b) allows the receipt of testimony over the telephone at the competency hearing: "Upon a showing by the proponent of good cause under § 807.13(2)(c), testimony may be received into the record of the hearing by telephone or live audiovisual means."

As to whether a defense lawyer may (or must) testify, State v. Meeks, 2003 WI 104, 263 Wis.2d 794, 666 N.W.2d 859, the Wisconsin Supreme Court held that a lawyer who formerly represented the defendant could not testify about his or her perceptions of the former client's competency when competency was raised in a new prosecution. Meeks was charged with felony murder, and his competency to stand trial was raised shortly after initial appearance. The state introduced testimony of an attorney who had represented Meeks on charges in earlier cases but did not represent him on the current charges. The attorney did not testify as to any specific communications with Meeks, but the implication

of her testimony was that Meeks was competent to proceed during those earlier cases.

The court of appeals held that the testimony was appropriate because it did not divulge the contents of any specific conversations and therefore did not violate the attorney-client privilege. The Wisconsin Supreme Court reversed, holding that:

> . . . an attorney's opinions, perceptions, and impressions relating to a former client's mental competency fall with the definition of a confidential communication pursuant to Wis. Stat. § 905.03(2) and SCR 20:1.6. As a result, such communications may not be revealed without the consent of the client. 2003 WI 104, ¶2.

The court adopted what is characterized as the minority view on this issue and admitted that it creates a tension with the Johnson decision. [discussed in Sec. II.A.4., above]. The court did not overrule Johnson, pointing out that:

> The attorney is merely obligated to "raise the issue [of competency] with the trial court." Johnson, 133 Wis.2d at 220. There is no requirement that the attorney testify about his or her reasons for raising the issue or the opinions, perceptions, or impressions that form the basis for his or her reason to doubt the client's competence. Meeks, 263 Wis.2d 794, ¶46.

In a final summary, the court restated its conclusion:

> In summary, we hold that the testimony of [former defense counsel] violated the attorney-client privilege. While the contents of confidential conversations with Meeks were not revealed in her testimony, [former defense counsel]'s expressed opinions, perceptions, and impressions of Meeks' competency were premised upon and inextricably linked to confidential communications. Confidential communications must be interpreted to include both verbal and non-verbal communications in order to preserve inviolate the integrity of the attorney-client relationship. Meeks, 263 Wis.2d 794, ¶58.

2. The burden of persuasion

Section 971.14(4)(b) provides as follows with respect to the standard of proof and the allocation of the burden of persuasion on the competency/incompetency issue:

> . . . . At the commencement of the hearing, the judge shall ask the defendant whether he or she claims to be competent or incompetent. If the defendant stands mute or claims to be incompetent the defendant shall be found to be incompetent unless the state proves by the greater weight of the credible evidence that the

defendant is competent. If the defendant claims to be competent, the defendant shall be found competent unless the state proves by evidence which is clear and convincing that the defendant is incompetent.

The statute appears to comply with due process requirements for the competency determination and commitment for treatment.[5] However, a possible problem remains if the statute is read literally: if a defendant "claims to be competent," the burden is on the state to prove incompetence "by evidence which is clear and convincing"; if the state fails to meet its burden, the statute provides that "the defendant shall be found competent."

A problem may arise in at least two ways. One is that if the defendant "claims to be competent," the state may well claim the defendant is competent as well, leaving neither party with an interest in presenting the case for either competency or incompetency. A second variation would be presented if the state does attempt to prove incompetency but fails. In either situation, the possible problem is this: failure to prove incompetency by clear and convincing evidence (either because no one pursues that issue or because the standard of proof is not satisfied) does not necessarily mean that competency is established by the greater weight of the evidence.

If it is a basic due process requirement that a person not be tried unless competency is established by at least the greater weight of the evidence, an affirmative finding must be made in every case where there is "reason to doubt" competency. The statute's assertion that "the defendant shall be found competent" in the absence of proof (to a higher degree of certainty) that the defendant is incompetent is no substitute for a finding based on the evidence.

As a practical matter, this should not be a serious problem, but the Committee recommends the cautious approach of making a finding of competency, based on the record, whenever there is "reason to doubt" competency rather than relying on the automatic direction of the statute. In virtually every case, a record failing to show incompetence (by clear and convincing evidence) should support an affirmative finding that the defendant is competent (by the greater weight of the evidence). A recommended finding is included in Sec. IV.B., below.

The approach recommended here is essentially the same as the one called for by the ABA Criminal Justice Mental Health Standards. They call for a finding by the greater weight of the evidence that the defendant is competent. The burden of persuasion is not assigned to either party. If that finding is not made, the court is to consider issues of treatment to effect competence. Involuntary commitment for treatment is to be ordered if the basis therefor is established by clear and convincing evidence. See ABA Criminal Justice Mental Health Standards 7 4.8(c) and 7 4.9(a) (1989).

B. If the court finds the defendant competent to proceed, the criminal proceeding shall resume.

If the court finds the defendant competent to proceed, a specific finding should be made. A finding like the following is recommended:

> The court has considered the reports of the examiners, the conduct and demeanor of the defendant, and all the facts and circumstances relating to the defendant's understanding of these proceedings. The court is satisfied by the greater weight of the credible evidence that the defendant does not lack substantial capacity to understand the proceeding or assist.

C. If the court finds the defendant incompetent to proceed, the court must determine if the defendant is likely to regain competency.

If the court finds that the defendant is not competent to proceed, the court must further determine whether the defendant is likely to become competent within the shorter of the two time periods specified by § 971.14(5)(a):

- within 12 months, or
- within a period equal to the maximum sentence for the most serious offense with which the defendant is charged (if that period is less than 12 months).

In practice, these limits amount to a 12 month limit for Criminal Code felonies because the lowest felony penalty class — Class I — provides for a maximum of 1.5 years imprisonment and 2 years of extended supervision. Most Criminal Code misdemeanors are "Class A" and have a 9 month maximum sentence. There are some Class B and C misdemeanors in the Criminal Code, which have 90 day and 30 day maximum penalties, respectively.

1. Recovery of competency not likely: release of defendant

If the court determines that regaining competency within the designated time period is not likely, § 971.14(6)(a) provides that the defendant is to be released, subject to the civil commitment transition provision described in § 971.14(6)(b) and in Sec. VIII. B., below.

2. Recovery of competency likely: commitment of defendant

If the court determines that the defendant is likely to become competent within the specified period, the court is to order that the proceedings be suspended and shall commit the defendant to the custody of the department for placement in an appropriate institution.

§ 971.14(5)(a). The commitment process is addressed in the next section. The reexamination process is described in Sec. VI.

V. Commitment as not competent to proceed – § 971.14(5)(a)

A. Basis for and terms of a commitment order.

1. Basis for commitment

Both of the following bases must exist to support a commitment:

a. The defendant lacks substantial mental capacity to understand the proceedings or assist in his or her own defense; and

b. The defendant is likely to become competent within the commitment period.

2. Length of commitment[7]

The commitment may continue until competency is regained or until the lesser of the following limits is reached:

a. 12 months

The 12-month limit will apply to almost all cases where Criminal Code felonies are charged because the felony class with the shortest penalty, Class I, carries a maximum sentence of 1.5 years confinement and 2 years extended supervision.

b. The maximum sentence for the most serious offense charged

The "maximum sentence" limit will apply only to misdemeanors. Class A misdemeanors carry a 9 month maximum sentence; Class B and C misdemeanors carry 90 day and 30 day maximums, respectively.

3. The commitment order

The commitment order should be executed completely and clearly. Use of the officially adopted circuit court form is required. § 971.025(1). The form is CR 206 (revised September 2022), available on the state court website: http://www.wicourts.gov/.

B. The right to refuse medication; involuntary medication orders.

The Wisconsin Supreme Court has held that all involuntarily committed persons have the right to refuse psychotropic medication. State ex rel. Jones v. Gerhardstein, 141 Wis.2d 710, 416 N.W.2d 883 (1987). This includes persons committed under § 971.14 as not competent to stand trial.

A finding on competence to refuse medication is to be made as part of the initial competency evaluation if sufficient information is available to the examiner. See § 971.14(3)(dm). A similar finding is also to be made at the time the person is committed as not competent to stand trial. See § 971.14(4)(b). If no court order regarding competence to refuse medication was entered at the time of commitment, a procedure for returning to court to obtain such an order is set forth in § 971.14(5)(am).

The standard for determining competence to refuse medication is set forth in § 971.14(3)(dm):

> …The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, and, after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the defendant, one of the following is true:
>
> 1. The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> 2. The defendant is substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness, developmental disability, alcoholism, or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

The necessity and extent of advice on the "advantages, disadvantages and alternatives" in a civil commitment case is discussed in Outagamie County v. Melanie L., 2013 WI 67, 349 Wis.2d 148, 833 N.W.2d 607.

It is important that hearings be held as quickly as possible so that needed treatment is not delayed. It may help to receive testimony pursuant to the rules on conducting proceedings by telephone or audiovisual means. (Section 971.14(5)(am) refers to the "procedures and standards specified in [§ 971.14] sub. (4)(b)." Subsection (4)(b) includes a provision for taking testimony by telephone.)[8] The hearing may be conducted by a court

commissioner. State ex rel. Jones v. Gerhardstein, supra, 141 Wis.2d 710, 746.

