

2630 OPERATING A MOTOR VEHICLE TO FLEE OR IN AN ATTEMPT TO ELUDE AN OFFICER — § 346.04(3)

Statutory Definition of the Crime

Section 346.04(3) of the Wisconsin Statutes is violated by a person who operates a motor vehicle¹ on a highway² after receiving a visual or audible signal from a (traffic officer) (federal law enforcement officer) (marked police vehicle) (unmarked police vehicle that the person knows or reasonably should know is being operated by a law enforcement officer) and knowingly (flees) (attempts to elude) any officer.

CHOOSE THE ALTERNATIVE SUPPORTED BY THE EVIDENCE. IF MORE THAN ONE ALTERNATIVE IS SUBMITTED, CONNECT THEM WITH “OR” AND SEE WIS-JI CRIMINAL 517, JURY AGREEMENT...³

[by willful⁴ disregard of such signal so as to interfere with or endanger (the operation of the police vehicle) (the traffic officer) (other vehicles) (pedestrians)].

[by increasing the speed of the vehicle (in an attempt to elude) (to flee)].

[by extinguishing the lights of the vehicle (in an attempt to elude) (to flee)].

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 two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle on a highway⁵ after receiving a (visual) (audible) signal from a (traffic officer) (federal law enforcement officer) (marked

police vehicle) (unmarked police vehicle that the person knows or reasonably should know is being operated by a law enforcement officer).⁶

(“Traffic officer” means every officer authorized by law to direct or regulate traffic or to make arrests for violation of traffic regulations.)⁷

2. The defendant knowingly⁸ (fled) (attempted to elude) an officer⁹

[by willful¹⁰ disregard of the visual or audible signal so as to (interfere with) (endanger) (the operation of the police vehicle) (the traffic officer) (other vehicles) (pedestrians)].

[by increasing the speed of the vehicle (in an attempt to elude) (to flee)].

[by extinguishing the lights of the vehicle (in an attempt to elude) (to flee)].

Deciding About Knowledge

You cannot look into a person’s mind to find knowledge. What a person knows or has reason to know 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.

Jury’s Decision

If you are satisfied beyond a reasonable doubt that both 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.

ADD THE FOLLOWING IF ONE OF THE MORE SERIOUS OFFENSES IDENTIFIED IN SEC. 346.17(3)(b), (c), OR (d) IS CHARGED AND THE

EVIDENCE WOULD SUPPORT A FINDING THAT THE FACT INCREASING THE PENALTY WAS PRESENT:¹¹

[If you find the defendant guilty, you must answer the following question(s):

[“Did the defendant’s operating a vehicle (to flee) (in an attempt to elude) an officer result in¹² (bodily harm to¹³) (damage to the property of¹⁴) another?”

(“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.)]

[“Did the defendant’s operating a vehicle (to flee) (in an attempt to elude) an officer result in¹⁵ great bodily harm¹⁶ to another?”

“Great bodily harm” means serious bodily injury.]

[“Did the defendant’s operating a vehicle (to flee) (in an attempt to elude) an officer result in¹⁷ death to another?”]

Before you may answer “yes,” you must be satisfied beyond a reasonable doubt that the answer to that question is “yes.”].

COMMENT

Wis JI-Criminal 2630 was originally published in 1979 and revised in 1986, 1989, 1995, 1997, 2003, 2012, and 2014. This revision was approved by the Committee in December 2018; it revised the instruction to reflect changes in the statute made by 2017 Wisconsin Act 347.

2017 Wisconsin Act 347 [effective date: April 18, 2018, revised § 346.04(3) to add reference to “federal law enforcement officer” and further revised the offense definition to refer to “marked or unmarked police vehicle that the operator knows or reasonably should know is being operated by a law enforcement officer.”

For violations of § 346.04(2t), a misdemeanor offense, see Wis JI-Criminal 2632.

The penalties for violation of § 346.04(3) are found in § 346.17(3) and read as follows as amended by 2001 Wisconsin Act 109:

346.17(3)(a) Except as provided in par. (b), (c) or (d), any person violating s. 346.04(3) is guilty of a Class I felony.

