1766A OBSTRUCTING AN OFFICER: GIVING FALSE INFORMATION — § 946.41(2)(a)

Statutory Definition of the Crime

Obstructing an officer, as defined in § 946.41 of the Criminal Code of Wisconsin, is committed by one who knowingly gives false information to an officer with intent to mislead the officer in the performance of his or her duty while the officer is doing any act in an official capacity and with lawful authority.[1]

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 knowingly gave false information to an officer.

   A (title – e.g., sheriff) is an officer.[2]

2. The officer was doing an act in an official capacity.[3]

   _____[4] act in an official capacity when they perform duties that they are employed to perform.[5] [The duties of a _____ include: _____.][6]

3. The officer was acting with lawful authority.

_____[7] act with lawful authority if their acts are conducted in accordance with the law. In this case, it is alleged that the officer was _____.[8]

4. The defendant intended to mislead the officer.

This requires that the defendant knew that (officer) was an officer acting in an official capacity and with lawful authority[9] and that the defendant had the purpose to mislead the officer in the performance of his or her duties.[10] It is not required that the officer was misled.[11]

Deciding About Intent and Knowledge

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

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 1766A was originally published in 1990 and revised in 1992, 2003, 2005, 2008, and 2009. This revision added to the Comment and to footnote 8.

The 1990 revision split former Wis JI Criminal 1765 into three instructions. Wis JI Criminal 1765 is limited to offenses involving "resisting" an officer, which is interpreted to require physical interference.

Wis JI Criminal 1766 is limited to offenses involving "obstructing," interpreted to involve nonphysical interference. Wis JI Criminal 1766A is limited to offenses involving the giving of false information.

Section 946.41 was amended by 1989 Wisconsin Act 121 (effective date: January 31, 1990) to add "or knowingly place physical evidence" to the definition of "obstruct" in subsec. (2)(a). A separate instruction has not been prepared for the "placing physical evidence" offense. Wis JI Criminal 1766A should be usable as a model with relatively little change.

1989 Wisconsin Act 121 also created sub. (2m), which provides that it is a Class H felony if § 946.41(1) is violated under all the following circumstances: the person gives false information or places physical evidence with intent to mislead the officer; and, the trier of fact at a criminal trial considers the false information or physical evidence; and, the trial results in the conviction of an innocent person. A uniform instruction has not been drafted for the felony offense.

In State v. Ferguson, 2009 WI 50, 317 Wis.2d 587, 767 N.W.2d 187, the court concluded that a jury instruction for a charge of obstructing an officer should include a definition of "lawful authority" and that the definition should include description of "exigent circumstances" when the obstructing occurs directly after a warrantless entry of a dwelling. However, the failure to so instruct in this case was not error, or, if error, was harmless, because the evidence supported conviction for obstructing after the defendant was arrested and had been removed from the dwelling.

Four justices also concluded that the decision of the court of appeals in State v. Mikkelson, 2002 WI App 152, 256 Wis.2d 132, 647 N.W.2d 421, is overruled. Mikkelson was characterized as holding that exigent circumstances could not justify a warrantless entry to arrest for a misdemeanor. Ferguson holds that a warrantless entry, based on probable cause and exigent circumstances, may be made for any jailable offense.

The general definition of "lawful authority" provided in Wis JI Criminal 1766 was used in the Ferguson case, though the standard instruction was not cited. A model description of what "lawful authority" involves where there is an "exigent circumstances" entry has been added to footnote 8.

1. This instruction is for a charge of obstructing an officer based on the giving of false information with intent to mislead the officer in the performance of his or her duties. Section 946.41(2)(a) provides as follows:

> "Obstructs" includes without limitation knowingly giving false information to the officer or knowingly placing physical evidence with intent to mislead the officer in the performance of his or her duty including the service of any summons or civil process.

In State v. Caldwell, 154 Wis.2d 683, 454 N.W.2d 13 (Ct. App. 1990), the court held that giving false information with intent to mislead constitutes "obstructing" as a matter of law. There is no need for further proof that the defendant's conduct made the officer's performance of duties more difficult.

