1480 ARMED ROBBERY: BY USE OR THREAT OF USE OF A DANGEROUS WEAPON — § 943.32(2)[1]

Statutory Definition of the Crime

Armed robbery, as defined in § 943.32(2) of the Criminal Code of Wisconsin, is committed by one who, with the intent to steal and by use or threat of use of a dangerous weapon, 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].[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. (Name) was the owner of property.[4]

   "Owner" means a person who has possession of property.[5]

2. The defendant took and carried away[6] property from the person or from the presence[7] of (name).

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

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"Intent to steal" means that the defendant had the mental purpose[8] to take and carry away property of another without consent and that the defendant intended to deprive the owner permanently of possession of the property.[9] [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.][10]

4. The defendant acted forcibly.[11]

"Forcibly" means that the defendant [used force against (name) with the intent to overcome or prevent physical resistance or physical power of resistance to the taking or carrying away of the property] [or] [threatened the imminent use of force against (name)[12] with the intent to compel (name) to submit to the taking or carrying away of the property].[13]

"Imminent" means "near at hand" or "on the point of happening."[14]

5. At the time of the taking or carrying away,[15] the defendant used or threatened to use a dangerous weapon.[16]

A "dangerous weapon" is (any firearm, whether loaded or not) (any device designed as a weapon and capable of producing death or great bodily harm) (any device or instrumentality which in the manner it is used or intended to be used is calculated or likely to produce death or great bodily harm).[17]

ADD THE FOLLOWING IF THE CASE INVOLVES A THREAT TO USE A WEAPON AND NO WEAPON OR OTHER ARTICLE IS ACTUALLY DISPLAYED:[18]

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[This element does not require that a defendant actually display or possess a dangerous weapon. It is sufficient if (name of victim) reasonably believed the defendant had a dangerous weapon at the time of the threat. Whether (name of victim) reasonably believed[19] that the defendant was armed with a dangerous weapon is to be determined from the standpoint of (name of victim) at the time of the alleged offense. The standard is what a person of ordinary intelligence and prudence would have believed under the circumstances that existed at that time.]

Deciding About Intent

The intent to steal and [the intent to overcome resistance] [or] [the intent to compel the one in possession to submit to the taking or carrying away] must be found as facts before you can find the defendant guilty of armed robbery. 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 five elements of armed robbery 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 1480 was originally published in 1966 and revised in 1974, 1980, 1983, 1988, 1990, 1993, 1997, 1999, and 2009. This revision was approved the Committee in June 2015; it involved nonsubstantive changes to the text and added to footnote 18.

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1. This instruction is for cases where a robbery is alleged to have been committed by the use or threat of use of a dangerous weapon. If the case involves "an article used or fashioned in a manner to lead the victim reasonably to believe it is a dangerous weapon," Wis JI-Criminal 1480A should be used.

Section 943.32(2) was amended by 1995 Wisconsin Act 288 (effective date: May 10, 1996) to refer not only to a dangerous weapon but also to "a device or container described under s. 941.26(4)(a)." The reference is to containers of oleoresin of capsicum, commonly referred to as "pepper spray." If that option is presented, the instruction must be modified. The Committee suggests simply substituting "container of oleoresin of capsicum" for "dangerous weapon" and not defining the term further. This is the approach used in the instructions for violations of § 941.26(4); see Wis JI-Criminal 1341, 1341A, and 1341B.

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 definition of "forcibly" 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. The instruction is drafted for a case where both alternative ways of committing robbery are submitted. That is, the instruction is phrased in terms of "use of force" or "threat of imminent force." If only one of the alternatives is indicated by the evidence, only one should be submitted. 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). This instruction tries to tie the two alternatives together by relating them to the concept of acting "forcibly."

4. "Property" for the purposes of robbery is the same as "property" for the purposes of theft; the latter 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.

5. "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.

6. 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,

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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.

7. 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.

8. "With intent to" is defined in § 939.23(4). 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.

9. This is intended to be a summary of the necessary components of "intent to steal." See Wis JI-Criminal 1441, THEFT.

10. 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 armed 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.