Note that at any stage where a person is found not competent to refuse medication, the effect of a court order is to authorize medication or treatment under appropriate medical standards. (See § 971.14(4)(d).) The statute does not give the court authority to order that specific kinds of treatment be offered.

The provisions in § 971.14 authorizing involuntary medication orders must be implemented only after consideration of the decisions of the United States Supreme Court in Riggins v. Nevada, 504 U.S. 127 (1992) and Sell v. United States, 539 U.S. 166 (2003), and the Wisconsin Supreme Court in State v. Fitzgerald, 2019 WI 69, 387 Wis.2d 384, 929 N.W.2d 165.

In Riggins, the Court reversed a conviction because the state trial court failed to make sufficient findings to support the forced administration of antipsychotic drugs during trial. Riggins was charged with murder and robbery. He complained about hearing voices and having trouble sleeping. The drug Mellaril was prescribed, beginning at a level of 100 milligrams per day. It was eventually increased to 800 milligrams per day. Prior to trial, Riggins requested that the trial court order the administration of the drug suspended until after trial. The trial court refused without an extensive statement of reasons.

The United States Supreme Court held that the involuntary administration of Mellaril denied Riggins "a full and fair trial." The side effects of the drugs could affect Riggins' outward appearance, which is observed by the jury in evaluating the defendant's demeanor. And ". . . it is clearly possible that such side effects impacted . . . the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." 504 U.S. 127, 137. Further, a defendant has a liberty interest in freedom from unwanted antipsychotic drugs. The Court found the record insufficient to support a finding that these interests were outweighed by the need to accomplish an essential state policy, so the conviction was reversed.

The Court elaborated on Riggins in Sell. The Court held:

> . . . the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests. 539 U.S. 166, 179.

The Court emphasized that the instances where involuntary medication is permitted may

be rare. That is because the standard says or implies the following:

> First, a court must find that **important** governmental interests are at stake. . .
>
> Second, the court must conclude that involuntary medication will **significantly further** those concomitant state interests. . .
>
> Third, the court must conclude that involuntary medication is **necessary** to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results.
>
> Fourth, . . . the court must conclude that administration of the drugs is **medically appropriate**, i.e., in the patient's best medical interest in light of his medical condition. 539 U.S. 166, 180-181 [emphasis in original]
>
> The question regarding medication for competency purposes was restated as follows:
>
> Has the government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it? Id., at 183.

In Fitzgerald, the Wisconsin Supreme Court examined the constitutionality of § 971.14 as it related to the issue of ordering involuntary medication to restore a criminal defendant's competency to stand trial. In a unanimous decision, the Court vacated the circuit court's order for involuntary medication, holding that § 971.14 was unconstitutional as applied to Fitzgerald. Therefore, regardless of the language of § 971.14(3)(dm) and (4)(b), the four Sell factors **must** be satisfied before a court can issue an involuntary medication order to restore competency to stand trial.[6]

Wisconsin Circuit Court form CR-206 Order for Commitment for Treatment (Incompetency) was revised in light of Fitzgerald to accurately reflect the factors set forth in Sell.

In State v. Scott, 2018 WI 74, 382 Wis.2d 476, 914 N.W.2d 141, the Wisconsin Supreme Court held that a defendant committed for treatment to competency may appeal an involuntary medication order as a matter of right under § 808.03(1) and that the order is subject to an automatic stay pending appeal. However, the court amended that rule in State v. Green, 2022 WI 30, 401 Wis.2d 542, 973 N.W.2d 770, and held that Scott's automatic stay rule does not apply to involuntary treatment orders for a person being treated to competency before trial. Instead, the defendant may seek a discretionary stay pending appeal under the standard in State v. Gudenschwager, 191 Wis.2d 431, 529 N.W.2d 225

(1995). 401 Wis. 2d 542, ¶¶18-36 & n.13.

C. Suspension of the criminal proceedings

The criminal proceedings are "suspended" during the competency commitment. Pretrial motions under § 971.31 may be decided notwithstanding the defendant's lack of competency if they are "susceptible of fair determination prior to trial and without the personal participation of the defendant." § 971.13(3).

VI. Reexamination and Reports

A. Timing of the reports

The treatment facility is required to reexamine the defendant and report to the court at specified intervals. Written reports are to be furnished to court three months after commitment, six months after commitment, nine months after commitment, and within 30 days of the expiration of the commitment. § 971.14(5)(b).

B. Contents of the reports – § 971.14(5)(b)

Each report shall indicate one of the following:

1. The defendant has become competent; or

2. The defendant remains incompetent but is likely to attain competency within the remaining commitment period; or

3. The defendant has not made such progress that attainment of competency is likely within the remaining commitment period. A report making this indication must include the examiner's opinion regarding whether the defendant is mentally ill, alcoholic, drug dependent, developmentally disabled, or infirm because of aging or other like incapacities.

C. Reexamination hearing; when required and how conducted

A reexamination hearing is required if the report indicates the defendant either has regained competency or is unlikely to attain competency within the remaining commitment period. A hearing is not required if the report indicates the defendant remains incompetent but is likely to attain competency within the remaining commitment period. § 971.14(5)(c).

The hearing shall be held within 14 days of the receipt of the report and is subject to the same requirements as the original commitment hearing – see § 971.14(4) and Sec. IV.,

above. The parties may waive the hearing, in which case the finding is to be based on the report.

If the court determines the defendant is competent, the criminal proceeding shall be resumed. If the court determines the defendant is making sufficient progress toward becoming competent, the commitment shall continue. § 971.14(5)(c)).

VII. The Defendant Who Regains Competency

A. Competency regained

If the court determines that the defendant has become competent, the defendant is to be discharged from the commitment, and the criminal proceedings are resumed. § 971.14(5)(c).

B. Competency dependent on medication

If medication has assisted the defendant in regaining competency, the court "may make appropriate orders for the continued administration of the medication in order to maintain the competence of the defendant for the duration of the proceedings." § 971.14(5)(d). The Committee recommends that § 971.14(5)(d) be interpreted in light of Riggins, Sell, and Fitzgerald to require a specific finding that the need for the ordered medication outweighs the interests of the defendant that the cases identify. See the discussion in Sec. V.B., above, regarding orders for involuntary medication to restore competency.

C. Recommitment

If a defendant who has been restored to competency thereafter again becomes incompetent, there may be a recommitment. § 971.14(5)(d). The court must make the same determinations as those required for an original commitment: not competent but likely to become competent within the commitment period.

The maximum period for a recommitment is 18 months, minus the days spent under previous commitments, or 12 months, whichever is less. § 971.14(5)(d).

D. Sentence credit

Sentence credit under § 973.155 is due for all days spent in commitment as not competent to proceed, whether the commitment is inpatient or outpatient. § 971.14(5)(a).3 Sentence credit is also required for all days spent during a commitment to an inpatient facility for examination relating to competency to proceed. § 971.14(2)(a).

VIII. Competency Not Regained: Discharge from the Commitment

A. Releasing the defendant

If the court determines that it is unlikely that an incompetent defendant will become competent within the remaining commitment period, it shall discharge the defendant from the commitment and release him, subject to the provisions relating to transition and civil commitment. § 971.14(6)(a). (Transition to civil commitment is discussed at Sec. B., below.)

1. Periodic return to court

If a defendant is released, the court may order the defendant to appear in court at specified intervals for redetermination of competency to proceed. § 971.14(6)(a).

2. Reexamination of competency

"Counsel who have received notice under par. (c) [from custodian of incompetent defendant who was civilly committed] or who otherwise obtain information that a defendant discharged under par. (a) [discharge and release] may have become competent may move the court to order that the defendant undergo a competency examination. . . ." § 971.14(6)(d).

This competency examination is to be conducted under § 971.14(2), the same statute that applies to an original examination. The court may order a report under § 971.14(3) and a hearing under § 971.14(4).

If the court determines that the defendant is competent, the criminal proceeding is resumed.

If the court determines that the defendant is not competent, it shall release the defendant. However, the court "may impose such reasonable nonmonetary conditions as will protect the public and enable the court and district attorney to discover whether the person subsequently becomes competent." § 971.14(6)(d).

3. Status of the criminal charges

The above procedures clearly imply that the criminal charges will remain pending. There is no authority for a trial judge to order dismissal sua sponte. State ex rel. Haskins v. Dodge County Court, 62 Wis.2d 250, 268, 214 N.W.2d 575 (1974). Dismissal of charges is apparently within the prosecutor's discretion, subject to the general rules relating to speedy trial. 62 Wis.2d 250, 267-71

B. Transition to civil commitment

One of the purposes of the changes made by § 917.14(6), was to facilitate the transition to civil commitment for persons who had been discharged from a competency commitment.[8]

1. Detention – § 971.14(6)(b)

When a defendant is discharged from a competency commitment, the court may order that he be taken into custody and delivered to one of the following facilities:

a. A facility specified in § 51.15(2) (facilities for the emergency detention of persons undergoing civil mental commitment).

b. An approved public treatment facility under § 51.45(2)(c) (an alcohol treatment facility).

c. An appropriate medical or protective placement facility.

