

1775 ESCAPE FROM CUSTODY: CHAPTER 980 CUSTODY ORDER — § 946.42(3m)**Statutory Definition of the Crime**

Escape from custody, as defined in § 946.42(3m) of the Criminal Code of Wisconsin, is committed by a person who intentionally escapes from custody while subject to a [detention order under § 980.04(1)] [custody order under § 980.04(3)] [a commitment order under § 980.06].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 was in custody.

"Custody" means the physical control of a person by (an institution) (a peace officer) (an institution guard).² (A person is also in custody when temporarily outside an institution for the purpose of working or receiving medical care or other authorized purpose.)³ (A person is also in custody when on supervised release under Chapter 980.)⁴

2. The custody was the result of a [detention order under § 980.04(1)] [custody order under § 980.04(3)] [commitment order under § 980.06].

AT THE REQUEST OF THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:

[While evidence that the defendant was in custody as the result of a (detention order) (custody order) (commitment order) is an essential element of this offense, it must not be used for any other purpose. Particularly, you should bear in mind that evidence of conviction of the defendant of a crime at some previous time is not proof that the defendant is guilty of the offense which is now charged.]⁵

3. The defendant escaped from custody.

Escape means to leave in any manner without lawful permission or authority.⁶

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.⁷

Deciding About Intent

You cannot look into a person's mind to find out 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 1775 was approved by the Committee in October 2007.

This instruction is drafted for violations of subsection (3m) of § 946.42, which was created by 2005 Wisconsin Act 434 – effective date: August 1, 2006. It reads as follows:

(3m) A person who intentionally escapes from custody under any of the following circumstances is guilty of a Class F felony:

(a) While subject to a detention order under s. 980.04(1) or a custody order under s. 980.04(3).

(b) While subject to an order issued under s. 980.06 committing the person to custody of the department of health and family services, regardless of whether the person is placed in institutional care or on supervised release.

1. Subsection (3m) of § 946.42 was created by 2005 Wisconsin Act 434. The text of the statute is provided in the Comment preceding this footnote. It applies to escape from custody imposed as a result of any of three orders issued under Chapter 980: a detention order issued after the petition is filed under § 980.04(1); a detention order issued after a finding of probable cause under § 980.04(1); and, a commitment order issued after a finding that the person is a sexually violent person under § 980.06.

2. The definition of "custody" is based on the one provided in § 946.42(1)(a).

"Custody" was discussed at length in State v. Schaller, 70 Wis.2d 107, 233 N.W.2d 416 (1974), where it was held that it was not escape when a person committed to the county jail during nonworking hours as a condition of probation failed to return at the close of the working day. The court discussed "actual" and "constructive" custody and determined that a probationer was not in the constructive custody of the sheriff during the periods of release and therefore his elopement did not constitute escape under § 946.42.

In State v. Rosenberg, 208 Wis.2d 191, 560 N.W.2d 266 (1997), the Wisconsin Supreme Court reaffirmed the holding in Schaller, at least as it applied to offenses charged under the 1994 version of § 946.42. The statute was again amended in 1996; the court "decline[d] to rule on the impact the 1996 amendments have on Schaller." Wis.2d 191, 193n.1. The Committee concluded that the plain language of the statute after the 1996 amendments covers a probationer who does not return to jail as required. The relevant portion is the last sentence of § 946.42(1)(a) which provides that custody does not include a probationer "unless the person is in actual custody or is subject to a confinement order under s. 973.09(4)." The underlined portion was added by 1995 Wisconsin Act 154. Rosenberg noted that the Legislative Reference Bureau analysis of the bill that was enacted as 1995 Wisconsin Act 154 stated: "This bill makes a probationer subject to the escape law at all times when he or she is subject to an order of confinement as a condition of probation."

In State v. Sugden, 143 Wis.2d 728, 422 N.W.2d 624 (1988), the Wisconsin Supreme Court held that "custody" refers to secure custodial facilities within the general geographical boundary of a particular

penal institution. Thus, Sugden's conviction for escape was affirmed where he left the locked cottage in which he was confined but was apprehended before he progressed beyond the outer fence defining the outer boundaries of the institution.

3. The sentence in parentheses should be read to the jury only when the accused was lawfully outside the institution when the alleged escape took place. Prisoners may be taken from jails or other institutions for "rehabilitative and educational activities. . . . While away from the institution grounds, an inmate is deemed to be under the care and control of the institution in which he is an inmate and subject to its rules and discipline." Wis. Stat. § 302.15.

4. This statement is part of the definition of "custody" in sec. 946.42.

5. This cautionary instruction is suggested to deal with the fact that evidence of the Chapter 980 order, which is based on a prior conviction, will be before the jury in most cases. It is intended to advise the jury that the existence of the order is a necessary element of the escape offense but must not be used to find that the defendant is probably guilty of the escape charge simply because he has been convicted before. It should be given only at the request of the defendant, since it may serve to highlight the prior conviction.

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

7. 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."