1421 BURGLARY WITH INTENT TO STEAL[1] — § 943.10(1)

Statutory Definition of the Crime

Burglary, as defined in § 943.10 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building[2] without the consent of the person in lawful possession and with intent to steal.

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 intentionally entered a building.[3]
2. The defendant entered the building without the consent[4] of the person in lawful possession.[5]
3. The defendant knew that the entry was without consent.[6]
4. The defendant entered the building with intent to steal.[7]

"Intent to steal" requires that the defendant had the mental purpose to take and carry away[8] movable property of another without consent and that the defendant intended to deprive the owner permanently of possession of the property.[9] [It requires that the defendant knew the property belonged to another and knew the person did not consent to the taking of the property.][10]

When Must Intent Exist?

The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is no more or less than the mental purpose to steal formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge 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 and knowledge.[11]

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.

IF ONE OF THE AGGRAVATING FACTORS SET FORTH IN § 943.10(2) IS CHARGED AND SUPPORTED BY THE EVIDENCE, ADD WIS JI-CRIMINAL 1425A, 1425B, OR 1425C.[12]

COMMENT

Wis JI-Criminal 1421 was originally published in 1966 and revised in 1984, 1991, 1993, 1996, 2001, and 2020. The 2020 revision added to footnote 2 of the comment. This revision was approved by the Committee in December 2023; it updated footnote 10 to correct the referenced section in the statutory citation.

Criminal trespass to dwelling under § 943.14 is not a lesser included offense of burglary with intent to steal. Raymond v. State, 55 Wis.2d 482, 198 N.W.2d 351 (1972).

1. This instruction is drafted for burglary with the "intent to steal." If "intent to commit a felony" is charged, see Wis JI-Criminal 1424. For burglary offenses committed "while armed" or under other aggravating circumstances as prohibited by § 943.10(2), see Wis JI-Criminal 1425A, 1425B, and 1425C.

2. The model instruction is drafted for a case involving entry into a "building." It must be modified if entry involved any of the other places listed in § 943.10(1)(a) through (f): any building or dwelling; an enclosed railroad car; an enclosed portion of any ship or vessel; a locked enclosed cargo portion of a truck or trailer; a motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or a room in any of the above.

The instruction has never included a definition of "building." The meaning of the term has been considered to be the same for burglary and arson cases. In an arson case, State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991), the Wisconsin Supreme Court held it was error for the trial court to state that "a mobile home is a building." The court said this created a "mandatory conclusive presumption . . . regarding an element of the arson offense." However, the court further held that the error was harmless because it played no role in the jury's verdict:

> We conclude that no rational juror could plausibly find that the structure in question was a mobile home without also finding that the structure was a building. . . . If the jury found this structure to be a mobile home, as that term is commonly understood, this finding would be the 'functional equivalent' of finding that the structure was a building.

160 Wis.2d 722, 740.

In United States of America v. Franklin, 2019 WI 64, 387 Wis.2d 259, 272, 928 N.W.2d 545, the Wisconsin Supreme Court concluded that the locational alternatives provided in Wis. Stat. § 943.01(1m)(a)-(f) are alternative factual means of committing one element of burglary. Providing context to this holding, the court referenced an example previously incorporated in State v. Pinder, 2018 WI 106, ¶60, 384 Wis. 2d 416, 919 N.W.2d 568. Although the issue in Pinder concerned the validity of a search warrant issued for the placement and use of a GPS tracking device on a motor vehicle, the court did make a ruling in which it denied an ineffective assistance of counsel claim for failure to object to the burglary jury instruction Wis. JI-Criminal 1421. Addressing this claim, the court emphasized the latitude afforded in the crafting of a burglary jury instruction so as to comport with the evidence of the case, noting that:

> "[w]hile the circuit court could have used the phrase 'a room within a building' instead of the words 'office' or 'building,' the facts adduced would not confuse the jury as to what it was called upon to decide regardless of which of these words might be used." Id. at 456.

The court in Franklin cited the analysis of the statutory text, the legislative history and context of the statute, along with the nature of the conduct, and the appropriateness of multiple punishments in its conclusion that Wis. Stat. § 943.01 "identifies alternative means of committing one element of the crime of burglary under § 943.01 (1m)(a)-(f)." Franklin at 273. Furthermore, the court found that the crime of burglary does not include a separate locational element and jury unanimity on finding guilt beyond a

reasonable doubt as to locational alternatives provided in § 943.01(1m)(a)-(f) is not necessary to convict. Id. 273.

If a definition of "building" is necessary, resort to a standard dictionary may be helpful. For example, Webster's Ninth New Collegiate Dictionary provides that a "building" refers to "a usually roofed and walled structure built for permanent use (as for a dwelling)."

