

985 CRIMINAL GANG CRIMES — § 939.625

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of (offense charged) but also that the defendant did so for the benefit of, at the direction of, or in association with any criminal gang, with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members.

If you find the defendant guilty, you must answer the following question:

"Did the defendant commit the crime of (offense charged)¹ for the benefit of, at the direction of, or in association with any criminal gang, with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members?"

Before you may answer this question "yes," the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements are present.

The first element requires that the defendant committed the crime of (offense charged) for the benefit of, at the direction of, or in association with a criminal gang.

"Criminal gang" requires proof of all of the following:²

- (1) an ongoing organization, association, or group of three or more persons, whether formal or informal;
- (2) that has a common name or a common identifying sign or symbol;

(3) that has as one of its primary activities the commission of one or more of the following criminal acts: (specify crime or crimes listed in § 939.22(21)(a) to (s) ; and

(4) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

"Pattern of criminal gang activity" means the commission³ of two or more of the following crimes within three years of one another: (specify crime or crimes listed in § 939.22(21)(a) to (s) .⁴

These crimes must have been committed either on separate occasions or, if committed on the same occasion, by two or more persons.

[The crime of (specify crime or crimes listed in § 939.22(21)(a) to (s) requires. . . .]⁵

The second element requires that the defendant committed the crime of (offense charged) with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members.⁶ This requires that the defendant acted with the purpose to promote, further, or assist criminal gang members in committing crimes.

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of (offense charged) for the benefit of, at the direction of, or in association with any criminal gang, and with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 985 was originally published in 1996. This revision was approved by the Committee in February 2003.

Section 939.625 was repealed by 2001 Wisconsin Act 109, effective February 1, 2003. Wis JI-Criminal 985 is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by § 939.625 have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(3)(c).

1. Here insert the name of the offense charged. It would be possible for the jury to find the defendant guilty of a lesser included offense. If a lesser included offense is submitted, and if the evidence supports a finding that it was a gang crime, the instruction should be changed to read: "Did the defendant commit the crime of [charged crime] or a lesser included offense for the benefit of . . ."

2. The definition is based on the one provided in § 939.22(9).

3. The instruction selects "commission of" crimes from the statutory alternatives which include "attempt to commit" and "solicitation to commit." The selection was made in an attempt to simplify the instruction and make it more understandable. If attempts or solicitations are involved, the model must, of course, be modified.

4. The concluding portion of the definition of "criminal gang" in § 939.22(9) refers to engaging in "a pattern of criminal gang activity." "Pattern of criminal gang activity" is in turn defined in § 939.22(21) as committing two or more of the crimes listed in the definition within three years of one another and on separate occasions or by two or more person. The instruction builds in this definition without separately referring to the "pattern of criminal gang activity."

"Pattern" is also used in Wisconsin's "RICO" statute. See § 946.83. Wis JI-Criminal 1881, at footnote 4, includes a discussion of the principles found inherent in the concept of "pattern" in decisions of the United States Supreme Court interpreting the federal RICO statute.

5. Because the definition of "gang activity" includes the requirement that particular crimes have been committed, it appears to be necessary for the jury to find that those crimes were in fact committed. It may be helpful to refer to the uniform jury instruction for the offense or offenses involved for a summary of the elements or a more complete description of the elements, as needed.

In an analogous situation, the Wisconsin Court of Appeals held that it was error to fail to instruct sufficiently on the crime committed against the victim where the charge was intimidation of a victim under § 940.44. That statute requires the target of the intimidation be a "victim," defined as a "person against whom any crime . . . has been perpetrated . . ." The jury in a case involving this charge "should have been told that it could not find the defendant guilty . . . unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt." *State v. Thomas*, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991) [discussed in footnote 8, Wis JI-Criminal 1294].

6. "Criminal gang member" is defined in § 939.22(9g) as "any person who participates in criminal gang activity, as defined in s. 941.38(1)(b), with a criminal gang." A definition combining these statutes might read as follows:

"Criminal gang member" means a person who commits, attempts to commit, or solicits another to commit one or more of the following crimes, committed for the benefit of, at the direction of or in association with any criminal gang, with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members: (specify crime or crimes listed in § 941.38(1)(b)).

The Committee concluded that separately defining "criminal gang member" in the instruction was unnecessary, since the "gang members" being referred to are those the defendant allegedly intended to assist, etc. The jury is likely to have a common understanding of "gang member" that is not helped by the elucidation attempted in the statutes. To the extent there is a difference, the common understanding is probably more limited, and thus to the defendant's advantage, than the statutory definition. The latter does not appear to require that the persons be "members" of a gang in the common meaning of the term; it is sufficient that they be involved in crimes intended to benefit a gang.