

1464A TAKING AND DRIVING A (VEHICLE) (COMMERCIAL MOTOR VEHICLE) WITHOUT THE OWNER'S CONSENT: DRIVING OR OPERATING WITHOUT THE OWNER'S CONSENT AS A LESSER INCLUDED OFFENSE – § 943.23(2), (2g) AND (3)

Statutory Definition of the Crime

Taking and driving a 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 took¹ a (vehicle)² (commercial motor vehicle)³ without the consent⁴ of the owner.

[“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 the 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 the owner of the vehicle did not consent to taking and driving the (vehicle) (commercial motor vehicle).⁶

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 of the charged crime.

If you are not so satisfied, you must find the defendant not guilty of taking and driving a vehicle without the owner's consent, and you should consider whether the defendant is guilty of driving or operating a vehicle without the owner's consent in violation of § 943.23 (3) of the Criminal Code of Wisconsin, which is a lesser included offense of the charged crime.⁸

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on your verdict on the crime charged before considering the lesser included offense. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the crime charged, you should consider whether the defendant is guilty of the lesser included offense.

The Difference Between the Two Crimes

There is a difference between the two crimes. The charged crime requires that the defendant intentionally took and drove the vehicle without the owner's consent, knowing that it was without consent. The lesser included offense requires only that the defendant intentionally drove or operated the vehicle without the owner's consent, knowing that it was without consent.

[A person may drive or operate a vehicle without the owner's consent even though the owner consented to the original taking.]⁹

[“Operate” means the physical manipulation or activation of any of the controls of a vehicle necessary to put it into motion.]¹⁰

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intentionally operated a vehicle without the consent of the owner and that the defendant knew that the owner did not consent to the operation, you should find the defendant guilty of the lesser included crime.

If you are not so satisfied, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one offense.

IF THERE IS EVIDENCE OF THE AFFIRMATIVE DEFENSE UNDER SUB.(3m),
ADD THE MATERIAL FROM WIS JI-CRIMINAL 1465A.¹¹

COMMENT

This instruction was originally published as Wis JI-Criminal 1467.1 in 1982 and revised in 1989, 1994, 2002, and 2018. The 2002 revision renumbered the instruction as Wis JI-Criminal 1464A. This revision was approved by the Committee in December 2018 and reflects changes made in the statute by 2017 Wisconsin Act 287 and 2017 Wisconsin Act 311.

This instruction is for cases where a violation of § 943.23(2) is charged, involving “taking and driving” a vehicle without the owner's consent and where a violation of § 943.23(3), involving “driving or operating” without the owner's consent is submitted as a lesser included offense. 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 to violations of sub. (2) of (3): abandoning the vehicle without damage within 24 hours of the taking. The defense is addressed by Wis II-Criminal 1465A, which should be added to this instruction if applicable. See footnote 10, below. The effective date of the Act 109 changes is February 1, 2003.

Section 943.23(3g) was created by 2017 Wisconsin Act 287 [effective date: April 18, 2018]. It provides: “Except as provided in sub. (3m), whoever intentionally drives or operates any commercial motor vehicle without consent of the owner is guilty of a class H felony.”

1. See note 1, Wis JI-Criminal 1464.

2. For definition of “vehicle,” see § 939.22(44).

3. For definition of “commercial motor 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 JI-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(1)(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 [formerly Wis JI-Criminal 923.1].

8. This material that follows builds in the usual transitional instruction on moving from the charged crime to the lesser included offense. See Wis JI-Criminal 112 and 112A.

9. The sentence in brackets may be helpful where the evidence might raise a question about whether a person who had consent to the original taking may be guilty of the Class I felony. It is the Committee’s conclusion that the Class I felony applies 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. See Wis JI-Criminal 1464, note 1.

10. This is the definition of “operate” provided by § 943.23(1)(c).

11. 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 JI-Criminal 1465A.