1498 RETAIL THEFT[1] — § 943.50(1m)(a) (e)

Statutory Definition of the Crime

Retail theft, as defined in § 943.50(1m) of the Criminal Code of Wisconsin, is committed by one who intentionally (alters the indicated price or value of) (takes and carries away) (transfers) (conceals) (retains possession of)[2] merchandise held for resale[3] by a merchant without consent and with the intent to deprive the merchant permanently of possession or the full purchase price of such merchandise.

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 six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (altered the indicated price or value of) (took and carried away) (transferred) (concealed) (retained possession of) (property involved).[4]
2. The (property involved) was merchandise held for resale[5] by a merchant.[6]
3. The defendant knew that (property involved) was merchandise held for resale[7] by a merchant.
4. The merchant did not consent[8] to (altering the indicated price or value of) (taking and carrying away) (transferring) (concealing) (retaining possession of) (property involved).

5. The defendant knew that the merchant did not consent.[9]

6. The defendant intended to deprive the merchant permanently of (possession) (any portion of its purchase price) of the merchandise.[10]

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 six 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 RETAIL THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE MERCHANDISE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[11]

Determining Value

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

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

Answer: "yes" or "no.")

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

Answer: "yes" or "no.")

("Was the value of the merchandise more than $500?"

Answer: "yes" or "no.")

"Value" means the (merchant's stated price of the merchandise) (the difference between the merchant's stated price of the merchandise and the altered price).[12]

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.]

COMMENT

Wis JI-Criminal 1498 was originally published in 1974 and revised in 1977, 1980, 1983, 1991, 1999, 2002, 2003, 2012, and 2019. This revision was approved by the Committee in December 2019; it adds to the comment.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. The amount distinguishing misdemeanors from felonies was decreased from $2,500 to $500 by 2011 Wisconsin Act 174. [Effective date: April 17, 2012.]

Act 174 also created ss. 943.50(4m) which provides that "[W]hoever violates sub. (1m) (a), (b), (c), (d), (e), or (f) is guilty of a Class I felony if all of the following apply:

(a) The value of the merchandise does not exceed $500.
(b) The person agree or combines with another to commit the violation.
(c) The person intends to sell the merchandise by means of the Internet."

2011 Wisconsin Act 110 amended § 943.50 to cover theft of services. See Wis JI-Criminal 1498C.

The 1999 revision reflected changes made in § 943.50 by 1997 Wisconsin Act 262, effective date: June 23, 1998. This instruction covers the alternative ways of committing retail theft that were prohibited by § 943.50 before the changes made by Act 262. These alternatives are defined in sub. (1m) (a) through (e) of the amended statute. New alternatives relating to "theft detection devices," "theft detection shielding devices" and "theft detection device removers" are defined in new subs. (1m)(f), (g), and (h). See Wis JI-Criminal 1498A and 1498B.

Act 262 also repealed former sub. (2) which had provided that intentional concealment of merchandise "beyond the last station for receiving payments," for example, was "evidence of intent. . . ." Paragraphs addressing those provisions [and treating them in the same way as "prima facie evidence" provisions] have been deleted from the instruction.

In State v. Lopez, 2019 WI 101, 389 Wis.2d 156, 936 N.W.2d 125**,** the Wisconsin Supreme Court affirmed the court of appeals decision in State v. Lopez, 2019 WI App 2, 385 Wis.2d 482, 922 N.W.2d 855, which held that the State may charge multiple acts of retail theft as one continuous offense pursuant

to § 971.36(3)(a). Nothing in § 971.36(3)(a) indicates that the legislature intended to limit the provision to a specific type or types of theft, therefore the statute is applicable to various types of theft, including retail theft under § 943.50(1m)(a)-(e).

1. The title of § 943.50 was changed from "shoplifting" to "retail theft" by Chapter 270, Laws of 1981. The change was effective April 27, 1981. Additional changes made by Chapter 270 were: extending the statute's coverage "to include" property of the merchant; cross referencing the definition of "merchant" in the Uniform Commercial Code; providing a new definition of value; expanding the immunity of one who detains a suspected violator of the statute; and providing for the admission of photographs of the merchandise in lieu of producing the merchandise itself.

2011 Wisconsin Act 110 changed the title of § 943.50 to "Retail Theft; Theft of Services."

2. The Committee recommends using only the verb or verbs which appropriately describe the form of retail theft alleged or indicated by the evidence. There is no authority specific to this statute requiring election of one alternative. However, cases interpreting the theft statute, § 943.20, address a closely comparable situation and hold that the statute identifies different ways of committing the offense: by taking and carrying way, or by using, by transferring, by concealing, or by retaining possession of property of another. The alternatives may not be charged in the disjunctive, Jackson v. State, 92 Wis.2d 1, 284 N.W.2d 685 (Ct. App. 1979); the jury must unanimously agree on the manner in which the statute was violated, State v. Seymour, 183 Wis.2d 682, 515 N.W.2d 874 (1994). See Wis JI-Criminal 517 for an instruction on jury agreement.

3. The amendment of § 943.50 by Chapter 270, Laws of 1981, extended the coverage of the statute to include "property of the merchant." In a case where the merchant's personal property was taken, substitute "property of the merchant" for "merchandise held for resale."

4. "Intentionally" requires that the defendant acted with the purpose to do the thing or cause the result specified "or is aware that his or her act is practically certain to cause that result." § 939.23(3). See Wis JI-Criminal 923A and 923B. "Intentionally" also requires knowledge of those facts necessary to make the conduct criminal that follow the word in the statute. See § 939.23(3).

5. See note 3, supra.

6. Section 943.50(1), as created by Chapter 270, Laws of 1981, provides that "merchant" includes those identified in § 402.104(3) as well as any innkeeper, motelkeeper, or hotelkeeper.

Section 402.104(3) defines "merchant" as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.

7. See note 4, supra.

8. The phrase "without consent" is defined in § 939.22(48)(a)-(c). That definition should be read to the jury at this point if consent is at issue. See Wis JI-Criminal 948.

9. See note 4, supra.

10. When appropriate add: "or is aware that his conduct is practically certain to cause that result." See § 939.23(4) and Wis JI-Criminal 923B.

When appropriate add: "or creates a serious risk of permanent loss by acts which manifest a gross indifference to the permanent loss of the property," Sartin v. State, 44 Wis.2d 138, 147, 170 N.W.2d 727 (1969), citing Baldwin, "Criminal Misappropriations in Wisconsin—Part I," 44 Marq. L. Rev. 253, 267 (1960).

11. 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 are set forth in § 943.50(4):

- if the value of the property does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $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; and,
- if the value of the property exceeds $10,000, the offense is a Class G felony.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for Class I and Class H 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.

12. Section 943.50(1)(b), as created by Chapter 270, Laws of 1981, provides a definition of "value" for the purposes of "retail theft" cases:

> (b) "Value of merchandise" means:
>
> 1. For property of the merchant, the value of the property; or
> 2. For merchandise held for resale, the merchant's stated price of the merchandise or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales devise to reflect less than the merchant's stated price, the difference between the merchant's stated price of the merchandise and the altered price.

