

**2623A OPERATING WHILE SUSPENDED: CRIMINAL OFFENSE:
CAUSING GREAT BODILY HARM OR DEATH — § 343.44(1)(a) and
(2)(ag)2. and 3.**

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who knowingly operates a motor vehicle upon any highway in this state while that person's operating privilege is duly suspended and causes (great bodily harm) (death).

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 operated a motor vehicle¹ on a highway.²

A motor vehicle is operated when it is set in motion.³

2. The defendant's operating privilege⁴ was duly suspended at the time the defendant operated a motor vehicle.

[A person's operating privilege remains suspended until it is reinstated.]⁵

3. The defendant knew (his) (her) operating privilege had been suspended.⁶
4. The defendant's operation of the vehicle caused (great bodily harm) (death) to (name of victim).

"Cause" means that the defendant's act was a substantial factor in producing the (great bodily harm) (death).⁷

["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.]⁸

Deciding About Knowledge

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

IF THERE IS EVIDENCE THAT A NOTICE OF SUSPENSION WAS PROPERLY MAILED, ADD THE FOLLOWING:⁹

[(Refusal to accept) (Failure to receive) an order of suspension is not, by itself, a defense, but it is relevant to whether the defendant knew (his) (her) operating privileges had been suspended. The State must prove beyond a reasonable doubt that the defendant knew (his) (her) operating privileges had been suspended regardless of whether the defendant received written notice of suspension.]

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 2623 was originally published in 2007. It was separated into two instructions in 2012: this instruction for operating while suspended offenses and Wis JI-Criminal 2623B for operating while revoked offenses. This instruction was approved by the Committee in June 2012; the Comment was also updated to reflect changes in penalties made by 2011 Wisconsin Act 113.

This instruction is for violations of § 343.44(1)(a) – operating while suspended – where great bodily harm or death is caused. These violations are punished as felonies pursuant to provisions created by 2011 Wisconsin Act 113 [effective date: March 1, 2012] if the person knew at the time of operation that his or her operating privilege had been suspended. Causing great bodily harm is a Class I felony; causing death is a Class H felony. See §343.44(2)(a)2. and 3. for the penalties for operating while suspended offenses.

1. Subsection 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

2. Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

3. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

4. Subsection 340.01(40) defines "operating privilege" as follows:

"Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

5. Subsection 343.44(1g) provides:

Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license

issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

6. Knowledge that the person's operating privilege has been suspended is required by the penalty provisions in § 343.44(2)(ag)2. and 3. If the knowledge element is lacking, offenses resulting in death or great bodily harm are forfeitures.

7. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

8. See § 939.22(14) and Wis JI-Criminal 914.

9. While the statutes require knowledge that privileges had been suspended, see note 6, supra, there has been no change in the provision regarding failure to receive mailed notice of suspension or revocation. Subsection (3) of § 343.44 continues to provide that "[r]efusal to accept or failure to receive an order of revocation, suspension or disqualification mailed by 1st class mail to such person's last-known address shall not be a defense to the charge of driving after revocation, suspension or disqualification." The Committee concluded that the proper way to address the mailed notice issue is to advise the jury that failure to receive a properly mailed notice is not by itself a defense, but that the state must prove, by whatever evidence is relevant to the issue, that the defendant did knowingly operate while suspended. This may be accomplished by showing any source of actual knowledge, such as notice given by a judge, receipt of a mailed notice, etc.