

2666 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF A DRUG — 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 drug to a degree which renders him or her incapable of safely driving.

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 vehicle^{2,3} 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 drug)⁶ to a degree which renders him or her incapable of safely driving at the time the defendant (drove) (operated) a motor vehicle.⁷

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 2666 was originally published in 1985 and revised in 1993. This revision was approved by the Committee in August 2003.

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 a 10-year period, equals 2 . . ." 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. There is no uniform instruction for the forfeiture violation of this offense. 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. See Wis JI-Criminal 2664 for an instruction for a criminal offense involving operating while under the influence of a controlled substance.

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 JI 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. This instruction assumes that the identity of the drug is known. If the identity of the drug is not known, proving that a drug is involved may be extremely difficult in light of the statutory definition of "drug" that applies. Section 340.01(15mm) provides that the applicable definition is the one found in

§ 450.01(10), which reads as follows:

"Drug" means:

(a) Any substance recognized as a drug in the official U.S. pharmacopoeia and national formulary or official homeopathic pharmacopoeia of the United States or any supplement to either of them;

(b) Any substance intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease or other conditions in persons or other animals;

(c) Any substance other than a device or food intended to affect the structure or any function of the body of persons or other animals; or

(d) Any substance intended for use as a component of any article specified in pars. (a) to (c) but does not include gases or devices or articles intended for use or consumption in or for mechanical, industrial, manufacturing or scientific applications or purposes.

Some of the difficulty of incorporating the "drug" definition into an instruction might be avoided by charging the case as one involving "under the influence of an intoxicant." If the intoxicant shares its influence with another substance, the person may still be considered to be "under the influence of an intoxicant." Waukesha v. Godfrey, 41 Wis. 2d 401, 406, 164 N.W.2d 314 (1965).

7. The statute requires not only operating while "under the influence" but also that the defendant be under the influence "to a degree which renders him or her incapable of safely driving." The "incapable of safely driving" requirement appears to be more restrictive than the "ability to operate is impaired" standard that is part of the uniform definition of "under the influence." See, for example, Wis JI-Criminal 2663. Since this requirement of the statute supersedes the usual "under the influence" definition, no definition is included in the instruction.

See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.