OFFICE OF JUDICIAL EDUCATION
2022

July 2022

TO: Consumers of the Wisconsin Jury Instructions - Criminal

FROM: Wisconsin Court System, Office of Judicial Education

Enclosed is Release No. 60 for the 1980 edition of Wis JI-Criminal. The release contains material approved by the Wisconsin Criminal Jury Instructions Committee through June 2022.

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**Filing Instructions.** The material is preceded by filing instructions which should be followed carefully. It is recommended that the Filing Instructions page be retained in the front of Volume I as a record of the proper filing of this release.

**Questions.** If you have any questions concerning the publication process, this release, or the criminal jury instructions project in general, please direct them to Bryce Pierson at Bryce.pierson@wicourts.gov.

OFFICE OF JUDICIAL EDUCATION
2022

# Wis JI-Criminal

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OFFICE OF JUDICIAL EDUCATION
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# WISCONSIN JURY INSTRUCTIONS

# CRIMINAL

## VOLUME I

**Wisconsin Criminal Jury Instructions Committee**

[Cite as Wis JI-Criminal]

- Includes 2022 Supplement (Release No. 60)

# WISCONSIN
# JURY
# INSTRUCTIONS
# CRIMINAL

Prepared for the Wisconsin Judicial Conference by its Criminal Jury Instructions Committee, consisting of Hon. William Domina, chair; Hon. Maureen Boyle; Hon. Jane Carroll; Hon. Thomas Eagon; Hon. Scott Horne; Hon. Nicholas McNamara; Hon. Mitchell Metropulos; Hon. Michael Moran; Hon. Frederick Rosa; Hon. Stephanie Rothstein; Hon. Thomas Walsh with assistance from Assistant Attorney General Annie Jay; Assistant State Public Defender Jefren E. Olsen; University of Wisconsin Law School Professor Emeritus David E. Schultz and Office of Judicial Education Legal Advisor Bryce Pierson.

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# FOREWORD

Since 1959, the Wisconsin Jury Instructions project has produced over one thousand jury instructions to assist judges, lawyers, and, most importantly, jurors in understanding what the jury must decide at the conclusion of a trial. In 2020, the Jury Instructions project was transferred entirely to the Wisconsin Court System after 60 years as a cooperative effort between the Judicial Conference and the University of Wisconsin Law School. Publication and distribution of the Wisconsin Jury Instructions – Criminal is now managed by the Office of Judicial Education with the assistance of the Wisconsin State Law Library. Throughout its sixty-three years of existence, the Wisconsin jury instructions model has proven unique in its longevity, continuity, and orientation toward the trial judge. Despite several structural changes over the last six decades, these distinctive aspects have remained consistent, and the jury instructions model has continued without interruption.

The instructions provided in Wisconsin Jury Instructions – Criminal respond to a need for a comprehensive set of instructions to assist judges, juries, and lawyers in performing their role in criminal cases. All published jury instructions share the same objective to provide a careful blending of the substantive law and the collective wisdom and courtroom experiences of the Committee members.

This set of instructions has been enriched by valuable suggestions from the judges and lawyers who have used the instructions in preparing trials, as well as presenting cases to juries. The Committee hopes this set will continue to receive the same valuable scrutiny from those who use it. We are proud of this publication and hope those who use it find it valuable.

**July 2022**

**Bryce Pierson**
**Legal Advisor & Committee Reporter**
**Office of Judicial Education**

# COMMITTEE HISTORY

## Foundation of the Wisconsin Criminal Jury Instructions 1959-1962

The origins of the Wisconsin Criminal Jury Instructions Committee and the model it employs to produce jury instructions date back to 1959. In that year, the University of Wisconsin-Extension, Department of Law, in partnership with the Board of Criminal Court Judges, put together the first "institute" on criminal jury instructions. Initially organized as a general traffic court conference, the Board of Criminal Court Judges ultimately revised the subject matter of the institute to focus on jury instruction at the suggestion of Circuit Judge Gerald Boileau of Wausau[1]. Judge Boileau's recommendation stemmed partly from his involvement in creating the new Wisconsin Criminal Code that took effect in 1956.[2] During the development of the Criminal Code, it became evident to the drafters that reference work did not exist, which could assist Wisconsin judges and attorneys in preparing jury instructions. Concluding that the newly defined crimes required such instructions, the Board of Criminal Court Judges agreed with Judge Boileau. It then directed the institute to focus on drafting formal model instructions so that the bench would not have to rely on instructions informally passed from judge to judge.

The format of the "institute," which established the committee model still in use today, is credited to University of Wisconsin law professor Frank J. Remington[3]. In a letter to Judge Boileau concerning his expert advice on the subject, Professor Remington advocated that judges take primary responsibility for the program. Expounding upon his position, Professor Remington explained, "I think this is right because the giving of instructions is uniquely a judicial function and one about which the judiciary has the most knowledge and experience." The institute's model, therefore, became oriented around trial judges and their instructional practices and policies.

Once the content and format of the institute were agreed upon, a conference date of June 10 and 11, 1959 was set. The primary objective of the meeting was to develop model instructions that would assist judges and trial attorneys in the submission of criminal cases to juries.[4] To facilitate this task, the Committee requested that trial judges send in copies of instructions they regularly used.[5] Additionally, the research staff presented proposed instructions, which the Committee analyzed, debated, and rewrote many times before the members attained unanimous approval. Although many conference attendees may have anticipated that their work would be complete once they addressed the new Criminal Code, this proved not to be the case.

After a second jury instructions conference in February of 1960, the attendees agreed that a regular committee was necessary to draft a complete set of criminal jury instructions. In response, the Board of Criminal Court Judges adopted a resolution that

called for the appointment of a five-member committee[6] to collaborate with the University

of Wisconsin Extension, Department of Law in preparing model jury instructions for criminal cases. The Jury Instructions Committee continued to meet regularly, and its existence was made permanent shortly before it completed the first edition of the model criminal jury instructions in 1962.[7]

**Development of the Original Model Instructions**

In the summer of 1962, the Committee published its inaugural edition of model jury instructions. The single-volume edition included both an introduction by Judge Boileau[8] and a Preface by editor John H. Bowers[9]. The advice and expectations for how the instructions should be used provided in the original edition remain accurate today.

Continuity of publication has been a trademark of the criminal jury instructions model since the original edition was published in 1962. In 1966, the Committee produced its first preliminary supplement to the original edition that updated material and added new instructions. The Committee also completed additional supplements to the 1962 edition in 1967, 1971, 1974, and 1976. These supplements expanded the Committee's original work from one to three volumes and completed the development of the first edition. Following the publication of the 1976 supplement, the Committee's production rate briefly declined due to funding difficulties. However, the University of Wisconsin was able to obtain temporary federal funding through the Wisconsin Council on Criminal Justice, which allowed for the hiring of additional staff to assist the Committee in completing its first substantial revision to the criminal jury instructions in 1980. This new edition increased the page size from the original 6 by 9 to 8 1/2 by 11, and became the basis from which all future supplements were added. Supplementation of the 1980 edition has continued frequently, with each new supplement designated as "Release No._____." In 1986, supplemental Release No. 15 expanded the Committee's work to four volumes. As of July 2020, 58 supplements have been added to the 1980 revised edition.

**Court Reorganization and Publication Incorporation into the Wisconsin Court System**

In 1978, the Wisconsin court system was reorganized, and the old statutory boards, including the Board of Criminal Court Judges, were abolished. The Criminal Jury Instructions Committee was reconstituted as a standing committee of the Wisconsin Judicial Conference, and membership was increased to eleven judges. In 1986, the University of Wisconsin-Extension, Department of Law, was integrated with the University of Wisconsin Law School as the Office of Continuing Education and Outreach. That office was renamed Continuing Education and External Affairs in 2016. In 2021, the University of Wisconsin transitioned its publication responsibilities to the Wisconsin Court

System's Office of Judicial Education. That same year, in partnership with the Wisconsin State Law Library, the Office of Judicial Education converted the production of supplemental releases from physical copies to an all-digital format. The entire set of Wisconsin Jury Instructions-Criminal is now available at no cost to the user in Word and PDF format at https://wilawlibrary.gov/jury

**Characteristics of the Wis JI-Criminal Model**

Several characteristics of the criminal jury instructions model add significantly to the product's strength and value. First and foremost is the model's orientation toward the trial judge. As the giving of instructions is exclusively a judicial function, a primary focus of the Committee is to assist colleagues on the trial bench who may handle a wide variety of cases. A common point of reference for the Committee when discussing a new or amended instruction is the hypothetical judge faced with a criminal trial issue after rotating from a civil or family law caseload.

Another important aspect of the model's orientation toward the trial judge is the Committee's make-up. The eleven voting members of the Committee are judges[10], and only they can approve proposed instructions or amendments. Additionally, the Committee's ability to approve and publish model instructions is done without any additional endorsement by the Judicial Conference or the Supreme Court. A direct result of this arrangement is that trial judges are allowed to use model instructions as guides instead of directives. When necessary, a trial judge may depart from the exact language of the instruction if it does not fit the facts of the case or when they believe an improvement to the instruction can be made. This is opposed to a model, like that implemented in Missouri, in which instructions are approved by order of the state supreme court and must be given without change.

Finally, another unique aspect of the criminal jury instructions model is its association with the notion of "law in action." This concept examines the role of law, not just as it exists statutorily or in case law, but as it is actually applied in the courtroom. The incorporation of this concept into the jury instructions model can be drawn back to the original partnership with the University of Wisconsin Law School and its pursuit of the Wisconsin Idea[11]. Utilizing the assistance of experts like Professor Frank J. Remington and Assistant Attorney General William A. Platz, early versions of the Wisconsin jury instructions committees provided an all-inclusive perspective of the law. Over the years, the committees have sought to continue this practice by recruiting member judges from across the state and support from non-voting advisors and law school faculty. Although the University of Wisconsin is no longer part of the jury instructions model, the committees and the Wisconsin Court System still strive to achieve the objectives embodied in the "law in action" concept.

# How to Use the Model Jury Instructions[12]

Unlike instructions drafted for the purpose of a particular case, each instruction was, necessarily, drafted to cover the particular rule of law involved without reference to a specific fact situation. While the general instructions may frequently be used without change, instructions on the substantive offenses may often have to be modified to fit the needs of the particular case. The user, therefore, should consider each instruction a model to be examined carefully before use for the purpose of determining what modifications are necessitated by the facts of the particular case. In addition, the effect of the instructions upon each other must be considered.

It is suggested that the comment and the footnotes be read fully and carefully before the instruction is used, in order that the user be informed of any conditions prerequisite to its use, alternative material for particular cases, and of other cautionary information. Words and phrases which are to be used alternatively appear in parenthesis and italics. Words and phrases which are not appropriate for every case, but which should be given in some situations, are in brackets. Editorial directions which alert the user to alternatives or to the need to insert material or other instructions are found in brackets in the body of the instruction or in the comment.

The book itself may be cited as "Wis JI-Criminal" and each instruction by adding the appropriate number . . . It is suggested, however, that these instructions be referred to by their citations only when the user requests that the instruction be given verbatim. If the attorney modifies one of these instructions, it is requested that he or she point out the nature of the change and the reason therefore.

# INQUIRIES AND SUGGESTIONS

Inquiries and suggestions from judges and lawyers are among the most important sources of new business for the Committee. It is always informative to receive questions and recommendations from those the Committee is trying to serve. Individuals are encouraged to contact the reporter by phone, mail, or e-mail or consult with any Committee member. Copies of approved but not published material are available from the reporter, as are working drafts.

