THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE DECEMBER 10, 2017.

2623B OPERATING WHILE REVOKED: CRIMINAL OFFENSE: CAUSING GREAT BODILY HARM OR DEATH — § 343.44(1)(b) and (2)(ar)3. and 4.

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 revoked 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 vehicle[1] on a highway. [2]

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

2. The defendant's operating privilege[4] was duly revoked at the time the defendant operated a motor vehicle.

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

3. The defendant knew (his) (her) operating privilege had been revoked. [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 REVOCATION WAS PROPERLY MAILED, ADD THE FOLLOWING: [9]

[(Refusal to accept) (Failure to receive) an order of revocation is not, by itself, a defense, but it is relevant to whether the defendant knew (his) (her) operating privileges had been revoked. The State must prove beyond a reasonable doubt that the defendant knew (his) (her) operating privileges had been revoked regardless of whether the defendant received written notice of revocation suspension.]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 revoked offenses and JI 2623A for operating while suspended offenses. The Comment was updated in 2013 to reflect changes in penalties made by 2011 Wisconsin Act 113. The 2017 revision was approved by the Committee in August 2017; it added the reference to State v. Villamil, 2017 WI 74 to the Comment.

The 2018 revision was approved by the Committee in April 2018; it added the caution at the top of page one to make it clear that this instruction should only be used for offenses committed before December 10, 2017. That date is the effective date for 2017 Wisconsin Act 127, which deleted the knowledge requirement from § 343.44(1)(b). For offenses committed on or after that date see Wis JI-Criminal 2623C.

This instruction is for violations of § 343.44(1)(b) – operating while revoked – where great bodily harm or death is caused. These violations may be punished as either misdemeanors or felonies pursuant to provisions created by 2011 Wisconsin Act 113 [effective date: March 1, 2012]. See § 343.44(2)(ar)3. and 4. This penalty anomaly apparently resulted from inadvertence.

The anomaly is that the penalty provisions purport to increase the penalty from a misdemeanor to a felony based on the fact that the defendant knew his or her operating privilege was revoked. However, the offense definition already requires that the defendant "knowingly operated"; the Committee has concluded that "knowingly operated" can only mean "knowledge that the privilege was revoked." Thus, subsections § 343.44(2)(ar)3. and 4. provide for both a misdemeanor and a felony penalty for offenses that have the same elements. The United States and Wisconsin supreme courts have held that there is no constitutional violation where crimes have the same elements but different penalties. In State v. Cissell, 127 Wis.2d 205, 378 N.W.2d 691 (1985), the court dealt with two 1983 statutes relating to nonsupport, one with a misdemeanor penalty and one with a felony penalty. The trial court dismissed felony charges against Cissell, concluding that the crimes had identical elements and that charging the defendant with a felony deprived him of his rights to due process and equal protection. The Wisconsin Supreme Court reversed, agreeing that the two crimes had identical elements, but concluding that ". . . identical element crimes with different penalties do not violate due process or equal protection." 127 Wis.2d 205, 215. The court relied on United States v. Batchelder, 442 U.S. 114 (1979), which addressed two federal statutes prohibiting felons from receiving firearms. One statute had a five year maximum penalty and the other a two year maximum. The court held that there was no constitutional violation: the statutes were clear and thus gave notice; a prosecutor's choice under these statutes is no different from the regular choice exercised in deciding what to charge; being influenced by the penalties does not give rise to a

constitutional issue. Prosecutors can choose to prosecute under either statute as long as there is no discrimination against any class of defendants as prohibited by selective enforcement principles.

The situation under the current operating while revoked penalty provisions appears to the Committee to be indistinguishable from the situations addressed in the Cissell and Batchelder cases.

The Committee's conclusion is consistent with the decision reached in State v. Villamil, 2017 WI 74, 371 Wis.2d 519, 885 N.W.2d 381:

> ¶49 Whether there is one criminal statute or two, both this case and Cissell involve criminal statutes with substantially identical elements where prosecutors have discretion to decide whether they will charge a defendant with a misdemeanor or a felony. Although a defendant could be charged with a misdemeanor instead of a felony for a knowing violation of OAR-causing death, the public is on notice that this offense may be punished as a Class H felony pursuant to Wis. Stat. §§ 343.44(1)(b) and (2)(ar)4. Because Villamil knew he was operating after his license was revoked, the statutes provide sufficient notice that this violation could be charged as a felony.

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 revoked is part of the offense definition in § 343.44(1)(b), which requires that the person "knowingly operate." The knowledge requirement is also part of the penalty provisions for operating while revoked offenses in § 343.44(2)(ar)3. and 4. The Committee concluded that this redundancy is inadvertent. See discussion in the Comment preceding footnote 1.

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 revoked, 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 revoked. This may be accomplished by showing any source of actual knowledge, such as notice given by a judge, receipt of a mailed notice, etc.

