

2677A SPEEDING: EXCEEDING 55 MILES PER HOUR IN THE ABSENCE OF POSTED LIMITS – CRIMINAL OFFENSE – § 346.57(4)(h); § 346.60 (3m)(a)2

Statutory Definition of the Crime

Section 346.60(3m)(a)2 of the Wisconsin Statutes, is violated by one who drives a vehicle on a highway¹ in excess of 55 miles per hour in the absence of any other posted limit in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) which results in bodily harm to another.

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 four elements were present.

Elements of the Offense That Must Be Proved

1. The defendant drove a vehicle² on a highway.³
2. The defendant drove the vehicle at a speed which exceeded 55 miles per hour.⁴
3. The defendant drove in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) where workers are at risk from traffic.

[“Highway maintenance or construction area” means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an “END ROAD WORK” or “END CONSTRUCTION”

sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.]⁵

[“Utility work area” means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an “END UTILITY WORK” sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.]⁶

[“Emergency or roadside response area” means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).]⁷

4. The defendant’s driving resulted in bodily harm to another.

This requires that the defendant’s driving was a substantial factor in causing bodily harm to another.⁸

“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.⁹

Jury’s Decision

If you are satisfied beyond a reasonable doubt that all four 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].¹⁰

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

COMMENT

Wis JI-Criminal 2677A was approved by the Committee in October 2022.

This instruction is drafted for violations of § 346.57(4)(h) where criminal penalties may apply. For violations of § 346.57(4)(h) that concern forfeiture or fine, see Wis JI-Criminal 2677.

§ 346.60(3m)(a)2, created by 2021 Wisconsin Act 115 [effective date: December 8, 2021], which provides the following:

If an operator of a vehicle violates s. 346.57 (2), (3), (4) (d) to (h), or (5) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic and the violation results in bodily harm, as defined in s. 939.22 (4), to another, the operator may be fined not more than \$10,000 or imprisoned for not more than 9 months, or both. In addition to the penalties specified under this subdivision, a court may also order a person convicted under this subdivision to perform not fewer than 100 nor more than 200 hours of community service work and attend traffic safety school, as provided under s. 345.60.

Section 346.60(3m)(a)2 provides for doubling the forfeiture “If an operator of a vehicle violates s. 346.57 (2) to (5) when children are present in a zone designated by ‘school’ warning signs as provided in s. 118.08 (1).

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. 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.

2. 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.

3. See note 1, supra.

4. 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.

5. The definition of “Highway maintenance or construction area” is the one provided in § 340.01(22e), which applies to this offense.

6. The definition of “Utility work area” is the one provided in § 340.01(73m), which applies to this offense.

7. The definition of “Emergency or roadside response area” is the one provided in § 340.01(15pu), which applies to this offense.

8. The Committee has concluded that the simple “substantial factor” definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

See Wis JI-Criminal 910 for a more complete discussion of “cause.”

Section 346.60 (3m)(a)2 states the causal requirement differently. It requires that the defendant’s violation of s. 346.57(4)(h) “results in bodily harm.” The statute is one of several criminal statutes using “results in” to establish the causal connection between the actor’s conduct and the prohibited result. The Committee has concluded that “results in” should be interpreted to mean “cause,” traditionally defined in terms of “substantial factor.” This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court construed “results in” as used in § 346.17(3).

The court held that the statute was not unconstitutionally vague because “results in” means “cause” and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant’s conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: “The state must further establish that ‘the harmful result in question be the natural and probable consequence

of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

9. This is the definition of "bodily harm" provided in § 939.22(4).

10. 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.")