The length of the detention is governed by the statutes relating to the parallel civil commitments: § 51.20 for civil mental commitment; § 51.45(11) for commitments for alcohol treatment; and § 55.06(11) for protective placements.

2. Commitment "statement"

Either the district attorney or the corporation counsel may prepare the "statement" for commitment. § 971.14(6)(b). It is to be based on the allegations of the criminal complaint and the evidence in the case. The statement must meet the requirements for the related civil petitions: § 51.20(1) for civil mental commitments; § 51.45(13)(a) for alcohol treatment; and § 55.06(11) for protective placements. It need not be corroborated by others and will be treated as the petition for commitment. All conduct "during or subsequent to the time of the offense" may be considered in deciding whether the "recent overt acts" requirement for civil commitment has been satisfied. See § 51.20(1)(am).

3. Filing the statement

The statement for commitment shall be given to the director of the facility to which the defendant was delivered. It shall be "filed with the branch of circuit court assigned to exercise criminal jurisdiction in the county in which the criminal charges are pending." § 971.14(6)(b). However, the court may transfer the matter to the branch assigned jurisdiction under Chapter 51.

4. If a person is committed

A person committed under this procedure is treated as though committed under § 51.20, § 51.45, or § 55.06, as applicable. Days spent subject to this commitment do not require sentence credit under § 973.155. § 971.14(6)(b).

5. Notice of transfer or discharge

At least 14 days prior to transfer, discharge, or expiration of the commitment order, the § 51.42 or § 51.437 board must notify the court which originally discharged the person from the competency commitment, the district attorney for the county in which that court is located, and the person's attorney of record. § 971.14(6)(c).

6. Subsequent competency examinations

Upon receiving the above notice or upon receiving other information that the defendant is competent to proceed, either the district attorney or defense counsel may move the court to order another competency examination under § 971.14(2). The procedures relating to the original evaluation of competency apply. § 971.14(6)(d).

If the court determines that the defendant is competent, the criminal proceedings shall be resumed. If the court determines that the defendant is not competent, it shall order release but may impose such reasonable nonmonetary conditions as will protect the public and enable the court and district attorney to discover whether the person subsequently becomes competent. § 971.14(6)(d).

COMMENT

SM 50 was originally published in 1974 and revised in 1986, 1988, 1989, 1991, 1997, 2004, and 2021. This revision was approved by the Committee in April 2023.

This Special Material is intended to outline the statutory procedures and case law requirements relating to determining a defendant's competency to stand trial.

The 2004 revision withdrew three appendices. Appendix A was a letter describing the "local sites" project of the Department of Health and Family Services, which is intended to provide faster and less expensive competency evaluations. Trial courts generally receive periodic updates on the local sites assigned to their courts. Appendix B illustrated a completed order for competency evaluation. Appendix C illustrated a completed order for commitment for treatment. The forms for these orders are available on the state court website. See CR 205 and CR 206 at http://www.wicourts.gov/.

1. This basic standard for competency is sometimes elaborated upon by reference to more specific abilities and characteristics. In State v. Garfoot, the court noted that "[t]o elicit information about a

defendant's competence, many courts and experts rely on a 13 point checklist known as the 'McGarry Scale' or 'Competency to Stand Trial Instrument,'" and made reference to State v. Shields, 593 A.2d 986 (Del. Super. 1990), which in turn refers to a detailed list of factors. 207 Wis.2d 215, 228, n.7.

2. It is assumed that a person committed for a competency examination will always be represented by counsel or will have waived counsel. A person must at least be afforded the opportunity to be represented, not only because it is constitutionally required (the criminal prosecution has begun) but also because medical ethics preclude conducting a competency examination of any person charged with crime "prior to access to or availability of legal counsel." American Psychiatric Association Ethical Guidelines, Section 4, Number 13.

3. Examiners are ethically prohibited from examining a person charged with a crime who has not had access to counsel. See note 2, supra.

4. The 15 day limit under § 971.14(2)(am) does not begin to run until the defendant arrives at the examination facility; the limit did not apply where the court's order was not reduced to writing, and the defendant was never transported to the examination facility. State ex rel. Hager v. Marten, 226 Wis.2d 687, 594 N.W.2d 791 (1999).

5. Subsection (4) of § 971.14 contains two different burdens of persuasion, depending on what the defendant claims with regard to competency. This possibly awkward approach was adopted in an attempt to serve two different interests. The statute requires the state to prove competency by the greater weight of the evidence to serve the basic due process requirement that an incompetent defendant may not be tried. The statute requires the state to prove incompetency by clear and convincing evidence to justify the involuntary commitment for treatment of the defendant who is found to lack competency. This approach was developed in an attempt to meet requirements that were believed to follow from the analogy made between involuntary civil mental commitments and commitments of those found not competent to stand trial. The United States Supreme Court has addressed some aspects of this issue since § 971.14 was adopted in its present form.

In Medina v. California, 505 U.S. 437, 439 (1972), the Court held that "the Due Process Clause permits a State to require a defendant who alleges incompetence to stand trial to bear the burden of proving so by a preponderance of the evidence." In Cooper v. Oklahoma, 517 U.S. 348 (1996), the Court held that an Oklahoma statute requiring the defendant to prove lack of competency by clear and convincing evidence violated the Due Process Clause. And, in Addington v. Texas, 441 U.S. 418 (1979), the Court held that the "clear and convincing evidence" burden satisfies the requirements of due process for the purposes of civil mental commitment. The Wisconsin two-step approach clearly complies with these due process-based requirements.

The constitutionality of the Wisconsin statutory scheme regarding the burden of persuasion was upheld in State v. Wanta, 224 Wis.2d 679, 592 N.W.2d 645 (Ct. App. 1999).

6. Subsections (3)(dm) and (4)(b) are less comprehensive than the standard articulated in Sell in four ways:

First, sub. (3)(dm) "does not require the circuit court to find that an important government 'interest in bringing to trial an individual accused of a serious crime' is at stake," as required by the first Sell factor. Fitzgerald, supra at ¶26. Instead, § 971.14 "merely requires the circuit court to find probable cause that the defendant committed a crime—not necessarily a serious one." Id. at ¶26. See also, § 971.14(1r).

Second, sub. (3)(dm) fails to consider the second Sell factor, as "it does not require the circuit court to conclude that medication is substantially likely to restore a defendant's competency or to consider whether side effects 'will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense.'" Fitzgerald, at ¶27 (quoting Sell, 539 U.S. at 181, 123 S.Ct. 2174 (2003)).

Third, in contrast to the third Sell standard, "§ 971.14(4)(b) mandates involuntary medication if the State establishes pursuant to paragraph (3)(dm) the defendant's inability to either express an understanding of the advantages and disadvantages of medication or to make an informed choice about it, regardless of the existence of less intrusive but nonetheless effective options." ¶28.

Fourth, in contrast to the fourth Sell factor, which requires the circuit court to conclude that the administration of medication is medically appropriate, § 971.14(4)(b) can be read to authorize "whoever administers the medication or treatment to the defendant" to "observe appropriate medical standards." § 971.14(4)(b). See State v. Fitzgerald, 2019 WI 69, ¶¶14-17, 387 Wis.2d 384, 929 N.W.2d 165.

7. Under pre Truth In Sentencing law, good time credit is to be accorded persons committed as incompetent to stand trial. State v. Moore, 167 Wis.2d 491, 481 N.W.2d 633 (1992).

8. For a case illustrating the transition from a competency commitment to a civil mental commitment, see In Re the Mental Condition of Billy Jo W., 182 Wis.2d 616, 514 N.W.2d 707 (1994). In that case, the court held that in certain circumstances, a court may order the release of civil commitment records where there is a "significant interrelationship between criminal proceedings involving a violent felony and the civil commitment." 182 Wis.2d 616, 649. Upon making a threshold determination that the interrelationship exists, the court must balance the public interest in access against the individual's privacy interest.

SM-50A ADVICE TO A PERSON FOUND NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT

[RENUMBERED C SEE WIS JI-CRIMINAL 650]

COMMENT

SM-50A was originally published in 1974 and revised in 1980 and 1990. It was renumbered as Wis JI-Criminal 650 and reapproved by the Committee in June 2003.

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SM-52 DISCLOSURE OF THE IDENTITY OF AN INFORMER

Section 905.10(1) recognizes a privilege on the part of the government "to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of the law."[1] The privilege may be claimed by an appropriate representative of the federal government or of the state or local government unit involved.[2]

The privilege does not exist if the informer or the holder of the privilege discloses the identity of the informer "to those who would have cause to resent the communication."[3] The privilege also does not exist if the informer appears as a witness for the state.[4]

There are two instances where a court may be called upon to conduct an inquiry into whether the identity of an informer should be disclosed despite the existence of the privilege. One occurs at the pretrial stage, where information from an informer is relied upon to establish the legality of obtaining evidence. The other occurs at trial where the defendant seeks the testimony of the informer. Different procedures and standards apply to the disclosure inquiry in these two situations.