(b) If the violation results in bodily harm, as defined in s. 939.22(4), to another, or causes damage to the property of another, as defined in s. 939.22(28), the person is guilty of a Class H felony.

(c) If the violation results in great bodily harm, as defined in s. 939.22(14), to another, the person is guilty of a Class F felony.

(d) If the violation results in the death of another, the person is guilty of a Class E felony.

Wis JI-Criminal 2630 is designed to be used for offenses involving any of the penalties. The fact increasing the penalty is to be handled as an extra question to be submitted to the jury. See text of the instruction at note 11. The following form is suggested for the verdict:

“We, the jury, find the defendant guilty of operating a motor vehicle to flee or in an attempt to elude an officer under Wis. Stat. § 346.04, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question “yes” or “no”:

[Add the appropriate question.]”

1. Section 346.04(3) applies to all vehicles and is not restricted to “motor” vehicles. [“Vehicle” is defined in § 340.01(74); “motor vehicle” is defined in § 340.01(35).] Since the majority of cases will involve motor vehicles, the instruction has been drafted for those cases. “Motor” should be omitted where a motor vehicle is not involved.

2. Offenses defined in chapter 346 apply exclusively to operation upon “highways” unless otherwise expressly provided. Sec. 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in secs. 346.62 and 346.63; sec. 346.61 provides that those statutes are applicable to “all premises held out to the public for use of their motor vehicles.”)

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

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the “drove or operated” element. However, in a case where the “highway” issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element.

3. Choose the alternative supported by the evidence. Any one of the alternatives is sufficient to establish the second element – that the defendant knowingly fled or attempted to elude the officers. See State v. Beamon, 2013 WI 47, ¶35, 347 Wis.2d 559, 830 N.W.2d 681, discussed in footnote 9, below. Make the same choice in defining the second element.

If more than one alternative is submitted, connect them with “or” and consider giving an instruction on jury agreement. See Wis JI-Criminal 517 JURY AGREEMENT: EVIDENCE OF MORE THAN ONE ACT INTRODUCED TO PROVE ONE CHARGE.

4. Section 346.04(3) reads “willful or wanton” (emphasis added). The Committee omitted “or wanton,” concluding that the phrase does not add anything substantial to the offense. If it appears that “or wanton” is appropriate to a given case, it should be added.

The Wisconsin Supreme Court discussed the meaning of “willful” in State v. Hanson, 2012 WI 4, 338 Wis.2d 243, 808 N.W.2d 390. Hanson claimed that he fled from the scene of a traffic stop because he feared for his safety. He argued that “willful” should be interpreted to require an evil intent. The court disagreed:

. . . we decline to read Wis. Stat. § 346.04(3) as providing a good faith exception to compliance. The statute requires: a subjective understanding by the defendant that a person known by the defendant to be a traffic officer has directed the defendant to take a particular action, and with that understanding, the defendant chose to act in contravention of the officer’s direction. This requirement does not include a showing that the defendant had an evil or scornful state of mind. 2012 WI 4, ¶27.

5. See note 2, supra.

6. The phrase “marked police vehicle” is not defined by statute or in case law. Where there is a dispute as to a vehicle’s status as “marked,” it is a factual question for the jury to determine under all the circumstances of the case.

In State v. Opperman, 156 N.W.2d 241, 456 N.W.2d 625 (Ct. App. 1990), the court held that facts showing a vehicle was equipped with red lights and siren were not sufficient by themselves to prove that a vehicle is a “marked vehicle.”

The question of whether a person may be charged under § 346.04(3) for fleeing or attempting to elude an unmarked police vehicle was considered in a 1976 opinion of the attorney general, which follows.

