

2664 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE — CRIMINAL OFFENSE — § 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 a controlled substance.

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 (drove) (operated) a motor vehicle² on a highway.³

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.]⁴

[“Operate” means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.]⁵

2. The defendant was under the influence of (name controlled substance)⁶ at the time the defendant (drove) (operated) a motor vehicle.

[(Name controlled substance) is a controlled substance.]⁷

The Definition of “Under the Influence”

“Under the influence” means that the defendant’s ability to operate a vehicle was impaired because of consumption of a controlled substance.⁸

[Not every person who has consumed (name controlled substance) is “under the influence” as that term is used here.]⁹ What must be established is that the person has consumed a sufficient amount of (name controlled substance) 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.

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.

COMMENT

Wis JI-Criminal 2664 was originally published in 1979 and revised in 1982, 1986, 1993, and 2003. This revision was approved by the Committee in June 2020; it added to the Comment. See footnotes 6 and 7 below.

This instruction is for a criminal offense under § 346.63(1)(a), which applies if “the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals two . . .” Section 346.65(2)(b). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply “regardless of the sequence of offenses.” State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

First violations of the statute are forfeitures. See Wis JI-Criminal 2664A for an instruction for a forfeiture offense involving operating while under the influence of a combination of an intoxicant and a controlled substance.

For offenses involving operating under the influence of “any other drugs,” see Wis JI-Criminal 2666.

This revision adopts 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 of individual instructions. 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. Regarding the definition of “motor vehicle,” see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

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

4. This is the definition of “drive” provided in § 346.63(3)(a).

5. Regarding the definition of “operate,” see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. To avoid confusion, the Committee strongly suggests that only the name of the statutorily listed controlled substance be used throughout the instruction, even if the specific substance alleged to have been in the defendant’s blood is not listed in Chapter 961. For example, if the substance is heroin, “heroin,” should be used throughout. Conversely, if the substance is a synthetic cannabinoid not listed by name in Section 961.14(4)(tb), “synthetic cannabinoid” should be used throughout the instruction, not the specific variation alleged to have been in the defendant’s blood. Section 340.01(9m) provides that for purpose of the Vehicle Code, “controlled substance” has the meaning specified in § 961.01(4), which provides: “‘Controlled substance’ means a drug, substance or immediate precursor included in schedules I to V of sub. II.” The schedules are found in §§ 961.14, 961.16, 961.18, 961.20, and 961.22.

7. It is helpful to instruct the jury that any statutorily listed controlled substance is a “controlled substance,” as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the defendant’s blood tested positive for cocaine, the jury should be instructed: “Cocaine is a controlled substance.”

In contrast, if the evidence shows that the defendant’s blood tested positive for “5F-AMQRZ,” a non-statutorily listed synthetic cannabinoid, the jury should be instructed: “A synthetic cannabinoid is a controlled substance,” *not* that “5F-AMQRZ” is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

8. This definition of “under the influence” is adapted from the one used for offenses involving alcoholic beverages. See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

9. The sentence in brackets is appropriate for cases involving the consumption of substances which are roughly similar in their effect on a person as alcohol. That is, a person could use some substances in a limited degree and, like the person who consumes a limited amount of alcohol, not be “under the influence” as that term is used here.

Some controlled substances, however, have such extreme effects that the sentence in brackets should not be used.