I. Pretrial Disclosure: Legality of Obtaining Evidence

In the context of a motion to suppress evidence, the informer's identity relates to evaluating his or her reliability and credibility as part of the probable cause determination. Where an informer has provided information relied upon to establish the legality of, for example, a search and seizure, disclosure of identity may be required if "the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible." § 905.10(3)(c).

If the judge orders disclosure, the state may request that the disclosure be made in-camera. If the request is made, the judge "shall" direct[5] that the disclosure be made in-camera. No counsel or party is permitted to be present. A record of the in-camera proceeding is to be made, but it is to be sealed and preserved to be made available in the event of an appeal.

II. Disclosure at Trial : Testimony on the Merits

Disclosure of an informer's identity at trial may become an issue when "it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence." § 905.10(3)(b). Upon such a showing, the court shall give the state an

opportunity to oppose disclosure in an in-camera proceeding. The amount of evidence required to justify the inquiry has been referred to as a "minimal burden. . . . The showing need only be one of a possibility that the informer could supply testimony necessary to a fair determination."[6]

The in-camera proceeding is to provide the state "an opportunity to show . . . facts relevant to determining whether the informer can, in fact, supply"[7] testimony necessary to a fair determination of guilt or innocence. The statute provides that the showing will ordinarily be in the form of affidavits but that the judge may direct that testimony may be taken. No counsel or party shall be permitted to be present at the in-camera proceeding.

The standard for deciding whether the informer's identity may be disclosed was stated in State v. Vanmanivong, 2003 WI 51, 261 Wis.2d 202, 661 N.W.2d 76, ¶24: ". . . a defendant must show that an informer's testimony is necessary to the defense before a court may require disclosure. 'Necessary' in this context means that the evidence must support an asserted defense to the degree that the evidence could create a reasonable doubt."[8]

The decision on whether to order disclosure is within the discretion of the trial court. The court should make sufficient findings "to show that its conclusion was reached by a reasoning process based on the facts of record or reasonable inferences from those facts."[9]

If the court concludes that the informer can give testimony that meets the "necessary" standard, and if the state elects not to disclose the informer's identity, the judge shall dismiss the charges to which the testimony would relate.[10]

Evidence submitted for the in-camera proceeding shall be sealed and preserved for possible reference on appeal. It is not to be otherwise revealed without the consent of the state.

COMMENT

SM-52 was originally published in 1991. This revision was approved by the Committee in October 2004.

1. Procedures relating to deciding whether an informer's identity must be disclosed are set forth in considerable detail in § 905.10 of the Wisconsin Rules of Evidence. The statute is based in part on preexisting Wisconsin precedent, see Stelloh v. Liban, 21 Wis.2d 119, 126, 124 N.W.2d 101 (1963), and

is consistent with the reasoning of the principal United States Supreme Court case, Roviaro v. United States, 353 U.S. 53 (1957). See State v. Outlaw, 108 Wis.2d 112, 120-24, 321 N.W.2d 145 (1982).

The privilege protects not only the identity of the informer but also the contents of a communication that will tend to reveal the identity. State v. Gordon, 159 Wis.2d 335, 464 N.W.2d 91 (Ct. App. 1990).

2. Section 905.10(2) "Who May Claim. The privilege may be claimed by an appropriate representative of the federal government, regardless of whether the information was furnished to an officer of the government or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof." The text of this Special Material refers only to "the state," on the assumption that the majority of Wisconsin cases will involve the claim of privilege by the state.

3. Section 905.10(3)(a). "[T]he State is the holder of the privilege . . . disclosure by the confidential informer's attorney . . . without specific authorization by the informer, is not 'by the informer's own action.'" State v. Lass, 194 Wis.2d 591, 598, 535 N.W.2d 904 (1995). Lass also concluded that the privilege survives the death of the confidential informer.

4. The full statement in § 905.10(3)(a) is "as a witness for the federal government or a state or subdivision thereof."

5. Section 905.10(3)(c) provides in part: "The judge shall on the request of the federal government, state or subdivision thereof, direct that the disclosure be made in-camera."

See State v. Fischer, 147 Wis.2d 694, 433 N.W.2d 647 (Ct. App. 1988), for a case finding there was an insufficient showing to require disclosure.

6. State v. Outlaw, 108 Wis.2d 112, 126, 321 N.W.2d 145 (1982). For a case finding no "showing whatsoever," see State v. Hargrove, 159 Wis.2d 69, 70, 464 N.W.2d 14 (Ct. App. 1990). An in-camera proceeding is not necessary if, without one, the trial court concludes that the informant "could provide relevant testimony necessary to a fair determination on the issue of guilt or innocence." State v. Norfleet, 2002 WI App. 140, 254 Wis.2d 569, 582-83, 647 N.W.2d 341.

7. Section 905.10(3)(b).

8. The Vanmanivong decision based this standard on State v. Outlaw, 108 Wis.2d 112, 126, 321 N.W.2d 145 (1982). The rule of the Outlaw case is found in the concurring opinions in which four justices joined because only three justices joined in the lead opinion. State v. Dowe, 120 Wis.2d 192, 352 N.W.2d 660 (1984).

The disagreement in the Outlaw case was over the meaning of "necessary" in the phrase "necessary to a fair determination of the issue of guilt or innocence." The definition in the concurring opinion was approved by a majority of the court: "an informer's testimony is necessary if it could have created in the minds of the jurors a reasonable doubt regarding a defendant's guilt." 108 Wis.2d 112, 140 Further, the concurrence "would limit the test to evidence being necessary to support the theory of defense." 108 Wis.2d 112, 141. [Otherwise, evidence corroborating guilt would result in the disclosure of an informant's identity.] A second concurring opinion was also joined in by four justices and added two

caveats to the "necessary" definition: evidence that is merely cumulative cannot be necessary; and evidence is not necessary if it is also available from another source. 108 Wis.2d 112, 142.

The previously published version of this Special Material summarized the Outlaw rule as follows: the test for disclosure of the informer's identity is whether there is a reasonable probability that the informer could give testimony necessary to the defense. All justices in Outlaw agreed that the state is not required to show beyond a reasonable doubt that the informer's testimony would not be helpful to the defense. (See the lead opinion at 108 Wis.2d 127 and the concurring opinion at 108 Wis.2d 138.) Testimony is necessary to the defense when it could create in the minds of the jurors a reasonable doubt about guilt. Testimony is not necessary when it is cumulative or available from another source.

9. State v. Larsen, 141 Wis.2d 412, 420, 415 N.W.2d 535 (Ct .App. 1987). Also see Outlaw, supra, 108 Wis.2d 112, 128. A finding denying disclosure in the following terms was found to fail to show that discretion was exercised: "I do not consider that there is a reasonable probability that the testimony of either informer would be able to give testimony necessary to a fair determination of guilt or innocence." 141 Wis.2d 412, 419-20.

For a review of the application of the complete procedure required by § 905.10, see State v. Gerard, 180 Wis.2d 327, 509 N.W.2d 112 (Ct. App. 1993).

10. Section 905.10(3)(b) states that the judge "shall" dismiss the charges upon motion by the defense and "may" do so on the court's own motion.

SM-55 INQUIRY WHEN A WITNESS CLAIMS THE PRIVILEGE AGAINST SELF INCRIMINATION

I. Introduction

This Special Material outlines the procedures a trial judge should follow when a witness asserts the privilege against self-incrimination.

The privilege is recognized in identical terms by both the United States and Wisconsin Constitutions[1]: "nor shall [a person] be compelled in any criminal case to be a witness against himself."

The privilege can be raised in a variety of situations in a criminal case: at a grand jury or John Doe hearing; at a preliminary examination; at a hearing on a pretrial motion; or at trial. The same basic procedure applies regardless of the situation.

One response to a valid claim of the privilege is to order the witness to testify, thereby granting immunity. Sections 972.08 and 972.085 provide the statutory recognition for immunity in criminal cases. A number of other statutes spell out procedures for immunity in a variety of other situations.[2] All immunity statutes are interpreted in the same way – as coextensive with the constitutional privilege.[3]

Discussed here are issues relating to the requirements for a valid claim of the privilege, the granting of immunity to who one invokes the privilege, and immunity for defense witnesses.

II. Invoking the Privilege

A. Should not be claimed in the presence of the jury

Section 905.13(2) provides as follows:

> In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

It is especially important to see that this rule is followed with respect to the privilege against self-incrimination. The burden properly falls on the attorney who calls the witness to assure that the witness is not expected to assert the privilege upon taking the stand. See §§ 3-5.7(c) and 4-7.6(c) of the ABA Standards Relating To Criminal Justice relating to the duty of counsel where a witness is expected to claim a valid privilege not to testify.