You state that a person in a motor vehicle attempted to elude an unmarked police car equipped with a red light on the dashboard or within the grillwork and a siren under the hood. The police car was driven by a traffic officer who turned on both the red light and the siren. You ask whether this violates sec. 346.04(3), Stats.,

. . . (statute omitted)

The intention of the legislature to exclude signals received from vehicles which are not marked as police vehicles is apparent. Many automobiles, some privately owned, which are not police vehicles, qualify as authorized emergency vehicles under the definition in sec. 340.01(3), Stats., and operators of other vehicles can hardly be expected to know whether the operators of such authorized emergency vehicles are traffic officers or not. The statute here involved requires that the offense be knowingly committed. It is, therefore, my opinion that sec. 346.04(3), Stats., was not violated under the circumstances you have presented unless the eluder knew that the signal from the unmarked vehicle was given by a traffic officer. This, of course, is a matter of proof.

However, Sec. 346.19, Stats., requires that upon the approach of an authorized emergency vehicle giving audible signal by siren, the operator of a motor vehicle shall yield the right of way, drive to the right and stop. I conclude that this is the proper statute to invoke in the case of a driver who flees from an unmarked police vehicle.

65 Op. Att’y Gen. 27 (1976)..

7. This is the definition provided in § 340.01(70).

8. The “knowingly” element was discussed in State v. Sterzinger, 2002 WI App 171, 256 Wis.2d 925, 649 N.W.2d 677. The court concluded that “the scienter requirement of Wis. Stat. § 346.04(3) applies only to the first element of the offense, that a driver ‘knowingly flee or attempt to elude’ an officer. We also conclude that the statute does not require the operator of a fleeing vehicle to actually interfere with or endanger identifiable vehicles or persons; he or she need only drive in a manner that creates a risk or likelihood of that occurring.” 2002 WI App 171, ¶2. The court stated that this interpretation is consistent with Wis JI-Criminal 2630, but the instruction does not actually make the clear distinction articulated in the decision.

9. “[T]he second element of Wis Stat. § 346.04(3) – that the defendant knowingly fled or attempted to elude an officer – may be demonstrated in one of three ways: (1) willful disregard of the signal so as to interfere with or endanger the officer, vehicles, or pedestrians; (2) increasing the speed of the vehicle; or (3) extinguishing the lights of the vehicle.” State v. Beamon, 2013 WI 47, ¶35, 347 Wis.2d 559, 830 N.W.2d 681. (Citing State v. Sterzinger, 2002 WI App 171, 256 Wis.2d 925, ¶9, 649 N.W.2d 677.).

10. See note 4, supra.

11. 2001 Wisconsin Act 109 (effective date: February 1, 2003) revised § 346.17, which identifies the penalty for a violation of § 346.04(3). See the Comment preceding note 1, supra. The Committee concluded that the best way to handle the facts which increase the penalty is to submit a special question to the jury, asking whether the fact has been established beyond a reasonable doubt. This is the same way the question of value is handled in a theft case. See Wis JI-Criminal 1441.

12. Section 346.17(3) does not use the word “cause” but rather uses “results in.” In State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), the court held that § 346.17(3) was not unconstitutionally vague because “results in” means “cause” and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant’s conduct was a substantial factor in causing the death. The court

noted that more than but-for cause is required: “The state must further establish that ‘the harmful result in question be the natural and probable consequence of the accused’s conduct,’ i.e., a substantial factor.” 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

If definition of the causal requirement is necessary, something like the following might be added:

This requires that the defendant’s operation of the vehicle (to flee) (in an attempt to elude) an officer was a substantial factor in producing (specify the harm that occurred).

13. Section 346.17(3)(b) provides that the definition of “bodily harm” in § 939.22(4) applies. That is the definition used in the instruction.

14. Section 346.17(3)(b) provides that the definition of “property of another” in § 939.22(28) applies: “‘Property of another’ means property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property.”

15. See note 12, supra.

16. Section 346.17(3)(c) provides that the definition of “great bodily harm” in § 939.22(14) applies. The Committee recommends defining the term in the manner used in the instruction. See Wis JI-Criminal 914 for a more complete discussion of issues relating to “great bodily harm.”

17. See note 12, supra.