

**5050 CAUSING INJURY OR DEATH TO AN UNDERAGE PERSON BY PROVIDING ALCOHOL BEVERAGES — § 125.075****Statutory Definition of the Crime**

Section 125.075 of the Wisconsin Statutes is violated by a person who provides alcohol beverages to a person under 18 years of age and knows or should know that the person was under the legal drinking age, where the underage person (dies) (suffers great bodily harm)<sup>1</sup> as a result of consuming the alcohol beverages provided.

**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 four elements were present.

**Elements of the Charged Crime That the State Must Prove**

1. The defendant provided alcohol beverages to (name of victim).

"Provided," as used here, means selling, dispensing, or giving away alcohol beverages.<sup>2</sup>

"Alcohol beverages" means fermented malt beverages and intoxicating liquor.<sup>3</sup>

2. The defendant provided alcohol beverages to (name of victim) at a time when (name of victim) was under 18 years of age and was not accompanied by a parent.<sup>4</sup>

3. The defendant knew or should have known that (name of victim) was under the legal drinking age.

The legal drinking age is 21 years of age.<sup>5</sup>

In deciding whether the defendant knew or should have known that (name of victim) was under the legal drinking age, you should consider all the circumstances relating to the alleged providing of alcohol beverages, including any representations about age made by (name of victim).<sup>6</sup>

4. Name of victim (died) (suffered great bodily harm) as a result of consuming alcohol beverages provided by the defendant.

This requires that the consumption of such alcohol beverages was a substantial factor<sup>7</sup> in causing (death) (great bodily harm) to (name of victim).

("Great bodily harm" means serious bodily injury.)<sup>8</sup>

### **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.

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

### **COMMENT**

Wis JI-Criminal 5050 was originally published in 1989 and revised in 1995 and 2005. This revision was approved by the Committee in February 2007.

This instruction is drafted for violations of § 125.075, which was created by 1987 Wisconsin Act 335 (effective date: April 28, 1988).

1. Section 125.075(2) provides that the penalty for a violation of this statute varies depending on the harm suffered by the underage person:

- if the underage person suffers great bodily harm, the defendant is guilty of a Class H felony.
- if the underage person dies, the defendant is guilty of a Class G felony.

2. The actual words used in statute are: "procures for . . . or sells, dispenses or gives away to. . ." § 125.075(1). The instruction uses the broader term "provides," which is used in the title of the statute, and then defines it by reference to the statutory language.

3. This is the definition of "alcohol beverage" provided in § 125.02(1).

"Fermented malt beverage" is defined in § 125.02(6) as follows:

"Fermented malt beverages" means any beverage made by the alcohol fermentation of an infusion in potable water of barley malt and hops, with or without unmalted grains or decorticated and degerminated grains or sugar containing 0.5% or more of alcohol by volume.

"Intoxicating liquor" is defined in § 125.02(8) as follows:

"Intoxicating liquor" means all ardent, spirituous, distilled or vinous liquors, liquids or compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing 0.5% or more alcohol by volume, which are beverages, but does not include "fermented malt beverages."

4. Section 125.075 prohibits providing alcohol beverages "to a person under 18 years of age in violation of s. 125.07(1)(a) 1 or 2. . . ." The statutory cross-reference is to provisions prohibiting the dispensing of alcohol beverages to an "underaged person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age." Thus, it is the source of the requirement in the second element that the underage person was not accompanied by a parent. The complete statement would be as set forth in the quotation above.

In State v. Wille, 2007 WI App 27, \_\_\_ Wis.2d \_\_\_, \_\_\_ N.W.2d \_\_\_ [No. 2005AP2839-CR, publication recommended], the court rejected the defendant's contention that § 125.075(1) applies "only when a defendant has had direct contact with a particular victim or otherwise knows of the specific victim for whom alcohol beverages are procured." ¶9. The court concluded that "a violation of § 125.075(1) is proven when a defendant is shown to have 'procure[d] alcohol beverages for . . . [one or more persons who are] under 18 years of age,' if the defendant 'knew or should have known that the underage person[s] were] under the legal drinking age' and an 'underage person [who was under eighteen when provided the beverages] dies . . . as a result.'" ¶15.

5. Section 125.02(8m) provides that "'legal drinking age' means 21 years of age."

6. With respect to the "knew or should have known" requirement, § 125.075(1m) provides as follows:

(1m) In determining under sub. (1)(a) whether a person knew or should have known that the underage person was under the legal drinking age, all relevant circumstances surrounding the procuring, selling, dispensing or giving away of the alcohol beverages may be considered, including any circumstance under pars. (a) to (d). In addition, a person has a defense to criminal liability under sub. (1) if all of the following occur:

(a) The underage person falsely represents that he or she has attained the legal drinking age.

(b) The underage person supports the representation under par. (a) with documentation that he or she has attained the legal drinking age.

(c) The alcohol beverages are provided in good faith reliance on the underage person's representation that he or she has attained the legal drinking age.

(d) The appearance of the underage person is such that an ordinary and prudent person would believe that he or she had attained the legal drinking age.

The instruction suggests a statement that calls the jury's attention to the general caveat of subsection (1m) and to the specific concern to which subsections (a) through (d) relate—representations as to age made by the underage person. Because the definition of the crime includes a "knew or should have known" element, any evidence tending to show the absence of that element must be considered by the jury. In addition, a more specific defense is provided by subsections (a) through (d). If the defendant presents evidence of each of the matters set forth in subsection (a) through (d), the Committee recommends that the jury be instructed that the state must prove that the defense does not apply. This can be done by proving that any one of the four matters is not present. See City of Oshkosh v. Abitz, 187 Wis.2d 202, 522 N.W.2d 258 (Ct. App. 1994), holding that a similar provision found in § 125.07 provided "two lines of defense": introducing any evidence believed relevant to challenging the element of the offense; and, providing evidence of all four aspects of the specific defense.

7. 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 immediately preceding the sentence in the instruction beginning with "before":

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

Also see, Wis JI-Criminal 901 Cause.

The Committee has treated this offense as one involving the traditional "substantial factor" causal relationship employed for criminal offenses. However, it should be noted that § 125.075 does not directly refer to the defendant's conduct causing the harm. Rather, the statute refers to the harm occurring "as a result of consuming the alcohol beverages provided" in violation of the statute § 125.075(1)(b). Since it

is not clear whether this approach was intended to indicate a different causal requirement, the Committee concluded that the regular "substantial factor" test should be used.

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).

In State v. Wille, 2007 WI App 27, \_\_\_ Wis.2d \_\_\_, \_\_\_ N.W.2d \_\_\_ [No. 2005AP2839-CR, publication recommended], the court concluded that the instruction was correct in adopting the "substantial factor" standard for the cause element. ¶26. The court also concluded that the trial court did not err in denying a request to add that the death must have been a "natural and probable consequence" of the defendant's conduct. "[I]t is not an erroneous exercise of discretion for a trial court to decline to provide jurors with alternative language that communicates the same concept as other language already included in the instruction." ¶27.

8. For additional definition and discussion of "great bodily harm," see Wis JI-Criminal 914.