

994 CONCEALING IDENTITY — § 939.641

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 _____ but also that he did so while his appearance was (concealed) (disguised) (altered)¹ with the intent to make it less likely that he would be identified with that crime.

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

"Did the defendant commit the crime of _____ while (concealing) (disguising) (altering) his identity with intent to make it less likely that he would be identified with that crime?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that both of the following facts were established:

First, that the defendant's appearance was (concealed) (disguised) (altered) at the time that he committed the crime of _____; and

Second, that the defendant so (concealed) (disguised) (altered) his appearance with the intent to make it less likely that he would be identified with the crime of _____.

This means that he must have had the purpose to make it less likely that he would be identified with the crime of _____.² You cannot look into the mind of the

defendant to find intent. Rather you must find it, if you find it at all, from acts and words and statements bearing on such intent.

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of _____ while his appearance was (concealed) (disguised) (altered) and that he so (concealed) (disguised) (altered) his appearance with the intent to make it less likely that he would be identified with the crime of _____, you should answer the question "yes."

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

COMMENT

Wis JI-Criminal 994 is Wis JI-Criminal 1805 (© 1981) renumbered. Wis JI-Criminal 1805 was originally published in 1974; it was revised in 1979 and 1981. It was republished as Wis JI-Criminal 994 in 1986 and revised in 1990. This revision was approved by the Committee in February 2003.

Section 939.641 was repealed by 2001 Wisconsin Act 109, effective February 1, 2003. This instruction is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by § 939.641 have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(3)(a).

The renumbering of the instruction in 1986 followed the renumbering of the statute from § 946.62 to § 939.641 by 1985 Wisconsin Act 104 (effective date: November 28, 1985). The renumbering of the statute clarifies the status of "concealing identity" by placing it in the section of the Criminal Code that contains other penalty-increasing factors like using a weapon (' 939.63) and using a bulletproof garment (' 939.64).

This statutory change concluded the process of clarifying the status of "concealing identity" as a factor that increases the penalty for the underlying crime as opposed to constituting a separate criminal offense. The 1974 and 1979 versions of Wis JI-Criminal 1805 characterized concealing identity as a separate offense, upon conviction for which the defendant could have received a consecutive or concurrent sentence. This characterization was no longer correct in light of the decision of the Wisconsin Supreme Court in Robinson v. State, 102 Wis.2d 343, 306 N.W.2d 668 (1981), which held that concealing identity may not be charged as a separate crime or be punished by imposing a separate sentence. The 1981 version of Wis JI-Criminal 1805 reflected the court's conclusion in Robinson.

The Committee recommends that facts which increase the range of penalties be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant commit the crime of _____ while (concealing) (disguising) (altering) his identity with intent to make it less likely that he would be identified with that crime?"

1. While the usual method of disguise is the wearing of a mask, the section is broad enough to cover the use of other means of concealing, disguising, or altering one's usual appearance to make it less likely to be identified with a crime. See Vol. V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 197 (February 1953).

The Committee concluded that the terms "concealed, disguised, and altered" are used in § 946.62 as synonyms, not to describe conceptually distinct acts. In instructing the jury, the word should be selected which most accurately describes the defendant's alleged conduct. If it is necessary to use more than one term in the instruction, the Committee concluded that the jury need not be instructed that they must unanimously agree on which term applies.

One may be found guilty, as a party to the crime, of committing a crime with identity concealed when he himself was not masked during the commission of the crime. Schroeder v. State, 96 Wis.2d 1, 291 N.W.2d 460 (1980).

2. "With intent to" is defined in § 939.23(4). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one part of the definition. It is the other alternative that changed from "believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.