1444 THEFT BY EMPLOYEE, TRUSTEE, OR BAILEE (EMBEZZLEMENT) — § 943.20(1)(b)

Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(b) of the Criminal Code of Wisconsin, is committed by one who,[1] by virtue of his or her employment, has possession of money belonging to another and intentionally uses[2] the money without the owner's consent, contrary to his or her authority, and with intent to convert it to [his or her own use] [the use of another].

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 Crime That the State Must Prove

1. The defendant had possession of money belonging to another because of (his) (her) employment.[3]
2. The defendant intentionally used the money without the owner's consent and contrary to the defendant's authority.

   The term "intentionally" means that the defendant must have had the mental purpose to use the money without the owner's consent[4] and contrary to the defendant's authority.[5]
3. The defendant knew that the use of the money was without the owner's consent

and contrary to the defendant's authority.[6]

4. The defendant intended to convert the money to [(his) (her) own use] [the use of any other person].[7]

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent 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 knowledge and intent.[8]

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.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[9]

[Determining Value]

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

("Was the value of the money used more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $2,500?"

Answer: "yes" or "no.")

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[10]

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

COMMENT

Wis JI-Criminal 1444 was originally published in 1966 and revised in 1991, 1994, 2002, 2003, 2006, and 2019. This revision was approved by the Committee in February 2022; it updated the text and footnote 10 to reflect a new sub category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(b). For theft by contractor offenses involving the combination of § 943.20(1)(b) with § 779.02(5), see Wis JI-Criminal 1443.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the money used exceeds specified amounts. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 9, below.

The four elements used in this instruction have been cited as a correct breakdown of this offense. See, State v. Halverson, 32 Wis.2d 503, 509, 145 N.W.2d 739 (1966); State v. Blaisdell, 85 Wis.2d 172, 176, 270 N.W.2d 69 (1978).

The essential distinction between a violation of section 943.20(1)(a) and section 943.20(1)(b) of the Criminal Code is that, under subsection (1)(a), the intention to return the property is a defense; whereas, under subsection (1)(b), an intention to return the property is not a defense since an intent to deprive the owner permanently is not essential to constitute the offense. Baldwin, "Criminal Misappropriations in Wisconsin – Part I," 44 Marq. L. Rev. 253, 275 (1960-1961). A distinction between theft under subsection (1)(b) and subsection (1)(d) is that, under the former section, the defendant has obtained only possession of the property; whereas, under the latter section, the defendant has obtained title to the property by false pretenses. See State v. Burke, 189 Wis. 641, 207 N.W. 406 (1926).

1. The summary of this offense in the first paragraph, and the elements of the instruction, represent a considerable simplification of a rather complex statutory definition. "By virtue of his employment" could be replaced by any of the following: "by virtue of his office"; "by virtue of his business"; "as a trustee"; or "as a bailee." "Having possession" is a choice over "having possession or custody." "Money" is one of several options, the others being "negotiable security," "instrument," "paper," or "other negotiable writing of another." If the theft of something other than money is involved, it may be necessary to define "value." See § 943.20(2)(d). "Uses" was selected rather than "transfers," "conceals," or "retains possession of." But see note 4, below. Finally, the statute also provides an alternative to "convert to his own use": "to the use of any other person except the owner." Rather than carry all these alternatives in parentheses throughout the instruction, the Committee concluded it was more efficient to select the simpler statement that ought to be general enough to cover the most common cases.

2. If the charge does not specify one of the alternatives in the statute – "use, transfer, conceal or retain possession of" – the jury instruction should either elect one of the alternatives or advise the jury they must unanimously agree if more than one alternative is submitted. In State v. Seymour, 183 Wis.2d 683, 515 N.W.2d 874 (1994), the Wisconsin Supreme Court held that it was error to instruct the jury in the disjunctive – "used, transferred, concealed or retained possession of . . ." – without requiring the jury to agree unanimously on which alternative applied. Rather, the statute "uses words which were intended to describe independent offenses rather than simply delineating methods by which the same offense may be committed." 183 Wis.2d 683, 685. This affirmed the court of appeals, which had reached the same conclusion. See 177 Wis.2d 305, 502 N.W.2d 591 (Ct. App. 1993). [See Wis JI-Criminal 517 for a suggested instruction requiring jury agreement.].

3. The Committee concluded that the general phrase, "because of (his) (her) employment," will be preferable in most cases to using one of the more specific statutory terms – "office," "business," "trustee," or "bailee." See note 1, supra.

