

570 CONSPIRACY AS A CRIME — § 939.31**Statutory Definition of the Crime**

The crime of conspiracy, as defined in § 939.31 of the Criminal Code of Wisconsin, is committed by one who, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime, if one or more of the parties to the conspiracy does an act to effect its object.

The defendant in this case is charged with having conspired to commit the crime of (name of crime).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intended that the crime of (name of crime) be committed.

The crime of (name of crime) is committed by one who

[DEFINE THE CRIME INVOLVED, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE.]¹

2. The defendant was a member of a conspiracy to commit the crime of (name of crime).

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. 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.

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE:

[As long as the parties agreed or combined by their words or actions, and the defendant intended that the agreement be carried out, it is not necessary that the other person intended to carry out the agreement.]²

3. One or more of the conspirators performed an act toward the commission of the intended crime that went beyond mere planning and agreement.

However, the act need not, by itself, be an unlawful act or an attempt to commit the crime. If there was an act which was a step toward accomplishing the criminal objective, that is sufficient.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent 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.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 570 was originally published in 1962 and revised in 1994, 1998, and 2001. This revision was approved by the Committee in October 2007 and involved a minor correction in the text and additions to the Comment.

This instruction is for the inchoate crime of conspiracy, as defined in § 939.31. Liability as a party to crime under § 939.05, based on conspiring to commit a crime, is addressed by Wis JI-Criminal 410 - 412.

Conspiracy under § 939.31 carries the same penalty as that for the completed crime, except that conspiracy to commit a crime punishable by life imprisonment is a Class B felony.

In a case dealing with a charge of conspiracy to deliver a controlled substance under § 961.41(1x), the Wisconsin Supreme Court held that a conspiracy is not established by proof only of an agreement between a buyer and a seller for a delivery of a small amount of controlled substance for personal use by the buyer. State v. Smith, 189 Wis.2d 496, 498, 525 N.W.2d 264 (1995). In Smith, there was no claim that the buyer intended to deliver the cocaine to third party. The court concluded that "the legislature did not intend a buyer-seller relationship for a small amount of cocaine for the buyer's personal use to be a conspiracy. . . ." 189 Wis.2d 496, 501. For a case where there was sufficient evidence of an agreement to furnish drugs to a third party, see State v. Cavallari, 214 Wis.2d 42, 571 N.W.2d 176 (Ct. App. 1997). Also see State v. Ray, 166 Wis.2d 855, 481 N.W.2d 855 (Ct. App. 1992), and State v. Blalock, 150 Wis.2d 688, 442 N.W.2d 514 (Ct. App. 1989).

In another case involving a charge of conspiracy under § 961.41(1x) [which incorporates § 939.31 by reference], the court found the evidence sufficient to support a finding of conspiracy to manufacture psilocybin/psilocin based on the sale of a single "grow kit." State v. Routon, 2007 WI App 178, 304 Wis.2d 480, 736 N.W.2d 530. Routon also discussed the Wisconsin rule that a "stake in the venture" is not a necessary element of a conspiracy. See Wis JI-Criminal 410, footnote 3, which discusses the leading cases referred to in Routon: United States v. Falcone, 109 F.2d 579 (CCA 2d, 1940); and, Direct Sales Co. v. United States, 319 U.S. 703 (1943).

For a decision ordering withdrawal of a guilty plea because a factual basis for conspiracy was lacking, see State v. West, 214 Wis.2d 467, 571 N.W.2d 196 (Ct. App. 1997).

Venue in a conspiracy case is established under § 971.19(2) in any county where an act to effect the object of the conspiracy took place. State v. Cavallari, *supra* at 55.

Withdrawal Is Not A Defense

Though there is not direct authority on point, the Committee has concluded that withdrawal or renunciation is not a defense to the inchoate crime of conspiracy as defined in § 939.31. In closely related situations, Wisconsin appellate courts have held that extending a defense of withdrawal to inchoate crimes requires specific statutory authority. State v. Boehm, 127 Wis.2d 351, 354, 379 N.W.2d 874 (Ct. App. 1985) addressed solicitation under § 939.30: "Renunciation or withdrawal cannot undo that which has been done and therefore has no effect on the elements of solicitation, once completed. Renunciation or withdrawal therefore cannot be a defense to the completed crime of solicitation, in the absence of a statute."

State v. Stewart, 143 Wis.2d 28, 45-46, 420 N.W.2d 44 (1988) addressed attempt under § 939.32: "We conclude that if the legislature had intended voluntary abandonment to be a defense, it would have expressly said so. We do not believe this court should distort the statutory language to incorporate the defense. The public policy arguments in favor of the defense are better addressed to the legislature than to the court."

Drafts of the Wisconsin criminal code revisions of 1950 and 1953 contained a separate provision that would have reduced the penalty for conspiracy, solicitation, and attempt for defendants who voluntarily changed their minds and took steps which prevented the completion of the crime. Those provisions were not part of the revised criminal code adopted in 1956. See § 339.20, 1950 Report of the Wisconsin Legislative Council; § 339.33, 1953 Report of the Wisconsin Legislative Council.

Section 939.05, which addresses liability as a party to a crime, does have a provision relating to withdrawal from conspiracy or solicitation. Section 939.05(2)(c) provides that withdrawal can excuse a defendant from liability for completed crimes committed by other parties after the withdrawal. Section 939.05 was part of the criminal code revision enacted in 1956. Comments to the drafts stated that "a co-conspirator or solicitor who withdraws is responsible only for the crimes of conspiracy or solicitation." See, § 339.33, 1953 Report of the Wisconsin Legislative Council.

Professor LaFave addresses the issue as follows:

The traditional rule here "is strict and inflexible: since the crime is complete with the agreement, no subsequent action can exonerate the conspirator of that crime." [Citing Model Penal Code § 5.03, Comment at 457 (1985).] In those jurisdictions which have added by statute an overt act requirement, the defendant is not punishable as a member of the conspiracy only if he withdraws before the overt act has been committed, but this is not significantly different from the common law rule.

LaFave, Substantive Criminal Law 2nd Ed., §12.4(b) (West 2003).

The Committee concluded that the rule articulated above applies in Wisconsin. Once the inchoate crime of conspiracy is completed – which in Wisconsin requires an agreement and an "act toward the commission of the intended crime" – withdrawal is not a defense. Evidence relating to withdrawal, however, may be relevant to the elements of the inchoate crime: whether the defendant was a member of the conspiracy when the "act toward the commission of the intended crime" was committed; and, whether the defendant intended that the crime be committed.

1. If the instruction on the intended crime involves considerable elaboration, it may aid jury understanding to move this description to the end of the instruction, immediately preceding the "Jury's Decision" paragraphs.

2. This is intended for the type of case considered in State v. Sample, 215 Wis.2d 487, 573 N.W.2d 187 (1998), where the conspiracy involved a feigned agreement by an undercover police officer, who furnished drugs that the defendant planned to deliver to a jail inmate. The Sample decision held that the "unilateral" approach to conspiracy applies under § 939.31 of the Wisconsin Statutes. Under that approach, "criminal conspiracy will lie even where one of the alleged 'co-conspirators' is, unknown to the defendant, an undercover police agent or a police informant who merely feigns participation in the conspiracy." Sample, 215 Wis.2d 486, 495-96. Put another way, § 939.31 adopts a subjective approach focusing on the criminal intent of the defendant.