

1495 THEFT OF TELECOMMUNICATIONS SERVICE — § 943.45(1)(a) and (3)(c)**Statutory Definition of the Crime**

Theft of telecommunications service, as defined in § 943.45(1)(a) of the Criminal Code of Wisconsin, is committed by one who intentionally obtains or attempts to obtain telecommunications service by charging the service to an existing telephone number or credit card number without the consent of the subscriber or legitimate holder and does so for direct or indirect commercial advantage or private financial gain.

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 (obtained) (attempted to obtain) telecommunications service.¹
2. The defendant (obtained) (attempted to obtain) service by charging it to a (telephone number) (credit card number) belonging to another person.
3. The (subscriber) (holder) of the (telephone number) (credit card) did not consent to the charges alleged to have been made by the defendant.
4. The defendant acted intentionally.

This requires that the defendant acted with the mental purpose² to obtain telecommunications service without paying for it by charging that service to the (telephone number) (credit card) of another person without consent.

5. The defendant (obtained) (attempted to obtain) telecommunications service for (direct or indirect commercial advantage) (private financial gain).

["Private financial gain" requires that the defendant received a financial benefit beyond simply receiving telecommunications service without paying for it.]³

Deciding About Intent

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

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of theft of telecommunications service 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 1495 was originally published in 1992 and revised in 1999 and 2009. This revision was approved by the Committee in December 2013. It updated the reference to penalties in the Comment.

This instruction is for violations of subsection (1)(a) of § 943.45. Four other violations are defined in subsections (1)(b) through (e). The penalties for violations of § 943.45(1)(a) are specified in sub. (3)(a)-d) as amended by 2013 Wisconsin Act 89:

- first offenses are Class C misdemeanors;
- second or subsequent offenses are Class B misdemeanors;
- offenses committed for "direct or indirect commercial advantage or private financial gain" are Class A misdemeanors; and,
- offenses committed for "direct or indirect commercial advantage or private financial gain" as second or subsequent offenses are Class I felonies.

This instruction may be used for Class A misdemeanors under sub. (3)(c) or Class I felonies under sub (3)(d). As to the latter, the Committee concluded that the fact of prior conviction need not be submitted to the jury. "Other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. United States, 530 U.S. 466, 490 (2000) [emphasis added.]

Subsection (2) of § 943.45 provides that the statute applies when the telecommunications service either originates or terminates in this state, or when it would have been billable by a provider of service in this state, except for the fraud involved in a violation of the statute.

1. The statute refers to "telecommunications service as defined in s. 196.01(9m)." That definition reads as follows:

"Telecommunications service" means the offering for sale of the conveyance of voice, data or other information at any frequency over any part of the electromagnetic spectrum, including the sale of service for collection, storage, forwarding, switching and delivery incidental to such communication and including the regulated sale of customer premises equipment. "Telecommunications service" does not include cable television service or broadcast service.

2. See § 939.23(3), which defines "intentionally." That definition includes being "aware that his or her conduct is practically certain" to cause the prohibited result. That alternative was not included in the instruction because the Committee concluded that violations of § 943.45 will usually involve the "mental purpose" alternative. If an instruction on "practically certain" is needed, see Wis JI-Criminal 923B.

3. The definition of "private financial gain" is based on the one provided in § 943.46, Theft of Cable Television Service, which deals with conduct that is very similar to the conduct covered by § 943.45 and has the same penalty structure. Sub. (1)(b) of § 943.46 reads as follows:

"Private financial gain" does not include the gain resulting to any individual from the private use in that individual's dwelling unit of any programming for which the individual has not obtained authorization.

While the statute's failure to provide that the same definition applies in § 943.45 can be interpreted in different ways, the Committee concluded that the more persuasive approach calls for using the definition. Because theft of telecommunications service is an offense [a Class C forfeiture] without a showing of "private financial gain," that term must require more than the benefit of receiving free service. The contrary interpretation would mean there would be no conduct that constitutes the forfeiture offense, making part of the statute meaningless. An interpretation that gives meaning and effect to all parts of a statute is preferred.