However, in a case involving a bailment, it may be necessary for the court to give the jury additional instruction in the light of the particular facts of the case. The situations here are so varied that the Committee has not attempted to set forth a standard definition, and the necessity and form for an instruction in that respect must be determined on a case-by-case basis. See Burns v. State, 145 Wis. 373, 380, 128 N.W. 987 (1911). Whether the relationship of bailee or trustee or the like is created does, however, sometimes present a question of fact. No particular ceremony is necessary for the creation of such a relationship under the Criminal Code. In Burns v. State, supra, the supreme court said, in part, at page 380:

> It seems to be thought that a bailment was not established by the evidence because some sort of contract inter partes was essential thereto. No particular ceremony or actual meeting of minds is necessary to the creation of a bailment. If one, without the trespass which characterizes ordinary larceny, comes into possession of any personalty of another and is in duty bound to exercise some degree of care to preserve and restore the thing to such other or to some person for that other, or otherwise account for the property as that of such other, according to circumstances, – he is a bailee. It is the element of lawful possession, however created, and duty to account for the thing as the property of another, that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense or not.

What constitutes a "bailment" was discussed in State v. Kuhn, 178 Wis.2d 428, 504 N.W.2d 405 (Ct. App. 1993). Kuhn affirmed the conviction of the owner of an auction gallery who took in goods consignment, sold them, and then failed to pay the person who consigned the goods to her. Her business was failing, and she apparently used the full sale proceeds to pay off debts. The court held that this consignment arrangement did constitute a "bailment" for purpose of § 943.20(1)(b), rejecting the defendant's argument that the formal definition of "bailment" in the Uniform Commercial Code should apply.

4. The defendant accused of this offense has by definition been given consent to hold or use the property for some purpose. It is the use beyond the scope of this consent that is the essence of this crime. Consent to the use of property may be expressed or implied and may result from words or from conduct involving a course of dealings between the parties. See Boyd v. State, 217 Wis. 149, 258 N.W. 330 (1935).

Liabilities growing out of a debtor-creditor relationship cannot be made the basis of the charge of theft. See Hanser v. State, 217 Wis. 587, 592, 259 N.W. 418 (1935). Also see Peters v. State, 42 Wis.2d 541, 167 N.W.2d 250 (1969), where the evidence was found to be sufficient to establish that a loan did not exist.

5. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

In State v. Bryzek, 2016 WI App 48, 370 Wis.2d 237, 882 N.W.2d 483, the trial court added to the standard instruction to include a definition of "power of attorney" in connection with the "contrary to the defendant's authority" element. The court of appeals reversed the conviction because the statute upon which the definition was based was not enacted until after the date of the offense.

6. The word "intentionally," as defined by § 939.23(3), requires "knowledge of those facts necessary to make the conduct criminal" and which appear after the word "intentionally" in the statute.

7. Under section 943.20(1)(b), an intent to pay back the money or restore the property at a later time is not a defense even though such intent existed contemporaneously with the act of conversion. Boyd v. State, supra; McGeever v. State, 239 Wis. 87, 93-94, 300 N.W. 486 (1941).

The evidence was found sufficient to establish "intent to convert to one's own use" in State v. Doss, 2008 WI 93, ¶¶57-64, 312 Wis.2d 570, 754 N.W.2d 150. Also see State v. Kuhn, 178 Wis.2d 426, 505 N.W.2d 405 (Ct. App. 1993).

The jury is under no obligation to accept direct evidence of intent furnished by the defendant, and it may infer intent from such of the defendant's acts as objectively evidence his state of mind. State v. Kuenzli, 208 Wis. 340, 346, 242 N.W. 147 (1932). In Boyd v. State, supra, the supreme court said ". . . acts intentionally committed under circumstances such as to constitute a crime are not justified by the claim of innocent intent." Boyd, 217 Wis. at 163.

Section 943.20(1)(b) includes a provision establishing refusal to deliver the property upon demand as "prima facie evidence" of intent to convert to his own use. The last sentence of that subsection provides:

> A refusal to deliver any money or a negotiable security, instrument, paper or other negotiable writing, which is in his possession or custody by virtue of his office, business or employment, or as trustee or bailee, upon demand of the person entitled to receive it, or as required by law, is prima facie evidence of an intent to convert to his own use within the meaning of this paragraph.

Wis JI-Criminal 225 provides a recommended model for implementing "prima facie evidence" provisions.

The definition of "conversion" is discussed in the context of a civil case in Kozak v. United States Fidelity & Guaranty Co., 120 Wis.2d 462, 355 N.W.2d 362 (Ct. App. 1984).

8. 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 923A.

9. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for

example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

10. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

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 § 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." (81 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 for the offense 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 is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."