For information on the status of the Committee's drafting of new or revised instructions, please contact:

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| Milton Meister | Washington Co. | 1960-1978 |
| Herbert Steffes | Milwaukee Co. | 1960-1975 |
| Clarence Whiffen | Racine Co. | 1960-1961 |
| Henry Gergen | Dodge Co. | 1961-1990 [Acting Chair: 1984-1990] |
| | | |
| Ervin Zastrow | Walworth Co. | 1965-1976 [Chair: 1975-1976] |
| James Levi | Portage Co. | 1965-1984 [Chair: 1976-1984] |
| John Buchen | Sheboygan Co. | 1974-1989 |
| James Seering | Sauk Co. | 1974-1989 |
| Edwin Dahlberg | Rock Co. | 1975-1998 [Chair: 1990-1998] |
| Hugh O'Connell | Milwaukee Co. | 1976-1983 |
| | | |
| John Bartholomew | St. Croix Co. | 1976-1989 |
| Robert Stoltz | Washington Co. | 1977-1978 |
| Ronald Keberle | Marathon Co. | 1979-1992 |
| Robert Landry | Milwaukee Co. | 1979-1991 |
| Michael Torphy | Dane Co. | 1979-1992 |
| Donald Steinmetz | Milwaukee Co. | 1979-1980 |
| | | |
| Fred Fink | Wood Co. | 1980-1985 |
| Patrick Madden | Milwaukee Co. | 1983-1994 |
| Richard Becker | Washington Co. | 1984-1994 |
| Fred Fleishauer | Portage Co. | 1986-1996 |
| Raymond Gieringer | Adams Co. | 1988-1991 |
| Mark Gempeler | Waukesha Co. | 1988-1998 |
| | | |
| Gregory Peterson | Eau Claire Co. | 1990-2002 [Chair: 1998-2002] |
| William Carver | Winnebago Co. | 1990-2000 |
| Victor Manian | Milwaukee Co. | 1991-2003 [Chair: 2002-2003] |
| James Eaton | Barron Co. | 1991-2001 |
| Angela Bartell | Dane Co. | 1992-2002 |
| Michael Fisher | Kenosha Co. | 1992-2002 |

| | | |
|---|---|---|
| James Schwalbach | Washington Co. | 1994-1997 |
| Thomas Doherty | Milwaukee Co. | 1994-1998 |
| Edward Zappen | Wood Co. | 1996-2006 [Chair: 2003-2005] |
| John DiMotto | Milwaukee Co. | 1997-2007 [Chair: |
| Kitty Brennan | Milwaukee Co. | 1998-2008 |
| James Daley | Rock Co. | 1998-2008 [Chair: |
| Donald Zuidmulder | Brown Co. | 1998-2008 |
| Mark Mangerson | Oneida Co. | 2000-2010 [Chair: |
| Scott Needham | St. Croix Co. | 2001-2011 [Chair: |
| Don Hassin | Waukesha Co. | 2002-2012 [Chair: |
| Steve Ebert | Dane Co. | 2002-2007 |
| Annette Ziegler | Washington Co. | 2002-2007 |
| John Franke | Milwaukee Co. | 2003-2008 |
| Thomas Flugaur | Portage Co. | 2006-2016 [Chair: |
| Jeffrey Kremers | Milwaukee Co. | 2007-2017 [Chair: |
| John Damon | Trempeleau Co. | 2007-2016 |
| Mary Ann Sumi | Dane Co. | 2007-2014 |
| Rory Cameron | Chippewa Co. | 2008-2016 |
| Mel Flanagan | Milwaukee Co. | 2008-2016 |
| Rebecca Dallet | Milwaukee Co. | 2008-2018 |
| Andrew Bissonnette | Dodge Co. | 2008-2013 |
| Guy Reynolds | Sauk Co. | 2011-2018 |
| William Hanrahan | Dane Co. | 2015-2020 |
| D. Todd Ehlers | Door Co. | 2010-2020 |

## Advisory Members

| | **Wis. Dept. Of Justice** | **Wis. State Public Defender** | |
|---|---|---|---|
| William Platz | 1960-1975 | Richard Martin | 1993-1995 |
| Bill Gansner | 1976-1979 | Randall Paulson | 1996-2001 |
| Edward Marion | 1979-1980 | Charles Vetzner | 2001-2007 |
| Marjorie Moeller | 1980-1981 | | |
| Kirbie Knutson/ Chris Heikenen | 1981-1986 | **Univ. of Wis. Law School** | |
| | | Frank J. Remington | 1960-1996 |
| David Becker | 1987-2010 | Walter Dickey | 1995-1997 |

| | |
|---|---|
| Barbara Oswald | 2010-2011 |
| Gary Freyberg | 2011-2017 |

**Reporters**

| | |
|---|---|
| Arnon Allen | 1960-1961 |
| John Bowers | 1961-1976 |
| Adv. Member | 1976-1994 |
| George Frederick | 1963-1966 |
| Donald Bruns | 1972-1975 |
| David Schultz | 1976- 2019 |

**Copy Editors**

| | |
|---|---|
| Barbara Muckler | 1966-1978 |
| Roger Bruesewitz | 1978-2001 |

**Comment**

This introduction was approved in August 2021. It expanded upon the 2018 introduction and incorporated a new format.

1. When the first edition was published in 1962, it was dedicated to the Committee's first chair, Circuit Judge Gerald Boileau from Wausau. The dedication reads as follows:

> DEDICATION
>
> The following resolution was unanimously passed by the WisconsinBoard of Criminal Court Judges at its annual meeting in June of 1961:
>
> WHEREAS, the Hon. Gerald J. Boileau has been the only Chairman of the Board's Committee on Criminal JuryInstructions, and;
>
> WHEREAS, the monumental work of this Committee, which will ultimately lead to the publication of model instructions for the use of this State, is due largely to the untiring and dynamic leadership of the Hon. Gerald J. Boileau, and;
>
> WHEREAS, the Hon. Gerald J. Boileau has in the past made significant contributions to the advancement of his profession in that he has been Chairman of the Wisconsin Board of Circuit Judges, Chairman of the Wisconsin Board of Criminal Court Judges, a member of the Judicial Council of this State for many years, and Chairman of the Criminal Code Advisory Committee which drafted the new Criminal Code in its final version;
>
> Be it therefore, resolved, that when Wisconsin Jury Instructions – Criminal is published, it be dedicated to the Hon. Gerald J. Boileau in recognition of his interest, his advice, and his time so freely given to his profession.

2. Several of the original members had strong ties to the development of the 1956 Criminal Code. The original judge members were:

- Hon, Gerald J. Boileau, Wausau, Chairman
- Hon. Herbert J. Steffes, Milwaukee

- Hon. William E. Gramling, Waukesha
- Hon. Milton L. Meister, West Bend
- Hon. Clarence Whiffen, Racine
- Hon. Charles Larson, Port Washington (ex officio)
- Hon. Howard DuRocher (ex officio)
- Hon. Henry Gergen, Beaver Dam [replaced Judge Whiffen in 1961]

Assistant Attorney General Bill Platz and Professor Frank Remington, who served as advisors to the criminal jury instructions effort, also had leading roles in developing the Criminal Code.

3. The original advisory members were two outstanding criminal law experts: Professor Frank J. Remington and Assistant Attorney General William A. Platz. In speaking about them, the 1966 foreword stated: "The Committee could have found no better qualified individuals than William Platz and Frank Remington for technical advisors. Suffice it to say that the aid of these two men has been invaluable."

Frank Remington's efforts were recognized in the foreword to the 1966 supplement:

> Frank Remington has such impressive credentials in the field of criminal law that we need not spell them out here. He was one of the principal researchers on the massive revision of the Wisconsin Criminal Code. As a member of the Law School faculty since 1949, he has been specializing in the study of criminal law. He has brought nationwide distinction to the Law School as a center for research and teaching in criminal law and the administration of criminal justice.

William Platz's contributions were further described in an in memoriam tribute published in 1980:

> William A. Platz had no peer in the field of criminal law. For nearly four decades, he was counsel to every district attorney and every law enforcement officer in the State of Wisconsin, always available and willing,cheerfully, to give advice. And no more knowledgeable, trustworthy help was available anywhere.
>
> He possessed not just a singular knowledge and devotion to the justice system but a keen wit and fine sense of humor as well. His wit and wisdomforever remain with all who knew this fine outstanding man.

4. The Committee's principal objectives were:

1. To prepare instructions that would accurately and concisely state the law in a way that would be meaningful andhelpful to the jury.
2. To make readily available such instructions as a trial judgewould likely need in the trial of a criminal case to a jury.
3. To revise instructions that had been in general use prior to the enactment of the

Criminal Code of Wisconsin, whichbecame effective July 1, 1956, and to make such changes therein as seemed to be advisable as a result of such enactment; and, generally, to relate the instructions to the newCriminal Code.

4. To make certain that all such instructions were in conformity with the decisions of the Wisconsin Supreme Court.

Introduction To The 1962 Edition – Judge Gerald Boileau, Chairman Committee on Jury Instructions – Criminal

5. Foremost among the judges who supplied copies of instructions regularly used to the institute was Judge Herbery Steffes of Milwaukee. Prior to the formation of the Wisconsin Criminal Jury Instructions Committee, Judge Steffes had served as an informal "instruction bank," and much of his work product can be found in the instructions today.

6. See Comment 2. Non-voting advisors also included Professor Gordon Baldwin and Professor William B. Smith.

7. The Board unanimously adopted the following resolution on February 15, 1962:

RESOLVED, that the jury instructions in criminal cases, which have been prepared by the committee appointed for that purpose, are hereby approved, but without certification of said instructions' freedom from error; be it further

RESOLVED, that said committee is hereby made a permanent committee to prepare additional instructions for use in criminal cases and to amend or correct any previously approved instructions whenever such committee deems such action to be appropriate

8. INTRODUCTION TO THE 1962 EDITION:

The Wisconsin Board of Criminal Court Judges, realizing that no ready reference work was available to assist the bench and the bar of the State of Wisconsin in the preparation of jury instructions in criminal cases, authorized and directed our committee, consisting of five trial judges, to study the problem and submit to the Board such suggested instructions as, in the committee's opinion, would assist judges and trial lawyers in the submission of criminal cases to juries.

Prof. Frank J. Remington, of the University of Wisconsin Law School, and Mr. William Platz, Assistant Attorney General of Wisconsin, graciously accepted our invitation to become unofficial members of the committee and have made substantial contributions to what success we have achieved. The University of Wisconsin Extension Law Department, under the direction of William Bradford Smith, has provided research assistants and has paid all expenses necessarily incurred in the preparation of these instructions.

The committee has met on an average of once a month for the past three years, such meetings lasting from one to three days. All members, both official and unofficial, have been most regular in their attendance at these meetings. These were the committee's objectives:

1. To prepare instructions that would accurately and concisely state the law in a way that would be meaningful and helpful to the jury.

2. To make readily available such instructions as a trial judge would likely need in the trial of a criminal case to a jury.
3. To revise instructions that had been in general use prior to the enactment of the Criminal Code of Wisconsin, which became effective July 1, 1956, and to make such changes therein as seemed to be advisable as a result of such enactment; and, generally, to relate the instructions to the new Criminal Code.
4. To make certain that all such instructions were in conformity with the decisions of the Wisconsin Supreme Court.

In the progress of our work the research staff presented proposed drafts. These drafts were prepared after a study of all available material. At our meetings, the committee analyzed every instruction minutely, giving thorough consideration to every word and phrase in the prepared draft and to all available authorities and precedents which seemed to be pertinent. Many instructions were corrected and rewritten many times. Finally, each instruction had the unanimous approval of the committee. Certainly, we make no claim that these instructions are free from error. We propose to continue our work as a permanent committee, adding new instructions from time to time, and correcting previously approved instructions when errors are called to our attention. We invite suggestions from the bench and the bar. We hope this work will, to some extent at least, achieve its objectives.

Gerald J. Boileau, Chairman
Committee on Jury Instructions Criminal

9. John H. Bowers was the original editor/reporter for the publication. The Introduction to the 1980 Edition recognized his contributions:

> The Committee has been fortunate to have the services of John H. Bowers, Attorney at Law, Madison, and former Deputy Attorney General, State of Wisconsin, as reporter and editor from 1961 through 1976. During that time John was responsible for most of the reporting and drafting chores.His services over the years have been of the greatest importance.

10. The Judicial Conference increased Committee membership to eleven judges to expand and update the Special Materials at a quicker rate.

11. The Wisconsin Idea is often described as being based on the principle that "the boundaries of the University are the boundaries of the State." It also has a second aspect which recognizes that University faculty and staff who participate in activities like the jury instructions projects use the experience to enrich their teaching, research, and service responsibilities.

