

1465A OPERATING WITHOUT OWNER’S CONSENT: AFFIRMATIVE DEFENSE – § 943.23(2), (3), (3m)**Statutory Definition of the Crime**

ADD THE FOLLOWING AT THE END OF WIS JI-CRIMINAL 1464, 1464A, OR 1465 IF THERE IS EVIDENCE OF THE AFFIRMATIVE DEFENSE PROVIDED IN SUB. (3m) OF § 943.23

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

“Did the defendant abandon the (vehicle) (commercial motor vehicle) without damage within 24 hours after the (vehicle) (commercial motor vehicle) was taken from the possession of the owner?”

“Abandon” means that the defendant must have freely, voluntarily, and permanently given up possession of the (vehicle) (commercial motor vehicle).¹

USE THE FOLLOWING PARAGRAPHS IF RAISED BY THE EVIDENCE:²

[The giving up of possession is not free and voluntary if it is done because of fear of immediate capture by police.]

[A person who sells or gives the (vehicle) (commercial motor vehicle) to another person has not abandoned it within the meaning of the statute.]

You must answer the question “yes” if the defendant proves by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that the answer is “yes.”³

If you are not so satisfied, you should answer the question “no.”⁴

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.

COMMENT

Wis JI-Criminal 1465A was approved by the Committee in April 2003. This revision was approved by the Committee in December 2018; it adds the option of “commercial motor vehicle” to the language of the instruction.

This instruction addresses the affirmative defense set forth in sub. (3m) of § 943.23, as created by 2001 Wisconsin Act 109. Effective date: February 1, 2003. The defense reduces violations of sub. (2) or (3) to Class A misdemeanor. The statute provides that “the defendant who raises this affirmative defense has the burden of proving the defense by a preponderance of the evidence.”

A similar defense existed in § 943.23 until it was repealed by 1993 Wisconsin Act 92. The Committee concluded that the interpretation of that provision applies to the current statute. See the discussion in footnote 1, below.

The Committee concluded that although not specifically enumerated in § 943.23(3m), this affirmative defense applies to “commercial motor vehicles” based on the language provided in § 943.23(2g) and (3g).

The Committee recommends that the affirmative defense 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 operating without the owner's consent under Wis. Stat. § 943.23, 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”:

“Did the defendant abandon the vehicle without damage within 24 hours after the vehicle was taken from the possession of the owner?”

1. This definition was included in the uniform instruction for a similar defense recognized by the version of the statute in effect until 1993. The Committee believed this to be consistent with State v. Olson, 106 Wis.2d 572, 587, 317 N.W.2d 448 (1982), which held that the term “abandons” requires “voluntary relinquishment of possession.” Abandonment does not exist where a defendant leaves the vehicle only when arrest and apprehension appears imminent. 106 Wis.2d 572, 586.

2. The two paragraphs in brackets are believed to be consistent with the discussion of abandonment in State v. Olson, *supra*, which interpreted the similar defense that applied to § 943 .23 until being repealed in 1993:

... Under the defendant's construction of the term “abandons,” any person operating a vehicle without the owner’s consent who had the foresight to leave the vehicle when his apprehension and arrest appeared imminent would fall under the lesser misdemeanor penalty although he had no intention of relinquishing possession of the vehicle if not for his imminent apprehension. Such a result is clearly contrary to the intent of the statute.

Certainly, if, after a chase and after being ordered to pull over to the side of the road, the driver steps out of the vehicle and hands the keys over to the law enforcement officer, it would be ludicrous for the defendant to argue that a party has abandoned a vehicle.

State v. Olson, 106 Wis.2d 572 at 586.

3. Section 943 .23 (3m) provides: “A defendant who raises this affirmative defense has the burden of proving the defense by a preponderance of the evidence.” The instruction uses the generally-accepted statement of the civil burden: “to a reasonable certainty by the greater weight of the credible evidence.”

If the jury answers the question “yes,” the defense is established and the defendant should be found guilty of the misdemeanor offense.

4. If the jury answers the question “no,” the defense is not established and the defendant should be found guilty of one of the felony offenses, depending on the jury’s original finding.