In Clark v. State, 69 Wis. 203, 33 N.W. 436 (1887), the issue was whether an unfinished house from which tools were taken was covered by § 4409 R.S. which made it a burglary to break "and enter in the night-time any office, shop, or any other building not adjoining or occupied with any dwelling house, or any ship, steamboat, vessel, railroad freight car or passenger car, with intent to commit the crime of larceny or other felony." The court held that the unfinished house was a "building" for purposes of burglary and defined the term as follows:

> . . . an edifice or structure erected upon land, and so far completed that it may be used temporarily or permanently for the occupation or shelter of man or beast, or for the storage of tools or other personal property for safe-keeping. . . . "The well-understood meaning of the word is a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property."

69 Wis. 203, 206-07

A more recent case discusses "building" in connection with zoning rules prohibiting "mobile homes" but allowing "modular homes" and other buildings. The person's home had been mobile once, but at the site was affixed to a foundation and attached to utilities with steel undercarriage and trailer hitch removed. The court of appeals used the county's own definition of "building" and found that the home in question qualified:

> . . . the county relies on the terms "building" and "mobile home" to classify structures. A building is "any structure used, designed or intended to be used for the protection, shelter or enclosure of persons, animals or property." It is clear that Hansman's structure is intended for the protection, shelter and enclosure of persons.

Hansman v. Oneida Co., 123 Wis.2d 511, 513, 366 N.W.2d 901 (Ct. App. 1985).

3. The offense of burglary is complete upon the slightest entry by the defendant into any one of the places described in § 943.10(1)(a)-(f) without the consent of the person in lawful possession, when such entry is made with the required intent. The least entry with any part of the body is sufficient. State v. Barclay, 54 Wis.2d 651, 655n.10, 196 N.W.2d 745 (1972).

The crime of burglary is completed once "the defendant jimmied the lock and pushed against the door, pushing it inward, [and making] entry onto the premises. . . . Whether he stepped in or, as he testified, later reached in to close the door, would not matter. It is not how or why the door was closed that matters. It is the fact that it was opened by a person with intent to steal that furnishes both entry and intent, the prerequisite for the crime of burglary." Morones v. State, 61 Wis.2d 544, 548-49, 213 N.W.2d 31 (1973).

4. The defendant's entry into the place involved was without consent if the person in lawful

possession did not consent in fact or if consent was given under the circumstances provided by Wis. Criminal Code § 939.22(48)(a)-(c). "Consent to enter which is obtained by the use or threat of force or by pretense of legal authority is in legal effect entry 'without consent.' The same ordinarily is true of consent obtained because the person giving the consent is mistaken as to the nature of the thing to which he consents. . . ." 1953 Legislative Council Committee Report on the Criminal Code, page 102.

Entry into a place when it is open to the public is not "without consent," see § 943.10(3). Thus, entry into a hotel lobby open to the public, although done with the intent to steal, is not burglary. Champlin v. State, 84 Wis.2d 621, 267 N.W.2d 295 (1978).

However, one who enters with consent may remain "at a time or place beyond his authority. 'Entry' in § 943.10(1)(a), Stats., must be construed to mean not only the simple act of passing through the outer wall of a structure but also the result of such action, namely, presence within the structure." Levesque v. State, 63 Wis.2d 412, 217 N.W.2d 317 (1974). Thus, an otherwise lawful entry became unlawful when Levesque hid himself in the false ceiling of the men's room and remained there until after the restaurant was closed.

State v. Schantek, 120 Wis.2d 79, 353 N.W.2d 832 (Ct. App. 1984), involved an entry of a gas station by an employee after regular business hours. The station closed at 9:00 p.m., and Schantek entered at around 11:30 p.m., using his own key. He took money from a cash box. The court upheld the conviction for burglary, stating that the extent of consent under these circumstances must be determined on the facts of each case:

> The task in most cases will be to determine the limits of such consent and the defendant's knowledge or lack of it.
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> . . . . We do conclude, however, that the arrangement between Schantek and his employer clearly rendered certain presence inappropriate and thus beyond the limits of the employer's consent and Schantek's knowledge. A fair reading of the evidence does not allow for the strained conclusion that Benco gave Schantek all-encompassing consent to enter the premises at all times for all purposes – including criminal adventure. Nor does the evidence remotely allow for Schantek's claim of knowledge of such all-encompassing consent. We therefore conclude under the facts of this case that the employer did not give Schantek consent to enter the premises, and Schantek had knowledge of such nonconsent.