12. Much of the language provided in the "How to Use" section comes from the Preface to the 1962 edition of Wisconsin Jury Instructions-Criminal authored by Editor John H. Bowers. The advice and expectations for how the instructions should be used provided by Mr. Bowers in the original edition remain accurate today.

## 50 PRELIMINARY INSTRUCTION: JURORS' CONDUCT; EVIDENCE; TRANSCRIPTS NOT AVAILABLE; CREDIBILITY; SUBSTANTIVE ISSUES; OPENING STATEMENT

Before the trial begins, there are certain instructions you should have to better understand your functions as a juror and how you should conduct yourself during the trial.

Your duty is to decide the case based only on the evidence presented at trial and the law given to you by the court. Anything you may see or hear outside the courtroom is not evidence. All people deserve fair treatment in our system of justice, regardless of their race, national origin, religion, age, ability, gender identity, sexual orientation, education, income level, or any other personal characteristic. People make assumptions and form opinions from their own personal backgrounds and experiences. Generally, we are aware of these things, but you should consider the possibility that you have biases of which you may not be aware which can affect how you evaluate information and make decisions.[1]

You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by any bias for or against any party, witness, or attorney. Personal opinions, preferences or biases have no place in a courtroom, where our goal is to treat all parties equally and to arrive at a just and proper verdict based on the evidence.

Do not begin your deliberations and discussion of the case until all the evidence is presented and I have instructed you on the law. Do not discuss this case among yourselves or with anyone else until your final deliberations in the jury room. This order is not limited to face-to-face conversations. It also extends to all forms of electronic communications.

Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any information about this case or your experience as a juror.

We will stop, or "recess," from time to time during the trial. You may be excused from the courtroom when it is necessary for me to hear legal arguments from the lawyers. If you come in contact with the parties, lawyers, (interpreters,) or witnesses, do not speak with them. For their part, the parties, lawyers, (interpreters,) and witnesses will not contact or speak with the jurors. Do not listen to any conversation about this case.

Do not research any information that you personally think might be helpful to you in understanding the issues presented. Do not investigate this case on your own or visit the scene, either in person or by any electronic means. Do not read any newspaper reports or listen to any news reports on radio, television, over the internet, or any other electronic application or tool about this trial. Do not consult dictionaries, computers, electronic applications, social media, the internet, or other reference materials for additional information. Do not seek information regarding the public records of any party or witness in this case. Any information you obtain outside the courtroom could be misleading, inaccurate, or incomplete. Relying on this information is unfair because the parties would not have the opportunity to refute, explain, or correct it.

Do not communicate with anyone about this trial or your experience as a juror while you are serving on this jury. Do not use a computer, cell phone, or other electronic device,

including personal wearable electronics, applications, or tools with communication capabilities, to share any information about this case. For example, do not communicate by telephone, blog post, e-mail, text message, instant message, social media post, or in any other way, on or off the computer.

Do not permit anyone to communicate with you about this matter, either in person, electronically, or by any other means. If anyone does so despite your telling them not to, you should report that to me. I appreciate that it is tempting when you go home in the evening to discuss this case with another member of your household, but you may not do so. This case must be decided by you, the jurors, based on the evidence presented in the courtroom. People not serving on this jury have not heard the evidence, and it is improper for them to influence your deliberations and decision in this case. After this trial is completed, you are free to communicate with anyone in any manner.

These rules are intended to assure that jurors remain impartial throughout the trial. If any juror has reason to believe that another juror has violated these rules, you should report that to me. If jurors do not comply with these rules, it could result in a new trial involving additional time and significant expense to the parties and the taxpayers.

You are to decide the case solely on the evidence offered and received at trial.

**EVIDENCE** [WIS JI-CRIMINAL 103]

Evidence is:

First, the sworn testimony of witnesses, both on direct and cross-examination,

regardless of who called the witness.

Second, the exhibits the court has received, whether or not an exhibit goes to the jury room.

Third, any facts to which the lawyers have agreed or stipulated or which the court has directed you to find.

**OBJECTIONS** [ADD WIS-JI CRIMINAL 148 IF DESIRED]

**NOTETAKING** [ADD WIS-JI CRIMINAL 55 OR 56 IF DESIRED]

**QUESTIONS BY JURORS** [ADD WIS-JI CRIMINAL 57 IF DESIRED]

**TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY** [WIS-JI CRIMINAL 58]

You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced during the trial.

**POLICE REPORTS** [ADD WIS JI-CRIMINAL 59 IF DESIRED]

**CREDIBILITY OF WITNESSES** [WIS JI-CRIMINAL 300]

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony

of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

In your determination of credibility, you must avoid any and all bias based on the witness's race, national origin, religion, age, ability, gender identity, sexual orientation, education, income level, or any other personal characteristic.

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

**SUBSTANTIVE INSTRUCTIONS – ELEMENTS OF THE CRIME**

**BURDEN OF PROOF** [ADD WIS JI-CRIMINAL 140 IF DESIRED]

**OPENING STATEMENTS** [WIS JI-CRIMINAL 101]

The lawyers will now make opening statements. The purpose of an opening statement is to give the lawyers an opportunity to tell you what they expect the evidence will show so that you will better understand the evidence as it is introduced during the trial. I must caution you, however, that the opening statements are not evidence.

## COMMENT

Wis JI-Criminal 50 was originally published in 1991 and revised in 1995, 1999, 2001, 2003, 2009, and 2020. The 2020 revision expanded on the use of social media and other digital tools. This revision was approved by the Committee in June 2022; it expanded the range of personal characteristics that may affect jurors consideration of the evidence. It also added to the comment.

The 2009 revision added cautions regarding use of computers, cell phones and other electronic communication devices and about communicating via blogs, e mail, text messages, etc. See page 2. The Committee tried to integrate those cautions into the broader concerns addressed by the instruction: deciding the case only on the basis of evidence introduced at trial, not communicating with others about the case while it is pending, and not making up one's mind until all the evidence is in. Communication by jurors after the trial is concluded, whether or not by electronic means, is covered by the general rule that jurors may, but are not required to, discuss their jury service with anyone. See Wis JI-Criminal 525.

The Michigan Supreme Court has adopted a rule requiring judges to instruct jurors not to use electronic communication devices during trials. See, Amendment of Rule 2.511 of the Michigan Court Rules, June 30, 2009, ADM File No. 2008 33.

This instruction as originally published dealt only with juror conduct during the trial. The 1999 revision added the material relating to defining "evidence," credibility, substantive instructions, and opening statements. These are matters that, in the Committee's judgment, are most typically included in the preliminary instructions. Adding other general material or giving fewer instructions than recommended here are matters within the discretion of the individual trial judge. Practice apparently varies as to repeating the instructions included here as part of the final instructions in the case. The Committee concluded that the instructions defining the offense and the instruction on the burden of proof should always be included in the final instructions.

In 2021, the Committee examined the issue of bias as it pertained to the jury instructions. Specifically, a comprehensive review of scholarly articles concerning the emerging concept of implicit bias was

conducted, which included reports from the National Center for State Courts and the American Bar Association. After much discussion, the Committee determined that current non-exhaustive list of personal characteristics should be expanded. Language was also added that clarified that any personal preferences, opinions, prejudices, stereotypes, sympathies, or biases must not influence a juror's decision.

The Committee also concluded that attorneys have an important role in addressing bias. Research regarding the efficacy of jury instructions addressing the impact of implicit bias is still evolving.

1. For further information regarding the selection of impartial juries see, Achieving an Impartial Jury (AIJ) Toolbox, American Bar Association, 17-18 (2015), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf; Elek, J. & Miller, A. The Evolving Science on Implicit Bias: An Updated Resource for the State Court Community, National Center for State Courts (March 2021), https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/911.

# 58 TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY

You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced during the trial.

**COMMENT**

Wis JI-Criminal 58 was originally published in 1992 and republished without substantive change in 2000. The Committee approved this revision in April 2022; it added to the comment.

The purpose of this instruction is to correct any misimpressions jurors may have about the immediate availability of written transcripts of the trial testimony.

This is not intended to encourage jury requests for the rereading of testimony. However, "When a jury has questions regarding testimony, 'the jury has a right to have that testimony read back to it, subject to the discretion of the trial judge to limit the reading.'" See State v. Anderson, 2006 WI 77, ¶83, 291 Wis.2d 673, 717 N.W.2d 74 citing Kohlhoff v. State, 85 Wis.2d 148, 159, 270 N.W.2d 63 (1978). Anderson was abrogated in part by State v. Alexander, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126 on different grounds.

[Note: Anderson, supra, was abrogated in part by State v. Alexander, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126. In Alexander, the supreme court held that "Anderson changed what should have been a fact-specific due-process inquiry (did the communication between the judge and jury deny the defendant a fair and just hearing?) into an absolute Confrontation Clause right to be present whenever the trial court speaks with members of the jury. Alexander, supra, ¶28. The court in Alexander thus withdraw all language from Anderson intimating such a right."].

The judge may choose to summarize the testimony in lieu of having it read. Salladay v. Town of Dodgeville, 85 Wis. 318, 323, 55 N.W. 696 (1893). See also, Kohlhoff v. State, supra at 160. In Kohlhoff, the jury requested clarification of the defendant's testimony. Subsequent to this request, a conference was held in chambers and out of the presence of the jury between the defendant, respective counsel, and the trial judge. The record reflects that during the conference, a portion of the testimony was read, and that both

counsel and the defendant participated in regard to the trial judge's summary. However, the record did not set forth in detail what was actually discussed. In its holding, the supreme court took the opportunity to make two observations. First, when a jury poses a question regarding testimony that has been presented, "the judge may, in the exercise of his [or her] discretion, choose to present a summary of the testimony to the jury instead of having it read." Id. at 160. However, the court further provided that "the far better practice is to have the testimony read to the jury." Second, conferences such as the in chambers meeting conducted in Kohlhoff should be fully transcribed. Id. For other cases applying these standards, see State v. Tarrell, 74 Wis.2d 647, 659, 247 N.W.2d 696 (1976); and Jones v. State, 70 Wis.2d 41, 57 58, 233 N.W.2d 430 (1975).

## 158 RECORDING PLAYED TO THE JURY

You are about to (hear an audio recording) (hear and view an audiovisual recording). Recordings are proper evidence and you may consider them, just as any other evidence. Listen carefully; some parts may be hard to understand.

[You may consider the actions of a person, facial expressions, and lip movements that you can observe on videotapes to help you to determine what was actually said and who said it.]

[You will be provided a transcript to help you listen to the recording. If you notice any difference between what you heard on the recordings and what you read in the transcript(s), you must rely on what you heard, not what you read.]

**COMMENT**

Wis JI-Criminal 158 was approved by the Committee in February 2010. This revision was approved by the Committee in June 2022; it added to the comment.

This draft was based on an instruction adapted from The Pattern Jury Instructions for the 7th Circuit, 3.17. [Available online at http://www.ca7.uscourts.gov/Pattern_Jury_Instr/pjury.pdf.]

Effective January 1, 2010, SCR 71.01 (2) is amended to create new subsection (e):

(2) All proceedings in the circuit court shall be reported, except for the following:

. . .

(e) Audio recordings of any type that are played during the proceeding, marked as an exhibit, and offered into evidence. If only part of the recording is played in court, the part played shall be precisely identified in the record.

In the Matter of Amendment of Supreme Court Rule 71.01 Regarding Required Reporting of Court Proceedings. 2009 WI 104

If the jury requests that a recording be played back during jury deliberations, the jury should return to the courtroom and the recording should be played for the jury in open court. See State v. Anderson, 2006 WI 77, ¶¶30-31, 291 Wis.2d 673, 717 N.W.2d 74 (overruled in part on other grounds. See State v. Alexander, 2013 WI 70, ¶¶26-28, 349 Wis. 2d 327, 833 N.W.2d 126).

The Committee recommends that the court or the parties should make a record of exactly what was played during deliberations by noting the beginning and end times from the exhibit.

A helpful summary of the procedures that a trial judge should follow when an audio/visual recording has been received into evidence and played at trial and a jury requests to listen to or watch the recording during deliberations is provided in SM-9 When a Jury Requests to Hear/See Audio/Visual Evidence During Deliberations.

