1281 KIDNAPPING — § 940.31(1)(b)

Statutory Definition of the Crime

Kidnapping, as defined in § 940.31(1)(b) of the Criminal Code of Wisconsin, is committed by one who, by force or threat of imminent force, seizes or confines another person without consent and with intent to cause (him) (her) to be secretly confined or imprisoned or to be carried out of this state or to be held to service against (his) (her) will.

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 four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (seized) (confined)[1] (name of victim) .
2. The defendant (seized) (confined) (name of victim) without (his) (her) consent.
3. The defendant (seized) (confined) (name of victim) forcibly.
4. The defendant (seized) (confined) (name of victim) with intent that[2] (name of victim) be (secretly confined) (secretly imprisoned) (transported out of this state) (held to service against (his) (her) will).[3]

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.[4]

Meaning of "Confined" or "Restrained"[5]

Although this requires genuine restraint or confinement, it does not require that it be in a jail or prison. If the defendant deprived (name of victim) of freedom of movement, or compelled (him) (her) to remain where (he) (she) did not wish to remain, then (name of victim) was confined or restrained. The use of physical force is not required. One may be confined or restrained by acts or words or both.

ADD THE FOLLOWING IF THE ISSUE OF "ESCAPE" IS RAISED BY THE EVIDENCE:[6]

[A person is not confined or restrained if (he) (she) knew (he) (she) could have avoided it by taking reasonable action.]

[A reasonable opportunity to escape does not change confinement or restraint that has occurred.]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[7]

[Meaning of "Without Consent"]

["Without consent," as used here, means that there was no consent in fact or that consent was given by (name of victim) because of fear caused by the defendant's use or threat of imminent use of physical violence on ((name of victim)) (on another person in the presence of (name of victim)) (on a member of (name of victim) 's immediate family).]

Meaning of "Forcibly"

"Forcibly" means that the defendant actually used force or threatened the use of imminent force to overcome or to prevent (name of victim) 's resistance to being (seized) (confined).[8] "Imminent" means "near at hand" or "on the point of happening."[9]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[10]

["Forcibly" includes the (use of) (threat to use) force directed at a (third person in the presence of) (member of the immediate family of) (name of victim) if that (use of) (threat to use) force results in the (seizing) (confining) of (name of victim) .

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four 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.

ADD THE FOLLOWING[11] IF DEFENDANT HAS BEEN CHARGED UNDER § 940.31(2): COMMITTING THE OFFENSE WITH INTENT TO CAUSE ANOTHER TO TRANSFER PROPERTY TO OBTAIN THE VICTIM'S RELEASE.

If you find the defendant guilty of kidnapping, you must consider the following question:

"Did the defendant commit this offense with intent to cause another person to transfer money or other form of property[12] in order to obtain the release of (name of victim) ?"

Before you may answer this question "yes," the State must satisfy you beyond a reasonable doubt that the defendant committed this offense with the intent to cause another

person to transfer money or other form of property in order to obtain the release of (name of victim) . You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts and words and statements, if any, bearing on his intent.

If you are satisfied beyond a reasonable doubt that the defendant committed this offense with the intent to cause another person to transfer money or other form of property in order to obtain the release of (name of victim) , you should answer this question "yes."

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

ADD THE FOLLOWING[13] IF THERE IS SOME EVIDENCE IN THE CASE THAT THE VICTIM WAS RELEASED WITHOUT PERMANENT PHYSICAL INJURY.

If you answer the first question "yes," you must consider the following question:

"Did the defendant fail to release (name of victim) without permanent physical injury (prior to the time the first witness was sworn at trial)?"[14]

The burden is on the State to satisfy you beyond a reasonable doubt that the defendant did not release (name of victim) without permanent physical injury (prior to the first witness being sworn at trial).[15] If you are so satisfied, you should answer this question "yes."

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

COMMENT

Wis JI-Criminal 1281 was originally published in 1980 and revised in 1990 and 2006. This revision was approved by the Committee in June 2015; it involved a nonsubstantive change to the text and additions to footnotes 3 and 6.

Section 940.31 defines the offense of kidnapping and provides that it may be committed in three ways, see subsections (1)(a), (1)(b), and (1)(c). This instruction deals with an offense under subsection (1)(b). For violations of subsection (1)(a), see Wis JI-Criminal 1280. For violations of subsection (1)(c), see Wis JI-Criminal 1282.

