1479 ROBBERY BY THE USE OR THREAT OF FORCE[1] — § 943.32(1)(a) and (b)

Statutory Definition of the Crime

Robbery, as defined in § 943.32(1) of the Criminal Code of Wisconsin, is committed by one who, with the intent to steal, takes property from the person or presence of the owner by [using force against the person of the owner with intent to overcome physical resistance or physical power of resistance to the taking or carrying away of the property] [or] [by threatening the imminent use of force against the person[2] of the owner with intent to compel the owner to submit to the taking or carrying away of the property].

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. (Name) was the owner of property.[3]

   "Owner" means a person in possession of property.[4]

2. The defendant took and carried away[5] property from the person or from the presence[6] of (name).

3. The defendant took the property with the intent to steal.

This requires that the defendant had the mental purpose[7] to take and carry away property of another without consent and that the defendant intended to deprive (name) permanently of possession of the property.

[It further requires that the defendant knew that the property belonged to another and knew that the person did not consent to the taking of the property.][8]

4. The defendant acted forcibly.[9]

Forcibly means that the defendant [actually used force against (name) with the intent to overcome or prevent (his) (her) physical resistance or physical power of resistance to the taking or carrying away of the property][10] [or] [threatened the imminent use of force against (name) [11] with the intent to compel (name) to submit to the taking or carrying away of the property. "Imminent" means "near at hand" or "on the point of happening"[12]].

Deciding About Intent

You cannot look into a person's mind to find intent. 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 intent.

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 1479 was originally published in 1974 and revised in 1983, 1988, and 1994. This revision was approved by the Committee in July 2008 and involved adoption of a new format and nonsubstantive changes to the text.

In 2008, separate instructions for use of force [Wis JI-Criminal 1475] and threat of force [Wis JI-Criminal 1477] were withdrawn and this instruction adapted for use in any one of three possible cases: 1) those alleging robbery by the use of force; 2) those alleging robbery by the threat of force; and, 3) those alleging robbery by the use or threat of force. See footnotes 1 and 9, below.

1. This instruction is for cases where either or both of the alternative ways of committing "unarmed robbery" are submitted. Thus, the instruction is phrased in terms of "use of force" or "threat of imminent force." While election of one alternative or the other is preferable, in some cases election may not be possible. In those cases, submitting both alternatives is not error, and it is not essential for the jury to agree on one alternative as opposed to the other. Manson v. State, 101 Wis.2d 413, 304 N.W.2d 729 (1981). Cheers v. State, 102 Wis.2d 367, 306 N.W.2d 676 (1981). The instruction tries to tie the two alternatives together by relating them to the concept of acting "forcibly." See note 9, below.

2. This instruction is drafted for threats against the person of the one in possession of the property. The statute also prohibits threats against others who are present. In cases where threats are against another, the introductory paragraph and the fourth element of the instruction will have to be modified to make it clear that force is threatened against someone else to compel the person in possession of the property to submit to the taking or carrying away.

3. "Property" for the purposes of robbery is the same as "property" for the purposes of theft; which is defined in § 943.20(2)(a). See Baldwin, "Criminal Misappropriations In Wisconsin — Part II," 44 Marq. L. Rev. 430, 450 (1961). The value of the property is immaterial.

4. "The person who has possession of the property" is the definition of owner provided in § 943.32(3).

In State v. Mosely, 102 Wis.2d 636, 307 N.W.2d 200 (1981), the court held that a person qualifies as an "owner" if his possession of the property is "actual or constructive," citing § 971.33. In Mosely, all employees of a restaurant were held to be "owners" of the restaurant's money kept in an office desk since each had dominion and control over it. As to jewelry and a purse on an office shelf, only the person to whom they actually belonged was an "owner," since only she had any control over or interest in the property.

5. On several occasions, Wisconsin appellate courts have held that "asportation" or "carrying away" is required for a taking to constitute robbery. In State v. Johnson, 207 Wis.2d. 240, N.W.2d (1997), the Wisconsin Supreme Court affirmed the reversal of an armed robbery conviction on the ground that there was no "asportation":

> We hold that a person may not be convicted of armed robbery when the property at issue is an automobile and the person does not move the automobile. 207 Wis.2d. 240, 249.

