406 PARTY TO CRIME: AIDING AND ABETTING: THE CRIME CHARGED IS THE NATURAL AND PROBABLE CONSEQUENCE OF THE INTENDED CRIME

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.

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) by intentionally aiding and abetting the person who directly committed it. 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. A person who intentionally aids and abets the commission of one crime is also guilty of any other crime which is committed as a natural and probable consequence of the intended crime.

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 intentionally aided and abetted the commission of the crime of (name intended crime), that (name charged crime) was committed, and that under the circumstances, (name charged crime) was a natural and probable consequence of the (name intended 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.

[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.]

First consider whether the defendant intentionally aided and abetted the crime of (name intended crime).

Statutory Definition of the Intended Crime

(Name intended crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the intended crime).[2]

State's Burden of Proof – Intended Crime

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[3] elements of (name intended crime) were present.

Elements of the Intended Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE INTENDED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE THE NAME OF THE PERSON WHO DIRECTLY COMMITTED THE CRIME IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE PERSON" OR "THE OTHER PERSON."[4]

Next consider whether the crime of (name charged crime) was committed.

Statutory Definition of the Charged Crime

(Name charged crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the charged crime).[5]

State's Burden of Proof – Charged Crime

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[6] elements of (name charged crime) were present.

Elements of the Charged 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."[7]

Natural and Probable Consequences

Finally, consider whether under the circumstances (name charged crime) was a natural and probable consequence of (name intended crime).[8]

A crime is a natural and probable consequence of another crime if, in the light of ordinary experience, it was a result to be expected, not an extraordinary or surprising result. The probability that one crime would result from another should be judged by the facts and circumstances known to the defendant at the time the events occurred. If the defendant knew, or if a reasonable person in the defendant's position would have known, that the crime of (name charged crime) was likely to result from the commission of (name intended crime), then you may find that under the circumstances (name charged crime) was a natural and probable consequence of (name intended crime).

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of the crime of (name intended crime), that (name charged crime) was committed, and that under the circumstances, (name charged crime) was a natural and probable consequence of the (name intended crime), you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 406 was originally published in 1994. This revision was approved the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

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.

This instruction is intended for the case where the defendant is alleged to be guilty as a party to a crime on the theory that he or she intentionally aided and abetted a crime, of which the charged crime is a natural and probable consequence. For an example of such a case, see State v. Ivy, 119 Wis.2d 591, 350 N.W.2d 622 (1984). Other cases recognizing this theory are State v. Cydzik, 60 Wis.2d 683, 211 N.W.2d 421 (1973), and State v. Asfoor, 75 Wis.2d 411, 249 N.W.2d 529 (1977).

For an illustration of how this model would be applied to a case with first degree intentional homicide as a natural and probable consequence of armed robbery, see Wis JI-Criminal 406 EXAMPLE.

In State v. Hoover, 2003 WI App 117, 265 Wis.2d 607, 666 N.W.2d 74, the court found an instruction to be adequate even though it did not define the intended crime. The court noted that "it would be advisable" to give a brief summary of the intended crime. Id. at ¶33. The instruction goes farther, in that it calls for including complete definitions of the intended crime and the charged crime.

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. Here summarize the definition of the intended crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

3. Insert the appropriate number of elements from the uniform instruction for the intended crime.

4. The primary change required in integrating the instruction for the intended crime is to phrase it in terms of another person committing the crime rather than to use "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime.

If the name of the principal is known, it should be used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" the first time reference is made and "the person" or "that person" for the other references.

5. Here summarize the definition of the charged crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

6. Insert the appropriate number of elements from the uniform instruction for the crime charged.

7. The primary change required in integrating the instruction for the charged crime is to phrase it in terms of another person committing the crime rather than to use "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime.

If the name of the principal is known, it should be used throughout the instruction. If the case presents the unusual situation where the name of the principal is now known, use "another person" the first time reference is made and "the person" or "that person" for the other references.

8. The Committee concluded that whether one crime is a "natural and probable consequence" of another is an issue of fact to be determined by reference to the circumstances of each case. This is consistent with the approach of the Wisconsin Supreme Court in State v. Ivy, 119 Wis.2d 591, 350 N.W.2d 622 (1984) (reversing 115 Wis.2d 645, 341 N.W.2d 408 (Ct. App. 1983)). Neither Ivy nor the other decisions dealing with the "natural and probable consequences" theory provide a definition of that term. The definition in the instruction was developed after extensive deliberation and review. It equates "natural and probable consequences" with foreseeability, evaluated from the point of view of one in the defendant's position at the time of the alleged offense. This type of definition is consistent with the use of the term in tort law:

> Natural and probable consequences. To some extent there are difficulties of language. Many courts have said that the defendant is liable only if the harm suffered is the "natural and probable" consequence of his act. These words frequently appear to have been given no more definite meaning than "proximate" itself. Strictly speaking, all consequences are "natural" which occur through the operation of forces of nature, without human intervention. But the word, as used, obviously appears not to be intended to mean this at all, but to refer to consequences which are normal, not extraordinary, not surprising in the light of ordinary experience. "Probable," if it is to add anything to this, must refer to consequences which were to be anticipated at the time of the defendant's conduct. The phrase therefore appears to come out as the equivalent of the test of foreseeability, of consequences within the scope of the original risk, so that the likelihood of their occurrence was a factor in making the defendant negligent in the first instance.

Prosser, The Law of Torts, 4th ed., p. 252 (West 1971).

If foreseeability is required in the context of negligence, the Committee reasoned that its equivalent, at a minimum, must be applicable in criminal cases employing the "natural and probable consequence" theory.