## 300 CREDIBILITY OF WITNESSES

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

[GIVE THE FOLLOWING PARAGRAPH ONLY WHEN THE DEFENDANT TESTIFIES.][1]

[The defendant has testified in this case, and you should not discredit the testimony just because the defendant is charged with a crime. Use the same factors to determine the credibility and weight of the defendant's testimony that you use to evaluate the testimony of any other witness.]

In your determination of credibility, you must avoid any and all bias based on the witness's race, national origin, religion, age, ability, gender identity, sexual orientation, education, income level, or any other personal characteristic.

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

**COMMENT**

Wis JI Criminal-300 was originally published in 1962 and revised in 1979, 1989, 1990, 1991, and 2000. This revision was approved by the Committee in June 2022; it amended the body of the instruction to mirror Wis JI-Criminal 50.

The 1999 revision involved a substantial rewriting of the former instruction and was intended to make it more understandable without changing the meaning.

In Wilson v. State, 184 Wis. 636, 200 N.W. 369 (1924), the court approved the general instruction that as to each witness, the jury should take into consideration the appearance and manner of testifying, the apparent interest in the result of the trial, if any, the degree of intelligence of the witness, the reasonableness of the testimony given, and every other circumstance bearing upon credibility and weight.

The supreme court has allowed the trial court considerable latitude in instructions dealing with the credibility of witnesses. A few cases are illustrative. In Emery v. State, 101 Wis. 627, 78 N.W. 145 (1899), the court approved the following part of the instruction:

> You are cautioned, however, that interest in the result of the trial creates no presumption that such witnesses will swear falsely.

The trial court was criticized, on the other hand, in Lee v. State, 74 Wis. 45, 41 N.W. 960 (1889), for instructing that:

> When the witnesses appear to be equally credible in every other respect, the one who appears to have the greater interest in the result of the case is to have the less weight of the two.

The court remarked that this "trenches too closely . . . upon the legitimate function of the jury."

The question has been raised with the Committee whether a special instruction should be given for police officer witnesses. One theory is that the instruction should advise that the testimony of the police officer witness is to be weighed by the same standards applied to other witnesses. In the Committee's judgment, no separate instruction is necessary; Wis JI-Criminal 300 would apply to all witnesses, including the police officer. A different theory is that an instruction should advise the jury that greater care should be taken in weighing the testimony of a police officer because of the officer's greater interest in gaining a conviction. The Wisconsin Supreme Court addressed that argument in State v. Melvin, 49 Wis.2d 246, 181 N.W.2d 490 (1970), and concluded that on the facts of that case, the general credibility instruction was sufficient.

1. The Committee recommends that instructing the jury on the credibility of the defendant be included in the general credibility instruction as indicated, rather than dealing with the credibility of the defendant separately.

Wis JI-Criminal 310 formerly dealt with the credibility of the defendant but was withdrawn by the Committee in 1979. However, the use of Wis JI-Criminal 310 was approved by the Wisconsin Supreme Court in Thompson v. State, 83 Wis.2d 134, 265 N.W.2d 467 (1978).

# 800 PRIVILEGE: SELF-DEFENSE: FORCE LESS THAN THAT LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48

[INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.]

## Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference[1] with the defendant's person; and,
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

## Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[2] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[3] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

**State's Burden of Proof**

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all __ elements of _____ have been proved and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.

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

**COMMENT**

Wis JI-Criminal 800 was originally published in 1962 and revised in 1994 and 2000. The 2000 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment. This revision was approved by the Committee in October 2021; it added to the comment.

This instruction is intended for use with crimes involving the intentional causing of bodily harm. For cases involving criminal recklessness or criminal negligence, see Wis JI-Criminal 801. For cases involving the intentional use of force intended or likely to cause death or great bodily harm, see Wis JI-Criminal 805.

The instructions for homicide offenses include models for cases involving self-defense. See Wis JI-Criminal 1014, 1016, 1017, and 1052.

The 1994 revision of this instruction changed its format to allow integrating the description of self-defense with the instruction for the crime charged. The Committee concluded that this provides a clearer statement of the facts necessary to constitute guilt in a case when self-defense is an issue. This kind of approach was suggested in State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

For examples integrating the self-defense instruction with instructions for battery, see Wis JI-Criminal 1220A – 1225A.

Wisconsin law establishes a "low bar" that the defendant must overcome to be entitled to a jury instruction on the privilege of self-defense. State v. Stietz, 2017 WI 58, ¶16, 375 Wis.2d 572, 895 N.W.2d 796 citing State v. Schmidt, 2012 WI App 113, ¶12, 344 Wis. 2d 336, 824 N.W.2d 839. A defendant need only to produce "some evidence" in support of the privilege of self-defense. Stiez, supra, at ¶15. See also, State v. Head, 2002 WI 99, ¶112, 255 Wis.2d 194, 648 N.W.2d 413. Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). When applying the "some evidence" standard, a court is not to weigh the testimony, as this would invade that province of the jury. Stiez, supra, at ¶18. Instead, the court should focus on "whether there is 'some evidence' supporting the defendant's self-defense theory." Id. at ¶58. Failure "to instruct on an issue which is raised by the evidence" is error. State v. Weeks, 165 Wis. 2d 200, 208, 477 N.W.2d 642 (Ct. App. 1991).

In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court concluded that the trial court erred by declining to instruct on self-defense. The Court held that although Johnson unlawfully entered K.M.'s home in the middle of the night, there was some evidence that he had an objectively reasonable belief that he was preventing an unlawful interference with his person. Although the physical attack in Johnson occurred entirely inside K.M.'s home, the opinion did not interpret, apply, or limit the castle doctrine in any way because the Court was tasked with examining Johnson's, not K.M.'s, actions. Therefore, this decision did not alter the "some evidence" standard used to determine whether a jury should be instructed on self-defense.

1. For purposes of self-defense, "unlawful" means "either tortious or expressly prohibited by criminal law or both." § 939.48(6). Further instruction on what constitutes "unlawful interference" in the context of the facts of a particular case may be desirable.

The word "unlawful" also appears in sub. (2) of § 939.48, which provides that a "person who engages in unlawful conduct of a type likely to provoke others . . ." loses the right to claim the privilege of self-defense. [See Wis JI-Criminal 815.] In State v. Bougneit, 97 Wis.2d 687, 294 N.W.2d 675 (Ct. App. 1980), the court held that engaging in what would be considered disorderly conduct under § 947.01 could constitute "unlawful conduct" for the purposes of § 939.48(2).

The "unlawful" component of "unlawful interference" is just one part of the predicate for invoking the privilege of self-defense. As stated in the instruction, the defendant must have believed "that there was an actual or imminent unlawful interference with the defendant's person and [must have] believed the amount of force he used or threatened to use was necessary to prevent or terminate the interference."

2. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

3. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627 28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self-defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to use doctrines other than self-defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to "heat of passion, caused by reasonable and adequate provocation" rather than self-defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines. However, some cases of this type may legitimately be considered under self-defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

4. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved . . ." See Wis JI-Criminal 1222A.

# 801 PRIVILEGE: SELF-DEFENSE: FORCE LESS THAN THAT LIKELY TO CAUSE DEATH OR GREAT BODILY HARM: CRIMES INVOLVING RECKLESSNESS OR NEGLIGENCE — § 939.48)

[INSERT THE FOLLOWING AFTER THE FIRST PARAGRAPH OF THE INSTRUCTION ON THE CRIME CHARGED BUT BEFORE THE ELEMENTS OF THE CRIME ARE DEFINED.]

**Self-Defense**

Self-defense is an issue in this case. In deciding whether the defendant's conduct [was criminally reckless conduct which showed utter disregard for human life] [was criminally reckless conduct] [was criminally negligent conduct],[1] you should also consider whether the defendant acted lawfully in self-defense.

The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference[2] with the defendant's person; and;
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

[ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.]

[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used

was necessary to prevent imminent death or great bodily harm to (himself) (herself).]

**Determining Whether Beliefs Were Reasonable**

A belief may be reasonable even though mistaken.[3] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[4] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

CONTINUE WITH THE DEFINITION OF THE ELEMENTS OF THE CRIME.

FOR ALL OFFENSES INVOLVING CRIMINAL RECKLESSNESS OR CRIMINAL NEGLIGENCE, ADD THE FOLLOWING TO THE DEFINITION OF THE RECKLESSNESS OR NEGLIGENCE ELEMENT:[5]

You should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, (his) (her) conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.[6]

FOR FIRST DEGREE RECKLESS OFFENSES, ALSO ADD THE FOLLOWING TO THE DEFINITION OF THE "UTTER DISREGARD FOR HUMAN LIFE" ELEMENT:[7]

[You should consider the evidence relating to self-defense in deciding whether the defendant's conduct showed utter disregard for human life. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the circumstances of the defendant's conduct showed utter disregard for human life.][8]

CONTINUE WITH THE CONCLUDING PARAGRAPHS OF THE INSTRUCTION.

**COMMENT**

Wis JI Criminal JI-Criminal 801 was originally published in 1993 and revised in 2001, 2014 and 2019. The 2014 revision added to the text to reflect the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833. See footnotes 6 and 8. This revision was approved by the Committee in October 2021; it added to the comment.

This instruction is intended for use with crimes involving criminal recklessness or criminal negligence. See §§ 940.02(1), 940.06, 940.08, 940.23, 940.24, 941.20, 941.30, and 948.03(3). Wis JI-Criminal 800 is intended for use with crimes involving the intentional causing of bodily harm.

A case illustrating the application of self-defense to criminal recklessness and criminal negligence is State v. Langlois, 2018 WI 73, 382 Wis.2d 414, 913 N.W.2d 812. The defendant was charged with 1st degree reckless homicide; 2nd degree reckless homicide and homicide by negligent handling of a dangerous weapon were submitted as lesser included offenses. (See Wis JI-Criminal 1023, which provides an instruction for this sequence of offenses). There was evidence of self-defense in the case. The defendant alleged it was error for the trial court to fail to repeat that the burden was on the prosecution to prove beyond a reasonable doubt that the defendant was not privileged to act in self-defense when addressing the lesser included offenses. Instead, the court's instructions stated "as I previously indicated," referring to the definition given when instructing on 1st degree reckless homicide which included a full description of the burden of proof. The court held that this was not error – the context made the reference clear. In the

Committee's judgment, it is best practice to repeat the full statement of the burden of proof with each of the lesser included offenses.

Wisconsin law establishes a "low bar" that the defendant must overcome to be entitled to a jury instruction on the privilege of self-defense. State v. Stietz, 2017 WI 58, ¶16, 375 Wis.2d 572, 895 N.W.2d 796 citing State v. Schmidt, 2012 WI App 113, ¶12, 344 Wis. 2d 336, 824 N.W.2d 839. A defendant need only to produce "some evidence" in support of the privilege of self-defense. Stiez, supra, at ¶15. See also, State v. Head, 2002 WI 99, ¶112, 255 Wis.2d 194, 648 N.W.2d 413. Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). When applying the "some evidence" standard, a court is not to weigh the testimony, as this would invade that province of the jury. Stiez, supra, at ¶18. Instead, the court should focus on "whether there is 'some evidence' supporting the defendant's self-defense theory." Id. at ¶58. Failure "to instruct on an issue which is raised by the evidence" is error. State v. Weeks, 165 Wis. 2d 200, 208, 477 N.W.2d 642 (Ct. App. 1991).

In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court concluded that the trial court erred by declining to instruct on self-defense. The Court held that although Johnson unlawfully entered K.M.'s home in the middle of the night, there was some evidence that he had an objectively reasonable belief that he was preventing an unlawful interference with his person. Although the physical attack in Johnson occurred entirely inside K.M.'s home, the opinion did not interpret, apply, or limit the castle doctrine in any way because the Court was tasked with examining Johnson's, not K.M.'s, actions. Therefore, this decision did not alter the "some evidence" standard used to determine whether a jury should be instructed on self-defense.

1. The Committee concluded that the description of the privilege should be integrated with the definitions of recklessness or negligence. This is because both concepts require that conduct create an unreasonable risk of death or great bodily harm. A risk is not unreasonable if the conduct undertaken is a reasonable exercise of the privilege of self-defense. Because criminal recklessness or criminal negligence and lawful actions in self-defense cannot coexist, it is best to advise the jury to consider the law relating to self-defense when considering those elements.