Johnson declined to overrule prior decisions establishing the asportation requirement. In State v. Moore, 55 Wis.2d 1, 197 N.W.2d 820 (l972), the court first interpreted the armed robbery statute to require asportation. That holding came in the context of justifying the conclusion that theft from person was a lesser included offense of robbery. Three court of appeals decisions have relied on Moore. In State v. Dauer, 174 Wis.2d 418, 497 N.W.2d 766 (Ct. App. 1993), the court relied on the asportation requirement to support its conclusion that convictions for robbery and extortion based on the same conduct were not barred by double jeopardy principles. In Ryan v. State, 95 Wis.2d 83, 289 N.W.2d 349 (Ct. App. 1980), the court found the evidence sufficient to support asportation where the defendant abandoned the stolen purse shortly after taking it from the victim. And in State v. Grady, 93 Wis.2d 1, 286 N.W.2d 607 (Ct. App. 1979), the court relied on the asportation element to support a conclusion that a robbery continued during the "carrying away" because it was at that point that a weapon was used. See note 8, below.

6. When there is a dispute on the facts as to precisely from where the property was taken – the person or the presence of the one in possession – then add this sentence: "It is immaterial whether the property is taken from the person or the presence of the one in possession." "Presence of the owner" means such a proximity to the owner as will enable the defendant when he takes the property to use or threaten the imminent use of force. See Baldwin, "Criminal Misappropriations," supra, 447-48. In certain cases, property may be taken from both the person and the presence of the one in possession. Then the words "or both" should be added at this point.

In State v. Mosely, 102 Wis.2d 636, 307 N.W.2d 200 (1981), the court held that "from his person or presence" did not require that the victim actually be aware of the taking: ". . . where the victim has been intimidated or placed in fear by use or threat of force . . . and the property is taken from an area sufficiently close and under his control that, but for the robber's intimidation or force he could have prevented the taking, the taking is from his "presence" under § 943.32(1); and this conclusion is not defeated by an unawareness of the taking as it occurs." 102 Wis.2d at 649.

7. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one part of the definition. It is the other alternative that changes from "believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

8. The bracketed material should be added if there is evidence that, for example, the defendant believed he was reclaiming his own property. Referred to as "right to recapture," "claim of right," or "self-help," this defensive matter tends to negate either the "property of another" or the "knew it was property of another" elements. The rule applies to robbery. Edwards v. State, 49 Wis.2d 105, 181 N.W.2d 383 (1970); Austin v. State, 86 Wis.2d 213, 271 N.W.2d 668 (1978).

The 1993 revision of this instruction substituted the bracketed material for the following phrase: ". . . knew he had no right to take it." The Committee concluded that the present version is a more accurate statement of the law.

The "right to recapture" is discussed in detail at Wis JI-Criminal 710, Law Note: Right To Recapture.

9. This paragraph restates the statutory requirement that the defendant act "by force or threat of imminent force" by phrasing them as alternative ways of satisfying the core requirement that the defendant act "forcibly." The Committee concluded that this properly emphasizes the intent of the statute to require a link between the taking of the property and the defendant's use of force. The Committee concluded that it is not necessary to elect between "use of force" and "threat of imminent force" alternatives, although in the usual case, election would clarify the issue for the jury and should be done where possible. In support of the proposition that election is not necessary, see Manson v. State, and Cheers v. State, cited in note 1, supra. As to jury unanimity generally, also see State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981), and Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); compare United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

10. It is robbery if force is used to accomplish the "carrying away" of the property as well as the "taking." State v. Grady, 93 Wis.2d 1, 286 N.W.2d 607 (Ct. App. 1979).

11. See note 2, supra.

In State v. Johnson, 231 Wis.2d 58, 604 N.W.2d 902 (Ct. App. 1999), the court held that the statute does not require express threats of bodily harm – "the element is met 'if the taking of the property [is] attended with such circumstances of terror, or such threatening by menace, word, or gesture as in common experience is likely to create an apprehension of danger and induce a [person] to part with property for [his or her] safety.'" 231 Wis.2d 58, 69, citing Washington v. Collinsworth, 966 F.2d 905, 907 (Wash. Ct. App. 1997).

12. The definition of "imminent" is adapted from Black's Law Dictionary, p. 884 (4th Edition, 1951).