In State v. Heft, 185 Wis.2d 289, 517 N.W.2d 494 (1994), the defendant argued that her rights to due process and equal protection were denied by the trial court's application of § 905.13. The trial court had denied the defendant's request to require a witness to claim the privilege against self-incrimination in the presence of the jury. The Wisconsin Supreme Court affirmed the decision of the court of appeals[4] that the right to present a defense was not significantly infringed; Heft was allowed to present a complete defense by introducing other evidence that the witness' driving, not Heft's, was the cause of the accident. The court also held that the fact that § 905.13 applies to criminal but not to civil cases does not deny equal protection of the law to criminal defendants. There are reasonable bases for the distinction which are rationally related to legitimate state

interests: the consequences of a criminal conviction are much more severe; the need for mutuality in light of the inability to comment on the defendant's decision not to testify; and the concern for collusion.[5]

If the privilege is unexpectedly invoked before the jury, an inquiry should be conducted outside the jury's presence. (See below.) A cautionary instruction should be given if requested but only if requested. See § 905.13(3) and Wis JI-Criminal 317.[6]

B. How the privilege is invoked

No particular statement is required to invoke the privilege. A literally correct invocation would be that the witness "declines to answer on the ground that the answer might tend to incriminate the witness." But no precise formula is required:

> [i]t is agreed by all that a claim of privilege does not require any special combination of words. . . .
>
> [T]he fact that a witness expresses his intention in vague form is immaterial so long as the claim is sufficiently definite to apprise the [court] of his intention. As everyone agrees, no ritualistic formula is necessary.

Quinn v. United States, 349 U.S. 155, 162 (1955), cited in State v. Worgull, 128 Wis.2d 1, 13, 381 N.W.2d 547 (1986).

A claim of privilege as to one question does not necessarily carry over to other questions, especially where they are directed toward a different area. See State v. Hall, 65 Wis.2d 18, 28-30, 221 N.W.2d 806 (1974).

III. Court Inquiry When the Privilege is Invoked

When the privilege is invoked, the court must conduct an inquiry to determine whether the claim of privilege is valid.[7] The privilege is personal to the witness; it applies only to "testimonial" evidence; and it extends to responses that might tend to "incriminate" the witness.

A. The privilege is personal to the witness

1. The witness cannot refuse to answer on the ground that the answer might incriminate another person.[8]

2. Corporations cannot invoke the privilege.[9]

B. The privilege applies only to "testimonial" evidence

1. "Testimonial" defined

> The distinction which has emerged . . . is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not.

Schmerber v. United States, 384 U.S. 757, 764 (1966); cited in State v. Driver, 59 Wis.2d 35, 40, 207 N.W.2d 850 (1973).

2. The privilege does not apply to physical evidence

The privilege does not extend to physical evidence, even if the witness is required to be the source of that evidence or to participate in the obtaining or displaying of the evidence. For example, the following practices do not implicate the privilege:

a. fingerprinting[10]

b. participating in a lineup[11]

c. providing a voice sample or speaking certain words[12]

d. trying on a shirt[13]

e. taking blood samples[14]

C. The evidence must "tend to incriminate" the witness

In State ex rel. Rizzo v. County Court, 32 Wis.2d 642,146 N.W.2d 499 (1966), the Wisconsin Supreme Court approved the following definition of incriminating evidence:

> A matter is incriminating or tends to incriminate whenever, in the probable operation of law or the ordinary happening of events, there would be reasonable grounds to apprehend dangers to the witness from his being compelled to answer questions about which he has a particular personal knowledge. Maloney, A Code of Evidence for Wisconsin – Self-Incrimination, 1946 Wis. L. Rev. 147, 155.

The United States Supreme Court in Kastigar v. United States, 406 U.S. 441, 445 (1972), stated that the Fifth Amendment privilege ". . . protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."

The privilege may be validly claimed even after the witness has pleaded guilty. Since sentencing remains, testimony could result in "injurious disclosure." State v. Seibert, 141 Wis.2d 753, 416 N.W.2d 900 (Ct. App. 1987). After conviction, the privilege survives through postconviction attack and appeal. State v. Anastas, 107 Wis.2d 270, 320 N.W.2d 15 (Ct. App. 1982).[15]

D. Determining the validity of the claim without requiring self-incrimination

While an inquiry must be made into the validity of the claim, a valid claim could be compromised if the inquiry is too detailed or extensive. That is, witnesses should not be required to incriminate themselves in the process of establishing the validity of their claim. For this reason, courts have been urged to extend substantial deference to the claim.

There is apparently no authority in Wisconsin for conducting an in camera inquiry into the validity of the claim of privilege and then sealing the record. However, adopting such a procedure ought to lie within the inherent powers of the trial court. A model is offered by the procedure set forth in § 905.10, which sets forth an in camera procedure for determining whether a confidential informant's identity must be disclosed. (See SM-52, Disclosure of the Identity of an Informer.)

E. The court should make a finding

1. The following is suggested as a finding:

"The court finds that the (evidence) (answer) demanded of the witness (might tend to incriminate) (could not incriminate) him because, in the probable operation of the law or the ordinary happening of events there (are) (are not) reasonable grounds to apprehend dangers to the witness."[16]

F. Further action if the claim of privilege is not valid

1. Order the witness to testify

The following is suggested as a statement for the trial court to make to the witness:

"The court has concluded that the [question(s)] [request(s) for evidence] directed to you do not violate your privilege against self-incrimination. Therefore, you are ordered to (answer the question(s)) (produce the evidence demanded)."

2. If the witness continues to refuse continue with the following:

"If you do not now produce the evidence requested, you may be summarily confined until such time as you are willing to do so, or until this (trial) (grand jury term) (John Doe investigation) is completed, but in no case exceeding one year. You may not be released on bail pending an appeal concerning such confinement."

If the witness now refuses to comply with the order, the court may order the witness' summary confinement as provided by Wis. Stat. § 972.08(2).[17]

G. Further action if the claim of privilege is valid

1. excuse the witness

2. strike previous testimony[18]

3. give cautionary instructions[19]

4. order the witness to testify, resulting in a grant of immunity (see Section IV., below)

IV. Grants of Immunity

A. Requirements

A witness is granted immunity when all of the following occur:

1. there is a valid claim of the privilege against self-incrimination
2. the prosecutor moves to compel the testimony
3. the court orders the witness to testify
4. the witness complies with the order

It is within the court's discretion to grant or to deny the prosecutor's motion to compel testimony. If the court grants the motion and orders the witness to answer or to produce evidence, and if the witness complies with such order, the witness is automatically invested with immunity under Wis. Stat. § 972.08.

B. Testimony after the order

1. Immunity is "automatic"

Strictly speaking, there need be no motion for a grant of immunity and, accordingly, no order granting immunity. Rather, immunity is the automatic result of testimony following an order to testify after a valid claim of the privilege against self-incrimination. The operative language is found in § 972.08(1)(a):

> Whenever any person refuses to testify or produce books, papers or documents when required to do so before any grand jury, in a proceeding under § 968.26 or

> at a preliminary examination, criminal hearing or trial for the reason that the testimony or evidence required of him or her may tend to incriminate him or her or subject him or her to a forfeiture or penalty, the person may nevertheless be compelled to testify or produce the evidence by order of the court on motion of the district attorney. No person who testifies or produces evidence in obedience to the command of the court in that case may be liable to any forfeiture or penalty for or on account of testifying or producing evidence, but no person may be exempted from prosecution and punishment for perjury or false swearing committed in so testifying.

2. Immunity is "use" immunity

The 1989-90 legislature changed immunity in Wisconsin from the broader "transactional" immunity to the narrower "use," or "use and fruits" immunity.[20] Section 972.08(1)(b) provides that all immunity is "subject to the restrictions under § 972.085," which reads as follows:

> Immunity from criminal or forfeiture prosecution under §§ 13.35, 17.16(7), 77.61(12), 93.17, 111.07(2)(b), 128.16, 133.15, 139.20, 139.39(5), 195.048, 196.48, 551.56(3), 553.55(3), 601.62(5), 767.47(4), 767.65(21), 776.23, 885.15, 885.24, 885.25(2), 891.39(2), 968.26, 972.08(1) and 979.07(1), provides immunity only from the use of the compelled testimony or evidence in subsequent criminal or forfeiture proceedings, as well as immunity from the use of evidence derived from that compelled testimony or evidence.

Thus, the statute provides "immunity only from the use of the compelled testimony or evidence . . . as well as immunity from the use of evidence derived from that compelled testimony or evidence." Whether evidence sought to be used in a later prosecution is protected by the immunity statute is obviously of concern only in the later prosecution. Immunity extends to subsequent criminal or forfeiture proceedings. It does not extend to protect from prosecution or punishment for perjury or false swearing

committed in the course of testifying. See Wis JI-Criminal 246 for a suggested instruction on the testimony of a witness who has received immunity.[21]

3. Bargained-for immunity: Nonprosecution agreements

As described above, immunity results from ordering a person to testify after a valid claim of privilege. The order can only follow a motion by the prosecutor. In many cases, there may be agreements with the witness, whereby concessions, including immunity, are granted in exchange for the witness' testimony. The legal effect of statutory immunity is limited to "use" immunity. Given that the broader "transactional" immunity is more attractive to the witness, what is the effect of a prosecutor's promise to, in effect, grant transactional immunity to a witness in exchange for testimony?

