

2663B OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT — CIVIL FORFEITURE — NO ALCOHOL CONCENTRATION TEST — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway¹ while under the influence of an intoxicant.²

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)³ must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle⁴ on a highway.⁵

[“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 was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

Definition of “Under the Influence of an Intoxicant”

“Under the influence of an intoxicant” means that the defendant’s ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.⁸

Not every person who has consumed alcoholic beverages is “under the influence” as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person’s ability to safely control the vehicle be impaired.

IF THE CASE INVOLVES A TEST REFUSAL, ADD THE FOLLOWING:⁹

[Testimony has been received that the defendant refused to furnish a (breath) (urine) sample for chemical analysis. You should consider this evidence along with all the other evidence in the case, giving to it the weight you decide it is entitled to receive.]

Jury’s Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing 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.

COMMENT

Wis JI-Criminal 2663B was originally published in 1986 and revised in 1992, 2004, and 2006. This revision was approved by the Committee in October 2018; it removed reference to “blood” in the paragraph relating to test refusal. See footnote 9.

This instruction is an adaptation of Wis JI-Criminal 2663A for a case where no evidence of an alcohol concentration test has been admitted. In place of the paragraphs relating to evidence of test

results, the text of Wis JI-Criminal 235, dealing with a test refusal, is substituted, based on the assumption that in most “no-test” cases, the defendant has refused to take one.

The 2004 revision adopted a new format for footnotes. 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.

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

2. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

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 instruction is drafted for cases involving the influence of an intoxicant. See note 2, *supra*. For a discussion of issues relating to the definition of “under the influence,” see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

9. The material in brackets is the text of Wis JI-Criminal 235. The leading case affirming the admissibility of test refusal evidence is State v. Albright, 98 Wis.2d 663, 298 N.W.2d 196 (Ct. App. 1980). The defendant’s explanation for the refusal is also admissible. State v. Bolstad, 124 Wis.2d 576, 370 N.W.2d 576 (Ct. App. 1985).

The 2018 revision removed reference to a blood test in light of recent decisions from the United States and Wisconsin Supreme Courts. In Birchfield v. North Dakota, 579 U.S. —, 136 S.Ct. 2160 (2016), the court held that it is unconstitutional to make it a crime to refuse a warrantless blood test after being lawfully arrested for OWI – where exigent circumstances were not shown. However, the court also stated:

“Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.

Petitioners do not question the constitutionality of those laws and nothing we say here should be read to cast doubt on them.” 136 S.Ct. 2160, 2185-86.

In State v. Dalton, 2018 WI 85, 383 Wis.2d 147, 914 N.W.2d 120, the defendant was subjected to a warrantless blood draw that was justified by exigent circumstances. The Wisconsin Supreme Court held that a trial court erred by expressly relying on the defendant’s refusal to consent to the blood draw to increase his sentence within the allowed statutory range:

Dalton was criminally punished for exercising his constitutional right. Established case law indicates that this is impermissible. ¶61.

. . . the circuit court violated Birchfield by explicitly subjecting Dalton to a more severe criminal penalty because he refused to provide a blood sample absent a warrant. ¶67.

Neither Birchfield nor Dalton holds that commenting on a blood test refusal is improper, but the Committee decided to remove reference to a blood test from the text of the instruction to avoid possible issues as this area of the law continues to develop.

NOTE: In State v. Hawley, 2014 AP 1113-CR, the Wisconsin Court of Appeals certified the case to the Wisconsin Supreme Court for a “final resolution” whether implied consent applies to blood draws of unconscious individuals. The certification is being held in abeyance pending the decision of the U.S. Supreme Court in Mitchell v. Wisconsin, U.S. Case No. 18-6210, where the issue presented is “whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the 4th Amendment warrant requirement.” Oral argument in Mitchell was held April 23, 2019.

For a more complete discussion of the case law, see the Comment to Wis JI-Criminal 235.