

2663A OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT — CIVIL FORFEITURE — § 346.63(1)(a)**Statutory Definition of the Crime**

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway¹ while under the influence of an intoxicant.²

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)³ must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle⁴ on a highway.⁵

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.]⁶

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.]⁷

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.⁸

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.⁹

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED¹⁰ AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"¹¹ THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence

of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied of that fact to a reasonable certainty by evidence which is clear, satisfactory, and convincing.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:¹²

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The identify prosecuting agency is not required to prove the underlying scientific reliability of the method used by the testing device. However, the identify prosecuting agency is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both 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 2663A was originally published in 1981 and revised in 1982, 1986, 1992, and 2004. This revision was approved by the Committee in October 2005.

The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

This instruction is for a first offense under § 346.63(1)(a), which is punished as a forfeiture. For criminal violations, see Wis JI-Criminal 2663. For instructions for cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of driving, see Wis JI-Criminal 2668 [forfeitures] and Wis JI-Criminal 2669 [criminal charges].

In City of Omro v. Brooks, 104 Wis.2d 352, 311 N.W.2d 620 (1981), the Wisconsin Supreme Court discussed the propriety of directing a verdict against the defendant in a forfeiture action for operating under the influence. The court held that the trial court erred not directing a verdict of guilty on the facts of that case. Brooks dealt with a charge of operating under the influence under a municipal ordinance in conformity with the state statutes, which at that time did not include a prohibited alcohol concentration offense. And, the evidence showing that the defendant in Brooks was under the influence was completely uncontradicted – the defendant testified and admitted the fact.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.
2. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.
3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.
4. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.
5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.
6. This is the definition of "drive" provided in § 346.63(3)(a).
7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.
8. The instruction is drafted for cases involving the influence of an intoxicant. See note 2, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

9. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any *prima facie* effect." Wis JI-Criminal 232 provides an instruction for this situation.

10. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.