

**2677 SPEEDING: EXCEEDING 55 MILES PER HOUR IN THE ABSENCE OF POSTED LIMITS UNDER § 346.57(4)(h) OR AN ORDINANCE ADOPTING § 346.57(4)(h)**

**Statutory Definition of the Crime**

[Section 346.57(4)(h)] [Ordinance \_\_\_\_\_, adopting § 346.57(4)(h)]<sup>1</sup> of the Wisconsin Statutes, is violated by one who drives a vehicle on a highway<sup>2</sup> in excess of 55 miles per hour in the absence of any other posted limit.

**Burden of Proof**

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)<sup>3</sup> must prove by evidence which satisfies 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 a vehicle<sup>4</sup> on a highway.<sup>5</sup>
2. The defendant drove the vehicle at a speed which exceeded 55 miles per hour.<sup>6</sup>

**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 [and you should also find the speed the defendant's vehicle was traveling and insert the same into the verdict].<sup>7</sup>

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

**COMMENT**

Wis JI-Criminal 2677 was originally published in 1987 and revised in 1988 and 1995. This revision was approved by the Committee in June 2009 and involved adoption of a new format and nonsubstantive changes to the text.

With respect to the "justification" defense to speeding, see State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982). Brown is summarized in Wis JI-Criminal 2672A Law Note: Justification Defense.

1. The use of brackets is intended to allow use of this instruction for cases charged either as violations of the state statutes or as violations of local ordinances in conformity with the statutes. Since ordinances may be adopted by a variety of governmental entities – county, city, town, etc. – the instruction refers only to "ordinance." Identifying the type of ordinance as, for example, a city ordinance may be helpful to the jury.

If a statutory violation was charged, the instruction would begin: "Section 346.57(4)(h) of the Wisconsin Statutes is violated . . ."

If an ordinance violation was charged, the instruction would begin: "Ordinance \_\_\_\_\_, adopting section 346.57(4)(h) of the Wisconsin Statutes, is violated . . ."

2. Offenses defined in Chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. § 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in §§ 346.62 and 346.63; § 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

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. If definition of "vehicle" is required, see Wis. Stat. § 340.01(74) which provides as follows:

"Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes specifically applicable by statute.

5. See note 2, supra.

6. A witness' personal estimate of vehicle speed is admissible if the witness was in a position to judge the speed and the length of the observation period was not too short. The estimate must be definite and objective (e.g., "in excess of 50 miles per hour"), as opposed to indefinite and subjective (e.g., "too fast"). If there is a reasonable basis for the estimate, the weight it is to be given is up to the jury. See Milwaukee v. Berry, 44 Wis.2d 321, 171 N.W.2d 305 (1969), and cases cited therein.

For discussion of radar speed measurement, see Wis JI-Criminal 2679 and comment.

7. The jury should be instructed to find the speed whenever the defendant is charged with exceeding the speed limit by 10 or more miles per hour. Such violations carry an increased penalty in terms of loss of points. See § 343.32(2)(b). A jury finding of the actual speed should also be made when suspension of operating privileges is sought under § 343.30(1n), which requires suspension for 15 days when the person has been convicted under § 346.57(4)(h) (as opposed to city or county ordinance adopting § 346.57(4)(h)) for exceeding the posted speed limit by 25 or more miles per hour.

In State v. Zick, 44 Wis.2d 546, 550, 171 N.W.2d 430 (1969), the Wisconsin Supreme Court held:

Under this section [§ 346.57(5)] we hold the state may charge a defendant with speeding and also state the excess rate of speed and such charge maybe sustained by proof of any speed in excess of the maximum permissible speed. Although the exact rate of speed found need not conform to the rate of speed stated in the ticket it is important in determining the punishment and points and must be proved beyond a reasonable doubt.

(Although the Zick case identifies the burden of proof as "beyond a reasonable doubt," where the penalty for the offense is only a forfeiture, the proper burden is "to a reasonable certainty by evidence which is clear, satisfactory, and convincing.")

The Zick decision approved the use of a verdict which provided in part:

We, the Jury, find the defendant, ((name of defendant)), guilty of speeding at the time and place charged in the Complaint and find the speed at which he drove was \_\_\_\_ miles per hour.

(Although the approved verdict in the Zick case referred to "the complaint," the proper reference would usually be to the "citation.")