

2420 CIVIL THEFT: WIS. STAT. § 895.446 (Based on Conduct (Theft) Prohibited**by Wis. Stat. §943.20(1)(a))**

Theft is committed by one who intentionally (takes and carries away) (uses) (transfers) (conceals) (retains possession of)¹ movable property of another without consent and with intent to deprive the owner permanently of possession of the property. In order to recover for a civil theft, (plaintiff) must prove by evidence that satisfies you to a reasonable certainty by the greater weight of the credible evidence that the following four elements were present:

First, that defendant intentionally took and carried away movable property of another.²

The term “intentionally” means the defendant must have had the mental purpose to take and carry away the property.³ You cannot look into a person’s mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

“Movable property” means property whose physical location can be changed.⁴

Second, that the owner of the property did not consent⁵ to the taking and carrying away the property.

Third, that the defendant knew that the owner did not consent.⁶

Fourth, that the defendant intended to deprive the owner permanently of the possession of the property.

[Burden of Proof: Give Wis JI-Civil 200.]

COMMENT

This instruction and comment were approved by the Committee in 2018.

The instruction is based on a claim of theft in violation of Wis. Stat. § 943.20. Other types of criminal conduct, such as retail theft, worthless checks, fraud on an innkeeper, and theft by contractor (see Tri-Tech Corp. v. Americomp Serv., 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822), also serve as a possible basis for a claim under Wis. Stat. § 895.446. If one of these other grounds of liability is claimed, this instruction must be adapted to the elements of the particular criminal statute.

The burden of proof is the ordinary burden See Wis. Stat. § 895.446(2)

Damages. In Estate of Miller v. Storey, 2017 WI 99 (Nov. 30 2017), the Wisconsin Supreme Court held that civil theft actions, under Wis. Stat. section 895.446, are not actions based in tort – ruling that the estate could obtain a \$10,000 actual damage award. The majority also ruled that double costs were authorized and that the estate could obtain attorney fees as “costs of investigation and litigation” under § 895.466(3)(b). However, a majority ruled that the appeals court did not commit an error in reversing the circuit court’s award of \$20,000 in exemplary damages.

1. One of the five alternatives in parenthesis should be selected. The rest of the instruction is drafted for a case where the act is alleged to be “takes and carries away,” which, in the Committee’s judgment, is the most commonly charged alternative.

In State v. Genova, 77 Wis,2d 141, 252 N.W.2d 380 (1977), the Wisconsin Supreme Court approved the construction of the theft statute adopted in Wis JI-Criminal 1441. A theft charge had been dismissed on the basis that the complaint charged only that the defendant had transferred property and no that he had taken the property and transferred it. The Wisconsin Supreme Court held that the complaint had been sufficient in charging only “transfer.” The statute should be read as though the following “ors” appeared in it: takes and carries away, or transfers, or conceals, or retains. A violation of the statute need not include a taking from the owner.

2. Define “movable property of another” if necessary. The term is defined as follows in §§ 939.22(28) and 943.20(2)(c):

939.22(28) “Property of another” means property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property.

943.20(2)(c): “Property of another” includes property in which the actor is a co-owner and property of a partnership of which the actor is a member, unless the actor and the victim are husband and wife.

3. “Intentionally” also is satisfied if the person “is aware that his or her conduct is practically certain to cause [the] result.” In the context of this offense, it is unlikely that the “practically certain” alternative will apply so it has been left out of the text of this instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

4. This is based on the definition of “movable property” in §943.20(2)(a) which provides:

(a) “Movable property” is property whose physical location can be changed, without limitation including electricity and gas, documents which represent or embody intangible rights, and things growing on, affixed to or found in land.

Section 943.20(2) defines “property” as follows:

(b) “Property” means all forms of tangible property, whether real or personal, without limitation including electricity and gas, documents which represent or embody a chose in action or other intangible rights.

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

6. Knowledge that the taking was without consent is required because the definition of this offense begins with the word “intentionally.” Section 939.23(3) provides that the word “intentionally” requires knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word “intentionally” in the statute.