1464 TAKING AND DRIVING A (VEHICLE) (COMMERCIAL MOTOR VEHICLE) WITHOUT THE OWNER'S CONSENT – § 943.23(2), § 943.23(2g)

Statutory Definition of the Crime

Taking and driving a (vehicle) (commercial motor vehicle) without the owner's consent, as defined in § 943.23(2) of the Criminal Code of Wisconsin, is committed by one who intentionally takes and drives any (vehicle) (commercial motor vehicle) without the consent of the owner.

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 three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally took[1] a (vehicle)[2] (commercial motor vehicle)[3] without the consent of (name of owner).[4]

   ["Commercial motor vehicle" means a motor vehicle designed or used to transport passengers or property and having one or more of the following characteristics (identify a characteristic provided in s. 340.01(8)(a) – (d)).]

2. The defendant intentionally drove the (vehicle) (commercial motor vehicle) without the consent of (name of owner).

   "Drive" means to exercise physical control over the speed and direction of a vehicle while it is in motion.[5]

3. The defendant knew that (name of owner) did not consent to taking and driving the (vehicle) (commercial motor vehicle).[6]

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Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and 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.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three 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 THERE IS EVIDENCE OF THE AFFIRMATIVE DEFENSE UNDER SUB. (3m), ADD THE MATERIAL FROM WIS JI-CRIMINAL 1465.[8]

COMMENT

This instruction was originally published as Wis JI-Criminal 1467 in 1982 and revised in 1989, 1994, 2002, 2003, and 2006. The 2002 revision renumbered the instruction as Wis JI-Criminal 1464. This revision was approved by the Committee in December 2018; it added the category of "commercial motor vehicle" to the offense.

This instruction is for violations of § 943.23(2) and § 943.23(2g), which respectively prohibits "taking and driving" a vehicle or commercial motor vehicle without the owner's consent. Section 943.23(2g), which provides; "Except as provided in sub. (3m), whoever intentionally takes and drives any commercial motor vehicle without the consent of the owner is guilty of a Class G felony." was created by 2017 Wisconsin Act 287 [effective date: April 18, 2018].

The 2003 revision reflects changes made in the statute by 2001 Wisconsin Act 109, which created sub. (3m) of § 943.23, recognizing an affirmative defense: abandoning the vehicle without damage within 24 hours of the taking. The defense is addressed by Wis JI-Criminal 1465A, which should be added to this instruction if applicable. See footnote 7, below. The effective date of the Act 109 changes is February 1, 2003. If the misdemeanor offense is charged, this instruction can be used as drafted, without any reference to the affirmative defense. By charging the misdemeanor, the State is conceding that the affirmative defense can be established. To prove that the misdemeanor was committed, the elements of the felony must be proved.

1. Wisconsin case law interpreting § 943.23 prior to its 1988 amendment had concluded that it did not require that the driver of the vehicle be the one who actually took the vehicle from the rightful owner. Edwards v. State, 46 Wis.2d 249,251, 174 N.W.2d 269 (1970). Also see State v. Robbins, 43 Wis.2d 478, 168 N.W.2d 544 (1969), and Bass v. State, 29 Wis.2d 201, 138 N.W.2d 154 (1965).

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For example, in the Bass case, a conviction was upheld where the automobile in question was left at a service station overnight to be repaired in the morning. The defendant, an employee of the service station, drove the car after business hours to go to a friend's house to pick up his sleeping bag. He was arrested during this trip and claimed he had limited permission to use the car and therefore there was not a taking without the consent of the owner. His argument was that if one has lawful possession in the first instance, one cannot be convicted of a crime where an essential element is the taking without the consent of the owner. The Wisconsin Supreme Court rejected this argument, holding that the leaving of the car at the station overnight does not constitute implied permission to use the car. When Bass drove the vehicle for his own purposes, not connected with the purposes for which the vehicle had been entrusted to the owner of the station, he committed the offense of operating without the owner's consent.

