1238 BATTERY OR THREAT TO A WITNESS [WITNESS HAS ATTENDED OR TESTIFIED] — § 940.201

Statutory Definition of the Crime

Section 940.201 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to a person who he or she knows or has reason to know is or was a witness by reason of the person having attended or testified as a witness and without the consent of the person harmed or threatened.

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 (caused) (threatened to cause) bodily harm to (name of victim).

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[1]

IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

["Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.][2]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated

orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][3]

2. (Name of victim) was a witness.

["Witness" means any person who has attended a proceeding to testify or who has testified.][4]

[A [insert proper term from the definition in § 940.41(3)] is a witness.]

3. The defendant knew [or had reason to know] that (name of victim) was a witness.

4. The defendant (caused) (threatened to cause) bodily harm to (name of victim) because[6] the person attended or testified as a witness.

5. The defendant (caused) (threatened) bodily harm without the consent[7] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose[8] to (cause) (threaten) bodily harm to (name of victim) and knew that (name of victim) did not consent.[9]

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.

COMMENT

Wis JI-Criminal 1238 was originally published 1998 and revised in 2004. The 2004 revision involved adoption of a new format, adding a definition of "true threat," and nonsubstantive changes in the text. This revision was approved by the Committee in April 2022; it added to the comment.

In 1998, this instruction replaced Wis JI-Criminal 1232 for offenses against witnesses. Wis JI-Criminal 1232 has been revised to apply only to battery against a juror.

This instruction is for violations of § 940.201(2)(a), where the alleged battery has taken place after the victim has testified or attended as a witness. In State v. McLeod, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978), the Wisconsin Court of Appeals held that the battery to witness statute also applies where the victim has not yet testified but is expected to be called. For that type of case, the second and fourth elements must be modified. See footnotes 4 and 6, below. Wis JI-Criminal 1239, which formerly provided a separate instruction for that type of case, has been withdrawn. [The withdrawal note for Wis JI-Criminal 1239 contains a summary of McLeod.

Section 940.201 was created by 1997 Wisconsin Act 143, effective date: May 5, 1998. Similar offenses against witnesses were formerly addressed by § 943.20(3). Act 143 expanded the scope of the statute by including threats to cause bodily harm and, in sub. (2)(b), threats to cause and causing of bodily harm against family members of a witness. If threat or harm to a family member of a witness is involved, the instruction must be modified.

1. This is the definition of "bodily harm" provided in § 939.22(4).

2. 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 bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

3. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats." Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin

law. The committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6 which requires that "the defendant acted with the mental purpose to threaten bodily harm" to another…

4. The definition of "witness" in the first set of brackets is a simplified version of the definition provided in § 940.41(3), which applies to violations of § 940.201. If that statement does not fit the status of the victim, the definition in the second set of brackets should be used, selecting the proper alternative from the full definition, which reads as follows:

> (3) "Witness" means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under § 885.01 or under the authority of any court of this state or of the United States.

In State v. McLeod, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978), the Wisconsin Court of Appeals held that the predecessor to § 943.201 B § 940.26, 1975 Wis. Stats. B also applied where the victim has not yet attended or testified but is expected to be summoned to testify. For that type of case, the definition of "witness" in the second element should be modified to refer to "a person who is expected to be summoned to testify."

5. The statute includes the requirement that the defendant "knew or had reason to know" that the victim is or was a witness. A strong argument can be made that making an element of this statement is unnecessary because of the element that follows. That is, if the defendant committed the battery against the victim because the victim had testified, the defendant must have known that the victim was a witness. However, because the "knew or had reason to know" requirement is part of the statute, the Committee concluded that it should be retained as an element. In all cases that the Committee could envision, the defendant who caused harm to another person "by reason of" that person having testified would have known that person was a witness. Thus, the "had reason to know" alternative is placed in brackets because it is not expected to be applicable to the typical case under the statute.

6. This element is drafted for a case where the person has attended or testified. If that statement does not fit the status of the victim, the statement must be modified. See note 4, supra.

The instruction uses "because" in place of the statutory language "by reason of . . ." The Committee intended no substantive change and believed the instruction will be easier for a jury to understand if "because" is used.

7. 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.

8. For further definition of "intentionally", including the alternative referring to being "aware that his or her conduct is practically certain to cause the result," see Wis JI-Criminal 923A and 923B.

9. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . 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."