

**402 PARTY TO CRIME: DEFENDANT EITHER DIRECTLY COMMITTED, INTENTIONALLY AIDED, OR WAS A MEMBER OF A CONSPIRACY TO COMMIT THE CRIME CHARGED**

**Party to a Crime**

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

**Three Ways in Which Defendant Can Be a Party to a Crime**

The State contends<sup>1</sup> that the defendant was concerned in the commission of the crime of (name crime charged) in one of the following three ways:

- 1) by directly committing it;
- 2) by intentionally aiding and abetting the person who directly committed it; or,
- 3) by being a member of a conspiracy to commit the crime.

If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it. And if a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime.

**Definition of Aiding and Abetting**

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name crime charged), the defendant must know that another person is committing or intends to commit the crime of (name crime charged) and have the purpose to assist the commission of that crime.<sup>2</sup>

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

### **Definition of Being A Member of a Conspiracy**

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

If a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime.<sup>4</sup>

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

### **State's Burden of Proof – Party To A Crime**

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant directly committed the crime of (name crime charged), intentionally aided and abetted the commission of that crime, or was a member of a conspiracy to commit that crime.

### **Unanimous Agreement Not Required Regarding Theory Of Party To A Crime**

All twelve jurors do not have to agree whether the defendant directly committed, intentionally aided and abetted, or was a member of a conspiracy to commit the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those three ways.<sup>5</sup>

### **Statutory Definition of the Crime**

(Name crime charged), as defined in § \_\_\_\_\_ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the crime).<sup>6</sup>

### **State's Burden of Proof**

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following \_\_\_\_\_<sup>7</sup> elements of (name crime charged) were present.

### **Elements of the Crime That the State Must Prove**

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "THE DEFENDANT OR (NAME OF OTHER PERSON)" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE DEFENDANT OR ANOTHER PERSON."<sup>8</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that the defendant directly committed all \_\_\_\_\_<sup>9</sup> elements of (name crime charged), or that the defendant intentionally aided and abetted the commission of that crime, or that the defendant was a member of a conspiracy to commit that crime and the crime was committed by a member of the conspiracy [and that the defendant did not withdraw before the crime was committed],<sup>10</sup> you should find the defendant guilty.

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

**COMMENT**

Wis JI-Criminal 402 was approved by the Committee in April 2005.

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

In addition to providing separate instructions, the 1994 revision provided more specifically for integrating the elements of the underlying crime with facts required for party to crime liability. This structure is believed to be more effective in emphasizing that someone, if not the defendant charged in the instant case, directly committed the crime. Instructions illustrating how several of the models would be implemented are also provided, titled "EXAMPLE."

This instruction is one of three in the series that provide for submitting more than one theory of liability to the jury. Wis JI-Criminal 400 is drafted for a case where directly committing the crime and intentionally aiding and abetting are submitted. Wis JI-Criminal 401 is drafted for the case where aiding and abetting and being a member of a conspiracy are submitted. This instruction is drafted for the case where all three theories are supported by the evidence.

For an illustration of how this instruction would be applied in a burglary case, see Wis JI-Criminal 402 EXAMPLE.

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

2. The definition of "intentionally" deals with the clear-cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis JI-Criminal 923A. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

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

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

4. There is a question in the law of conspiracy whether a person must have sufficient interest in the outcome to amount to a "stake in the venture." There is an extensive discussion of this issue in note 3, Wis JI-Criminal 410.

5. The jurors need not be instructed that they must unanimously agree on the basis of liability, that is, whether the defendant directly committed the crime or aided and abetted its commission. Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).
6. Here summarize the definition of the underlying crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.
7. Insert the appropriate number of elements from the uniform instruction for the crime charged.
8. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of either the defendant or another person committing the crime rather than by using only "the defendant." In the type of party to crime case covered by this instruction, either the defendant or the other person may have directly committed the crime.
9. Insert the appropriate number of elements from the uniform instruction for the crime charged.
10. The material in brackets should be added if the jury was instructed on withdrawal from a conspiracy. See § 939.05(2)(c) and Wis JI-Criminal 412.