For example, the issue of self-defense might arise in a case where the defendant is charged with recklessly causing great bodily harm in violation of § 940.23. Wis JI-Criminal 1250 provides that the second element of that offense is that the defendant recklessly caused harm. Wis JI-Criminal 801 should be added to the definition of "recklessly" in Wis JI-Criminal 1250 if the evidence provides the basis for the privilege of self-defense.

This approach treats the privilege differently in recklessness cases than in cases involving the intentional causing of harm. In the latter, intent to cause harm and self-defense can exist at the same time. Thus, the absence of the privilege is identified as a fact the state must prove in addition to the statutorily defined elements of the intentional crime. See Wis JI-Criminal 800.

2. For purposes of self-defense, "unlawful" means "either tortious or expressly prohibited by criminal law or both." § 939.48(6). Further instruction on what constitutes "unlawful interference" in the context of the facts of a particular case may be desirable.

The word "unlawful" also appears in sub. (2) of § 939.48, which provides that a "person who engages in unlawful conduct of a type likely to provoke others . . ." loses the right to claim the privilege of self-

defense. [See Wis JI-Criminal 815.] In State v. Bougneit, 97 Wis.2d 687, 294 N.W.2d 675 (Ct. App. 1980), the court held that engaging in what would be considered disorderly conduct under § 947.01 could constitute "unlawful conduct" for the purposes of § 939.48(2).

The "unlawful" component of "unlawful interference" is just one part of the predicate for invoking the privilege of self-defense. As stated in the instruction, the defendant must have believed "that there was an actual or imminent unlawful interference with the defendant's person and [must have] believed the amount of force he used or threatened to use was necessary to prevent or terminate the interference."

3. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

4. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self-defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to use doctrines other than self-defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to "heat of passion, caused by reasonable and adequate provocation" rather than self-defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines. However, some cases of this type may legitimately be considered under self-defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

5. The Committee concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless offenses. Conduct does not create an unreasonable risk of harm to another if the conduct is undertaken as reasonable action in self-defense. Recklessness and reasonable exercise of the privilege cannot coexist. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "unreasonable risk" component of recklessness.

6. The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833, in which the court of appeals ordered a new trial for a person convicted of 2nd degree recklessly endangering safety. The court held that the jury instructions given in that case – which followed the pattern suggested by Wis JI-Criminal 801 – were deficient because they did not specifically state that the prosecution must prove the absence of self-defense once raised. The first of the added sentences is intended to make that requirement clear. The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the defendant's conduct created an unreasonable risk of death or great bodily harm.

7. The Committee concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless offenses. Conduct does not show utter disregard for human life if it is undertaken in the reasonable exercise of the privilege of self-

defense. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "utter disregard" element.

8. The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, see note 6, supra. Austin was concerned with the "unreasonable risk" element of the offense, but the same concern should apply to the "utter disregard" element of 1st degree reckless offenses. The first of the added sentences is intended to make it clear that the prosecution must prove the absence of self-defense once raised to meet its burden to prove "utter disregard for human life." The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the circumstances of the defendant's conduct showed utter disregard for human life.

# 805 PRIVILEGE: SELF-DEFENSE: FORCE INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48

[INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.]

## Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference[1] with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

## Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[2] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[3] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts

and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

**State's Burden of Proof**

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all ___ elements of _____[4] have been proved and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.

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

**COMMENT**

Wis JI-Criminal 805 was originally published in 1966 and revised in 1993 and 2001. This revision was approved by the Committee in October 2021; it added to the comment.

The 1994 revision of this instruction changed its format to allow integrating the description of self-defense with the instruction for the crime charged. See the Comment to Wis JI-Criminal 800. Instructions for homicide offenses include models for cases involving self-defense. See Wis JI-Criminal 1014, 1016, 1017, and 1022.

Wisconsin law establishes a "low bar" that the defendant must overcome to be entitled to a jury instruction on the privilege of self-defense. State v. Stietz, 2017 WI 58, ¶16, 375 Wis.2d 572, 895 N.W.2d 796 citing State v. Schmidt, 2012 WI App 113, ¶12, 344 Wis. 2d 336, 824 N.W.2d 839. A defendant need

only to produce "some evidence" in support of the privilege of self-defense. Stiez, supra, at ¶15. See also, State v. Head, 2002 WI 99, ¶112, 255 Wis.2d 194, 648 N.W.2d 413. Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). When applying the "some evidence" standard, a court is not to weigh the testimony, as this would invade that province of the jury. Stiez, supra, at ¶18. Instead, the court should focus on "whether there is 'some evidence' supporting the defendant's self-defense theory." Id. at ¶58. Failure "to instruct on an issue which is raised by the evidence" is error. State v. Weeks, 165 Wis. 2d 200, 208, 477 N.W.2d 642 (Ct. App. 1991).

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1. For purposes of self-defense, "unlawful" means "either tortious or expressly prohibited by criminal law or both." Section 939.48(6). Further instruction on what constitutes "unlawful interference" in the context of the facts of a particular case may be desirable.

The word "unlawful" also appears in sub. (2) of § 939.48, which provides that a "person who engages in unlawful conduct of a type likely to provoke others . . ." loses the right to claim the privilege of self-defense. [See Wis JI-Criminal 815.] In State v. Bougneit, 97 Wis.2d 687, 294 N.W.2d 675 (Ct. App. 1980), the court held that engaging in what would be considered disorderly conduct under § 947.01 could constitute "unlawful conduct" for the purposes of § 939.48(2).

The "unlawful" component of "unlawful interference" is just one part of the predicate for invoking the privilege of self-defense. As stated in the instruction, the defendant must have believed "that there was an actual or imminent unlawful interference with the defendant's person and [must have] believed the amount of force he used or threatened to use was necessary to prevent or terminate the interference."

2. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

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However, some cases of this type may legitimately be considered under self-defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

4. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

# 805A LAW NOTE: SELF-DEFENSE UNDER § 939.48(1m)

**Contents** Page

**Scope**

This Law Note explains the Committee's conclusions about how to implement the provisions of § 939.48(1m), created by 2011 Wisconsin Act 94. [Effective date: December 21, 2011; the act first applies to a use of force that occurs on the effective date.] The provisions of sub. (1m) relate to what is commonly termed the "Castle Doctrine," but caution should be used in relying on that term to accurately describe the new provision. While it is a convenient term, the substance of the "Castle Doctrine" varies state by state; Wisconsin's version is more limited than that of Florida,[1] for example. This Law Note uses the term "the new rule."

The Committee's primary conclusions about the new rule are that it does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege, but that it does affect what a defendant must show to have the privilege of self-defense submitted to the jury – that is, it provides another way for the defendant to meet the burden of production. These conclusions are explained in Section II.

The primary focus of the Committee's work on the new rule was on how to implement it procedurally. But there are also issues with respect to its substance. These issues, under the Committee's approach that the new rule goes only to the defendant's burden of production, will not need to be defined for the jury. But they will be important to the judge in deciding whether the defendant meets the burden of production.

**I. The Substance of the New Rule in § 939.48(1m).**

The key part of the new provision is set forth in sub. (1m) (ar), which reads as follows:

> (ar) If an actor intentionally used force that was intended or likely to cause death or great bodily harm, the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force and shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself if the actor makes such a claim under sub. (1) and either of the following applies:
>
> 1. The person against whom the force was used was in the process of unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring.
> 2. The person against whom the force was used was in the actor's dwelling,

> motor vehicle, or place of business after unlawfully and forcibly entering it, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

In the discussion that follows, the requirements set forth in subdiv. 1. and 2. are referred to as the "predicate facts."

The new rule addresses the use of force by a person against someone who has unlawfully and forcibly entered the person's dwelling, motor vehicle, or place of business (or is in the process of doing so). The new rule does not define "unlawfully" or "forcibly." However, § 939.48(6) provides: "In this section, 'unlawful' means either tortious or expressly prohibited by criminal law or both." Thus, the definition in sub. (6) should apply to the new rule. With respect to "forcibly," the standard instructions for robbery use the term "forcibly" to refer to either the use or threat of use of force. See Wis JI-Criminal 1479.

Some of the terms used are defined in the new rule. Section 939.48(1m)(a)1. defines "dwelling": "'Dwelling' has the meaning given in s. 895.07(1)(h)." Section 895.07(1)(h) provides as follows:

> "Dwelling" means any premises or portion of a premises that is used as a home or a place of residence and that part of the lot or site on which the dwelling is situated that is devoted to residential use. "Dwelling" includes other existing structures on the immediate residential premises such as driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages, and basement.[2]

Section 939.48(1m)(a)2. defines "place of business" as "a business that the actor owns or operates."

The predicate facts that are the basis for the new rule are subject to exceptions set forth in § 939.48(1m)(b). These must be evaluated by the court in determining whether a defendant has met the burden of production on the new rule. The court must find that the exceptions do not apply and that there is some evidence of the predicate facts for the new rule.

Section 939.48(1m)(b) provides:

> (b) The presumption described in par. (ar) does not apply if any of the following applies:

1. The actor was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time.

2. The person against whom the force was used was a public safety worker, as defined in s. 941.375 (1) (b), who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties. This subdivision applies only if at least one of the following applies:

a. The public safety worker identified himself or herself to the actor before the force described in par. (ar) was used by the actor.

b. The actor knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

Section 941.375 (1) (b) defines "public safety worker" as follows:

"Public safety worker" means an emergency medical services practitioner licensed under § 256.15, an emergency medical responder certified under §256.15(8), a peace officer, a fire fighter, or a person operating or staffing an ambulance.

## II. The Committee's Conclusions

The Committee has reached the following conclusions about the new rule set forth in § 939.48(1m):

- it does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege;

- it does affect what a defendant must show to have the privilege of self-defense submitted to the jury – that is, it provides another way for the defendant to meet the burden of production;

- when self-defense is presented to the jury in a case where the new rule applies, the substance of the new rule is not presented to the jury and the standard instructions on the privilege of self-defense can be used without change;

- the state may succeed in proving that the privilege does not apply by proving, beyond a reasonable doubt, that the defendant's conduct does not meet the definition in the standard instruction; and,

- when self-defense is presented to the jury in a case where the new rule applies, the standard instruction on retreat – Wis JI-Criminal 810 – should not be given.

The Committee realizes that this approach differs from what some may believe to be the impact of the new rule. However, the Committee believes that this approach is the one that is most faithful to the statutory language. The key aspects of the Committee's analysis are described in detail below.

**A. The new rule does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege.**

The new rule applies where "the actor makes . . . a claim under sub. (1)," referring to sub. (1) of § 939.48, which is the definition of the privilege of self-defense.[3] Because the new rule plays a role only if "the actor makes . . . a claim under sub. (1)," the new rule is tied to the definition of the existing privilege and does not create an alternative to the existing privilege. The existing privilege under sub. (1), was not changed by Act 94. As applied to the use of deadly force, § 939.48(1) still requires that the actor "reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to himself or herself."

**B. The new rule does affect what a defendant must show to have the privilege submitted to the jury – that is, it provides another way for the defendant to meet the burden of production.**

The new rule provides that if the actor makes a claim under sub. (1) and the predicate facts apply, "the court . . . shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself." The Committee considered two issues relating to this provision: 1) whether the reference to "the court" refers to the judge alone, or whether it also applies to the jury; and, 2) what the effect is of requiring the court to employ the presumption. The Committee concluded that the reference to "the court" refers to the trial judge, not the jury, and that the effect of the presumption is to assist the defendant in meeting the burden of production that is required to make the privilege of self-defense [as defined in sub. (1) of § 939.48] an issue in the case.

- **"The court" refers to the trial judge, not the jury.**

In most situations, "the court" refers to the circuit court, that is, the judge, not the jury. See, for example, § 967.02(7), which provides [for the purposes of the Criminal Procedure Code]: "Court means the circuit court unless otherwise indicated." The Committee's conclusion that the reference is to the judge only and does not include the jury is consistent with the usual meaning given to "the court" and is faithful to the language of Act 94.

