

**1282 KIDNAPPING — § 940.31(1)(c)****Statutory Definition of the Crime**

Kidnapping, as defined in § 940.31(1)(c) of the Criminal Code of Wisconsin, is committed by one who by deceit induces another person to go from one place to another 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 three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant induced (name of victim) to go from one place to another.<sup>1</sup>
2. The defendant induced (name of victim) to go from one place to another by deceit.

["By deceit" requires that the defendant induced (name of victim) to go from one place to another by (making a false statement) (giving a false impression).]<sup>2</sup>

3. The defendant induced (name of victim) to go from one place to another with intent that<sup>3</sup> (name of victim) be (secretly confined) (secretly imprisoned) (transported out of this state) (held to service against (his) (her) will).<sup>4</sup>

### 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, 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.

ADD THE FOLLOWING<sup>5</sup> 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<sup>6</sup> 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<sup>7</sup> 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)?"<sup>8</sup>

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).<sup>9</sup> 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 1282 was originally published in 1980 and revised in 1990. This revision was approved by the Committee in April 2006 and involved adoption of a new format and nonsubstantive changes to the text.

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)(c). For violations of subsection (1)(a), see Wis JI-Criminal 1280. For violations of subsection (1)(b), see Wis JI-Criminal 1281.

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 9 and 11, 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. Section 940.31(1)(c) requires that the victim be induced to move "from one place to another." A question may arise as to how far the victim must be moved to sustain a charge of kidnapping. See discussion of this issue at note 2, Wis JI-Criminal 1280.

2. The term "deceit" as used in sec. 940.31(1)(c) was discussed in State v. Dalton, 98 Wis.2d 725, 298 N.W.2d 398 (Ct. App. 1980). Dalton appealed his conviction, claiming that he could not be convicted absent proof of express or implied misrepresentations. The court rejected his argument, holding that the use of "deceit," without further statutory definition shows legislative intent to avoid limiting it to express or implied misrepresentations. Rather, the legislature intended to proscribe "wily and cunning stratagems that are contrived to delude the victim and conceal the violator's intent to effectuate the crime" of kidnapping. 98 Wis.2d 725, 741.

At common law, "deceit" was generally used as an equivalent of "fraud" and typically had the following elements: a false representation; made with intent to induce another to act; relied on by another person; to the damage of that person. In general, see Wis JI-Civil 2401 and cases cited therein. Also see 37 Am.Jur.2d Fraud and Deceit (1968). This amounts to using a false representation or other deceptive practice. The Committee concluded the two alternatives in parentheses adequately cover the likely application of "by means of deceit." Garner, A Dictionary of Modern Legal Usage, 2d Edition (Oxford University Press 1995), defines deceit as the "act of giving a false impression."

3. 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.

4. 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).

5. 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)?

6. 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).

7. Section 940.31(2) provides that where the defendant committed the offense for ransom (see note 5, 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 5, 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 8, 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.

8. 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.

9. See note 8, supra.