1765 RESISTING AN OFFICER — § 946.41(1)

Statutory Definition of the Crime

Resisting an officer, as defined in § 946.41 of the Criminal Code of Wisconsin, is committed by one who knowingly resists an officer while the officer is doing any act in an official capacity and with lawful authority.

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. The defendant resisted an officer.

   A (title – e.g., sheriff) is an officer.[1]

   To resist an officer means to oppose the officer by force or threat of force. The resistance must be directed to the officer personally.[2]

2. The officer was doing an act in an official capacity.[3]

   _____[4] act in an official capacity when they perform duties that they are employed to perform.[5] [The duties of a _____ include: _____.][6]

3. The officer was acting with lawful authority.

_____[7] act with lawful authority if their acts are conducted in accordance with the law. In this case, it is alleged that the officer was _____.[8]

4. The defendant knew that (officer) was an officer acting in an official capacity and with lawful authority and that the defendant knew (his) (her) conduct would resist the officer.[9]

Deciding About Knowledge

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

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.

ADD THE FOLLOWING[10] IF THE DEFENDANT HAS BEEN CHARGED WITH THE FELONY OFFENSE UNDER § 946.41(2r): SUBSTANTIAL BODILY HARM OR A SOFT TISSUE INJURY WAS CAUSED TO AN OFFICER:

If you find the defendant guilty, you must consider the following question:

Did the defendant cause (substantial bodily harm) (a soft tissue injury) to an officer?

"Cause" means that the defendant's act was a substantial factor in producing (substantial bodily harm) (a soft tissue injury).[11]

["Substantial bodily harm" means bodily injury that causes [a laceration that requires (stitches) (staples) (a tissue adhesive)] [any fracture of a bone] [a broken nose] [a burn] [a petechia] [a temporary loss of consciousness, sight, or hearing] [a concussion] [a loss or fracture of a tooth].][12]

["Soft tissue injury" means an injury that requires medical attention to a tissue that connects, supports, or surrounds other structures and organs of the body and includes tendons, ligaments, fascia, skin, fibrous tissues, fat, synovial membranes, muscles, nerves, and blood vessels.[13]]

Before you may answer the question "yes," the State must satisfy you beyond a reasonable doubt that the defendant caused (substantial bodily harm) (a soft tissue injury) to an officer.

If you are not so satisfied, you must answer this question "no."

ADD THE FOLLOWING[14] IF THE DEFENDANT HAS BEEN CHARGED WITH THE FELONY OFFENSE UNDER § 946.41(2t): GREAT BODILY HARM WAS CAUSED TO AN OFFICER:

If you find the defendant guilty, you must consider the following question:

Did the defendant cause great bodily harm to an officer?

"Cause" means that the defendant's act was a substantial factor in producing great bodily harm.[15]

"Great bodily harm" means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[16]

Before you may answer the question "yes," the State must satisfy you beyond a reasonable doubt that the defendant caused great bodily harm to an officer.

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 1765 was originally published in 1966 and revised in 1985, 1990, 1992, 1999, 2004, 2008, 2010, and 2011. This revision was approved by the Committee in December 2011; it revised the instruction to reflect changes made by 2011 Wisconsin Act 74.

2011 Wisconsin Act 74 amended § 946.41 in two ways: it added reference to "soft tissue injury" to subsec. (2r); and, it created subsec. (2t) which makes it a Class G felony to cause great bodily harm by violating subsec. (1). See footnotes 10 and 14, below. The effective date of Act 74 is December 2, 2011.

The 1990 revision split former Wis JI Criminal 1765 into three instructions. Wis JI Criminal 1765 is limited to offenses involving "resisting" an officer, which is interpreted to require physical interference. Wis JI Criminal 1766 is limited to offenses involving "obstructing," interpreted to involve nonphysical interference. Wis JI Criminal 1766A is limited to offenses involving the giving of false information.