Act 94 had two parts: one relating to civil liability – § 895.62 – and one relating to the criminal law privilege of self-defense – § 939.48(1m). The civil and criminal provisions have roughly the same content, though they are not set up in exactly the same way. Section 895.62(3) is the civil equivalent of § 939.48(1m)(ar) and specifically refers to the "finder of fact":

> . . . the finder of fact may not consider whether the actor had an opportunity to flee or retreat before he or she used force and the actor is presumed to have reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself or herself or to another person.

The legislature used the term "finder of fact" in the civil provision, which clearly includes both the judge in a case without a jury and the jury. In the criminal provision that is part of the same act, the legislature used the term "court." Because Act 94 did not use "finder of fact" in the criminal provision, the Committee concluded that the reference to "the court" means the judge and does not include the jury.

- **"The court shall presume" does not affect the state's burden of persuasion.**

The usual effect of a "presumption" is to shift the burden of persuasion from one party to another. This is routinely done in civil cases. In criminal cases, the burden of persuasion is always on the state to prove all facts necessary to constitute the crime[4] and this burden cannot be shifted to the defendant by use of a "presumption."[5] With respect to the privilege of self-defense in Wisconsin, the burden is on the state to prove the privilege does not apply once the defendant meets the burden of production by showing "some evidence" of each aspect of the privilege.[6] The basic problem the Committee confronted is: how do you give defendants the benefit of a presumption as to a specific part of the case when a) they bear no burden of persuasion with respect to establishing that part of the case, and, b) they already enjoy a presumption of innocence as to all aspects of the case?

A defendant has a "presumption of innocence." This means the defendant must be found not guilty unless the state proves beyond a reasonable doubt both that all the facts

necessary to constitute the crime have been established and that any defense raised by the evidence has been disproved. For example, as applied to a first degree intentional homicide case, the state must prove that the defendant caused death with intent to kill [the "elements" of the crime], and, if there is "some evidence" of the privilege of self-defense, that the defendant did not act lawfully in self-defense.[7]

Given the structure of the existing privilege of self-defense, and given that Act 94 did not change that privilege, the Committee concluded that creating a "presumption" about a part of the definition of self-defense [namely, that the defendant reasonably believed deadly force was necessary] does not add anything to what the state is already required to prove. The state already has burden to disprove the privilege of self-defense [once the burden of production is met] and that burden cannot be increased by any presumption the court might employ. Thus, the Committee concluded, Act 94 does not create any new, alternative standard for the jury to consider and there is no reason to communicate the substance of the new rule to the jury.

- **"The court . . . shall presume" provides another way for the defendant to meet the burden of production.**

The Committee concluded that the requirement that "the court shall presume" should be implemented by applying it to the defendant's obligation to meet the burden of production on the privilege of self-defense. The complete privilege of self-defense as defined in § 939.48(1) is to be submitted to the jury when there is "some evidence" of the privilege.[8] In a case that does not involve the new rule, the defendant must point to evidence that he or she reasonably believed the following:

- that there was an actual and imminent unlawful interference with the defendant's person; and,
- that it was necessary to use force or threaten force to prevent or terminate the interference; and,
- when deadly force is used, that it was necessary to prevent imminent death or great bodily harm to himself or herself.

Once there is evidence tending to show these matters, the burden of persuasion is on the state to prove that the defendant's conduct did not meet the standard.[9]

The Committee concluded that under the new rule, the effect of "the court shall presume" is to provide the defendant with another way to meet the burden of production on self-defense. If there is evidence of the predicate facts under § 939.48(1m)(ar)1. or 2., the requirement that "the court shall presume" means that no additional evidence is

required as to the issue of the defendant's reasonable belief that the force used was necessary to prevent imminent death or great bodily harm to himself or herself.

Thus, under § 939.48 as amended by 2011 Wisconsin Act 94, there are two ways for a defendant to meet the burden of production on the privilege of self-defense:

- by pointing to some evidence of each part of the definition of self-defense in sub. (1) of § 939.48; or,
- by pointing to some evidence of the predicate facts set forth in sub. (1m)(ar)1. or 2., the provisions created by Act 94.

The determination whether the facts meet the "some evidence" threshold is for the trial court as is the case in other situations involving defenses or mitigating factors.

### C. When a defendant asserts the privilege of self-defense under the new rule, the "some evidence" test is applied to the predicate facts.[10]

This section details what is required when a defendant asserts the privilege of self-defense under the new rule set forth in sub. (1m). The trial court should review the evidence, including that produced by the state and by the defendant, to determine whether there is "some evidence" of the predicate facts recognized by the new rule. Specifically, the court must determine whether the evidence, when viewed most favorably to the defendant, shows three things:

1) that the person against whom the force was used

- was in the process of unlawfully and forcibly entering the the defendant's dwelling, motor vehicle, or place of business OR
- was in the the defendant's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it; AND

2) that the defendant was present in the dwelling , motor vehicle, or place of business; AND

3) that the defendant knew or reasonably believed either that

- an unlawful and forcible entry was occurring OR
- the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

The court must also determine that the evidence, when viewed most favorably to the defendant, shows that the exceptions to the new rule set forth in sub. (1m)(b) do not apply. Those exceptions are:

- the defendant was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time;

- the person against whom the force was used was a public safety worker who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties AND the public safety worker identified himself or herself to the defendant before the force was used by the defendant OR the defendant knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

If the court finds that there is some evidence that the predicates for the new rule are present, and that the exceptions to the new rule do not apply, the privilege of self-defense should be presented to the jury.

**D. When self-defense is presented to the jury in a case where the new rule applies, the substance of the new rule is not presented to the jury and the standard instructions on the privilege of self-defense can be used without change.**

Because the Committee concluded that the new rule does not define a new alternative to the standard for the privilege of self-defense and goes only to the defendant's burden of production, nothing in the substance of the new rule need be communicated to the jury. The standard instruction on self-defense and the standard homicide instructions that incorporate self-defense can be given to the jury without change.[11]

**E. The state may succeed in proving that the privilege does not apply by proving, beyond a reasonable doubt, that the defendant's conduct does not meet the definition in the standard instruction.**

Because the Committee concluded that the new rule does not define a new alternative to the standard for the privilege of self-defense and goes only to the defendant's burden of production, and because the standard instruction on self-defense and the standard homicide instructions that incorporate self-defense can be given to the jury without change, the state can succeed in proving the privilege does not apply by proving that the defendant did not act lawfully in self-defense.[12] The state may do this by proving beyond a reasonable doubt that the defendant did not reasonably believe any of the following:

- that there was an actual and imminent unlawful interference with the defendant's person; or,
- that it was necessary to use force or threaten force to prevent or terminate the interference; or,
- that the force used was necessary to prevent imminent death or great bodily harm to himself or herself.

**F. When self-defense is presented to the jury in a case where the new rule applies, the standard instruction on retreat – Wis JI-Criminal 810 – should not be given.**

Section 939.48(1m)(ar) also addresses retreat, providing that if the predicate facts apply, "the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force . . ." The standard instruction that addresses retreat is Wis JI-Criminal 810. It provides that while "there is no duty to retreat" evidence relating to retreat may be considered in determining "whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the [unlawful] interference."

In a case where the new rule may apply, the court must not consider evidence relating to "whether the actor had an opportunity to flee or retreat" in making any decisions the court may be called upon to make regarding the privilege of self-defense. Further, as part of the court's obligation to instruct the jury on the law, the court should, upon request, instruct the jury as follows:

> There is no duty to retreat. You must not consider evidence relating to whether the defendant had an opportunity to flee or retreat in deciding whether the state has proved that the defendant did not act lawfully in self-defense.

**COMMENT**

Wis JI-Criminal 805A Law Note was originally published in 2013 and revised in 2019. This revision was approved by the Committee in October 2021; it added to the comment.

This Law Note explains the Committee's approach to the expanded privilege of self-defense set forth in § 939.48(1m), created by 2011 Wisconsin Act 94. [Effective date: December 21, 2011; the act first applies to a use of force that occurs on the effective date.].

1. See §§ 776.013 and 776.032, Fla. Stats.

2. In State v. Chew, 2014 WI App 116, 358 Wis.2d 368, 856 N.W.2d 541, the court of appeals affirmed a trial court ruling that the evidence was not sufficient to raise the "Castle Doctrine." The court concluded that a shooting in a parking lot of an apartment complex did not occur in the "dwelling" – a factual predicate for the applicability of the new rule in § 939.48(1m).

3. While the new rule refers to the actor making "a claim under sub. (1)," and while the facts of a case may make it clear that self-defense will be an issue, under Wisconsin law a defendant does not have a general obligation to "claim" a defense in any formal way.

4. The term "facts necessary to constitute the crime" is used to refer to those facts on which the state bears the burden of persuasion. See In Re Winship, 397 U.S. 358, 364 (1970): ". . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged . . ." These facts will always include the statutory elements of the crime and will include other facts on which the state bears the burden due to definitions of terms, exceptions recognized by the offense definition, defenses, and some penalty-increasing facts.

5. Mullaney v. Wilbur, 421 U.S. 684 (1974). "Mullaney surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." Patterson v. New York, 432 U.S. 197, 215 (1977). Also see, Sandstrom v. Montana, 442 U.S. 510 (1979).

6. See State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413 and Wis JI-Criminal 1014.

7. A more complete statement of the "some evidence" standard is: when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

8. Wisconsin law establishes a "low bar" that the defendant must overcome to be entitled to a jury instruction on the privilege of self-defense. State v. Stietz, 2017 WI 58, ¶16, 375 Wis.2d 572, 895 N.W.2d 796 citing State v. Schmidt, 2012 WI App 113, ¶12, 344 Wis. 2d 336, 824 N.W.2d 839. A defendant need only to produce "some evidence" in support of the privilege of self-defense. Stiez, supra, at ¶15. See also, State v. Head, supra, at ¶112. Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). When applying the "some evidence" standard, a court is not to weigh the testimony, as this would invade that province of the jury. Stiez, supra, at ¶18. Instead, the court should focus on "whether there is 'some evidence' supporting the defendant's self-defense theory." Id. at ¶58. Failure "to instruct on an issue which is raised by the evidence" is error. State v. Weeks, 165 Wis. 2d 200, 208, 477 N.W.2d 642 (Ct. App. 1991).

9. See State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413 and Wis JI-Criminal 1014.

10. In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court concluded that the trial court erred by declining to instruct on self-defense. The Court held that although Johnson unlawfully entered K.M.'s home in the middle of the night, there was some evidence that he had

an objectively reasonable belief that he was preventing an unlawful interference with his person. Although the physical attack in Johnson occurred entirely inside K.M.'s home, the opinion did not interpret, apply, or limit the castle doctrine in any way because the Court was tasked with examining Johnson's, not K.M.'s, actions. Therefore, this decision did not alter the "some evidence" standard used to determine whether a jury should be instructed on self-defense.

11. The free-standing instruction on self-defense involving deadly force is Wis JI-Criminal 805. The instructions for homicide offenses that incorporate instructions on self-defense are Wis JI-Criminal 1014, 1016, and 1017.

12. The standard instructions for intentional homicides involving the privilege of self-defense address both first and second degree intentional homicide and include instructions on the complete privilege and the mitigating circumstance of "unnecessary defensive force." Thus, the approach described above will not be presented to the jury in exactly that form. Absence of the mitigating circumstance is presented as part of the facts necessary to constitute first degree intentional homicide; absence of the complete privilege is presented as part of the facts necessary to constitute second degree intentional homicide. See Wis JI-Criminal 1014, 1016, and 1017.

# 820 PRIVILEGE: SELF-DEFENSE: INJURY TO THIRD PARTY CHARGED AS RECKLESS OR NEGLIGENT CRIME — § 939.48(3)

INSERT THE FOLLOWING AFTER THE FIRST PARAGRAPH OF THE INSTRUCTION ON THE CRIME CHARGED BUT BEFORE THE ELEMENTS OF THE CRIME ARE DEFINED.

**Self-Defense As To (Name Person)**

There is evidence in this case that the defendant was acting in self-defense as to (name person).[1]

The fact that the law may allow the defendant to use force in self-defense as to (name person) does not necessarily mean that the causing of harm to (name victim)[2] was lawful. You must consider the law of self-defense in deciding whether the defendant's conduct as to (name victim) [was criminally reckless conduct which showed utter disregard for human life] [was criminally reckless conduct] [was criminally negligent conduct], but the defendant does not have a privilege of self-defense as to (name victim).

