

**1405 ARSON OF A BUILDING WITH INTENT TO DEFRAUD AN INSURER —
§ 943.02(1)(b)****Statutory Definition of the Crime**

Arson, as defined in § 943.02(1)(b) of the Criminal Code of Wisconsin, is committed by one who, by means of fire, intentionally damages any building with intent to defraud an insurer of that building.

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 two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally damaged a building¹ by means of fire.

"Damaged" means injured, charred, defaced, and includes smoke damage.²

"Intentionally" means that the defendant must have had the mental purpose to damage the building by means of fire or was aware that (his) (her) conduct was practically certain to cause damage to the building.³

2. The defendant damaged the building with intent to defraud an insurer of that building.

The intent to defraud is the mental purpose to deceive an insurer of the building, and thereby induce an insurer to make payment under a fire insurance

policy.⁴ This intent must have been formed at some time before the fire started and must have continued to exist at the time the fire started.⁵

ADD THE FOLLOWING PARAGRAPH WHEN THE VALIDITY OR EXISTENCE OF AN INSURANCE POLICY IS QUESTIONED:

[Whether in fact there was insurance coverage on the building is immaterial. It is sufficient that the defendant believed there was such coverage on the building.]⁶

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 both 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 1405 was originally published in 1969 and revised in 1977, 1983, and 1992. This revision was approved by the Committee in December 2007 and involved adoption of a new format and nonsubstantive changes to the text.

1. This instruction has never included a definition of "building." For an extensive discussion of the issue, see Wis JI-Criminal 1404, footnote 1.

2. "The word 'damage' includes, in addition to what is thought of as damage in the narrow sense, anything from mere defacement and mutilation to total destruction." 1953 Judiciary Committee Report on the Criminal Code, p. 97 (Wis. Legislative Council, 1953). The quoted material referred to "damage" as used in the criminal damage to property statute; the meaning of "damage" was considered to be the same for arson, which was called "Criminal Damage By Fire or Explosives" in the original 1953 draft of

the Criminal Code. Ibid, p. 99. The name of the offense was changed to "arson" before the draft was enacted. The recodification of the arson statutes was not intended to change the substantive law, although "by means of fire, intentionally damages," was substituted for "sets fire to or burns or causes to be burned" under the pre-1956 law. Bill Platz commented on this change in his law review article on the Criminal Code revision.

This change is not intended to produce any different result, although conceivably the new language could be construed to include smoke damage without actual charring. However, such cases should be prosecuted under Code § 943.01 [criminal damage to property], or as attempted arson under Code § 939.32 depending on the facts.

Platz, "The Criminal Code: Thumbnail History of the Code" 1956 Wis. Law Rev. 350, 374

The Committee concluded that any damage, including smoke damage, is sufficient under the arson statutes as long as the damage is caused "by means of fire."

3. This is the definition of "intentionally" provided in § 939.23(3). See also Wis JI-Criminal 923A and 923B for further discussion of "intentionally."

The footnote to the 1980 version of this instruction provided as follows: "The defendant may set fire to furniture with mental purpose to damage only the furniture; he may be found guilty of arson of the building though indifferent to that result." This statement was cited and applied in State v. Thompson, 146 Wis.2d 554, 431 N.W.2d 716 (Ct. App. 1988). The court found that the defendant's actions of placing crumpled newspapers against a wall under drapes and igniting them "manifest an intent to damage the building." 146 Wis.2d 554, 563. Also see State v. Dunn, 121 Wis.2d 389, 359 N.W.2d 151 (1984), discussing the sufficiency of the evidence at a preliminary examination to show intent to damage the building.

4. Vol. V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, p. 101.

Section 943.02(2) provides that recovery or attempt to recover on an insurance policy is not an essential element of the crime but is relevant on the issue of intent to defraud.

5. If the fire was not directly set by the defendant, it should be made clear that the intent to defraud an insurer must have existed when the accomplice was hired to set it. In such a case, this instruction would need to be modified, and the jury would also have to be instructed on the appropriate basis of party-to-crime liability under § 939.05.

6. Parb v. State, 143 Wis. 561, 128 N.W. 65 (1910); Smith v. State, 149 Wis. 63, 134 N.W. 1123 (1912).