# 1498B RETAIL THEFT: USING A THEFT DETECTION SHIELDING DEVICE — § 943.50(1m)(g)

## Statutory Definition of the Crime

Section 943.50(1m)(g) of the Criminal Code of Wisconsin is violated by one who uses [or possesses with intent to use] a theft detection shielding device to shield merchandise held for resale[1] from being detected by a theft alarm sensor and does so without the merchant's consent and with intent to deprive the merchant permanently of possession[2] of the merchandise.

## 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 six elements were present.

## Elements of the Crime That the State Must Prove

1. The defendant used [or possessed with intent to use] a theft detection shielding device to shield (property involved) from being detected by a theft alarm sensor.

   "Theft detection shielding device" means any laminated or coated bag or device designed to shield merchandise held for resale by a merchant from being detected by an electronic or magnetic theft alarm sensor.[3]

2. (Property involved) was merchandise held for resale by a merchant.[4]
3. The defendant knew that (property involved) was merchandise held for resale[5] by a merchant.

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4. The merchant did not consent[6] to use of [or possession with intent to use] a theft detection shielding device to shield (property involved) from being detected by a theft alarm sensor.
5. The defendant knew that the merchant did not consent.
6. The defendant intended to deprive the merchant permanently of possession of the merchandise.[7]

### Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or 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.[8]

### Jury's Decision

If you are satisfied beyond a reasonable doubt that all six 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 RETAIL THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE MERCHANDISE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[9]

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## Determining Value

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

("Was the value of the merchandise more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the merchandise more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the merchandise more than $500?"

Answer: "yes" or "no.")

["Value" means the (merchant's stated price of the merchandise) (the difference between the merchant's stated price of the merchandise and the altered price).[10]

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.]

**COMMENT**

Wis JI-Criminal 1498B was originally published in 1998 and revised in 2003, 2012, and 2019. This revision was approved by the Committee in December 2019; it adds to the comment.

This instruction is for the offense defined in sub. (1m)(g) of § 943.50, which was created by 1997 Wisconsin Act 262 [effective date: June 23, 1998].

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 distinguishing misdemeanors from felonies was decreased from $2,500 to $500 by 2011 Wisconsin Act 174. [Effective date: April 17, 2012.]

Act 174 also created ss. 943.50(4m) which provides that "[W]hoever violates sub. (1m) (a), (b), (c), (d), (e), or (f) is guilty of a Class I felony if all of the following apply:

(a) The value of the merchandise does not exceed $500.
(b) The person agree or combines with another to commit the violation.
(c) The person intends to sell the merchandise by means of the Internet."

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In State v. Lopez, 2019 WI 101, 389 Wis.2d 156, 936 N.W.2d 125, the Wisconsin Supreme Court affirmed the court of appeals decision in State v. Lopez, 2019 WI App 2, 385 Wis.2d 482, 922 N.W.2d 855, which held that the State may charge multiple acts of retail theft as one continuous offense pursuant to § 971.36(3)(a). Nothing in § 971.36(3)(a) indicates that the legislature intended to limit the provision to a specific type or types of theft, therefore the statute is applicable to various types of theft, including retail theft under § 943.50(1m)(a) (e).

1. Section 943.50(1m)(g) prohibits using, or possessing with intent to use, a theft detection shielding device to shield "merchandise held for resale by a merchant or property of a merchant." The instruction is drafted for an offense involving "property held for resale by a merchant" and must be modified if "property of a merchant" was involved.

2. The instruction does not include the following alternative from the statute: intent to deprive the merchant permanently of "the full purchase price" of the merchandise. The Committee concluded that a shielding device would be used only to steal the merchandise, not to reduce its stated price.

3. This is the definition provided in § 943.50(1)(at).

4. Section 943.50(1), as created by Chapter 270, Laws of 1981, provides that "merchant" includes those identified in § 402.104(3) as well as any innkeeper, motelkeeper, or hotelkeeper.

Section 402.104(3) defines "merchant" as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.

5. See note 1, supra.

6. The phrase "without consent" is defined in § 939.22(48)(a)-(c). That definition should be read to the jury at this point if consent is at issue. See Wis JI-Criminal 948.

7. When appropriate add: "or is aware that his conduct is practically certain to cause that result." See § 939.23(4) and Wis JI-Criminal 923B.

8. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee has concluded that this shorter version is appropriate for most cases. The complete, traditional, statement is found at Wis JI-Criminal 923A.

9. 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.

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The amounts determining the penalty are set forth in § 943.50(4):

- if the value of the property does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $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; and,
- if the value of the property exceeds $10,000, the offense is a Class G felony.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for Class I and Class H 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.

10. Section 943.50(1)(b), as created by Chapter 270, Laws of 1981, provides a definition of "value" for the purposes of "retail theft" cases:

> (b) "Value of merchandise" means:
>
> 1. For property of the merchant, the value of the property; or
> 2. For merchandise held for resale, the merchant's stated price of the merchandise or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales devise to reflect less than the merchant's stated price, the difference between the merchant's stated price of the merchandise and the altered price.

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