The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and,
- the defendant believed that the amount of force (he) (she) used or threatened to use was necessary to prevent or terminate the interference; and,
- the defendant's beliefs were reasonable.

ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.

[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).]

**Determining Whether Beliefs Were Reasonable**

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now.

IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.

IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.

CONTINUE WITH THE DEFINITION OF THE ELEMENTS OF THE CRIME.

FOR ALL OFFENSES INVOLVING CRIMINAL RECKLESSNESS OR CRIMINAL NEGLIGENCE, ADD THE FOLLOWING TO THE DEFINITION OF THE RECKLESSNESS OR NEGLIGENCE ELEMENT:

You should consider the evidence relating to self-defense along with all the other evidence in the case in deciding whether the defendant's conduct created an unreasonable

risk of death or great bodily harm to (name victim). If the defendant was acting lawfully in self-defense, (his) (her) conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.[3]

FOR FIRST DEGREE RECKLESS OFFENSES ALSO ADD THE FOLLOWING TO THE DEFINITION OF THE "UTTER DISREGARD" ELEMENT:

[You should consider the evidence relating to self-defense in deciding whether the circumstances of the defendant's conduct showed utter disregard for human life. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the circumstances of the defendant's conduct showed utter disregard for human life.][4]

CONCLUDE WITH THE CONCLUDING PARAGRAPHS FROM THE INSTRUCTION FOR THE OFFENSE CHARGED.

**COMMENT**

Wis JI-Criminal 820 was originally published in 1962 and revised in 1994, 2006, and 2018. This revision was approved by the Committee. in October 2021; it added to the comment.

This instruction is intended to implement § 939.48(3), which provides as follows:

(3) The privilege of self-defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a 3rd person,

except that if the unintended infliction of harm amounts to the crime of first-degree or 2nd-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire, first-degree or 2nd-degree reckless injury or injury by negligent handling of dangerous weapon, explosives or fire, the actor is liable for whichever one of those crimes is committed.

The original version of Wis JI-Criminal 820 paraphrased the statute, explaining that the privilege of self-defense extended to the unintended infliction of harm to a third party, unless that infliction amounted to a crime involving what was formerly called "conduct regardless of life," reckless conduct, or criminal negligence.

The 2006 revision modified that approach, based on the assumption that the issue will arise in the context of a charge based on causing harm to the third party by criminally reckless or criminally negligent conduct. In that context, the Committee concluded that the preferred approach is to relate the defendant's exercise of the privilege to the establishment of the elements of the recklessness-based or negligence-based crime. Thus, the substance of this instruction is borrowed from Wis JI-Criminal 801, Privilege: Self Defense: Force Less Than That Likely To Cause Death Or Great Bodily Harm: Crimes Involving Recklessness or Negligence.

For example, assume that a defendant is charged with causing reckless injury to the victim, and raises the defense that he was acting in self-defense against someone else and thereby injured the victim. Criminal recklessness requires that the defendant's conduct created "an unreasonable and substantial risk of death or great bodily harm." [See § 939.24.] In considering whether the risk was "unreasonable," the jury should consider the evidence that the defendant was acting in self-defense. [See Wis JI-Criminal 801.]

It is possible that a case could involve a charge based on intentional harm to the third person – as under a statute such as § 940.19(1), simple battery, which applies to causing bodily harm with intent to cause harm to that person or another. In such a case, conduct that is privileged as to its intended target is also privileged as to the unintended third person who is injured. Such harm is "unintended" as that term is used in § 939.48(3), but it is "intentional" under the substantive statutes that define crimes in terms of intending to harm "that person or another." For that case, see Wis JI-Criminal 821, which provides that to establish the crime against the unintended victim, the state must prove beyond a reasonable doubt that the defendant was not privileged in the use of force against the intended target of that force.

Wisconsin law establishes a "low bar" that the defendant must overcome to be entitled to a jury instruction on the privilege of self-defense. State v. Stietz, 2017 WI 58, ¶16, 375 Wis.2d 572, 895 N.W.2d 796 citing State v. Schmidt, 2012 WI App 113, ¶12, 344 Wis. 2d 336, 824 N.W.2d 839. A defendant need only to produce "some evidence" in support of the privilege of self-defense. Stiez, supra, at ¶15. See also, State v. Head, 2002 WI 99, ¶112, 255 Wis.2d 194, 648 N.W.2d 413. Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). When applying the "some evidence" standard, a court is not to weigh the testimony, as this would invade that province of the jury. Stiez, supra, at ¶18. Instead, the court should focus on "whether there is 'some evidence' supporting the defendant's self-defense theory." Id. at ¶58. Failure "to instruct on an issue which is raised by the evidence" is error. State v. Weeks, 165 Wis. 2d 200, 208, 477 N.W.2d 642 (Ct. App. 1991).

In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court concluded that the trial court erred by declining to instruct on self-defense. The Court held that although Johnson unlawfully entered K.M.'s home in the middle of the night, there was some evidence that he had

an objectively reasonable belief that he was preventing an unlawful interference with his person. Although the physical attack in Johnson occurred entirely inside K.M.'s home, the opinion did not interpret, apply, or limit the castle doctrine in any way because the Court was tasked with examining Johnson's, not K.M.'s, actions. Therefore, this decision did not alter the "some evidence" standard used to determine whether a jury should be instructed on self-defense.

1. Here, use the name of the person against whom the defendant intended to use force in self-defense.

2. Insert the name of the injured party, who is the victim of the crime charged.

3. The last two sentences of this paragraph were added in 2018 in response to the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833, in which the court of appeals ordered a new trial for a person convicted of 2nd degree recklessly endangering safety. The court held that the jury instructions given in that case – which followed the pattern suggested by Wis JI-Criminal 801 – were deficient because they did not specifically state that the prosecution must prove the absence of self-defense once raised. The same deficiency appeared in this instruction. The first of the added sentences is intended to make that requirement clear. The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the defendant's conduct created an unreasonable risk of death or great bodily harm.

4. The last two sentences of this paragraph were added in 2018 in response to the decision in State v. Austin, see note 3, supra. Austin was concerned with the "unreasonable risk" element of the offense, but the same concern should apply to the "utter disregard" element of 1st degree reckless offenses. The first of the added sentences is intended to make it clear that the prosecution must prove the absence of self-defense once raised to meet its burden to prove "utter disregard for human life." The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the circumstances of the defendant's conduct showed utter disregard for human life.

# 821 PRIVILEGE: SELF-DEFENSE: UNINTENDED HARM TO THIRD PARTY CHARGED AS INTENTIONAL CRIME — § 939.48(3)

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.

**Self Defense**

There is evidence in this case that the defendant was acting in self-defense as to (name of person).[1] If the defendant was privileged to use force in self-defense against (name of person), that privilege extended to harm caused to [(name of victim)[2]].

The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference[3] with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

[ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.]

[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).]

**Determining Whether Beliefs Were Reasonable**

A belief may be reasonable even though mistaken.[4] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[5] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

**State's Burden of Proof**

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all _____ elements _____[6] have been proved [as to the harm caused to (name of victim)] and that the defendant did not act lawfully in self-defense as to (name of person), you should find the defendant guilty.

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

**COMMENT**

Wis JI-Criminal 821 was approved by the Committee in December 2017.This revision was approved by the Committee in October 2021; it added to the comment.

This instruction is intended to implement § 939.48(3), which provides as follows:

> (3) The privilege of self-defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a 3rd person, except that if the unintended infliction of harm amounts to the crime of first degree or 2nd degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire, first degree or 2nd degree reckless injury or injury by negligent handling of dangerous weapon, explosives or fire, the actor is liable for whichever one of those crimes is committed.

The Committee concluded that two types of cases can arise in which this statute could apply. First, the defendant may be charged with a negligent or reckless crime committed against the third person. For that type of case, see Wis JI-Criminal 820. Second, the defendant may be charged with intentionally causing harm to the third person under a statute that defines an offense as acting with intent to cause harm "to that person or another" or where there is a dispute about whether self-defense applies at all. This instruction is intended for use in that type of case and adapts the wording of Wis JI-Criminal 800 to these circumstances.

For an example where this instruction may be used, consider the crime of simple battery as defined in § 940.19(1): "Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor." A defendant could be charged with committing a battery against the victim by an act done with intent to cause bodily harm to another person – a person as to whom the defendant claims the right to use force in self-defense. If the defendant is lawfully acting in self-defense as to the other person, the privilege extends to "the infliction of unintended harm" upon the victim of the charge offense. That harm is "unintended" as the term is used in § 939.48(3), but is "intentional" under § 940.19(1) which defines the crime as requiring "intent to cause bodily harm to that person or another."

Wisconsin law establishes a "low bar" that the defendant must overcome to be entitled to a jury instruction on the privilege of self-defense. State v. Stietz, 2017 WI 58, ¶16, 375 Wis.2d 572, 895 N.W.2d 796 citing State v. Schmidt, 2012 WI App 113, ¶12, 344 Wis. 2d 336, 824 N.W.2d 839. A defendant need only to produce "some evidence" in support of the privilege of self-defense. Stiez, supra, at ¶15. See also, State v. Head, 2002 WI 99, ¶112, 255 Wis.2d 194, 648 N.W.2d 413. Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). When applying the "some evidence" standard, a court is not to weigh the testimony, as this would invade that province of the jury. Stiez, supra, at ¶18. Instead, the court should focus on "whether there is 'some evidence' supporting the defendant's self-defense theory." Id. at ¶58. Failure "to instruct on an issue which is raised by the evidence" is error. State v. Weeks, 165 Wis. 2d 200, 208, 477 N.W.2d 642 (Ct. App. 1991).

In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court concluded that the trial court erred by declining to instruct on self-defense. The Court held that although Johnson unlawfully entered K.M.'s home in the middle of the night, there was some evidence that he had an objectively reasonable belief that he was preventing an unlawful interference with his person. Although the physical attack in Johnson occurred entirely inside K.M.'s home, the opinion did not interpret, apply,

or limit the castle doctrine in any way because the Court was tasked with examining Johnson's, not K.M.'s, actions. Therefore, this decision did not alter the "some evidence" standard used to determine whether a jury should be instructed on self-defense.

1. Here, use the name of the person against whom the defendant intended to use force in self-defense.

2. Insert the name of the injured party, who is the victim of the crime charged.

3. For purposes of self-defense, "unlawful" means "either tortious or expressly prohibited by criminal law or both." Section 939.48(6). Further instruction on what constitutes "unlawful interference" in the context of the facts of a particular case may be desirable. See footnote 1, Wis JI-Criminal 800 for additional discussion.

4. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

5. The phrase "in the defendant"s position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627 28, 230 N.W.2d 789 (1975). See footnote 3, Wis JI-Criminal 800 for additional discussion.

6. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved . . ." See Wis JI-Criminal 1222A.

## 901 CAUSE

The _____ element requires that the defendant caused (identify harm or consequence) to (name of victim). "Cause" means that the defendant's conduct was a substantial factor in producing (identify harm or consequence).

FOR CASES WHERE THERE IS EVIDENCE OF MORE THAN ONE CAUSE, ADD THE FOLLOWING:

[There may be more than one cause of (identify harm or consequence). The act of one person alone might produce it, or the acts of two more persons might jointly produce it.]

**COMMENT**

Wis JI-Criminal 901 was originally published in 1996 and the Comment was updated in 2004, and 2016. This revision was approved by the Committee in October 2021; it added to the comment.

This instruction is intended to provide a basic definition of "cause." Its substance is incorporated into most instructions for substantive offenses. That typically involves a relatively brief statement, which may be inadequate in a case where a contested or difficult cause issue is presented. The material provided here may be helpful for the preparation of a more detailed cause instruction in those cases.

**Cause In Wisconsin: "Substantial Factor"**

Wisconsin has no statutory definition of cause; through case law it has adopted the "substantial factor" test. The same standard is used in civil cases – see Wis JI-Civil 1500 and 1505.