In the Robbins case, the conviction was affirmed where the defendant was incarcerated in the Milwaukee County House of Correction on the date the vehicle was actually taken from the owner. The defendant was arrested for operating the vehicle some 10 days after the original taking. There was no argument in this case that the defendant did not satisfy the "take and drive" element of the crime, since the court indicated that the only issue in the case was criminal intent.

In the Edwards case, the car in question had been taken from the lot of an auto dealer by the defendant's uncle. The defendant was later arrested for driving that vehicle. Again, the court raised no question about whether the defendant satisfied the "take and drive" requirement. The court stated that "the statutory language 'intentionally takes and drives any vehicle without the consent of the owner' does not require that the driver of the stolen vehicle be the person who actually took the vehicle from the rightful owner."

Each of these cases was decided at the time when the statute had a single section which prohibited "taking and driving without consent." Under the revised statute, of course, there is a second type of offense: "driving or operating without consent." Was the creation of the new offense intended to change the prior case law to require that the defendant charged with "taking and driving" be the one who took the vehicle from the owner? The bill that revised the statute in 1988 gives little guidance as to what the intent of the legislature was. The changes in § 943.23 were part of a bill that made a number of changes in the provisions relating to junked or destroyed vehicles, fraudulent insurance claims, etc. See 1987 Assembly Bill 748.

So, one is left with a situation where the only difference between a Class H and Class I felony is that the more serious crime requires that the defendant "take," as well as "drive," a vehicle without the consent of the owner. The Committee struggled with this matter at great length and finally concluded that it must have been the intent of the legislature that the Class I felony was created to cover the situation where a person is lawfully in possession of a vehicle but operates it in a manner that goes beyond the scope of the use authorized or permitted by the owner. Interpreted in this way, prior law to the effect that the defendant need not be the one who takes the vehicle from the owner would remain intact. One gap in the prior statute, however, would be covered by the new Class I felony offense. That is the situation presented in State v. Mularkey, 195 Wis. 549,218 N.W. 809 (1928). In the Mularkey case, the defendant rented a car from the owner, but drove it beyond the area specified, did not return it at the time designated, and abandoned the car. The Wisconsin Supreme Court held that the defendant had not violated the operating without consent statute, because "the mere unauthorized or extended use of such a vehicle by one who has lawfully obtained the consent of the owner to its taking for use and operation upon the public highway is not a violation of this statute." Because Mularkey's original possession and

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use was with the express knowledge and consent of the owner, he was not guilty under the prior statute. This is because the "taking" was not unlawful even though the ultimate use may have been. In the Committee's judgment, a person in the Mularkey situation would be guilty of the Class I felony under the current statute. Defendants in situations like those in the Bass, Edwards, and Robbins cases would be guilty of the Class H felony because they did not gain possession of the car with the consent of the owner. When they asserted control over it without the owner's consent, they "took" within the meaning of the statute, both the prior and the revised versions.

2. For the definition of "vehicle," see § 939.22(44).

3. For definition of "commercial vehicle," see § 340.01(8). At least one of the following characteristics provided in § 340.01(8)(a) through § 340.01(8)(d) must be chosen in order for the vehicle to classify as a "commercial motor vehicle":

(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 bus, by dividing the total seating space measured in inches by 13.

(d) The vehicle is transporting hazardous materials requiring placarding or any quantity of a material listed as a select agent or toxin under 42 CFR 73.

4. If definition of "without consent" is believed to be necessary, see Wis Il-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. This is the definition of "drive" provided in § 943.23(l)(a).

6. When "intentionally" is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3). Thus, the instruction requires knowledge that the taking and driving was without consent. Also see State v. Edwards, note 1, supra at 252, for a discussion of "intentionally" in the context of this offense.

7. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

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8. 2001 Wisconsin Act 109 created sub. (3m) of § 943.23, which recognizes an affirmative defense: abandoning the vehicle without damage within 24 hours of the taking reduces felony offenses under subs. (2) or (3) offenses to Class A misdemeanors. The statute places the burden of persuasion on the defendant to prove it by a preponderance of the evidence. The Committee concluded that the defense is best handled by submitting it to the jury as a special question, which is provided by Wis Il-Criminal 1465A.

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