

1441B THEFT: PENALTY FACTORS — § 943.20(3)(d) and (3)(e)

ADD ONE OF THE FOLLOWING QUESTIONS IF FELONY THEFT IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN SUB. (3)(d) OR (3)(e) IS ESTABLISHED.

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

FOR CHARGES UNDER SUB. (3)(d)1.

[“Was the property taken a domestic animal?”]¹

FOR CHARGES UNDER SUB. (3)(d)3.

[“Was the property taken from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing or the proximity of battle?”]²

FOR CHARGES UNDER SUB. (3)(d)4.

[“Was the property taken after physical disaster, riot, bombing or the proximity of battle has necessitated its removal from a building?”]³

FOR CHARGES UNDER SUB. (3)(d)5.

[“Was the property taken a firearm?”]⁴

“Firearm” means a weapon that acts by the force of gunpowder.]

FOR CHARGES UNDER SUB. (3)(d)6.

[“Was the property taken from (an individual at risk) (a patient or resident of a (name type of facility under s. 940.295(2)))?”]⁵

FOR CHARGES UNDER SUB. (3)(e).

[“Was the property taken from (the person of another) (a corpse)”]⁶

[This requires that the property was taken from the body of the person in possession of the property, or that the person had immediate control over the property.]⁷

Before you may answer the question “yes,” you must be satisfied beyond a reasonable doubt that the answer to the question is “yes.”

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

COMMENT

Wis JI-Criminal 1441B was originally published in 1999 and revised in 2002, 2003, 2008, and 2018. The 2018 revision made an editorial correction and added to footnote 6. This revision was approved by the Committee in December 2019; it added language to the bracketed requirement for charges under sub. (3)(e), and added footnote 7.

This instruction addresses the six penalty-increasing factors set forth in § 943.20(3)(d) and (e). Theft from person – set forth in subdiv. (3)(e) – was formerly covered by a separate instruction, Wis JI-Criminal 1442, but that instruction has been withdrawn in favor of including all the factors together in this instruction. Each of the factors in sub. (3)(d) increases the penalty to a Class H felony; theft from person under sub. (3)(e) is a Class G felony. Section 943.20(3)(d), as amended by 2001 Wisconsin Act 109.

As with the value question in theft cases, see Wis JI-Criminal 1441, the Committee recommends that these factors be presented 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 theft under Wis. Stat. § 943.20, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

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

“Was the property taken (repeat the essential facts in the question)?”

1. This is the factor in subdiv. 1. of § 943.20(3)(d). “Domestic animal” is defined as follows for the purposes of Chapter 174: “‘Domestic animal’ includes livestock, dogs, and cats.” § 174.001(2g).
2. This is the factor set forth in subdiv. 3. of § 943.20(3)(d).
3. This is the factor set forth in subdiv. 4. of § 943.20(3)(d).

4. This is the factor in subdiv. 5. of § 943.20(3)(d). The definition of “firearm” in the next sentence is the standard one used in the uniform instructions. It is based on Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

5. These are the factors set forth in subdiv. 6. of § 943.20(3)(d). The facilities “under s. 940.295(2)” include a variety of facilities, most of which involve providing health care or related services. See note 1, Wis JI-Criminal 1271. 2005 Wisconsin Act 388 changed the reference to “individual at risk” from “vulnerable adult.” “Individual at risk” is defined as follows in § 940.20(2)(ae): “‘Individual at risk’ means an elder adult at risk or an adult at risk.” Section 943.20(2)(a) provides that “‘Adult at risk’ has the meaning given in s. 55.01(1e).” Section 943.20(2)(ad) provides that “‘Elder adult at risk’ has the meaning provided in s. 46.90(1)(br).” Definitions based on those cross references, which also apply to violations of § 940.285, are provided in Wis JI-Criminal 1268.

6. These are the factors in § 943.20(3)(e). The explication of “from the person” in the next sentence is what was formerly provided in Wis JI-Criminal 1442, Theft From Person. In State v. Hughes, 218 Wis.2d 538, 548, 582 N.W.2d 49 (Ct. App. 1998), the court concluded that “theft ‘from the person’ encompasses the taking of property from the wheelchair of one sitting in the wheelchair at the time of the taking.” Hughes did not state a generally applicable definition of “from the person” and expressly provided that the court “refrain[ed] from embracing either a narrow or broad standard that would necessarily apply to other factual situations.” 218 Wis.2d 538, 548, note 10. Also see, State v. Graham, 2000 WI App 138, 237 Wis.2d 620, 614 N.W.2d 504, finding the evidence sufficient to prove “theft from person”; and State v. Tidwell, 2009 WI App 153, 321 Wis.2d 596, 774 N.W.2d 650, finding the evidence sufficient to prove “attempted theft from person.”

“‘Corpse’ means the dead body of a human being.” American Heritage Dictionary of the English Language, 3rd Edition, 1992.

7. In State v. Tidwell, 321 Wis.2d 596, 774 N.W.2d 650, 2009 WI App 153, the defendant argued that the evidence was insufficient to find him guilty on the charge of attempted theft from a person as the property he attempted to steal, a cash register on a counter, was not connected in any way to the victim’s person. After reviewing the legislative history of § 943.20(3) the court of appeals disagreed and concluded that the intent of the “from the person” penalty enhancer was to “cove[r] circumstances which made stealing particularly dangerous and undesirable.” It was the victim’s constructive possession of the property which made the attempted theft particularly dangerous and undesirable. Id. at ¶¶8-12.

The Committee concluded that acts of theft in which the victim has immediate control over the property in question fall into the category of particularly dangerous and undesirable circumstances, and therefore constitutes theft from a person.

See JI 920 Possession.