The Wisconsin Court of Appeals dealt with a so-called nonprosecution agreement in State v. Lukensmeyer, 140 Wis.2d 92, 409 N.W.2d 395 (Ct. App. 1987). The agreement, reduced to writing, granted Lukensmeyer "immunity" in return for truthful testimony in a murder prosecution. The court found that Lukensmeyer had breached the agreement and could be prosecuted. But the court noted that his challenge to the nonprosecution agreement was a question of first impression in Wisconsin: "Because neither party raised it, we do not reach the question of the agreement's fundamental validity. We assume, but do not decide, that a prosecutor may lawfully enter an agreement not to prosecute in return for cooperation in a criminal investigation." 140 Wis.2d 92, 102.

The question may be more important now that statutory immunity is only of the "use" variety. One could argue that the prosecutor should not be able to grant broader immunity than the statutes allow. As a practical matter, of course, prosecutors may exercise their discretion not to prosecute virtually without review. And in the process of plea negotiations charges are routinely dropped, which could be characterized as immunity on those dropped charges. Lukensmeyer appears to have it right: all agreements by the prosecutor, whether designated as "immunity" or not, need to be reviewed under the general rules relating to the fulfillment and breach of plea agreements.[22]

V. Immunity for Defense Witnesses

Immunity may be granted only upon the motion of the prosecutor. The court cannot grant immunity sua sponte; the defendant does not have the right to compel the state to request immunity for a defense witness. Hebel v. State, 60 Wis.2d 325, 210 N.W.2d 695 (1973); Sanders v. State, 69 Wis.2d 242, 230 N.W.2d 845 (1975); Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975).

While the defendant has no reciprocal right to immunity grants for defense witnesses, the rule is tempered by two considerations. First, the Wisconsin Supreme Court has noted that the prosecutor's duty is "'to seek justice, not merely to convict.' When the prosecutor is considering whether or not to make a motion for immunity, he should bear in mind this predominant objective of impartial justice, and not merely whether the

evidence will be favorable to the prosecution. He should not hesitate to move for immunity solely on the basis that the testimony thus elicited might exonerate the defendant." Peters, supra, 70 Wis.2d 22, 41. Second, developments in other contexts suggest that a prosecutor's refusal to request immunity for a defense witness based solely on tactical considerations may violate due process. See McMorris v. Israel, 643 F.2d 458 (7th Cir. 1981), where, under Wisconsin's since-abandoned polygraph stipulation rule, it was held that a prosecutor must have valid, nontactical reasons for refusing to enter into a stipulation.

The law on this topic was reviewed in State v. Evers, 163 Wis.2d 725, 472 N.W.2d 828 (Ct. App. 1991). Peters and Sanders, supra, were reviewed and a standard was adopted to identify the showing a defendant must make to obtain judicial review of a prosecutor's immunization decision: "To demonstrate an abuse of prosecutorial discretion, a defendant must make a substantial evidentiary showing that the government intended to distort the judicial fact-finding process. See Stuart v. Gagnon, 614 F.Supp. 247 (E.D. Wis. 1985)." 163 Wis.2d 725, 737.

COMMENT

SM-55 was originally published in 1974. This revision was approved by the Committee in October 1994.

1. The privilege is found in the 5th Amendment to the United States Constitution and in Article 1, § 8. The latter differs in one respect from the former; it refers to being compelled to be "a witness against himself or herself." (Emphasis added.)

2. The immunity statutes are listed in § 972.085.

3. See, for example, State v. Hall, 65 Wis.2d 18, 27, 221 N.W.2d 806 (1974); State v. Aliota, 64 Wis.2d 354, 361, 219 N.W.2d 585 (1974).

4. 178 Wis.2d 823, 505 N.W.2d 437 (Ct. App. 1993).

5. 185 Wis.2d 289, 302, 517 N.W.2d 494 (1994).

6. Wis JI-Criminal 317 reads as follows:

> A witness, (name of witness), exercised the constitutional right not to answer (a question) (questions) on the ground that the answer(s) might tend to incriminate the witness.
>
> (Name of witness)'s decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

7. "The trial court has a clear responsibility to make a full record that the witness' fear of incrimination is valid, real and appreciable, and not speculative or merely an imaginary possibility of incriminatory danger." State v. Harris, 92 Wis.2d 836, 844-45, 285 N.W.2d 917 (Ct. App. 1979). Also see State v. McConnohie, 121 Wis.2d 57, 68-71, 358 N.W.2d 256 (1984).

8. Hale v. Henkel, 201 U.S. 43 (1970).

9. Braswell v. United States, 487 U.S. 99 (1988).

10. United States v. Peters, 687 F.2d 1295 (10th Cir. 1982).

11. United States v. Wade, 388 U.S. 218 (1967).

12. United States v. Dionisio, 410 U.S. 1 (1973).

13. Holt v. United States, 218 U.S. 245 (1910).

14. Schmerber v. United States, 384 U.S. 757 (1966).

15. Also see State v. McConnohie, 121 Wis.2d 57, 358 N.W.2d 256 (1984). State v. Harris, 92 Wis.2d 836, 285 N.W.2d 917 (Ct. App. 1979).

16. This suggested finding is based on the quotation from State ex rel. Rizzo v. County Court, found at page 5 of this Special Material.

17. But see State v. Gonzalaz, 172 Wis.2d 576, 493 N.W.2d 410 (Ct. App. 1992), holding that the summary contempt power of § 978.08(2) is not applicable to a pretrial motion hearing.

18. State v. Robinson, 145 Wis.2d 273, 426 N.W.2d 606 (Ct. App. 1988); Robinson v. State, 100 Wis.2d 152, 301 N.W.2d 429 (1981); State v. Koller, 87 Wis.2d 253, 274 N.W.2d 651 (1977); Ryan v. State, 95 Wis.2d 83, 289 N.W.2d 349 (Ct. App. 1980).

19. See Wis JI-Criminal 317, note 6, supra.

20. "Transactional immunity is essentially a promise not to prosecute the immunized witness for the transaction about which he testifies. In contrast, use . . . immunity . . . preserves the possibility of prosecution of the witness, provided that the government can prove that it did not use the witness's testimony in . . . proving his guilt at trial." BNA Criminal Practice Manual, Immunity, 111:2402-03.

21. Wis JI-Criminal 246 reads as follows:

> You have heard the testimony of (name of witness) who has received immunity. This means that (name of witness') testimony and evidence derived from that testimony cannot be used in a later criminal prosecution of (name of witness) .
>
> This witness, like any other witness, may be prosecuted for testifying falsely.
>
> You should consider whether receiving immunity affected the testimony and give the testimony the weight you feel it deserves.

22. "Informal" immunity and other plea concessions should be brought to jury's attention. See the Comment to Wis JI-Criminal 245 and 246.

SM-60 PROCEDURE TO DETERMINE THE ADMISSIBILITY OF STATEMENTS OR CONFESSIONS OF THE DEFENDANT

[WITHDRAWN]

COMMENT

SM-60 was originally published in 1974. It was withdrawn by the Committee in 1993.

See "Suppression – Confessions" at CR 15, Wisconsin Judicial Benchbook Volume I, Criminal and Traffic.

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SM-61 PROCEDURE TO FOLLOW WHEN THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE IS AT ISSUE PRIOR TO OR DURING A CRIMINAL TRIAL

[WITHDRAWN]

COMMENT

SM-61 was originally published in 1974. It was withdrawn by the Committee in 1993.

See "Substitution of Judge/Recusal" at CR 6, Wisconsin Judicial Benchbook Volume I, Criminal and Traffic.

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SM-62 ADMISSIBILITY OF EVIDENCE OBTAINED BY A SEARCH AND SEIZURE

[WITHDRAWN]

COMMENT

SM-62 was originally published in 1974. It was withdrawn by the Committee in 1993.

See "Suppression – Search and Seizure" at CR 13, Wisconsin Judicial Benchbook Volume I, Criminal and Traffic.

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SM-70 POST CONVICTION PROCEDURE UNDER SECTION 974.06, WIS. STATS.

[WITHDRAWN]

COMMENT

SM-70 was originally published in 1974. It was withdrawn by the Committee in 1993.

See "§ 974.06 Motions" at CR 39, Wisconsin Judicial Benchbook Volume I, Criminal and Traffic.

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SM-80 HABEAS CORPUS

[WITHDRAWN]

COMMENT

SM 80 was originally published in 1974. It was withdrawn by the Committee in 1993.

See "Habeas Corpus" at CR 43, Wisconsin Judicial Benchbook Volume I, Criminal and Traffic.

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SM-90 PROCEDURE TO FOLLOW IN ADVISING A PRISONER OF RIGHTS UNDER THE UNIFORM DETAINER ACT

WHEN ANOTHER JURISDICTION[1] FILES A WRITTEN REQUEST FOR TEMPORARY CUSTODY OR AVAILABILITY OF A PRISONER WITH THE WARDEN OF AN INSTITUTION (OR WITH THE SHERIFF IN CHARGE OF A COUNTY JAIL),[2] THE PRISONER IS TO BE TAKEN FORTHWITH BEFORE A JUDGE OF A COURT OF RECORD.[3] THE JUDGE SHOULD EXAMINE THE REQUEST FOR A TEMPORARY CUSTODY TO ASSURE THAT IT HAS BEEN DULY APPROVED, RECORDED, AND TRANSMITTED BY THE COURT HAVING JURISDICTION OVER THE INDICTMENT, INFORMATION OR COMPLAINT UPON WHICH THE REQUEST IS BASED.[4]

IF THE REQUEST IS IN PROPER FORM, THE COURT SHOULD ADVISE THE PRISONER AS FOLLOWS:

A request for your temporary custody or availability under Article IV of the Uniform Detainer Act was received on (date request received by warden or sheriff) from (name of officer and jurisdiction). You are charged with committing the offense of (name of offense), on (date offense committed), in (site of offense). (SPECIFY ALL OFFENSES LISTED IN THE REQUEST.) The request for temporary custody means that (receiving state) wants to have you returned to stand trial on the charge(s) I have just described to you. If you are returned to (receiving state), you may also be tried on other charges upon which detainers have been filed.[5] Trial must be commenced within 120 days of your arrival in (receiving state), unless a continuance has been granted in open court in your presence or the presence of your counsel.[6] After the charges are resolved, you will be returned to Wisconsin to complete your present sentence.

