

**1455 THEFT BY FAILURE TO RETURN LEASED OR RENTED PROPERTY
— § 943.20(1)(e)**

Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(e) of the Criminal Code of Wisconsin, is committed by one who intentionally fails to return any personal property which is in his or her possession or under his or her control by virtue of a written lease or written rental agreement within 10 days after the lease or rental agreement has expired.

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 had personal property in (his) (her) possession or under (his) (her) control by virtue of a written lease or written rental agreement.
2. The defendant failed to return the property within 10 days after the lease or rental agreement expired.
3. The defendant intentionally failed to return the property.

The term “intentionally” means that the defendant must have the mental purpose not to return the property within 10 days after the lease or rental agreement expired.¹

4. The defendant knew that the property belonged to another person and knew that the written lease or rental agreement had expired.

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.²

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 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. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.³

[Determining Value]

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

(“Was the value of property stolen more than \$100,000?”

Answer: “yes” or “no.”)

(“Was the value of property stolen more than \$10,000?”

Answer: “yes” or “no.”)

(“Was the value of property stolen more than \$5,000?”

Answer: “yes” or “no.”)

(“Was the value of property stolen more than \$2,500?”

Answer: “yes” or “no.”)

“Value” means the market value of the property at the time of the theft or the replacement cost, whichever is less.⁴

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).⁵

[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.]

COMMENT

Wis JI-Criminal 1455 was originally published in 1976 and revised in 1992, 2002, 2003, and 2006. This revision was approved by the Committee in February 2019; it updated the text and footnote 3 to reflect a new penalty category.

This instruction is for violations of § 943.20(1)(e). The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. 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 3, below. The penalty increases to a Class D felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes “ownership” and “possession” in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

In State v. Roth, 115 Wis.2d 163, 339 N.W.2d 807 (Ct. App. 1983), the court held that § 943.20(1)(e) does not allow unconstitutional imprisonment for debt. The court also held that “intent to defraud” is not an element of the crime.

The essence of this offense is an omission – the failure to return the property. Criminal liability for an omission generally requires the ability to perform the required acts. See State v. Williquette, 129 Wis.2d 239, 251, 385 N.W.2d 145 (1986), citing LaFave and Scott, Criminal Law, sec. 28 at 182. See Wis JI-Criminal 905 Liability For Failure To Act – Criminal Omissions.

1. “Intentionally” also is satisfied if the person “is aware that his or her conduct is practically certain to cause [the] result.” In the context of this offense, it is unlikely that the “practically certain” alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

2. 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.

3. 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). 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 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;
- 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.

4. This is the most often used part of the definition of “value” provided in § 943.20(2)(d). The full definition follows:

“Value” means that market value at the time of the theft or the cost to the victim of replacing the property within a reasonable time after the theft, whichever is less, but if the property stolen is a document evidencing a chose in action or other intangible right, value means either the market value of the chose in action or other right or the intrinsic value of the document, whichever is greater. If the thief gave consideration for, or had a legal interest in, the stolen property, the amount of such consideration or value of such interest shall be deducted from the total value of the property.

The Wisconsin Supreme Court in Sartin v. State, 44 Wis.2d 138, 170 N.W.2d 727 (1969), a theft case, refused to adopt either a retail or wholesale value definition of the term “value.” It is felt that in the theft statute, “[t]he statutory scheme clearly contemplates a determination of the cost of replacement to the victim.” Sartin at 149.

5. Regarding the application of § 971.36, see footnote 10, Wis JI-Criminal 1441.