

**2690 OPERATING A COMMERCIAL MOTOR VEHICLE WITH AN ALCOHOL CONCENTRATION OF 0.04 GRAMS OR MORE BUT LESS THAN 0.08 GRAMS — CRIMINAL OFFENSE — § 346.63(5)(a)**

**Statutory Definition of the Crime**

Section 346.63(5)(a) of the Wisconsin Statutes is violated by one who drives or operates a commercial motor vehicle on a highway<sup>1</sup> while that person has an alcohol concentration of .04 or more but less than .08.

**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 commercial motor vehicle<sup>2</sup> on a highway.<sup>3</sup>

**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.]<sup>4</sup>

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.]<sup>5</sup>

2. The defendant had an alcohol concentration of .04 or more but less than .08<sup>6</sup> at the time the defendant (drove) (operated) a commercial motor vehicle.

### How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING 0.04 GRAMS OR MORE HAVE BEEN ADMITTED<sup>7</sup> AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"<sup>8</sup> THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

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). If you are satisfied beyond a reasonable doubt that there was [.04 grams or more of alcohol in 100 milliliters of the defendant's blood] [.04 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 had an alcohol concentration of .04 or more at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had an alcohol concentration of .04 or more at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:<sup>9</sup>

[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 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 2690 was originally published in 1993. This revision was approved by the Committee in August 2003.

This revision reflects the change in the prohibited alcohol concentration level for this offense from "more than 0.04 but less than 0.10" to "more than 0.04 but less than 0.08" made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

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 for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

This instruction is for a criminal offense under § 346.63(5)(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(2j). 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 not a uniform instruction for the forfeiture offense, but see Wis JI-Criminal 2660A for an instruction for a forfeiture offense involving a non-commercial motor vehicle.

The maximum penalty for this offense is doubled if there was a child under the age of 16 years in the defendant's vehicle. See § 346.65(2j)(d) and Wis JI-Criminal 999.

The constitutionality of penalizing the "status" of having a prohibited level of alcohol concentration has been upheld. State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984); State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989). Defendants may not litigate the validity of the "partition ratio" that is used to calculate the prohibited breath alcohol level. McManus, 152 Wis.2d 113, 123.

Note that § 346.63(7)(a) imposes an absolute sobriety requirement on commercial motor vehicle operators during on duty time. Violations are punished by a forfeiture of \$10; any refusal to take a chemical test is a separate violation. § 346.65(2u).

The implied consent law requires that notice of commercial motor vehicle license sanctions be included in the implied consent warnings given to suspects. See § 343.305(4)(b) and (c). These warnings must be given to drivers whenever the officer knows that the suspect holds a commercial motor vehicle license. State v. Geraldson, 176 Wis.2d 487, 500 N.W.2d 415 (Ct. App. 1993). The commercial motor vehicle warnings need not be given to suspects who are not licensed as a commercial motor vehicle operator. State v. Piskula, 168 Wis.2d 135, 483 N.W.2d 250 (Ct. App. 1992).

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

2. If definition of "commercial motor vehicle" is necessary, see § 340.01(8), which provides as follows:

(8) "Commercial motor vehicle" means a motor vehicle designed or used to transport passengers or property and having one or more of the following characteristics:

(a) The vehicle is a single vehicle with a gross vehicle weight rating of 26,001 or more pounds or the vehicle's registered weight or actual gross weight is more than 26,000 pounds.

(b) The vehicle is a combination vehicle with a gross combination weight rating, registered weight or actual gross weight of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating, registered weight or actual gross weight of more than 10,000 pounds.

(c) The vehicle is designed to transport or is actually transporting the driver and 15 or more passengers. If the vehicle is equipped with bench type seats intended to seat more than one person, the passenger carrying capacity shall be determined under s. 340.01(31) or, if the vehicle is a school buss, by dividing the total seating space measured in inches by 13.

(d) The vehicle is transporting hazardous materials requiring placarding.

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. Section 340.01(1v) provides that "alcohol concentration" means the number of grams of alcohol per 100 milliliters of a person's blood or the number of grams of alcohol per 210 liters of a person's breath. For this offense the prohibited range is more than 0.04 grams but less than 0.08 grams.

7. Section 885.235(1)(d) provides that test results in this range are "prima facie evidence" of an alcohol concentration of .04 or more at the time of the driving.

This instruction, therefore, advises the jury that a test result showing an alcohol concentration of .04

or more is sufficient evidence upon which to base a finding that the person had such a concentration at the time of the driving. But the jury is also advised that they are not required to make such a finding and that they may only find that the defendant had an alcohol concentration of .04 or more at the time of the driving if they are so satisfied beyond a reasonable doubt from all the evidence in the case. In the Committee's judgment, this is the type of instruction required by Wis. Stat. § 903.03.

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

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