

**1791 AIDING A FELON BY DESTROYING, ETC., PHYSICAL EVIDENCE —
§ 946.47(1)(b)**

Statutory Definition of the Crime

Aiding a felon, as defined in § 946.47(1)(b) of the Criminal Code of Wisconsin, is committed by one who with intent to prevent the apprehension, prosecution, or conviction of a felon, destroys, alters, hides, or disguises physical evidence.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. (Name of person aided) was a felon.

A felon is a person who has committed a crime punishable by imprisonment in the Wisconsin state prisons.² (Name of crime) is such a crime³ and the State must prove by evidence which satisfies you beyond a reasonable doubt that (name of person aided) committed that crime. (Name of crime) is committed by one who

LIST THE ELEMENTS OF THE ALLEGED CRIME
AS IDENTIFIED IN THE UNIFORM INSTRUCTION.
ADD DEFINITIONS FROM THE UNIFORM
INSTRUCTIONS AS NECESSARY.⁴

2. The defendant knew that (name of person aided) had engaged in conduct which constitutes (name of crime).⁵
3. The defendant (destroyed) (altered) (hid) (disguised) physical evidence.
4. The defendant (destroyed) (altered) (hid) (disguised) physical evidence with the intent to prevent the (apprehension) (prosecution) (conviction) of (name of person aided).⁶

This element requires that the defendant had the purpose of preventing (name of person aided) from being (taken into custody) (prosecuted) (convicted) or was aware that his conduct was practically certain to cause that result.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.

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 1791 was originally published in 1991 and revised in 2008. This revision was approved by the Committee in October 2014; it added text at element 2. and revised the Comment and footnotes to reflect changes made by 2013 Wisconsin Act 254.

This instruction is for an offense under § 946.47(1)(b). Aiding a felon by harboring is covered by § 946.47(1)(a). See Wis JI Criminal 1790.

Section 946.47(3) formerly provided an exclusion for persons related to the felon. That provision was repealed by 2013 Wisconsin Act 254 [effective date: April 10, 2014].

2013 Wisconsin Act 254 also changed the penalty structure for this offense. See subsection (2m) of § 946.47. It is a Class G felony if the defendant aided a felon who committed a Class A, B, C, or D felony; it is a Class I felony if the defendant aided a felon who committed a Class E, F, G, H, or I felony. Because the crime committed by the felon will be specified in the second element, there is no need for any additional fact-finding as to the classification of that crime.

Section 946.47 applies to aiding felons who committed a crime outside of Wisconsin that was a felony in that jurisdiction and would also be a felony if committed in Wisconsin. See § 946.47(2). The Committee concluded that the jury must find that the facts constituting the out-of-state crime occurred, but that it is for the judge to determine that those facts constituted a felony in the other state and would constitute a felony in Wisconsin.

"Felon," as used in § 946.47, refers to a person who has engaged in prohibited felonious conduct, whether convicted or not. State v. Jones, 98 Wis.2d 679, 681, 298 N.W.2d 100 (Ct. App. 1988).

In State v. Schmidt, 221 Wis.2d 189, 198, 585 N.W.2d 100 (Ct. App. 1998), the court held that § 946.47 could be applied to a person who aided a convicted felon who was wanted for a parole violation:

. . . The plain language of § 946.67(1)(a) and (2)(a) suggests no distinction between a person who has already been convicted of a felony and is now wanted for a parole violation following that conviction, and a person who is now wanted for, but has not yet been convicted of, a felony. Each is a "felon" within the definition of § 946.47(2)(a) because each "commits an act . . . which constitutes a felony under the laws of this state."

Though Schmidt was concerned with a crime charged under sub. (1)(a), the same conclusion should apply to violations of sub. (1)(b).

Note that § 946.46 makes it a Class A misdemeanor to aid or encourage a person under supervision to abscond or violate a condition of supervision.

1. The statute also covers placing false evidence. Section 946.47(1)(b).
2. Wis. Stat. § 939.60.

3. Here use the short title for the felony, for example: "Burglary is such a crime." The Committee concludes that the jury may be told that a certain crime constitutes a felony under the laws of Wisconsin. However, the jury must find that the person aided committed the crime. In the usual case, the person aided will have been convicted and proof will not be difficult. However, it is not necessary that the

person aided have been convicted of, or even charged with, the felony. State v. Jones, 98 Wis.2d 679, 298 N.W.2d 100 (Ct. App. 1980). The Committee recommends advising the jury of the elements of the underlying crime allegedly committed by the person aided, requiring them to find each element before finding the defendant guilty of aiding a felon.

4. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

5. In State v. Jones, cited in note 3 above, the court held that a required element of this offense is that "the accused had actual knowledge" of the offense committed by the person aided. 98 Wis.2d at 681.

The third element of the instruction does not require that the defendant know the precise name of the felony committed or know that the conduct engaged in by the person aided is a felony. It does require that the defendant know what conduct was engaged in by the person aided. That conduct must constitute a felony under the law of Wisconsin.

"This section requires that the actor (1) intend to prevent the apprehension of a person he knows has committed a crime which in fact constitutes a felony. . . ." 1953 Judiciary Committee Report on the Criminal Code, p. 195 (Wis. Legislative Council).

In a case where further definition of the defendant's knowledge is desired, the sentence in brackets may be helpful. For example: "This requires that the defendant knew that (name persons aided) intentionally entered a building without the consent of the person in lawful possession and with intent to steal."

In State v. Schmidt, 221 Wis.2d 189, 198, 585 N.W.2d 100 (Ct. App. 1980), the court held that § 946.47 could be applied to a person who aided a convicted felon who was wanted for a parole violation. See Comment preceding note 1. For a case like Schmidt, the elements of the crime need not be summarized, since it is likely the state will simply introduce documentary proof that the person had been convicted of a felony and was on parole on a sentence for that conviction.

6. "Whether the actor has an intent to prevent the apprehension of the felon is a question of fact depending on the circumstances of each case. For example, a person who has committed a felony might go to the home of a friend who, having never been faced with such a situation before, might allow him to remain there for an hour or might give him food or medical treatment without having formed an intent to prevent his apprehension by the police." 1953 Judiciary Committee Report on the Criminal Code, p. 195 (Wisconsin Legislative Council).

7. Section 939.23(4). See Wis JI-Criminal 923A and 923B.