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11. This 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." "Forcibly" is defined in the text preceding footnotes 16 and 17.

12. See note 2, supra.

13. It is robbery if force is used to accomplish either the "carrying away" of the property or the "taking." State v. Grady, 93 Wis.2d 1, 6, 286 N.W.2d 607 (Ct. App. 1979).

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 3, 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).

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

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

16. This instruction is drafted for cases involving the use or threat of use of a dangerous weapon and is intended to cover one of several options possible under the present version of the armed robbery statute.

Prior to 1980, § 943.32(2) applied to violations of sub. (1) of the statute committed "while armed with a dangerous weapon." The Wisconsin Supreme Court had interpreted the statute to require that the defendant actually possess something that qualified as a "dangerous weapon." In Dickenson v. State, 75 Wis.2d 47, 248 N.W.2d 447 (1977), an armed robbery conviction was reversed because there was no evidence that the object in the waistband on his trousers was a firearm or was an object of such size that it could be used as a bludgeon. Also see Davis v. State, 93 Wis.2d 319, 286 N.W.2d 570 (1980); Beamon v. State, 93 Wis.2d 215, 286 N.W.2d 592 (1980); and McKissick v. State, 78 Wis.2d 176, 254 N.W.2d 218 (1977).

Section 943.32(2) was amended by Chapter 114, Laws of 1979 (effective date: March 1, 1980), to replace "while armed" with "by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon." Several points should be noted relating to how the statute is implemented in the instructions for armed robbery.

First, even if the defendant has possession of a weapon, he must use it or threaten to use it before the statute is violated. In State v. Moriarty, 107 Wis.2d 622, 321 N.W.2d 324 (Ct. App. 1982), the court held that it is no longer sufficient for the state to prove that a defendant was merely armed; rather, it must be proved that the defendant actually used or threatened to use the weapon during the robbery.

Second, the "use" or "threat of use" alternatives do not appear to be conceptually distinct and neither election of one alternative nor jury agreement on which applies should be required. This is consistent with the analysis of the "use of force" and "threat of imminent use of force" in subsecs. (1)(a) and (b) of § 943.32. See cases discussed in note 3, supra. There is no reason to require the jury to decide, for example, whether the display of a gun is "use" or just a "threat to use" that weapon.

Third, there appear to be at least two different types of "threat to use a weapon or article" cases. One is where the defendant has something in his possession that looks like a weapon but actually is not. Wis JI-

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Criminal 1480A is intended for this kind of case and treats it as "use or threat of use of an article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon." The other type of threat case occurs where there is a pure verbal threat to use a weapon, but no weapon or article is present. This instruction addresses that problem at footnote 10, below.

A case which might be handled under either approach is State v. Hopson, 122 Wis.2d 395, 362 N.W.2d 166 (Ct. App. 1984). Hopson had shoplifted several packages of luncheon meat, which he had stuffed in the waistband of his trousers. The store manager stopped him near the door and asked if he had forgotten to pay for something. Hopson put his hand under his shirt and said, "I got a gun. You better move." The manager stepped aside and later testified that he could not tell whether Hopson actually had a gun because the meat "caused a considerable bulge" under Hopson's shirt. The court of appeals concluded that Hopson's conduct violated the statute, emphasizing "that a victim who is threatened with a supposed weapon which is concealed is put in the same degree of fear and feels as strongly compelled to comply with the robber's demands as a victim who is threatened with a weapon which is openly displayed." 122 Wis.2d 395, 403. The court characterized this as the "subjective" view of armed robbery, as distinguished from the "objective" view, which requires that the robber actually be armed with a dangerous weapon. The court says that the legislature rejected the objective view by amending the statute in 1979 and "see[s] no reason to partially reinstate the 'objective' approach . . . by construing sec. 943.32(2) to require that the robber produce and display to the victim a dangerous-appearing article." 122 Wis.2d 395, 404. The court concluded that sub. (2), as amended by Chapter 114, Laws of 1979, "should be construed to focus upon the reasonable perception of the victim that he or she was in danger and not upon the defendant's possession or display of dangerous weapons or other dangerous-appearing articles." 122 Wis.2d 395, 401-02.

