

1493 POSSESSION OF A FORGED WRITING (CHECK) WITH INTENT TO UTTER — § 943.38(2)**Statutory Definition of the Crime**

Possession of a forged writing with intent to utter, as defined in § 943.38(2) of the Criminal Code of Wisconsin, is committed by one who possesses a writing or object by which legal rights or obligations are created or transferred with intent to utter it as false or as genuine with knowledge that the writing or object has been falsely made or altered.

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 possessed a writing.¹

"Possessed" means that the defendant knowingly² had actual physical control³ of the writing.

2. The writing was one by which legal rights or obligations are created or transferred.

(A bank check) (An endorsement on a bank check) is such a writing.⁴

3. The writing was falsely (made) (altered).

The (check) (endorsement) must have been falsely (made) (altered) to appear to have been made (by another person) (at another time) (with different terms) (by authority of someone who really did not give such authority).⁵

4. The defendant knew the writing was falsely (made) (altered).⁶
5. The defendant intended to utter the writing.

(It is immaterial whether the defendant intended to utter the writing as genuine or as false.)⁷

"To utter" simply means to (present it for payment)⁸ (transfer it to another).⁹

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent or 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.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five 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.

COMMENT

Wis JI-Criminal 1493 was originally published in 1980 and revised in 1985, 1987, and 1995. This revision was approved by the Committee in April 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Under § 943.38(1) and (2), three forms of conduct are made felonies: the forging of a writing or object (Wis JI-Criminal 1491), the possession of a forged writing or object with intent to utter (Wis JI-Criminal 1493), and the uttering of a forged writing or object (Wis JI-Criminal 1492). Though these forms of conduct are distinct, they constitute only one offense, so that the person who both forges and utters an instrument is punishable for but one offense. State v. Nichols, 7 Wis.2d 126, 95 N.W.2d 765 (1959), cited in Little v. State, 85 Wis.2d 558, 562, 271 N.W.2d 105 (1978).

1. The instruction has been drafted using "writing" only. If the offense involved an "object," the Committee suggests naming the object and using that name in the instruction in place of "writing" and "check."

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

3. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called "constructive possession."

4. Since bank checks are the writings used in most forgery cases, the rest of the uniform instruction uses only the term "check." If the offense involved a different kind of writing or an "object," the Committee suggests naming the writing or object and using that name whenever "check" appears in the instruction. Whether a particular writing or object is one by which "legal rights or obligations are created or transferred" is a question of fact for the jury to determine. Where the law establishes that a particular writing or object has that effect, it is permissible to communicate that legal rule to the jury. With regard to the definition of "check" and other instruments, see § 403.104.

State v. Perry, 215 Wis.2d 690, 631 N.W.2d 651 (1997), held that "Transchecks" used by truckers for unexpected expenses are writings covered by the forgery statute.

5. Examples of the kinds of conduct covered are given in the Vol. V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 131 (February 1953):

Signing a check with another's name (an example of making a writing purporting to have been made by another); raising a check (an example of making a writing purporting to have been made with different terms); filling in blanks over the signature of another either without authority or with unauthorized terms (an example of making a writing appearing to have been made by authority of one who did not give such authority).

The fact that the writing is nonnegotiable is immaterial. The absence of the maker's signature may mean the check is not a negotiable instrument but presenting such a check for payment may constitute uttering a forged writing. See State v. Machon, 112 Wis.2d 47, 331 N.W.2d 665 (Ct. App. 1983).

"Falsely made" does not apply to writing someone else's name as the payer on a postal money order. "Wisconsin requires that a false making must relate to the genuineness of execution of a document, not to the genuineness of its contents." State v. Entringer, 2001 WI App 157, 246 Wis.2d 851, 631 N.W.2d 651.

6. The Committee concluded that "intent to defraud" is not a statutorily-required element for a violation of sec. 943.38(2). Knowledge that the writing is forged and uttering it (or possessing it with intent to utter) is all that is required. The clearest support for this conclusion is the statutory language itself: "Intent to defraud" appears in subsecs. (1) and (3), but not in (2). This difference between the subsections appears to be intentional: The parallel section in the 1953 draft of the proposed Criminal Code had "intent to defraud" as an element; as enacted in 1955, that element had been eliminated and the statute read essentially as it does today. (The 1953 version is found in the 1953 Report On The Criminal Code, Wisconsin Legislative Council, 1953; the Code was enacted as Chapter 696, Laws of 1955.)

The interpretation in the instruction is consistent with a policy of penalizing those who introduce forged writings into the stream of commerce, which the Committee concluded is the likely purpose of sec. 943.38(2).

7. The Committee recommends that the sentence in parentheses be read only when the facts of the case suggest that the defendant possessed the forged writing with intent to utter it as false. One example of such possession would be the "middleman" who passes forged checks to others who utter them as genuine. The middleman possesses the writings with intent to utter as false.

Section 943.38(2) prohibits the possession of a forged writing "with intent to utter as false or as genuine." (Emphasis added.) The reason for drafting the statute in this way is explained in the 1953 Judiciary Committee Report on the Criminal Code, at page 131: "The phrase to 'utter as true or false' does away with the necessity of proving that the actor possessed the forged article with intent to utter it as true."

Thus, there are two aspects to the mental purpose of the possessor of a forged writing under this statute: (1) the possessor must have the intent to utter the writing to pass it along to someone else; but (2) whether or not the possessor intends to pass the writing along as a false writing or as genuine is immaterial. In the usual case where the possessor intends to utter the writing as genuine, the immateriality of the possessor's purpose need not be brought to the attention of the jury. But where the possessor intends to pass the writings along as false, the immateriality of the purpose should be brought to the jury's attention. This will carry out the intent of the statute to eliminate the defense that the possessor did not intend to present the writing as genuine.

8. The alternative "present it for payment" should be used where the facts show that the defendant intended to present the check for payment himself. This would be applicable to the most common situation, that where the defendant possessed the forged writing with intent to utter it as true.

9. The alternative "transfer it to another" should be used where the facts show that the defendant intended to transfer the check to another person, which other person would be expected to present the check for payment. In this situation, the common definition of "utter," presenting for payment, is not suitable, and the Committee suggests substituting the "transfer to another" definition. This alternative may apply in the case where the defendant is acting as a middleman, passing on forged writings to others who will eventually present them as genuine. Such a case would be one where the defendant possessed the writings "with intent to utter as false"; see note 7, supra.