Basic violations of §940.31 are Class C felonies. This instruction also deals with the aggravating and mitigating factors provided for in subsection (2). The penalty classification for the offense is increased to a Class B felony if committed for ransom. The penalty classification for the aggravated offense is reduced back to a Class C felony if the victim is released without injury prior to trial. The Committee recommends handling both the aggravating and mitigating factors by submitting separate questions to the jury, see notes 11 and 13, below.

In State v. Simplot, 180 Wis.2d 383, 509 N.W.2d 338 (Ct. App. 1993), the court addressed the application of the kidnapping statute to a defendant who claimed to be acting as an agent of the parent of the child who was kidnapped. The defendant claimed he had a defense because a parent is immune from prosecution for kidnapping and he shared the same immunity when acting as the parents' agent. The Wisconsin Court of Appeals rejected this argument, adopting what the court characterized as the minority view which refuses to extend the parent's immunity to an agent.

Although kidnapping is sometimes referred to as "aggravated false imprisonment" (see, for example, 1953 Judiciary Committee Report on the Criminal Code, page 72), false imprisonment is not a lesser included offense of kidnapping. Geitner v. State, 59 Wis.2d 128, 207 N.W.2d 837 (1973).

1. The Committee recommends that one of the alternatives be elected but does not conclude that an instruction joining the two alternatives in the disjunctive would be error. See Clark v. State, 92 Wis.2d 617, 642, 286 N.W.2d 344 (1979), and discussion at note 8, below.

2. Under § 939.23(4), "with intent that" is defined to mean "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B for further discussion.

3. In State v. Clement, 153 Wis.2d 287, 450 N.W.2d 789 (Ct. App. 1989), the court held that the word "service" in the phrase "hold to service against his will" is unambiguous on its face: it "includes acts done at the command of another. It clearly embraces sexual acts performed at the command of another." 153 Wis.2d 287, 293. Also see, State v. Wagner, 191 Wis.2d 322, 329, 528 N.W.2d 85 (Ct. App. 1995). In State v. Denton, 2009 WI App 78, 319 Wis.2d 718, 768 N.W.2d 250, the court applied the Clement standard in rejecting the defendant's argument that "held to service" for purposes of kidnapping should be limited to "forced labor or involuntary servitude." The word "service" includes "acts done at the command of another." 319 Wis.2d 718, 739.

4. The basis for the knowledge requirement in the fifth element is the provision in § 939.23(3) which states that when the word "intentionally" is used in a criminal statute, it requires "knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'."

5. The definition of "confined or restrained" is the one used in Wis JI-Criminal 1275 False Imprisonment. In State v. Burroughs, 2002 WI App 18, 250 Wis.2d 180, 640 N.W.2d 190, the court viewed "the false imprisonment statute as a cousin to Wis. Stat. s. 940.31(1), the kidnapping statute. . . . We therefore are satisfied that the definition of 'confine' as set forth in Wis JI-Criminal 1275 is also appropriate for cases alleging kidnapping pursuant to s. 940.31." ¶19.

6. As with the definition of "confined or restrained" – see footnote 5, supra – the bracketed paragraphs are based on Wis JI-Criminal 1275, False Imprisonment. One or both should be used only when the issue of "escape" is raised by the evidence. They replace a statement in the 1971 version of Wis JI-Criminal 1275 to the effect that "if there is some reasonable means of escape, there is no confinement or restraint." The Committee concluded that this statement was potentially confusing if literally applied. The word "escape" implies leaving a situation of confinement or restraint. Yet once there is confinement or restraint, that aspect of the crime of false imprisonment – or kidnapping – is complete, and a later escape would not affect it. This is the concept expressed in the second bracketed paragraph.

In the Committee's judgment, the relevance of escape is more accurately expressed in terms of actions that could reasonably have been taken to avoid confinement or restraint. This is the concept expressed in the first bracketed paragraph.