120 Wis.2d 79, 85.

The Schantek approach was applied in State v. Karow, 154 Wis.2d 375, 453 N.W.2d 181 (Ct. App. 1990). In Karow, the defendant claimed the entry was with consent because the victim allowed him to come into the house and use the telephone. After entering, Karow and accomplices killed the victim. The court of appeals affirmed the burglary conviction, finding that the entry was "without consent" because of an "implied limitation on the scope of the invitation to enter":

> We hold that an implied limitation on the scope of the consent to enter may be recognized, and we recognize it here. The record supports an inference, not patently incredible, that the consent Brown granted to Karow, a stranger, was limited to a specific area and a single purpose. That consent can in no way be reasonably construed to extend beyond the purpose for which it was granted.

154 Wis.2d 375, 384.

5. Under § 943.10, the question is one of lawful possession and not legal title. Ordinarily, the question of who is in lawful possession, while presenting a mixed question of law and fact, can be decided by the court as a matter of law on admitted or undisputed facts.

6. Knowledge that the entry is without consent is an element of the offense of burglary because of the standard interpretation of criminal statutes required by § 939.23(3): Where the word "intentionally" is used, "the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" The decision in Hanson v. State, 52 Wis.2d 396, 190 N.W.2d 129 (1971), is sometimes cited for the contrary position. However, Hanson involved a defendant's postconviction challenge to the validity of his guilty plea and simply held that there was an adequate factual basis for a finding that there was no consent in fact to the defendant's entry. Under such circumstances, said the court, there was no additional burden on the state to show that the defendant did not "purport to be acting under legal authority," one of the alternatives to "no consent in fact" provided in the statutory definition of without consent, § 939.22(48). Recent decisions have reaffirmed that knowledge that entry is without consent is an essential element of burglary. See State v. Schantek, supra, note 4, and State v. Wilson, 160 Wis.2d 774, 467 N.W.2d 130 (Ct. App. 1991).

7. The problem of circumstantially proving intent to steal has received considerable attention from the Wisconsin Supreme Court. The present rule provides that while "intent to steal will not be inferred from the fact of entry alone," "'additional circumstances such as time, nature of the place entered, method of entry, identity of the accused and other circumstances, without proof of actual larceny, can be sufficient to permit a reasonable person to conclude the defendant entered with an intent to steal.'" State v. Barclay, 54 Wis.2d 651, 654, 196 N.W.2d 745 (1972), citing Strait v. State, 41 Wis.2d 552, 562, 164 N.W.2d 505 (1969). Also see State v. Holmstrom, 43 Wis.2d 465, 168 N.W.2d 574 (1969), and Bethards v. State, 45 Wis.2d 606, 173 N.W.2d 634 (1970), overruling State v. Kennedy, 15 Wis.2d 600, 113 N.W.2d 372 (1962). For a complete review of prior cases, see State v. Bowden, 93 Wis.2d 574, 288 N.W.2d 139 (1980).

8. The instruction uses "take and carry away" since it is the most common type of theft and the one that would most often be involved in a burglary case. In a proper case, the other alternatives in the theft statute ("use, transfer, conceal, or retain possession of . . .") should be substituted.

9. "Intent to deprive the owner permanently of possession" is used as the most common type of "intent to steal." It is possible that a burglary offense could involve mental states for other types of stealing. See, for example, theft under § 943.20(1)(b), which involves "intent to convert to his own use" and theft under § 943.10(1)(c), which requires intent to deprive a pledgee or other person having a superior right of possession.

10. The bracketed material should be added if there is evidence that, for example, the defendant believed he was reclaiming his own property. Referred to as "right to recapture," "claim of right," or "self-help," this defensive matter tends to negate either the "property of another" or the "knew it was property of another" elements. The rule applies to burglary, see State v. Pettit, 171 Wis.2d 627, 492 N.W.2d 633 (Ct. App. 1992), and is discussed at Wis JI-Criminal 710, Law Note: Right to Recapture.

11. Evidence of the defendant's possession of recently stolen property may often be offered to support a finding of intent to steal. If an instruction on the effect of such evidence is requested, see Wis

JI-Criminal 170, Circumstantial Evidence, and 173, Possession of Recently Stolen Property.

12. Burglary, as defined in § 943.10(1m), is punished as a Class F felony. The penalty increases to a Class E felony if a burglary is committed under any of the circumstances defined in subsec. (2). The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Instructions are provided for three of the four factors identified in subsec. (2): while armed (see Wis JI-Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (see Wis JI-Criminal 1425B); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); and, while in the enclosure, the person commits a battery upon a person lawfully therein (see Wis JI-Criminal 1425C).