

1755 FALSE SWEARING: INCONSISTENT STATEMENTS — § 946.32(1)(b)**Statutory Definition of the Crime**

False swearing, as defined in § 946.32(1)(b) of the Criminal Code of Wisconsin, is committed by one who makes or subscribes two inconsistent statements under (oath) (affirmation) in regard to any matter respecting which an (oath) (affirmation) is, in each case, (authorized or required by law)¹ (required by any public officer or governmental agency as a prerequisite to such officer or agency taking some official action) under circumstances which demonstrate that the witness or subscriber knew at least one of the statements to be false when made.

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 four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (made) (subscribed)² inconsistent statements.

Statements are inconsistent when they are contrary or contradictory to each other, so that the truth of one implies the negation and falsity of the other.³

2. The statements were (made) (subscribed) under (oath) (affirmation).⁴

USE THE FOLLOWING IF WRITTEN STATEMENTS ARE INVOLVED.⁵

[The meaning of being under (oath) (affirmation) is usually well understood, as when the witnesses in this case were put under oath before you. A written statement is under (oath) (affirmation) when it is subscribed or signed by a person, who swears that it is the truth, before some person authorized⁶ to administer an (oath) (affirmation).]

3. The (oath) (affirmation) was (authorized or required by law)⁷ (required by any public officer or governmental agency as a prerequisite to the officer or agency taking some official action).
4. The defendant (made) (subscribed) the statements under circumstances which demonstrate that the defendant knew at least one of the statements was false when (made) (subscribed).

"Knew" requires only that the defendant believed that at least one of the statements was false when made.⁸

You need not determine which statement the defendant knew was false as long as you are satisfied beyond a reasonable doubt that the defendant knew that at least one of the statements was false when made.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four 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 1755 was originally published in 1966 and revised in 1993 and 1997. This revision was approved by the Committee in August 2003 and involved adoption of a new format.

This instruction is for a violation of § 946.32(1)(b); violations of sub. (1)(a) are addressed in Wis JI Criminal 1754. Violations of sub. (1) are felonies. The misdemeanor offense defined in sub. (2) is addressed by Wis JI Criminal 1756.

If a statement was made in each of two different counties within Wisconsin, venue lies in either county. § 971.19(2). If one of the statements was made out of the state, an issue of jurisdiction under § 939.03 may arise. See Wis JI Criminal 268.

Section 946.32(1)(b) also provides: "The period of limitations within which the prosecution may be commenced runs from the time of the first statement." In State v. Slaughter, 200 Wis.2d 190, 198, 546 N.W.2d 490 (Ct. App. 1996), the court held the statute of limitations language "refers to an affirmative defense, which means it must be raised by the defendant." The Committee interprets this to mean that the limitations issue would be raised by a pretrial motion and not submitted to the jury. This is consistent with the court's statement that the limitations language in the false swearing statute "simply clarifies the point at which the statute should begin running." 200 Wis.2d 190, 197. Slaughter also held that the tolling provisions of the regular statute of limitations, § 939.74, apply in this situation.

1. The sworn statement must be "authorized or required" by law. An affidavit made for no reason for a purpose for which the law does not specifically authorize or require an oath, e.g., endorsement of a product, is not within the statute. See State v. Zisch, 243 Wis. 175, 9 N.W.2d 625 (1943). The unauthorized affidavit, if false, is covered by § 946.32(2).

In State v. Devitt, 82 Wis.2d 262, 270, 262 N.W.2d 73 (1978), the court concluded that "authorized by law" must "be narrowly construed in light of a penal statute, the definition of 'permitted' [urged by the state] is inappropriate." The court cited the definition provided in Black's Law Dictionary, 4th ed., p. 169, as indicating "that 'authorize' means more than consistent with the general scheme. Among its definitions: 'To empower; to give a right or authority to act . . . It has a mandatory effect or meaning, implying a direction to act. Authorized is sometimes construed as equivalent to directed.'" The court found that the filing of the statements in question were not "authorized" by the state Corrupt Practices Act (§ 12.09(5)(b), 1971 Wis. Stats.). The court also noted that the alleged misconduct was "not a wrong without a remedy. The misdemeanor false swearing statute, see § 946.32(2), would clearly apply in this case because it has no requirement that the false statement be made under oath or affirmation required or authorized by law." 82 Wis.2d 262, 270-271.

2. The meanings of "make" and "subscribe" were discussed in State v. Devitt, 82 Wis.2d 262, 262 N.W.2d 73 (1978). Both parties and, apparently, the Wisconsin Supreme Court, agreed that "subscribes" refers to signing a written document. The defendant argued that "makes" is limited to preparing or drawing up a writing. The court rejected this narrow definition, favoring a more general concept that includes making an oral statement in a judicial proceeding. 82 Wis.2d 262, 271-75.

3. This definition is a slightly revised version of the one provided in the 1966 version of the instruction. The 1966 instruction cited 20-A, Words & Phrases, pp. 341-44.

4. "Oath" is defined to include "affirmation" in § 990.01(24). The form of the testimonial oath is described in §§ 906.03(2) and 990.01(24).

Section 906.03(3) provides for taking a statement under affirmation where a person has conscientious scruples against taking an oath and sets forth the form.

5. The bracketed material is provided for possible use where one or more written statements is involved. Jurors are familiar with testimony made under oath but may be less clear about how written statements are sworn to or affirmed.

6. Section 887.01 identifies those who may administer oaths.

7. In State v. Slaughter, 200 Wis.2d 190, 199, 546 N.W.2d 490 (Ct. App. 1996), the court cited Wis JI-Criminal 1755 as support for its conclusion that it is the oath or affirmation that must be "required by law," not the making of the statement.

8. Section 939.23(2).