Section 946.41 was amended by 2009 Wisconsin Act 251 [effective date: May 22, 2010]. Subsection (2r) was created to read: "Whoever violates sub. (1) and causes substantial bodily harm to an officer is guilty of a Class H felony." A special question has been added to the instruction to account for the fact increasing the penalty.

In State v. Hobson, 218 Wis.2d 550, 577 N.W.2d 825 (1998), the Wisconsin Supreme Court concluded that Wisconsin has historically recognized the common law privilege to forcibly resist an unlawful arrest. However, based on public policy considerations, the court abrogated that common law defense prospectively. Hobson involved a defendant charged with battery to a law enforcement officer who sought to invoke a true "affirmative defense" in the sense that the privilege would have provided a defense that prevented conviction even though all the elements of the crime charged were present. That is, Hobson did commit a battery against a law enforcement officer, but claimed a defense to that crime based on facts that were not inconsistent with the presence of any of the elements of the crime. Notwithstanding the Hobson decision, the fact that a police officer was acting unlawfully in making an arrest would be inconsistent with the proof of an element of resisting or obstructing an officer. An

element of the crime is that the officer was acting "with lawful authority." See element 3. and note 8. An officer making an unlawful arrest would not be acting with lawful authority, thus negating an element of the crime. For a more complete discussion, see Wis JI Criminal 795 Law Note: Privilege: Resisting An Unlawful Arrest.

In State v. Ferguson, 2009 WI 50, 317 Wis.2d 587, 767 N.W.2d 187, the court concluded that a jury instruction for a charge of obstructing an officer should include a definition of "lawful authority" and that the definition should include description of "exigent circumstances" when the obstructing occurs directly after a warrantless entry of a dwelling. However, the failure to so instruct in this case was not error, or, if error, was harmless, because the evidence supported conviction for obstructing after the defendant was arrested and had been removed from the dwelling.

Four justices also concluded that the decision of the court of appeals in State v. Mikkelson, 2002 WI App 152, 256 Wis.2d 132, 647 N.W.2d 421, is overruled. Mikkelson was characterized as holding that exigent circumstances could not justify a warrantless entry to arrest for a misdemeanor. Ferguson holds that a warrantless entry, based on probable cause and exigent circumstances, may be made for any jailable offense.

The general definition of "lawful authority" provided in Wis JI Criminal 1766 was used in the Ferguson case, though the standard instruction was not cited. A model description of what "lawful authority" involves where there is an "exigent circumstances" entry has been added to footnote 8.

1. The Committee believes that it is clearer to the members of the jury if they are simply instructed that, for example, a sheriff is an officer. "Officer" is defined as follows in sec. 946.41(2)(b):

> "Officer" means a peace officer or other public officer or public employee having the authority by nature of his office or employment to take another into custody.

2. The only Wisconsin case that directly discusses the meaning of "resist" is State v. Welch, 37 Wis. 196 (1875). Welch analyzed the predecessor to present § 946.41, a statute that prohibited only "resisting." Welch said: "To resist, is to oppose by direct, active and quasi-forcible means." 37 Wis. at 201. The 1966 version of Wis JI-Criminal 1765 used the Welch definition. The revised definition in this instruction is intended to be a more understandable expression of the same basic concept.

3. Acting "in an official capacity" and acting "with lawful authority" are two separate questions. State v. Barrett, 96 Wis.2d 174, 180-81, 291 N.W.2d 498 (1980). For the purposes of sec. 940.20(2), Battery To A Law Enforcement Officer, the court in Barrett adopted the following test for "in his official capacity": "whether the official is acting in the scope of his employment as opposed to being engaged in a personal act of his own." Barrett, supra. "Lawful authority" goes to whether the officer's actions "are conducted in accordance with the law." Barrett, 96 Wis.2d at 181. See note 8, below.

