

2669 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT / OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION OF 0.08 GRAMS OR MORE — CRIMINAL CHARGE — §§ 346.63(1)(a) and 346.63(1)(b)

NOT RECOMMENDED FOR USE FOR CASES INVOLVING A CHARGE OF A PAC OF MORE THAN 0.02¹

Description of the Charges

The first count in the criminal complaint charges that the defendant drove or operated a motor vehicle on a highway while under the influence of an intoxicant in violation of § 346.63(1)(a) of the Wisconsin Statutes.

The second count in the criminal complaint charges that the defendant drove or operated a motor vehicle on a highway while the defendant had a prohibited alcohol concentration in violation of § 346.63(1)(b) of the Wisconsin Statutes.

To these charges, the defendant has entered pleas of not guilty which means the State must prove every element of each offense charged beyond a reasonable doubt.²

It is for you to determine whether the defendant is guilty of one, both, or neither of the offenses charged. You must make a finding of guilty or not guilty for each offense charged.³

Each count charges a separate offense, and you must consider each one separately.

Definition of Count 1 – Operating Under The Influence

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway while under the influence of an intoxicant.⁴

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 Count 1 – Operating Under The Influence

1. The defendant (drove) (operated) a motor vehicle⁵ on a highway.⁶

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.]⁷

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.]⁸

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.⁹

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.

Definition of Count 2 – Operating With A Prohibited Alcohol Concentration

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway with a prohibited alcohol concentration.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must satisfy you beyond a reasonable doubt that the following two elements were present.

Elements of Count 2 – Prohibited Alcohol Concentration

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

"Prohibited alcohol concentration" means¹⁰

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

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).¹¹

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED¹² AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"¹³ THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating) or that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), or both, but you are not required to do so. You the jury are here to decide these questions on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating) or that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), or both, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:¹⁴

[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 the defendant (drove) (operated) a motor vehicle on a highway while under the influence of an intoxicant, you should find the defendant guilty of Count 1.

If you are not so satisfied, you must find the defendant not guilty of Count 1.

If you are satisfied beyond a reasonable doubt that the defendant (drove) (operated) a motor vehicle on a highway while the defendant had a prohibited alcohol concentration, you should find the defendant guilty of Count 2.

If you are not so satisfied, you must find the defendant not guilty of Count 2.

COMMENT

Wis JI-Criminal 2669 was originally published in 1989 and revised in 1992, 1995, 2004, and 2006. This revision was approved by the Committee in July 2014; it added a recommendation for cases involving a PAC of more than 0.02.

The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. For persons with two or fewer priors, a test showing 0.08 grams or more is prima facie evidence of being "under the influence of an intoxicant." § 885.235(1)(c). The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

This instruction is drafted for the case where two counts based on the same incident are submitted to the jury: one alleging operating while under the influence in violation of 346.63(1)(a); and, one alleging

operating with a prohibited alcohol concentration of 0.08 or more. It is a combination of Wis JI-Criminal 2660 and 2663 and is intended to implement the procedure set forth in § 346.63(1)(c). It attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge. This instruction is drafted for criminal charges; for two civil forfeiture offenses, see Wis JI-Criminal 2668.

The constitutionality of the two-charge procedure was upheld in State v. Bohacheff, 114 Wis.2d 402, 338 N.W.2d 446 (1983). The court held that the Double Jeopardy Clause is not offended because of the express limitation in § 346.63(1)(c) that there be only one conviction. Bohacheff dealt with a challenge to the criminal complaint, so it did not address the problems presented at a trial where both charges are submitted to the jury. The Committee concluded that § 346.63(1)(c) clearly suggests that both charges should be submitted and that the jury should make a finding as to each charge. If the jury returns a guilty verdict on both, judgment of conviction should be entered on the count on which the prosecutor moves for judgment. The remaining count should be dismissed. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

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. A two-count case could involve the combination of an under-the-influence charge with a charge of operating with a PAC of more than 0.02. The Committee recommends that a combined instruction not be given for that kind of case, because the standard paragraphs on the evidentiary effect of test results could be confusing. Rather, Wis JI-Criminal 2663 Operating Under The Influence should be used for the under-the-influence count; Wis JI-Criminal 2660C Operating With A Prohibited Alcohol Concentration – More Than 0.02 Grams should be used for the 0.02 count. Those instructions will have references to the test results that are appropriate for each offense. The instructions should identify the charges as "Count One" and "Count Two" as reflected in the charging document.

2. This statement is the equivalent of Wis JI-Criminal 115, One Defendant: Two Counts. If Wis JI-Criminal is also given, the statement need not be repeated here.

3. This statement is the equivalent of Wis JI-Criminal 484, . . . One Defendant: Two Counts . . . If Wis JI-Criminal 484 is also given, the statement need not be repeated here.

4. 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.

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

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

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

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

9. The instruction is drafted for cases involving the influence of an intoxicant. See note 3, *supra*. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

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

11. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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