In State v. Espinoza, 2002 WI App 51, 250 Wis.2d 804, 641 N.W.2d 484, the court of appeals recognized an "exculpatory denial" exception to § 946.41(2)(a). This was overruled by State v. Reed, 2005 WI 53, ¶48, 280 Wis.2d 68, 695 N.W.2d 315:

> In sum, we conclude that there is no exculpatory denial exception in the obstructing statute. The statute criminalizes all false statements knowingly made and with intent to mislead the police. Although the State should have sound reasons for believing that a defendant knowingly made false statements with intent to mislead the police and were not made out of a good-faith attempt to defend against accusations of a crime, we conclude that the latter can never include the former; knowingly providing false information with intent to mislead the police is the antithesis of a good-faith attempt to defend against accusations of criminal wrongdoing. Accordingly, we overrule Espinoza.

2. The Committee believes that it is clearer to the members of the jury if they are simply instructed that, for example, a sheriff is an officer. "Officer" is defined as follows in sec. 946.41(2)(b):

> "Officer" means a peace officer or other public officer or public employee having the authority by nature of his office or employment to take another into custody.

3. Acting "in an official capacity" and acting "with lawful authority" are two separate questions. State v. Barrett, 96 Wis.2d 174, 180-81, 291 N.W.2d 498 (1980). For the purposes of sec. 940.20(2), Battery To A Law Enforcement Officer, the court in Barrett adopted the following test for "in his official capacity": "whether the official is acting in the scope of his employment as opposed to being engaged in a personal act of his own." Barrett, supra. "Lawful authority" goes to whether the officer's actions "are conducted in accordance with the law." Barrett, 96 Wis.2d at 181. See note 8, below.

4. Use the plural form in the blank, e.g., "sheriffs," "police officers," etc.

5. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

6. The duties, powers, or responsibilities of some peace officers are set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

7. Use the plural form in the blank, e.g., "sheriffs," "police officers," etc.

8. The Committee suggests specifying the lawful function being performed and, if raised by the evidence, instructing the jury on the applicable legal standard. For example, if a "stop and question" situation is involved, something like the following may be helpful:

> In this case, it is alleged that the officer was conducting a lawful stop to investigate a suspected crime. A stop is lawful when the officer has reasonable suspicion that a person is committing, has committed, or is about to commit a crime. A stop may continue for a reasonable period of time required to inquire into the person's identity and to ask for an explanation of the person's conduct. An officer conducting a stop may use only the amount of force reasonably necessary to detain the person while the inquiry into identity and conduct is made.

Or, if the evidence raises a question about the legality of an arrest, something like the following may be helpful:

> In this case, it is alleged that the officer was making a lawful arrest. An arrest is lawful when the officer has reasonable grounds to believe that the person has committed a crime. An officer making an arrest may use only the amount of force reasonably necessary to take the person into custody.

If the evidence raises a question about the "lawful authority" for an "exigent circumstances" entry, something like the following may be helpful:

> In this case, it is alleged that the officer was making a lawful entry under the "exigent circumstances" rule. That rule allows an officer to enter a dwelling without a warrant when the entry is necessary [to prevent the imminent destruction of evidence] [in hot pursuit of a criminal suspect] [to prevent injury to the suspect or another person] [to prevent the likelihood that the suspect will escape.]

The four bracketed examples of exigent circumstances are based on those set forth in the Ferguson decision, 2009 WI 50, ¶20, citing State v. Richter, 2000 WI 58, 235 Wis.2d 524, ¶29, 612 N.W.2d 29 and State v. Smith, 131 Wis.2d 220, 229, 388 N.W.2d 601 (1986).

9. This interpretation of the knowledge element is based on the one found in Wis JI-Criminal 1765 and 1766, which was confirmed as correct in State v. Lossman, 118 Wis.2d 526, 536, 348 N.W.2d 159 (1984):

> The accused must believe or know he (1) resisted the officer, while the officer was (2) acting in an official capacity and (3) with lawful authority.

Also see State v. Elbaum, 54 Wis.2d 213, 194 N.W.2d 1660 (1972), and State v. Zdiarstek, 53 Wis.2d 776, 193 N.W.2d 833 (1972).

10. "With intent to" is defined in § 939.23(4). The definition changed, effective January 1, 1989, though both the old and new versions have "mental purpose" as one part of the definition. It is the other alternative that changed from "believes his act, if successful, will cause that result" to "is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

11. State v. Caldwell, 154 Wis.2d 683, 454 N.W.2d 13 (Ct. App. 1990), discussed in note 1, supra.

