

OWI TRILOGY TRIAL CHECKLISTS

The Charge: Operating Under the Influence

The Statute: 346.63(1)(a) (1) No person may drive or operate a motor vehicle while:

- (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving;

The burden of proof and the elements:

Did the prosecution prove by clear, satisfactory, and convincing evidence?

_____ The defendant drove or operated a motor vehicle?

Definitions:

346.63 (3)

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

(b) "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

_____ The defendant drove or operated on a highway or premises held out to the public for use of their motor vehicles?

340.01(22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as

defined in s. 115.01 (1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

The Wisconsin Supreme Court held that the definition of a highway includes the paved or ordinarily traveled portion of a road, plus the shoulders, and the entire platted or dedicated right-of-way of a public road. *In the Interest of E.J. H.* 112 Wis. 2d 439, 334 N.W. 2d 77 (1983)

Premises Held Out to the Public

346.61 Applicability of sections relating to reckless and drunken driving. In addition to being applicable upon highways, ss. 346.62 to 346.64 are applicable upon all premises held out to the public for use of their motor vehicles, all premises provided by employers to employees for the use of their motor vehicles and all premises provided to tenants of rental housing in buildings of 4 or more units for the use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof. Sections 346.62 to 346.64 do not apply to private parking areas at farms or single-family residences.

Was the defendant under the influence?

939.22(42)

(42) "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.

“The phrase ‘under the influence of an intoxicant’ covers not only the well-known and easily recognized conditions and degrees of intoxication but also any abnormal mental or physical conditions which [are] the result of indulging in any degree in intoxicating liquors, including beer, which tends to deprive one of the clearness of intellect and self-control which one would otherwise possess.

A person who is even to the slightest extent under the influence of an intoxicant in the common and well-understood acceptation of the term is, to some degree at least, less able either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle as powerful and dangerous a mechanism as a modern motor vehicle with safety to himself and the public. *State v Waalen*, 130 Wis.2d 18, 386 N.W.2d 47 1986

A layman's opinion of the state of sobriety is competent and entitled to such probative value as the experience of the witness justifies. *Milwaukee v Kelly*, 40 Wis. 2d 136, 161 N.W. 2d 271 (1968)

In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicantwhile operating or driving a motor vehicle, evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicantif the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effectwithout requiring any expert testimony Sec. 885.235(1g), Wis. Stats.

The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant.... Sec. 885.235(1g)(c), Wis. Stats.

The Charge: Operating a Motor Vehicle with a Prohibited Alcohol Concentration

The Statute: 346.63(1)(b)

(1) No person may drive or operate a motor vehicle while:

(b) The person has a prohibited alcohol concentration.

The Burden of Proof and the Elements:

Did the prosecution prove by clear satisfactory and convincing evidence:

_____ The defendant drove or operated a motor vehicle?

Note the statutory definition of “drive” and “operate”.

346.63(3)(a) "Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.

(b) "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

_____ The defendant drove or operated on a highway or premises held out to the public for use of their motor vehicles?

Note the definition of “highway”

340.01(22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in s. 115.01 (1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

Note also the definition of “premises held open to the public”:

346.61 Applicability of sections relating to reckless and drunken driving. In addition to being applicable upon highways, ss. 346.62 to 346.64 are applicable upon all premises held out to the public for use of their motor vehicles, all premises provided by employers to employees for the use of their motor vehicles and all premises provided to tenants of rental housing in buildings of 4 or more units for the use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof. Sections 346.62 to 346.64 do not apply to private parking areas at farms or single-family residences.

Did the Defendant have a prohibited alcohol concentration?

Prohibited Alcohol Concentration means....if the person has 2 or fewer prior convictions, suspensions, or revocations, as counted under s. 343.307 (1), an alcohol concentration of 0.08 or more. Sec. 340.01(46m)(a), Wis. Stats.

In any action or proceeding in which it is material to prove that a person had a prohibited alcohol concentration while operating or driving a motor vehicle,evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony..... Sec. 885.235 (1g), Wis. Stats.

The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she ... had an alcohol concentration of 0.08 or more. Sec. 885.235 (1g)(c), Wis. Stats.

If the sample of breath, blood or urine was not taken within 3 hours after the event to be proved, evidence of the amount of alcohol in the person's blood or breath as shown by the chemical analysis is admissible only if expert testimony establishes its probative value and

may be given prima facie effect only if the effect is established by expert testimony. Sec. 885.235(3), Wis. Stats.

The Charge: Operating a Motor Vehicle with a Restricted Controlled Substance.

The Statute: 346.63(1)(am)

(1) No person may drive or operate a motor vehicle while:

(am) The person has a detectable amount of a restricted controlled substance in his or her blood

The Burden of Proof and the Elements:

Did the prosecution prove **by clear, satisfactory, and convincing evidence:**

_____ **The defendant drove or operated a motor vehicle?**

Note the statutory definition of “drive” and “operate”.

346.63(3)

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

(b) "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

_____ **The defendant drove or operated on a highway or premises held out to the public for use of their motor vehicles?**

Note the definition of “highway”

340.01(22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in s. 115.01 (1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

Note also the definition of “premises held open to the public”:

364.61 Applicability of sections relating to reckless and drunken driving. In addition to being applicable upon highways, ss. 346.62 to 346.64 are applicable upon all premises held out to the public for use of their motor vehicles, all premises provided by employers to employees for the use of their motor vehicles and all premises provided to tenants of rental housing in buildings of 4 or more units for the use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof. Sections 346.62 to 346.64 do not apply to private parking areas at farms or single-family residences.

Did the Defendant have a detectable amount of a restricted controlled substance in his or her blood

340.01(50m)

(50m) "restricted controlled substance" means any of the following:

340.01(50m)(a)

(a) A controlled substance included in schedule I under ch. 961 other than a tetrahydrocannabinol.

340.01(50m)(am)

(am) The heroin metabolite 6-monoacetylmorphine.

340.01(50m)(b)

(b) A controlled substance analog, as defined in s. 961.01 (4m), of a controlled substance described in par. (a).

340.01(50m)(c)

(c) Cocaine or any of its metabolites.

340.01(50m)(d)

(d) Methamphetamine.

340.01(50m)(e)

(e) Delta-9-tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person's blood

885.235(1k)

(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle, ...if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.