1400 CRIMINAL DAMAGE TO PROPERTY — § 943.01

Statutory Definition of the Crime

Criminal damage to property, as defined in § 943.01 of the Criminal Code of Wisconsin, is committed by one who intentionally causes damage to the physical property of another person without the consent of that person.

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 five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused damage to physical property.

   The word "damage" includes anything from mere defacement to total destruction.[1]

2. The defendant intentionally caused the damage.

   The term "intentionally" means that the defendant must have had the mental purpose to damage the property or was aware that the conduct was practically certain to cause that result.[2]

3. The property belonged to (name of owner, agent, etc.).[3]

4. The defendant caused the damage without the consent[4] of (name of owner, agent, etc.).

5. The defendant knew the property belonged to another and knew that the property owner did not consent to the damage.[5]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five 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.

ADD THE FOLLOWING IF THE FELONY OFFENSE IS CHARGED, AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE PROPERTY WAS REDUCED IN VALUE BY MORE THAN $2,500.[6]

[Finding the Reduction in the Value of the Property]

[If you find the defendant guilty, answer the following question:

"Was the property reduced in value by more than $2,500?"

Answer: "yes" or "no."

"Reduced in value" means what it would cost to repair or replace the property, whichever is less.[7] Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the property was reduced in value by more than $2,500.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING DAMAGE TO MORE THAN ONE ITEM OF PROPERTY "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 943.01(3).[8]

[In determining the amount by which the value of the property was reduced, you may consider all damage that you are satisfied beyond a reasonable doubt was caused by acts of the defendant pursuant to a single intent and design.]

COMMENT

Wis JI-Criminal 1400 was originally published in 1976 and revised in 1977, 1987, 1995, 1999, and 2002. This revision was approved by the Committee in February 2020; it added to the comment.

This instruction is for violations of § 943.01. The basic offense is a Class A misdemeanor. The penalty increases to a Class H felony under circumstances specified in sub. (2k). The penalty increases to a Class I felony in six situations specified in sub. (2), one of which is addressed by this instruction: where the amount of property damage exceeds $2,500. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001.

The offense is a Class I felony if the property damaged is a coin or card operated machine damaged in the course of a theft. See Wis JI-Criminal 1400A.

The offense is a Class H felony if the property damaged is owned, leased, or operated by an energy provider [sub. (2k)]. See Wis JI-Criminal 1400B.

"Energy" provider means any of the following:

1. A public utility under s. 196.01 (5) (a) that is engaged in any of the following: (a) The production, transmission, delivery, or furnishing of heat, power, light, or water. (b)The transmission or delivery of natural gas.
2. A transmission company under s. 196.485 (1) (ge).
3. A cooperative association organized under ch. 185 for the purpose of producing or furnishing heat, light, power or water for its members.
4. A wholesale merchant plant under s. 196.491 (1) (w), except that "wholesale merchant plant" includes an electric generating facility or an improvement to an electric generating facility that is subject to a leased generation contract, as defined in s.196.52 (9) (a) 3.
5. A decommissioned nuclear power plant.
6. A company that operates a gas, oil, petroleum, refined petroleum product, renewable fuel, water, or chemical generation, storage transportation, or delivery system that is not a service station, garage, or other place where gasoline or diesel fuel is sold at retailer offered for sale at retail.

The court should inquire whether the parties agree that the entity whose property is at issue is a qualified energy provider. If there is no agreement, the court should require the state designate under which subsection they are proceeding.

The offense is also a Class I felony where the property damaged:

- is a vehicle or highway and the damage is of a kind which is likely to cause injury to a person or further property damage [sub. (2)(a)2.]

- belongs to a public utility or common carrier and the damage is of a kind which is likely to impair the services of the public utility or common carrier [sub. (2)(c)]

- belongs to a person who is or was a grand or petit juror and the damage was caused by reason of any verdict or indictment assented to by the owner [sub. (2)(c)]

- is on state-owned land and is listed on the registry under sub. (5) [sub. (2)(e)]

- is a rock art site listed on the national register of historic places in Wisconsin [sub. (2)(f)2.]

- plant material used in research [sub. (2d), as created by 2001 Wisconsin Act 16; effective date: September 1, 2001]

If one of the above is alleged, the Committee recommends handling it with a special question, in the same manner that the value question is handled in this instruction.

"Common carrier" is defined in § 194.01. Also see Brockway v. Travelers Ins. Co., 107 Wis.2d 636, 638, 321 N.W.2d 332 (Ct. App. 1982): "Two elements characterize a carrier as a common carrier: (1) The service is for hire, and (2) the carrier holds itself out to the public."

There are other statutes which provide special criminal damage to property provisions for certain situations:

- § 943.01(2k) Criminal damage to property: energy provider property. See Wis JI-Criminal 1400B.

- § 943.011 Criminal damage or threat to property of witness. See Wis JI-Criminal 1400C.

- § 943.012 Criminal damage to religious and other property. See Wis JI-Criminal 1401.

- § 943.013 Criminal damage; threat; property of judge. See Wis JI-Criminal 1402A.

- § 943.015 Criminal damage; threat; property of department of revenue employee. See Wis JI-Criminal 1402B.

1. See Vol. V 1953 Judiciary Report on the Criminal Code, Wisconsin Legislative Council, page 97 (February 1953).

2. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923.1.

3. Section 939.22(28) provides the following definition of "property of another": "'Property of another' means property in which a person other than the defendant has a legal or equitable interest which the defendant has no right to defeat or impair, even though the defendant may also have a legal or equitable interest in the property."

In State v. Sevelin, 204 Wis.2d 127, 131, 554 N.W.2d 521 (Ct. App. 1996), the court held that § 939.22(48) "unambiguously means that a person can be convicted of criminal damage to property even though he or she has an ownership interest if someone else also has an ownership interest." Thus, the defendant's conviction was affirmed where the charge was based on his damaging his own marital home, because his wife also had an ownership interest in the home.

4. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

5. See § 939.23(3).

6. A misdemeanor charge requires no finding as to reduction in value. This instruction and the verdict question need be given only if a felony is charged and the evidence would support a finding of damage exceeding $2,500. The value level was increased to $2,500 by 2001 Wisconsin Act 2001, effective date: September 1, 2001.

7. § 943.01(2)(d).

8. This material deals with the issue addressed by § 943.01(3) which provides:

> Where more than one item of property is damaged under a single intent and design, the damage to all the property may be prosecuted as a single forfeiture offense or crime.

The Committee's research on the issue of whether this need be submitted to the jury can be summarized as follows: (1) there is no case law dealing with subsec. (3) of the criminal damage to property statute; (2) § 943.01(3) was modeled after the provision applicable to theft cases, now found at § 971.36; (3) an instructive case, State v. Spraggin, dealt with a similar situation in the context of receiving stolen property; and (4) while there may be equally effective ways of dealing with the issue, the Committee concluded that the question of whether all property was damaged pursuant to a single intent and design must be submitted to the jury.

No reported appellate opinion could be found that dealt with the multiple items of property issue. Subsection (3) of § 943.01 was not part of the criminal damage to property statute included in the 1953 draft of the Criminal Code. It was added during the 1954-55 review by the advisory committee and was modeled after the statute then in effect and applicable to theft cases. That statute (formerly § 355.31) now appears, virtually without change, as § 971.36. No cases were found that discuss § 971.36 or its predecessor.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 943.01(3) or § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (71 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal. App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis. 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury should include damage to "all property which you find, beyond a reasonable doubt, to have been damaged pursuant to a single intent or design."