4. Use the plural form in the blank, e.g., "sheriffs," "police officers," etc.

5. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

6. The duties, powers, or responsibilities of some peace officers are set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the

duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

7. Use the plural form in the blank, e.g., "sheriffs," "police officers," etc.

8. The Committee suggests specifying the lawful function being performed and, if raised by the evidence, instructing the jury on the applicable legal standard. For example, if a "stop and question" situation is involved, something like the following may be helpful:

> In this case, it is alleged that the officer was conducting a lawful stop to investigate a suspected crime. A stop is lawful when the officer has reasonable suspicion that a person is committing, has committed, or is about to commit a crime. A stop may continue for a reasonable period of time required to inquire into the person's identity and to ask for an explanation of the person's conduct. An officer conducting a stop may use only the amount of force reasonably necessary to detain the person while the inquiry into identity and conduct is made.

Or, if the evidence raises a question about the legality of an arrest, something like the following may be helpful:

> In this case, it is alleged that the officer was making a lawful arrest. An arrest is lawful when the officer has reasonable grounds to believe that the person has committed a crime. An officer making an arrest may use only the amount of force reasonably necessary to take the person into custody.

If the evidence raises a question about the "lawful authority" for an "exigent circumstances" entry, something like the following may be helpful:

> In this case, it is alleged that the officer was making a lawful entry under the "exigent circumstances" rule. That rule allows an officer to enter a dwelling without a warrant when the entry is necessary [to prevent the imminent destruction of evidence] [in hot pursuit of a criminal suspect] [to prevent injury to the suspect or another person] [to prevent the likelihood that the suspect will escape.]

The four bracketed examples of exigent circumstances are based on those set forth in State v. Ferguson, supra, 2009 WI 50, ¶20, citing State v. Richter, 2000 WI 58, 235 Wis.2d 524, ¶29, 612 N.W.2d 29 and State v. Smith, 131 Wis.2d 220, 229, 388 N.W.2d 601 (1986).

9. That the interpretation of the knowledge element reflected in Wis JI-Criminal 1765 is correct was confirmed in State v. Lossman, 118 Wis.2d 526, 536, 348 N.W.2d 159 (1984):

> The accused must believe or know he (1) resisted the officer, while the officer was (2) acting in an official capacity and (3) with lawful authority.

Also see State v. Elbaum, 54 Wis.2d 213, 194 N.W.2d 1660 (1972), and State v. Zdiarstek, 53 Wis.2d 776, 193 N.W.2d 833 (1972).

10. As amended by 2011 Wisconsin Act 74, § 946.41(2r) provides:

"Whoever violates sub. (1) and causes substantial bodily harm or a soft tissue injury to an officer is guilty of a Class H felony."

Where the felony offense is charged, the Committee recommends that a separate question be submitted to the jury if the jury finds the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Did the defendant cause (substantial bodily harm) (soft tissue injury) to an officer?

11. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of (substantial bodily harm) (soft tissue injury). The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

12. This is the definition of "substantial bodily harm" provided in § 939.22(38). Note that the definition provides only a list of harms that constitute "substantial bodily harm." Compare this with the definitions of "bodily harm" [§ 939.22(4)] and "great bodily harm" [§ 939.22(14)] which contain a general category in addition to a list of specific harms: in § 939.22(4) – "any impairment of physical condition," in § 939.22(14) – "other serious bodily injury."

13. 2011 Wisconsin Act 74 amended § 946.41(2r) to add as an alternative harm the causing of "a soft tissue injury." The definition in the instruction is the one provided in § 946.41(2)(c).

14. 2011 Wisconsin Act 74 created subsec. (2t) of § 946.41 to read:

"Whoever violates sub. (1) and causes great bodily harm to an officer is guilty of a Class G felony."

Where the felony offense is charged, the Committee recommends that a separate question be submitted to the jury if the jury finds the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Did the defendant cause great bodily harm to an officer?

15. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of great bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

16. See § 939.22(14) and Wis JI-Criminal 914.