Authorities from (receiving state) will be able to pick you up after 30 days have elapsed from the date the request was received unless the governor of Wisconsin disapproves the request within that period of time. You have the right to petition the governor to ask that he disapprove the request.[7] You may petition the governor by writing the following person:

Pardon and Extradition Counsel

Office of the Governor

State Capitol Building

Madison, Wisconsin 53702

You may not oppose your delivery to the authorities from (receiving state) on the ground that the governor has not affirmatively consented to or ordered the delivery.[8]

You also have the right to contest your delivery in court[9] and to be represented by an attorney. If you cannot afford to hire an attorney, one will be appointed for you. If you wish to contest the matter in court, the only issues will be the sufficiency of the request for temporary custody and your identification as the person sought.[10] Your guilt or innocence on the criminal charge(s) will not be inquired into. If you wish to contest your delivery in court you must request a hearing promptly; the hearing must be held within 30 days after the request for temporary custody was received.

Do you understand your rights as I have just described them to you?

And do you understand that if you wish to contest your delivery to (receiving state), either by petitioning the governor or by requesting a court hearing, or both, the matter must be resolved within 30 days after the request for temporary custody was received, which will be (specify date)?

[END OF ADVICE TO PRISONER]

IF THE PRISONER REQUESTS COUNSEL, COUNSEL SHOULD BE APPOINTED IMMEDIATELY.

IF THE PRISONER REQUESTS A COURT HEARING TO CONTEST DELIVERY, A DATE SHOULD BE SET WITHIN THE 30-DAY PERIOD FOLLOWING THE RECEIPT OF THE REQUEST.

IF THE PRISONER INDICATES THAT HE OR SHE DOES NOT WISH TO CONTEST DELIVERY PURSUANT TO THE REQUEST FOR TEMPORARY CUSTODY, THE COURT SHOULD EMPHASIZE THAT NO FURTHER LEGAL PROCEEDINGS WILL BE REQUIRED AND THAT THE PRISONER WILL BE MADE AVAILABLE TO THE AUTHORITIES FROM THE RECEIVING STATE AT THE END OF THE 30-DAY PERIOD.[11]

IF THE PRISONER INDICATES THAT HE OR SHE DOES NOT KNOW WHAT TO DO, EMPHASIZE THAT THE PRISONER HAS THE RIGHT TO CONSULT WITH COUNSEL, AND THE RIGHT TO HAVE COUNSEL APPOINTED IF INDIGENT, TO ASSIST IN MAKING THE DECISION.

COMMENT

SM-90 was originally published in 1980. This revision involved nonsubstantive editorial changes and updated the comment. It was approved by the Committee in February 1998.

The procedures described in this Special Material are required by Wis. Stat. § 976.06 created by Chapter 158, Laws of 1975. The statute is designed to remedy the deficiencies in the Uniform Detainer Act identified by the Wisconsin Supreme Court in State ex rel. Garner v. Gray, 55 Wis.2d 574, 201 N.W.2d 163 (1972). In Garner, the court held the Uniform Detainer Act unconstitutional because it failed to require that the prisoner be advised of his rights to contest his delivery under the detainer by petitioning the governor and by going to court. To remedy the defect, the court required that prisoners be taken

before a judge to be advised of these rights. Section 976.06 is modelled after § 976.03(10) of the Uniform Criminal Extradition Act.

The usual sequence of events leading up to this court appearance begins with the receipt by the custodian (sheriff, prison warden) of what is broadly called a detainer. A detainer, also called a "hold" or "hold order," is a notice of a criminal charge pending against a prison inmate, given by law enforcement or prosecuting officials to prison authorities to insure that after the completion of the prisoner's present sentence he will be held until turned over to the notifying authorities for prosecution. The detainer usually consists of a letter or other written document accompanied by a copy of the outstanding warrant, information, or indictment. (Jacob and Sharma, "Justice After Trial: Prisoners' Need For Legal Services In The Criminal-Correctional Process," 18 Kansas L. Rev. 495, 579 (1970).)

Out of recognition that the existence of a detainer can have a detrimental effect on such aspects of the prisoner's confinement as custody classification, parole eligibility, work-release eligibility, and parole planning, many states, including Wisconsin, have adopted the Uniform Detainer Act (Wis. Stat. § 976.05). (A list of states which have adopted the Act follows as Appendix A.) The Act's purpose is to encourage the expeditious and orderly disposition of charges outstanding against a prisoner and to determine the proper status of any and all detainers based on untried indictments, information or complaints (' 976.05(1) Article I). Both prisoners and prosecuting authorities may initiate proceedings under the Act, and different procedures apply depending upon who initiates the action.

The Act requires that upon receipt of a detainer, the warden promptly inform the prisoner of its source and contents. The prisoner must also be informed of the right to request final disposition of the charge on which the detainer is based. If the prisoner makes that request, 976.05(3) [Article III(a)] of the Act requires that the charge be dismissed if not brought to trial within 180 days.

The Act also provides a procedure enabling the charging jurisdiction to gain custody of the prisoner for the purpose of bringing him to trial. This procedure is described in 976.05(4) [Article IV] of the Act and is initiated by the presentation of a written request for temporary custody to the proper authorities in the state where the prisoner is incarcerated. The request is presented after a detainer has been lodged against the prisoner and it is the receipt of the request for temporary custody that triggers the court appearance described in this Special Material.

State v. Aukes, 192 Wis.2d 338, 531 N.W.2d 382 (Ct. App. 1995), discusses the two different procedures available under the Interstate Agreement on Detainers. Under Article III [' 976.05(3)] a prisoner may request a final disposition of charges pending in another state. The prisoner must be brought to trial within 180 days after the prosecutor receives the prisoner's request. Under Article IV [' 976.05(4)], an officer of a jurisdiction in which charges are pending can request to have a prisoner returned to that jurisdiction for trial. A prisoner returned under this provision must be tried within 120 days. In Aukes, the court of appeals concluded that the 180-day limit applied to a person returned to Wisconsin from Colorado. The court also found that the 180-day limit was tolled during the time that an appeal of a suppression order was pending and that it was ultimately waived when the defendant agreed to a trial date set after the limit would have expired. That waiver can occur by conduct; express waiver on the record is not necessary.

When another jurisdiction makes a request under Article IV, the prisoner is to be brought before a court "forthwith." § 976.06. This is the court appearance addressed by this Special Material. The prisoner has the right to request a hearing to test the legality of the request and the hearing is to be held

within 30 days. If a hearing is not held within the 30-day period, the original request or detainer is dismissed. State v. Sykes, 91 Wis.2d 436, 283 N.W.2d 446 (Ct. App. 1979). However, dismissal of procedurally defective detainers does not bar successive requests. In the Matter of Custody of Aiello, 166 Wis.2d 27, 479 N.W.2d 178 (Ct. App. 1991). The new request must itself satisfy the requirements of the Act, including it being approved by the court in the jurisdiction filing the request. State ex rel. Kerr v. McCaughtry, 183 Wis.2d 54, 515 N.W.2d 276 (Ct. App. 1994).

1. In the Uniform Detainer Act (Wis. Stat. § 976.05) and in this Special Material, the state requesting the custody of the prisoner is referred to as the "receiving state." Wisconsin is the "sending state." See § 976.05(2) Article II(a) and (b).

2. The Act applies to "one who has entered upon a term of imprisonment in a penal or correctional institution." (Section 976.05(3), Article III(a).) It is usually applied to inmates of the state prisons, but could also be invoked with regard to county jail inmates. The Act does not apply to persons adjudged to be mentally ill (' 976.05(6), Article VI(b)). A separate compact exists for juveniles, see Wis. Stat. § 938.991.

3. It may be necessary for the court to issue a writ of habeas corpus as prosequendum or ad testificandum to allow the warden or other custodian to bring the prisoner from the place of his confinement to the court.

4. See § 976.05(1), Article IV(a). A sample "Request for Temporary Custody" follows as Appendix B. It is the suggested Agreement on Detainers Form V, see Handbook on Interstate Crime Control, p. 106.

5. Section 976.05(4), Article IV(b) provides that upon receiving a request for temporary custody, the warden or other custodian shall furnish the requesting officer with a certificate specifying the term of the prisoner's commitment, the time already served, the time remaining to be served, the amount of good time earned, the parole eligibility date, and any parole board decisions. Such a certificate is also to be sent to any other officials in the receiving state who have lodged detainers against the prisoner, thus alerting those officials to the possible availability of the prisoner. Therefore trial on other charges could result when the prisoner is returned to the receiving state.

