

**1465 DRIVING OR OPERATING A (VEHICLE) (COMMERCIAL MOTOR VEHICLE) WITHOUT THE OWNER'S CONSENT – § 943.23(3), § 943.23(3g)**

**Statutory Definition of the Crime**

Driving or operating a (vehicle) (commercial motor vehicle) without the owner's consent, as defined in § 943.23(3) of the Criminal Code of Wisconsin, is committed by one who intentionally drives or operates a (vehicle) (commercial motor vehicle) without the consent of the owner.

**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 (drove) (operated) a (vehicle)<sup>1</sup> (commercial motor vehicle)<sup>2</sup> without the consent of the owner.<sup>3</sup>

[“Drive” means to exercise physical control over the speed and direction of a vehicle while it is in motion.]<sup>4</sup>

[“Operate” means the physical manipulation or activation of any of the controls of a vehicle necessary to put it into motion.]<sup>5</sup>

[“Commercial motor vehicle” means a motor vehicle designed or used to transport passengers or property and having one or more of the following characteristics (identify a characteristic provided in s. 340.01(8)(a) – (d)).]

[A person (drives) (operates) without consent even though the owner consented to the original taking if the person (drives) (operates) the vehicle in a manner that goes beyond the scope of the use authorized or permitted by the owner.]<sup>6</sup>

2. The defendant knew that the owner of the vehicle did not consent to (driving) (operating) the (vehicle) (commercial motor vehicle).<sup>7</sup>

### **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.<sup>8</sup>

### **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.

IF THERE IS EVIDENCE OF THE AFFIRMATIVE DEFENSE UNDER SUB. (3m),  
ADD THE MATERIAL FROM WIS JI-CRIMINAL 1465A.<sup>9</sup>

### **COMMENT**

This instruction was originally published as Wis JI-Criminal 1467.2 in 1989 and revised in 1994, 2002, 2003, 2007, and 2016. The 2002 revision renumbered the instruction as Wis JI-Criminal 1465. This revision was approved by the Committee in December 2018; it added the option of "commercial motor vehicle" to the offense.

This instruction is drafted for a case where the offense defined in § 943.23(3) is charged: "driving or operating" a vehicle without the owner's consent. See the discussion in note 1, Wis JI-Criminal 1464, for an explanation of the Committee's approach to this statute.

Section 943.23(3g) was created by 2017 Wisconsin Act 287 [effective date: April 18, 2018]. It provides: "Except as provided in sub. (3m), whoever intentionally drives or operates any commercial motor vehicle without consent of the owner is guilty of a class H felony."

The 2003 revision reflects changes made in the statute by 2001 Wisconsin Act 109, which created sub. (3m) of § 943.23, recognizing an affirmative defense: abandoning the vehicle without damage within 24 hours of the taking. The defense is addressed by Wis JI-Criminal 1465A, which should be added to this instruction if applicable. See footnote 9, below. The effective date of the Act 109 changes is February 1, 2003. If the misdemeanor offense is charged, this instruction can be used as drafted, without any reference to the affirmative defense. By charging the misdemeanor, the State is conceding that the affirmative defense can be established. To prove that the misdemeanor was committed, the elements of the felony must be proved.

1. For definition of “vehicle,” see § 939.22(44).
2. For definition of “commercial motor vehicle,” see § 340.01(8). At least one of the following characteristics provided in § 340.01(8)(a) through § 340.01(8)(d) must be chosen in order for the vehicle to classify as a “commercial motor vehicle”:
  - (a) The vehicle is a single vehicle with a gross vehicle weight rating of 26,001 or more pounds or the vehicle’s registered weight or actual gross weight is more than 26,000 pounds.
  - (b) The vehicle is a combination vehicle with a gross combination weight rating, registered weight or actual gross weight of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating, registered weight or actual gross weight of more than 10,000 pounds.
  - (c) The vehicle is designed to transport or is actually transporting the driver and 15 or more passengers. If the vehicle is equipped with bench type seats intended to seat more than one person, the passenger carrying capacity shall be determined under s. 340.01 (31) or, if the vehicle is a school bus, by dividing the total seating space measured in inches by 13.
  - (d) The vehicle is transporting hazardous materials requiring placarding or any quantity of a material listed as a select agent or toxin under 42 CFR 73.
3. If definition of “without consent” is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that “without consent” means “no consent in fact” or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.
4. This is the definition of “drive” provided in § 943.23(1)(a).
5. This is the definition of “operate” provided by § 943.23(1)(c).
6. The sentence in brackets may be helpful if there is a question whether a person who had consent to the original taking of the vehicle may be guilty of this offense. The Committee concluded that a person “drives or operates a vehicle without the owner’s consent” where that person may have been lawfully in possession of a vehicle but operates it in a manner that goes beyond the scope of the use authorized or permitted by the owner. A complete explanation of this conclusion is provided in Wis JI-Criminal 1464, footnote 1.

7. When “intentionally” is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that “the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word ‘intentionally.’” § 939.23(3). Thus, the instruction requires knowledge that the driving or operating was without consent.

8. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

9. 2001 Wisconsin Act 109 created sub. (3m) of § 943.23, which recognizes an affirmative defense: abandoning the vehicle without damage within 24 hours of the taking reduces felony offenses under subs. (2) or (3) offenses to Class A misdemeanors. The statute places the burden of persuasion on the defendant to prove it by a preponderance of the evidence. The Committee concluded that the defense is best handled by submitting it to the jury as a special question, which is provided by Wis JI-Criminal 1465A.