2660D OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — CRIMINAL OFFENSE — MORE THAN 0.02 GRAMS — SUBJECT TO AN IGNITION INTERLOCK ORDER — § 346.63(1)(b)

Statutory Definition of the Crime

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while that person has a prohibited alcohol concentration.[2]

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] [three][3] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[4] on a highway.[5]

Definition of "Drive" or "Operate"

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][6]

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][7]

2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Prohibited Alcohol Concentration"

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"Prohibited alcohol concentration" means[8]

[more than .02 grams of alcohol in 210 liters of the person's breath].

[more than .02 grams of alcohol in 100 milliliters of the person's blood].

NOTE: THE DEFENDANT'S ADMISSION THAT HE OR SHE IS SUBJECT TO AN ORDER UNDER § 343.301 DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THIS ELEMENT AND PROCEED TO THE PARAGRAPH CAPTIONED "HOW TO USE THE TEST RESULT EVIDENCE."[9]

[3. The defendant was subject to a court order under § 343.301 requiring the installation of an ignition interlock device.][10]

IF THE THIRD ELEMENT IS INCLUDED AND IF REQUESTED BY THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:[11]

[Evidence has been received that the defendant was subject to a court order requiring the installation of an ignition interlock device. This evidence was received as relevant to this element only. It must not be used for any other purpose and, particularly, it is not proof that the defendant drove or operated a motor vehicle with a prohibited alcohol concentration on this occasion.]

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[12]

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IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[13]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all the 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 2660D was approved by the Committee in December 2010.

This instruction is drafted for offenses involving a prohibited alcohol concentration level [PAC] of more than 0.02, which applies to persons subject to an order under § 343.301 requiring the installation of an ignition interlock device. See § 340.01(46m)(c), as amended by 2009 Wisconsin Act 100. [Effective date: July 1, 2010.]

Note that § 340.01(46m)(c) defines the prohibited alcohol concentration as "more than 0.02." This differs from the generally applicable level, referred to as "an alcohol concentration of 0.08 or more." See § 340.01(46m)(a).

The "more than 0.02" PAC level also applies to persons who have 3 or more prior convictions, suspensions, or refusals as counted under § 343.307(1)." See Wis JI-Criminal 2660C.

The fact of being subject to an order under § 343.301 is included as a bracketed third element in this instruction. It is an element because the existence of that fact changes the substantive definition of the crime from an alcohol concentration of 0.08 or more to one of more than 0.02. It is in brackets because, by analogy to the case where prior offenses reduce the level to 0.02, it is not to be submitted to the jury if the defendant admits being subject to the order. See footnotes 3 and 9, below. When priors change the

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offense from a forfeiture to a crime or increase the criminal penalty, they need not be submitted to the jury. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

The constitutionality of penalizing the "status" of having a prohibited level of alcohol concentration has been upheld. State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984); State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989). Defendants may not litigate the validity of the "partition ratio" that is used to calculate the prohibited breath alcohol level. McManus, 152 Wis.2d 113, 123.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. See Wis JI-Criminal 2600 Introductory Comment, Sec. V., regarding the definition of "prohibited alcohol concentration."

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the second element. It then provides for using the appropriate measure of alcohol concentration – blood alcohol or alcohol in the breath – in the definition of the second element.

3. The instruction is drafted to allow for use with either two or three elements, depending on whether the third element, relating to the defendant being subject to an order under § 343.301, is submitted to the jury. See discussion at note 9, below.

4. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

6. This is the definition of "drive" provided in § 346.63(3)(a).

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

9. The third element has been placed in brackets because the Committee concluded that the "status element" of this offense must be addressed in the same manner as for 0.02 offenses involving prior convictions. See Wis JI-Criminal 2660C. State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997) addressed an earlier version of the OWI law which reduced the PAC level to 0.08 if the defendant had prior convictions. In Alexander, the Wisconsin Supreme Court referred to this element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions or

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revocations [the relevant number under prior law], the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 628, 646. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 628, 651. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 628, 649-50.

The court gave explicit direction to the trial courts as to how to handle this situation:

> "When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The 'prohibited alcohol concentration' means 0.08 . . ."
> 214 Wis.2d 628, 651-52.

By placing the "status element" in brackets, the Committee intends to implement the approach approved in Alexander. The existence of an ignition interlock order implies the existence of a prior OWI offense, creating the same risk of unfair prejudice that concerned the court in Alexander. If the defendant admits the "status element," the instruction should be given with two elements: by operating a vehicle, and, having an alcohol concentration of more than 0.02. If the defendant does not admit the "status element," the instruction should be given with a third element: being subject to an order under § 343.301.

Because the defendant's admission removes an element from the jury's consideration, the record should reflect the defendant's acknowledgment that a jury determination is, in effect, being waived on the "status element." See Wis JI-Criminal 162A Law Note: Stipulations.

10. This element is not to be included if the defendant admits being subject to the order. See note 9, supra.

11. Making the fact of being subject to an order under § 343.301 an issue for the jury creates the possibility that a jury may make improper use of the evidence relating to the defendant's driving record. Therefore, upon request, an instruction should be given on the limited use to be made of the driving record evidence. In State v. Ludeking, 195 Wis.2d 132, 536 N.W.2d 119 (Ct. App. 1995), the court pointed to this cautionary paragraph as a way to offset the inevitable prejudicial impact of presenting this evidence to the jury.

12. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of .02 or more any prima facie effect. So there is no statutory authority for the typical statement that discusses test results like the ones included in the instructions for 0.08 offenses. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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