6. Section 976.05(4), Article IV(c).

7. Section 976.05(4), Article IV(a) states in part:

> . . . and that there shall be a period of 30 days after receipt by the appropriate authorities before the request is honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability either upon the governor's own motion or upon motion of the prisoner.

Garner, supra, held, and new § 976.06 requires, that the prisoner be advised of the right to petition the governor.

8. Section 976.05(4), Article IV (d).

9. The decision in Garner, supra, required that the prisoner be advised of his right to contest

delivery under the detainer, "either by petitioning the governor or by going to court." (Garner, supra, at 585.) Section 976.06 requires that the prisoner be advised of both rights and says that the court hearing scheduled if the prisoner wishes to contest the request in court must also be set within the 30-day time limit applicable to the governor's denial of the request (see note 6, supra). There is no indication whether a prisoner may exercise both rights in a single case or must elect between petitioning the governor and contesting the request in court.

10. Section 976.06 was modelled after § 976.03(10) of the Uniform Criminal Extradition Act. Therefore the issues cognizable upon habeas corpus in an extradition proceeding may offer guidance as to the issues the court can consider in the detainer case where the prisoner wishes to contest the detainer. The issues which can be raised by habeas corpus in an extradition case have been identified by the Wisconsin Supreme Court as follows:

1. Are the papers in order and properly authenticated?
2. Was a crime substantially charged under the law of the demanding state?
3. Is the petitioner the person named in the papers (identity)?
4. Was the petitioner present in the demanding state at the time of the alleged offense (fugitive status)?

State v. Ritter, 74 Wis.2d 227, 246 N.W.2d 552 (1976).

Each of these four categories, except fugitive status, should be open to inquiry in the detainer case. Guilt or innocence on the underlying charge can only be inquired into insofar as it relates to one of the other four issues. The receiving state's motive for demanding the prisoner's return is also irrelevant. (Handbook on Interstate Crime Control, pp. 147-154.)

Whether or not courts in the sending state can consider constitutional claims is open to question. On the one hand, the Wisconsin Supreme Court has held that trial courts in habeas corpus proceedings can "examine into constitutional questions affecting the legality of the arrest in this state for extradition at least where constitutional standards are shown not to have been complied with on the face of the documents." State ex rel. Foster v. Uttech, 31 Wis.2d 664, 671, 143 N.W.2d 500 (1966). The Uttech case has been recognized as a limited exception to the general rule that "whether correct constitutional procedures had been followed by the demanding state in obtaining the arrest of the defendant was an issue to be raised in the demanding state, not the asylum state." State v. Hughes, 68 Wis.2d 662, 670, 229 N.W.2d 655 (1975). The decision in Ritter, supra, limited the application of Uttech to the case where the alleged constitutional defect appears on the face of the papers. Where defects in the receiving state's procedures are alleged, Ritter suggests that the following practical test be applied: "Can the defects in the procedures of the demanding state be more easily raised and adequately handled in the demanding state after the accused is returned or is the decision one which the asylum state can make with comparative ease and with expertise equal to that of the demanding state, thus saving the accused the expense, inconvenience and jeopardy involved in litigating the issue in the demanding state?" (Ritter, supra at page 237.)

With respect to a specific defect, trial within 180 days as guaranteed by the Uniform Detainer Act, the Wisconsin Supreme Court has held that the claim that a prisoner was not afforded this right may not be considered in the sending state but must be decided by the courts in the receiving state. State ex rel. Garner v. Gray, 59 Wis.2d 323, 208 N.W.2d 161 (1973).

11. The court may also wish to advise the custodian of the prisoner that if the prisoner does not contest delivery, or if the governor takes no action and the prisoner does not challenge delivery in court, that the custodian may surrender the prisoner after the expiration of the 30-day period to the appropriate representative of the receiving state who shall present the following:

1. Proper identification and evidence of his or her authority to act for the state into whose temporary custody the prisoner is to be given.

2. A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(Section 976.05(5), Article V(b).)

APPENDIX A
UNIFORM AGREEMENT ON DETAINERS: PARTY STATES

ALABAMA	Code 1975, § 15-9-81
ALASKA	AS 33.35.010 to 33.35.040
ARIZONA	A.R.S. §§ 31-481, 31-482
ARKANSAS	Ark. Stats. §§ 43-3201 to 43-3208
CALIFORNIA	West's Ann. Penal Code §§ 1389 to 1389.8
COLORADO	C.R.S. '73, §§ 24-60-501 to 24-60-507
CONNECTICUT	C.G.S.A. §§ 54-186 to 54-192
DELAWARE	11 Del. C. §§ 2540 to 2550
DISTRICT OF COLUMBIA	D.C. Code 1981, §§ 24-701 to 24-705
FLORIDA	West's F.S.A. §§ 941.45 to 941.50
GEORGIA	D.C.G.A. §§ 42-6-20 to 42-6-25
HAWAII	HRS 834-1 to 834-6
IDAHO	I.C. §§ 19-5001 to 19-5008
ILLINOIS	S.H.A. ch. 38, § 1003-8-9
INDIANA	West's A.I.C. 35-33-10-4
IOWA	I.C.A. §§ 821.1 to 821.8
KANSAS	K.S.A. §§ 22-4401 to 22-4408
KENTUCKY	KRS 440.450 to 440.510
MAINE	34-A M.R.S.A. §§ 9601 to 9609
MARYLAND	Code 1957, art. 27, §§ 616A to 616S
MASSACHUSETTS	M.G.L.A. c. 276 App. §§ 1-1 to 1-8
MICHIGAN	M.C.L.A. §§ 780.601 to 780.608
MINNESOTA	M.S.A. § 629.294
MISSOURI	V.A.M.S §§ 217.490 to 217.520
MONTANA	M.C.A. 46-31-101 to 46-31-204
NEBRASKA	R.R.S. 1943, §§ 29-759 to 29-765
NEVADA	N.R.S. §§ 178.620 to 178.640
NEW HAMPSHIRE	R.S.A. §§ 606-A:1 to 606-A:6
NEW JERSEY	N.J.S.A. §§ 2A:159A-1 to 2A:159A-15
NEW MEXICO	NMSA 1978, § 31-5-12
NEW YORK	McKinney's C.P.L. § 580.20
NORTH CAROLINA	G.S. §§ 15A-761 to 15A-767
NORTH DAKOTA	NDCC §§ 29-34-01 to 29-34-08
OHIO	R.C. §§ 2963.30 to 2963.35
OKLAHOMA	22 Okla. St. Ann. §§ 1345-1349
OREGON	ORS 135.775 to 135.793

PENNSYLVANIA	42 Pa. C.S.A. §§ 9101 to 9108
RHODE ISLAND	Gen. Laws 1956, §§ 13-13-1 to 13-13-8
SOUTH CAROLINA	Code 1976, §§ 17-11-10 to 17-11-80
SOUTH DAKOTA	SDCL §§ 23-24A-1 to 23-24A-34
TENNESSEE	§§ 40-31-101 to 40-31-108
TEXAS	Vernon's Ann. C.C.P. art. 51.14
UTAH	U.C.A. 1953, §§ 77-29-5 to 77-29-11
VERMONT	28 V.S.A. §§ 1501 to 1509, 1531 to 1537
VIRGINIA	Code 1950, §§ 53.1-210 to 53.1-215
WASHINGTON	RCWA §§ 9.100.010 to 9.100.080
WEST VIRGINIA	Code, §§ 62-14-1 to 62-14-7
WISCONSIN	W.S.A. § 976.05, 976.06
WYOMING	W.S. 1957, §§ 7-408.9 to 7-408.15
UNITED STATES	18 U.S.C.A. App.

APPENDIX B
AGREEMENT ON DETAINERS FORM V

Five copies. Signed copies must be sent to the prisoner and to the official who has the prisoner in custody. A copy should be sent to the Agreement Administrator of the state which has the prisoner incarcerated. Copies should be retained by the person filing the request and the judge who signs the request.

REQUEST FOR TEMPORARY CUSTODY

TO: .....
(Warden-Superintendent-Director) (Institution)
.....
(Address)

Please be advised that . . . . . ., who is presently an inmate of your institution, is under [indictment] [information] [complaint] in the . . . . . of which I am the
(Jurisdiction)
. . . . . .
(Title of Prosecuting Officer)

Said inmate is therein charged with the [offense] [offenses] enumerated below:

Offense(s)
. . . . . .
. . . . . .
. . . . . .

I propose to bring this person to trial on this [indictment] [information] [complaint] within the time specified in Article IV(c) of the agreement.

In order that proceedings in this matter may be properly hand, I hereby request temporary custody of such persons pursuant to Article IV(a) of the Agreement on Detainers.

Signed: . . . . . .
Title: . . . . . .

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV(a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers.

DATED: . . . . . Signed: . . . . . .
(Judge)
. . . . . .
(Court)

WIS JI-CRIMINAL

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References are to Instruction Numbers

G

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