

**1771 ESCAPE FROM CUSTODY RESULTING FROM VIOLATION OF PROBATION, PAROLE, OR EXTENDED SUPERVISION — § 946.42(2m)**

**Statutory Definition of the Crime**

Escape from custody, as defined in § 946.42(2m) of the Criminal Code of Wisconsin, is committed by a person who intentionally escapes from the custody of a probation, parole, or extended supervision agent, or a correctional officer, when that custody resulted from an allegation or finding of a violation of the rules or conditions of probation, parole, or extended supervision.

**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 was in the custody of a (probation agent) (parole agent) (extended supervision agent) (correctional officer).

"Custody" means the physical custody or authorized physical control of a person by a (probation agent) (parole agent) (extended supervision agent) (correctional officer).<sup>1</sup>

2. The custody resulted from (an allegation) (a finding) that the defendant violated the rules or conditions of (probation) (parole) (extended supervision).<sup>2</sup>

3. The defendant escaped from custody.

"Escape" means to leave in any manner without lawful permission or authority.<sup>3</sup>

4. The escape from custody was intentional.

This requires that the defendant intentionally escaped from custody, that is, that the defendant had the mental purpose to escape.<sup>4</sup>

### **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 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 1771 was approved by the Committee in December 2008.

This instruction is drafted for violations of subsection (2m) of § 946.42, which reads as follows:

(2m) A person who is in the custody of a probation, parole, or extended supervision agent, or a correctional officer, based on an allegation or a finding that the person violated the rules or conditions of probation, parole, or extended supervision and who intentionally escapes from custody is guilty of a Class H felony.

This subsection was created by 2007 Wisconsin Act 226 [effective date: May 31, 2008]. It was apparently intended to address a gap in the former statute identified in State v. Zimmerman, 2001 WI App 238, 248 Wis.2d 370, 635 N.W.2d 864, which held that a probationer or parolee, taken into custody for

violating terms of release by a probation or parole agent, was not "in custody" for purposes of § 946.42 when being transported to jail.

1. The definition of "custody" is based on § 946.42(1)(a)1.c.: "Actual custody or authorized physical control of a probationer, parolee, or person on extended supervision by the department of corrections." The instruction uses "physical custody" in place of "actual custody"; no change in meaning is intended. In the Committee's judgment, the custody requirement and its definition are intended to make the distinction between "legal custody" – all persons under supervision are in the legal custody of the department – and the "actual" or "physical" custody required as the predicate for an escape charge. For court decisions discussing "custody" in other contexts, see Wis JI-Criminal 1772, footnote 2.

Section 302.113 provides authority for the department to take physical custody of persons released on extended supervision. Section 304.06 does the same regarding persons released on parole. DOC 328.22, Wis. Admin. Code, promulgated under the authority of § 973.01(1), authorizes custody of probationers.

2. If a cautionary instruction is requested regarding the evidence that the defendant was alleged or found to have violated conditions of supervision, see Wis JI-Criminal 275 Cautionary Instruction: Evidence Of Other Conduct and Wis JI-Criminal 312 Prisoner As Witness Or Defendant: Prisoner Status An Issue.

3. This is the definition of escape found in § 946.42(1)(b).

4. The crime of escape is considered to be a continuing offense. Thus, a person who claims he was unable to form the intent to escape because of drunkenness or epileptic seizure may still be convicted since the person could have formed the required intent when he sobered up or when the disability ceased. See Parent v. State, 31 Wis.2d 106, 141 N.W.2d 878 (1966) (drunkenness), and Ray v. State, 33 Wis.2d 685, 148 N.W.2d 31 (1967) (psychomotor or epileptic seizure).

See Wis JI-Criminal 923A and 923B regarding instructing the jury on "intentionally."