The "reasonable means of escape" issue as it applies to false imprisonment was discussed in State v. C.V.C., 153 Wis.2d 145, 450 N.W.2d 463 (Ct. App. 1989). The court relied on a standard from the Restatement of Torts to determine whether a victim had a "reasonable means of escape":

> Since the actor has intended to imprison the other, the other is not required to run any risk of harm to his person or to his chattels or of subjecting himself to any substantial liability to a third person in order to relieve the actor from a liability to which his intentional misconduct has subjected him. So too, even though there may be a perfectly safe avenue of escape, the other is not required to take it if the circumstances are such as to make it offensive to a reasonable sense of decency or personal dignity.

Restatement (Second) of Torts, sec. 36 comment a. (1978).

The standard had previously been applied in a civil false imprisonment case. Herbst v. Wuennenberg, 83 Wis.2d 768, 778-79, 266 N.W.2d 391 (1978). In C.V.C., the court concluded that "the victim was not required to take steps dangerous to herself or offensive to a reasonable sense of decency or personal dignity to free herself in order for the state to prove restraint or confinement. . . ." 153 Wis.2d 145, 150. Also see the Comment to § 340.25 in Volume V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 71 (February 1953).

7. "Without consent" is defined in § 939.22(48). The material in brackets reflects the rule stated in § 939.22(48)(a) and has been included because the use of force, required as an element of the crime of kidnapping, will often be relevant to the consent issue as well. When the bracketed material is used, additional explanation is recommended, especially where consent was given because of threats to a third person or family member.

8. This paragraph restates the statutory requirement that the defendant act "by force or threat of imminent force" by phrasing them as alternative ways of satisfying the core requirement that the defendant act "forcibly." The Committee has concluded that this properly emphasizes the intent of the statute to require a link between the transporting of the victim and the defendant's use of force. The Committee has concluded that it is not necessary to elect between "use of force" and "threat of imminent force" alternatives, although in the usual case election would clarify the issue for the jury and should be done where possible. In support of the proposition that election is not necessary, see Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979), and Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

9. The definition of "imminent" is adapted from the one provided in Black's Law Dictionary, p. 884 (4th ed., 1981).

10. The seizing, confining, or restraining of the victim must be accomplished by force or threat of imminent force. The Committee has concluded that this element may be satisfied when the use or threat of force is directed at a third person or family member as well as if it is directed at the victim. This is based on analogy with the definition of "without consent" in § 939.22(48), see note 7, supra.

11. Section 940.31(2) provides for an increased penalty (from a Class C to a Class B felony) if the offense is committed for ransom. Where the aggravated offense is charged, the Committee recommends that a separate question be submitted to the jury if they find the defendant committed the basic offense. The following should be added to the standard verdict form:

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

Did the defendant commit this offense with intent to cause another to transfer money or other form or property in order to obtain the release of (name of victim) ?

12. The statute refers simply to the transfer of "property"; the Committee concluded that since money will be involved in most cases, it is proper to refer directly to "money" in the instruction. If further definition of "property" is required, see §§ 943.20(2) and 990.01(27) and (31).

13. Section 940.31(2) provides that where the defendant committed the offense for ransom (see note 11, supra), the penalty may be reduced back to the penalty for simple kidnapping (Class C felony) if the victim was released without permanent physical injury prior to the first witness being sworn at trial. This mitigating circumstance operates only if the defendant is found guilty of committing the offense for ransom.

The Committee recommends that the issue be handled by submitting a separate question to the jury if they find the defendant guilty of the aggravated offense of kidnapping for ransom. The following should be added to the verdict form (as amended, see note 11, supra):

If you answer this question "yes," answer the following question "yes" or "no":

Did the defendant fail to release (name of victim) without permanent physical injury (prior to the time the first witness was sworn at trial)?

The Committee recommends the phrase in parentheses should be included only when the time of the release is an issue in the case, see note 14, below.

The additional instruction on the mitigating factor should be given whenever there is some evidence in the case that the victim was released without permanent physical injury. This evidence may be part of the state's case or may be presented by the defendant. The question is phrased in terms of the defendant's failure to release the victim in order to avoid any problems in shifting the burden of proof to the defendant. Once there is some evidence of a mitigating factor, the burden is on the state to prove the absence of that factor.

14. The Committee believes that the precise time of release of the victim will seldom be an issue and that the phrase in parentheses need not be read to the jury in most cases.

15. See note 14, supra.