1443 THEFT BY CONTRACTOR — §§ 779.02(5) and 943.20(1)(b)

Statutory Definition of the Crime

Theft by contractor, as defined in § 779.02(5) of the Wisconsin Construction Lien Law and in § 943.20(1)(b) of the Criminal Code of Wisconsin, is committed by one who, under an agreement for the improvement of land, receives money from the owner, and who, without consent of the owner, contrary to his or her authority, intentionally uses any of the money for any purpose other than the payment of claims due or to become due from the defendant for labor or materials used in the improvements before all claims[1] are paid[2] [in full] [or] [proportionally in cases of deficiency].[3]

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 five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant entered into an oral or written agreement for the improvement of land.

   (Building) (Repairing) (Altering) (_____) a (house) (garage) (_____) is an improvement of land.[4]

2. The defendant received money from the owner under the agreement for the improvement of land.

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["Owner" means the owner of any interest in land who, personally or through an agent, enters into a contract for the improvement of the land.][5]

3. The defendant intentionally used any of the money for a purpose other than the payment of claims due or to become due from the defendant for labor or materials used in the improvements before all claims were paid [in full][6] [proportionally in cases of deficiency].[7]

4. The use of the money was without the consent of the owner of the land and contrary to the defendant's authority.

5. The defendant knew that the use of the money was without the consent of the owner of the land and contrary to the defendant's authority.[8]

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and 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 knowledge and intent.[9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of theft by contractor have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[10]

[Determining Value]

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

("Was the value of the money used more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $2,500?"

Answer: "yes" or "no.")

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[11]

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

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COMMENT

Wis JI-Criminal 1443 was originally published in 1976 and revised in 1985, 1991, 1994, 2002, 2003, 2006, 2007, and 2014. The 2014 revision added references to proportional payment in cases of deficiency to the text at footnotes 3 and 7. This revision was approved by the Committee in February 2019; it updated the text and footnote 10 to reflect a new penalty category.

This instruction is for violations of §§ 779.02(5) and 943.20(1)(b). The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the money used exceeds specified levels. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 10, below.

Section 779.02(5) provides that any use by a contractor of money paid for improvements except to pay the claims of those who furnished labor and materials is theft and is "punishable under sec. 943.20." Longstanding Wisconsin case law has interpreted this offense and the reference to sec. 943.20 as not simply a reference to the penalty provision but rather to the definition of theft by trustee under sec. 943.20(1)(b), thereby incorporating the elements of that offense. Pauly v. Keebler, 175 Wis. 428, 185 N.W.2d 554 (1921); State v. Halverson, 32 Wis.2d 503, 145 N.W.2d 749 (1966).

The history and development of this offense were traced in footnote 9 to the 1976 version of JI-1443. It explained the early cases as follows:

> 9. This instruction on the nature of theft by a contractor demonstrates that it is a sophisticated cousin of ordinary embezzlement. The relationship between a misappropriation by a contractor and ordinary embezzlement was first made clear in Pauly v. Keebler (1921), 175 Wis. 428, 185 N.W. 554. At that time the misappropriation by a contractor was called "embezzlement" (Wis. Stat. § 3315(3) (1921)), which corresponded to the terminology used in the criminal code at the time. Wis. Stat. § 4418 (1921).
>
> In Pauly, supra, the court indicated that the elements which are essential to an ordinary embezzlement conviction may be implied into this statute, outside the criminal code, making misappropriations by contractors illegal. 175 Wis. at 436. In that particular case, the court implied the element of wrongful intent into the contractors statute because such intent was part of the ordinary embezzlement provisions of the criminal code. Since that case, nothing has happened which indicates that the court or the legislature intended any result other than the inclusion of all essential elements of the criminal embezzlement offense in the offense of theft by a contractor. In fact, the available evidence tends to reaffirm the view expressed in Pauly. In 1955, the legislature passed a complete revision of the criminal code to be effective July 1, 1956. Chapter 696, Laws of Wisconsin (Vol. II, 1955). In section 943.20 of the code revision act, the old embezzlement statute was revised by removing the word "embezzlement" and replacing it with the word "theft," and by merging it with other misappropriation laws to make one multiparagraph section on criminal misappropriation. Section I (943.20(1)(b)), Chapter 696, Laws of Wisconsin (Vol. II, 1955). In an effort to keep the close relationship between the old embezzlement law and the embezzlement by contractors provision constant, the legislature also amended section 289.02(4) to change the word "embezzlement" to "theft" in the contractors statute. Section 55 (289.02(4), Chapter 696, Laws of Wisconsin (Vol. II, 1955).