Hopson could be considered a pure "verbal threat" case and Wis JI-Criminal 1480 could be used. Or, the bulge in the trousers could be considered an "article" and Wis JI-Criminal 1480A could be used. In either case, the important fact would be whether the victim reasonably believed that the defendant was armed.

17. The Committee suggests using the part of the statutory definition that applies to the facts of the case. The definition in the instruction does not include all the alternatives provided in § 939.22(10), which, as amended by 2007 Wisconsin Act 127, defines "dangerous weapon" as follows:

> "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede partially or completely, breathing or circulation of blood; any electric weapon as defined in § 941.295(4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

See Wis JI-Criminal 910 for suggested instructions for all the statutory alternatives and a discussion of some of the substantive issues relating to "dangerous weapons."

Section 943.32(2) was amended by 1995 Wisconsin Act 288 (effective date: May 10, 1996) to refer not only to a dangerous weapon but also to "a device or container described under s. 941.26(4)(a)." The reference is to containers of oleoresin of capsicum, commonly referred to as "pepper spray." See note 1, supra.

18. This material should be added when the case involves a verbal threat to use a weapon, but no weapon or other "article" is actually present. If the case involves an "article" that the victim believed to be a weapon, use Wis JI-Criminal 1480A. Also see the discussion at note 16, supra.

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This paragraph is intended to reflect the rule recognized in State v. Witkowski, 143 Wis.2d 216, 420 N.W.2d 420 (Ct. App. 1988). The facts were as follows:

> Sharon Plambeck, a bartender at the Lean-To Tavern in Portage, served drinks and a meal to Witkowski while he sat at the bar. He appeared to be intoxicated. When she gave him the check, he told her that "he wanted all the money out of the [cash] register and that he had a gun and don't be cute." Plambeck backed slowly down the bar to where two other patrons, Gordon and Micki Kluth, were seated. She wrote a note stating "Man is holding me up now" and handed it to Micki Kluth who left the bar to call the police. Witkowski then approached Gordon Kluth, stating that "he was having trouble holding up this tavern." The telephone rang and Plambeck answered it, telling the caller to call the police. At that moment, Witkowski took some cash lying on the bar in front of Gordon Kluth and grabbed Micki Kluth's purse. Gordon Kluth struck Witkowski, knocking him to the floor. Shortly thereafter, the police arrived and searched Witkowski. The search did not reveal a gun or any weapon.
>
> Plambeck testified that she felt her "life was threatened" when Witkowski told her he had a gun and wanted the money, and she backed away from him because she was afraid to turn her back on him. She described herself as "very scared and nervous, shaking all over." She stated on cross-examination, however, that she did not comply with Witkowski's demands and had no intention of doing so "unless he pulled a gun out." Gordon Kluth was unaware of Witkowski's statement about a gun until the incident was over.
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> The court affirmed the conviction for armed robbery, holding that:
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> We believe that a victim may be threatened with the use of a weapon within the letter and the spirit of sec. 943.32(2), Stats., by verbal threats alone. We hold, therefore, that if, under all the circumstances, the victim could reasonably believe the defendant's verbal representation that he or she was armed, that representation, standing alone, may be enough to meet the "threat of use of a dangerous weapon" requirement of sec. 943.32(2), regardless of whether the representation is accompanied by physical gesture or other visual evidence indicating the presence of a weapon.

Also see State v. Rittman, 2010 WI App 41, 324 Wis.2d 273, 781 N.W.2d 545, where the court found the evidence sufficient to support a conviction for armed robbery despite the fact that no weapon was present and the defendant did not say he had one – under all the circumstances the victim could have reasonably believed that the defendant was armed with a dangerous weapon. Rittman also discusses the difference between this offense – threat to use a dangerous weapon – and the offense addressed by Wis JI-Criminal 1480A – use or threat of use of an article reasonably believed to be a dangerous weapon. 324 Wis.2d 273, 281, footnote 2.

19. "Reasonably believes" is defined by § 939.22(32) to mean "that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous."

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