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> Furthermore, in State v. Halverson, (1966) 32 Wis.2d 503, 154 N.W.2d 739, the court stated that the statutes governing what used to be known as embezzlement in the criminal code and a statute nearly identical to the theft by contractors one involved here (Wis. Stat. § 235.701 (1965)) were to be read together. In the Halverson case, the court also indicated that the trustee referred to in the criminal code provision on misappropriation would include a contractor who held funds advanced to him pursuant to the trust created by the statute in his hands. Wis. Stat. §§ 289.02(5) or 706.11(3).

More recent cases indicate that "criminal intent," rather than "intent to defraud" is sufficient to constitute the crime, and Wis JI-Criminal 1443 now reflects this conclusion. See discussion at note 6, below.

1. Section 779.02 applies only to claims that are "not the subject of a bona fide dispute." If there is evidence of a bona fide dispute about the claims, the phrase "not the subject of a bona fide dispute" should be added immediately after the word "claims." Also see note 6, below.

2. The statement of the definition of the offense is a slightly simplified version of the full statutory text. No change in meaning is intended.

In cases involving mortgages, "proceeds of any mortgage" may be used in place of "money" and "mortgagee" used in place of or in addition to "owner." The changes would be necessary throughout the instruction.

3. Use the first phrase in brackets when there is no issue relating to proportional payment in a case involving a deficiency. Use the second phrase in brackets when there is an issue relating to proportional payment; see note 7, below. Use both phrases, connected with "or," when there is conflicting evidence about whether the case involves a deficiency.

4. If a more formal definition of "improvement" is needed, see sec. 779.01(2)(a) which provides as follows:

> (a) "Improve" or "improvement" includes any building, structure, erection, fixture, demolition, alteration, excavation, filling, grading, tiling, planting, clearing or landscaping which is built, erected, made or done on or to land for its permanent benefit. This enumeration is intended as an extension rather than a limitation of the normal meaning and scope of "improve" and "improvement."

5. This definition is adapted from the one found in sec. 779.01(2)(c).

6. The third element was affirmed as a correct statement of the law in State v. Sobkowiak, 173 Wis.2d 327, 336-39, 496 N.W.2d 620 (Ct. App. 1992): "The intent establishing the violation is the intent to use moneys subject to a trust for purposes inconsistent with the trust." No further intent – to defraud or to permanently deprive – is required. See note 8, below, which Sobkowiak cited with apparent approval.

If there is evidence in the case that the unpaid claims, or portions of the unpaid claims, were the subject of a bona fide dispute, add the following as a second paragraph of the definition of the third element:

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The third element also requires that the claims for labor or materials were not the subject of a bona fide dispute. The state must prove either that there was no bona fide dispute about the claim or, that aside from any bona fide dispute, the defendant failed to pay claims that were not disputed. A "bona fide dispute" means a dispute based on a reasonable belief about the basis for or the amount of a claim.

7. Use this bracketed material when the case involves a deficiency in the amount available to pay the lienholders. In this situation, § 779.02(5) requires that the trust fund money be paid proportionally. See, State v. Keyes, 2008 WI 54, 309 Wis.2d 516, 750 N.W.2d 30, at ¶24-34.

8. In State v. Hess, 99 Wis.2d 22, 298 N.W.2d 111 (Ct. App. 1980), the court held that theft by contractor requires only "criminal intent" and not "intent to defraud." Hess seems to indicate the "criminal intent" boils down to knowledge that the defendant is in the position of trustee and that he or she intentionally uses the money for some other purpose than paying the suppliers. Wis JI-Criminal 1443 is drafted on the premise that using the funds for any purpose other than paying off the lien claimants is theft by contractor. This position is consistent with Hess, and with other recent cases: State v. Blaisdell, 85 Wis.2d 172, 270 N.W.2d 69 (1978); State v. Wolter, 85 Wis.2d 353, 270 N.W.2d 230 (Ct. App. 1978).

The 1976 version of Wis JI-Criminal 1443 included a sixth element which emphasized that the defendant must act with intent to convert the funds to his own personal use. This element has been eliminated as possibly confusing in light of the Hess, Blaisdell, and Wolter decisions discussed above. The matter is not as clear as one would like, since Hess and Wolter both cite the 1976 version of Wis JI-Criminal 1443 with approval while reaching conclusions that are arguably inconsistent with the instruction's emphasis on "personal use." The Committee takes the position that using the trust fund money for any purpose other than paying off the lienholders is "personal use" and thus the sixth element in the 1976 instruction was redundant.

This note was cited with apparent approval in State v. Sobkowiak, note 6, supra.

In Tri-Tech Corp. v. Americomp Services, 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822 – a civil case – the court referred to the "six elements" of theft by contractor without referring to this instruction or to State v. Sobkowiak, (see note 6, supra). The Committee concluded that this reference did not require a change in the conclusion that the offense can be defined with five elements as described above.

9. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

10. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). [In the context of this offense, the "property" is the money used for purposes other than paying the claims due.] While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective

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date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

11. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the

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felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

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