Even the comprehensive Wisconsin Criminal Code Revision in the 1950's did not define "cause." But the state of the law at the time was summarized in the commentary to a general section on homicide – sec. 340.01 of the 1950 draft – that was not enacted:

> *Causation:* In criminal law, as in torts, the term causation is used to refer to 2 quite different problems: (a) Did the actor's act in fact cause the consequences, and, (b) assuming that it did, is there any reason based on policy considerations for limiting liability?

> Whether the actor's act did in fact cause the prescribed consequence is, in the ordinary case, not difficult to determine. The state has the burden of proving this element to the jury. The "substantial factor" test currently in use in tort litigation works equally well in criminal law.
>
> Whether there is any reason based on policy considerations for limiting liability may be more difficult to determine. Part of this difficulty is attributable to the fact that the problem is often treated as one of causation rather than one of limiting liability based on policy considerations present in the particular case. . .
>
> **Wisconsin Legislative Council 1950 Report Vol. VII – Judiciary – Part III**
> **April 1951, p. 50**

For a case finding the evidence insufficient to prove that a defendant's conduct caused death, see State v. Serebin, 119 Wis. 2d 837, 350 N.W.2d 65 (1984).

In State v. Below, 2011 WI App 64, 333 Wis. 2d 690, 799 N.W.2d 95, the court held that the "substantial factor" test was met as to reckless homicide and physical abuse of a child and affirmed the trial court's refusal to give an instruction on "intervening cause."

Several cases have addressed the definition of "substantial factor." In the context of felony murder, the Wisconsin Supreme Court has held that a "'substantial factor' need not be the sole cause of death." See State v. Oimen, 184 Wis.2d 423, 516 N.W.2d 399 (1994). In State v. Owen, 202 Wis.2d 620, 631, 551 N.W.2d 50, (Ct. App. 1996), the court concluded, "A substantial factor need not be the sole or primary factor causing the great bodily harm."

In State v. Miller, 231 Wis.2d 447, 457, 605 N.W.2d 567 (1999) the court determined that the Oimen and Owen holdings are not inconsistent with each other. The Miller court noted, "Both cases use a definite article in explaining that a substantial factor need not be limited to one sole or primary cause" . . . "[O]ur reading of Oimen and Owen convinces us that a substantial factor contemplates not only the immediate or primary cause, but other significant factors that lead to the ultimate result." Id. At 457.

In Burrage v. United States, 571 U.S. 204, 134 S.Ct. 881 (2014), the U.S. Supreme Court interpreted a federal statute – 21 USC § 844(a)(1), (b)(1)A-C – which provides for a 20-year mandatory minimum sentence where death or great bodily harm results from the use of a controlled substance. The Court held that "results from" means "actual cause" and that "actual cause" means that the harm would not have occurred but-for the defendant's conduct. The Court rejected the government's argument [a position also adopted by several federal circuits] that it was sufficient if the defendant's conduct was a "contributing cause" of the harm. In rejecting that argument, the court referred to [but did not necessarily accept] the government's characterization that "contributing cause" and "substantial factor" cause were the same thing. That reference should have no impact on Wisconsin law because Burrage is a decision interpreting a federal criminal statute and is not binding in Wisconsin. Further, the Wisconsin "substantial factor" test requires "actual" or "physical" cause [and thus would satisfy the concerns addressed in Burrage if that decision did apply].

**Intervening Medical Treatment**

The issue of intervening medical treatment and cause of death was discussed in State v. Block, 170 Wis.2d 676, 489 N.W.2d 715 (Ct. App. 1992). Block was convicted of second degree murder in connection with the death of his 73-year-old grandmother, whom he stabbed on October 5, 1987. Between the day of

the stabbing and the day of death on December 24, 1987, the victim was hospitalized three times and underwent three operations. She died from a pulmonary embolism. The treating physicians testified that the stabbing was a substantial factor in causing her death.

Block claimed that negligence by the treating physicians caused the death. Over Block's objection, the trial court instructed the jury as follows:

> In Wisconsin, if the defendant inflicts a wound of potentially mortal or life threatening nature on another and negligence, if any, of the doctor contributes to the victim's death, such negligence does not break the chain of causation between the acts of the defendant and the subsequent death. The State is only required to prove beyond a reasonable doubt that the defendant's acts were a substantial factor in producing the death.

The court of appeals held that the instruction was warranted by the evidence and also accurately stated the law:

> . . . any medical negligence in connection with procedures undertaken in response to a life-threatening situation created by the defendant does "not break the chain of causation" even though that negligence may have "contributed" to the victim's death.

170 Wis.2d 676, 682, citing Cranmore v. State, 85 Wis.2d 722, 271 N.W.2d 402 (Ct. App. 1978).

Also see, State v. Below, 2011 WI App 64, 333 Wis. 2d 690, 799 N.W.2d 95, which involved the termination of life support measures for a child victim injured by the defendant's actions.

**"As a Result" Means "Cause"**

Some criminal statutes, primarily outside the Criminal Code, use a phrase like "as a result" or "results in" where one might expect to see the word "cause" used. These phrases mean the same thing as "cause" and should be defined in terms of "substantial factor." State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989) and State v. Wille, 2007 WI App 27, 299 Wis.2d 531, 798 N.W.2d 343. See, for example, § 346.17 [Wis JI-Criminal 2630] and § 125.075 [Wis JI-Criminal 5050].

**The "Year And A Day" Rule**

In State v. Picotte, 2003 WI 42, 261 Wis.2d 249, 661 N.W.2d 381, the court held that the common law year and a day rule had been the law in Wisconsin since statehood. That rule provided that a prosecution for homicide was barred if death occurred more than one year and one day after the act which caused the death. The court exercised its authority to abrogate the rule, finding that it was archaic and no longer made sense. The court further held that "purely prospective abrogation of the year-and-a-day rule best serves the interest of justice. Thus, prosecutions for murder in which the conduct inflicting the death occurs after the date of this decision are permissible regardless of whether the victim dies more than a year and a day after the infliction of the fatal injury." 2003 WI 42, ¶5. The date of the Picotte decision was May 16, 2003.

## 997 ELDER PERSON VICTIMS — § 939.623

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of (specify crime for which imprisonment may be imposed) but also that the defendant committed that crime against an elder person.

["Elder person" means any individual who is 60 years of age or older.][1]

If you find the defendant guilty of (specify crime for which imprisonment may be imposed), you must answer the following question:

"Did the defendant commit the crime of (specify crime for which imprisonment may be imposed) against a person who was 60 years of age or older?"[2]

Knowledge of the victim's age is not required and mistake about the victim's age is not a defense.[3]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of (specify crime for which imprisonment may be imposed) against a person who was 60 years of age or older, you should answer the question "yes."

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

**COMMENT**

Wis JI-Criminal 997 was approved by the Committee in December 2021.

Section 939.623 was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021]. § 939.623 allows a sentencing court to increase the maximum term of imprisonment prescribed by law if the defendant is convicted of a crime for which imprisonment may be imposed, and the crime victim is an elder person.

For "violent felony" offenses committed against an individual 62 years of age or older before February 1, 2003, see Wis JI-Criminal 998.

The maximum term of imprisonment for any crime for which imprisonment may be imposed may increased as follows if the victim is an elder person:

(a) A maximum term of imprisonment of one year or less may be increased to not more than 2 years.
(b) A maximum term of imprisonment of more than one year but not more than 10 years may be increased by not more than 4 years.
(c) A maximum term of imprisonment of more than 10 years may be increased by not more than 6 years.

1. This definition of "elder person" is the one provided in § 939.623.

2. Strictly following the statutory format would mean first stating the term "elder person" and then providing the definition: one who is 60 years of age or older. The Committee concluded that it was more direct simply to ask: Was the victim 60 years of age or older?

3. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (3) of § 939.623 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to an increased penalty under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

OFFICE OF JUDICIAL EDUCATION
2022

# WISCONSIN JURY INSTRUCTIONS

# CRIMINAL

## VOLUME II

**Wisconsin Criminal Jury Instructions Committee**

[Cite as Wis JI-Criminal]

- Includes 2022 Supplement (Release No. 60)

# WIS JI-CRIMINAL

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# 1021 FIRST DEGREE RECKLESS HOMICIDE — 940.02(2)[1]

## Statutory Definition of the Crime

First degree reckless homicide, as defined in § 940.02(2) of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by delivery[2] of a controlled substance in violation of § 961.41, which another human being uses and dies as a result of that use.[3]

## 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 five elements[4] were present.

## Elements of the Crime that the State Must Prove

1. The defendant delivered[5] a substance.

   "Deliver" means to transfer something from one person to another.[6]

2. The substance was by itself or contained (name controlled substance) .[7]

   [(Name statutorily listed controlled substance) is a controlled substance the delivery of which is prohibited by law.]

3. The defendant knew or believed that the substance was by itself or contained [(name controlled substance)] [a controlled substance. A controlled substance is a substance the delivery of which is prohibited by law.][8]

You cannot look into a person's mind to determine knowledge or belief. You may determine knowledge or belief directly or indirectly from all the evidence concerning this offense. You may consider any statements or conduct of the defendant which indicate state of mind. You may find knowledge or belief from such conduct or statements, but you are not required to do so.

4. (Name of victim) used the substance alleged to have been delivered by the defendant.

5. (Name of victim) died as a result of the use of that substance.

This requires that use of the controlled substance was a substantial factor in causing the death.[9]

[A substantial factor need not be the sole or primary factor causing death.][10]

[There may be more than one cause of death. The use of one substance may produce it, or the use of two or more substances might jointly produce it.][11]

IF THE SUBSTANCE ALLEGED TO HAVE BEEN DELIVERED BY THE DEFENDANT IS A COMPOUND, MIXTURE, DILUENT, OR OTHER SUBSTANCE MIXED OR COMBINED WITH A CONTROLLED SUBSTANCE ADD THE FOLLOWING:

[Whether the substance is a (controlled substance) (controlled substance analog) by itself, or a mixture or combination of a (controlled substance) (controlled substance analog) with any compound, mixture, diluent or other substance is not relevant as long as ~~you find~~ (name of victim) died as a result of using the substance.][12]

IF DELIVERY BY MORE THAN ONE PERSON IS INVOLVED, ADD THE FOLLOWING:[13]

[It is not required that the defendant delivered the substance directly to (name of victim). If possession of the substance was transferred more than once before it was used by (name of victim), each person who transferred possession of that substance has delivered it.]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that the defendant delivered (name controlled substance), that the defendant knew that the substance was by itself or contained [(name controlled substance)] [a controlled substance],[14] that (name of victim) used the substance delivered by the defendant, and that (name of victim) died as a result of that use, you should find the defendant guilty of first degree reckless homicide.

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

**COMMENT**

Wis JI-Criminal 1021 was originally published in 1989 and revised in 1992, 1998, 2006, 2009, and 2011. This revision was approved by the Committee in October 2021; it added language to element 5 addressing the term "substantial factor" as it pertains to causation, as well as mixed or combined substances. It also added to the comment.

The 1997 revision addressed changes made by 1995 Wisconsin Act 448. [Effective date: July 9, 1996.] The primary changes were:

(1) renumbering the controlled substance statutes from Chapter 161 to Chapter 961;
(2) adding "distributing" to the conduct prohibited by § 940.02(2); and

(3) extending the coverage of the statute to "controlled substance analogs."

The instruction continues to refer only to "deliver" because that term seems to include "distribute" as well. "Distribute" is defined in § 961.01(9) as "to deliver other than by administering or dispensing. . . ." For offenses involving "manufacture," see Wis JI-Criminal 6021, and use the first and second elements of that instruction in place of the first element provided here. For offenses involving a "controlled substance analog," see Wis JI-Criminal 6005, which provides the definition of the term, and Wis JI-Criminal 6020A, which illustrates how an instruction must be modified to employ the "analog" alternative.

Possession of a controlled substance is not a lesser included offense of reckless homicide as defined in § 940.02(2)(a). State v. Clemons, 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991). In Clemons, the court held that the strict statutory elements test for lesser included offenses was not satisfied: one can "deliver" without "possessing," as where a doctor provides drugs to a person by writing an illegitimate prescription. 164 Wis.2d 506, 512.

Charging a defendant with violating § 940.02(2) and with contributing to the delinquency of a child resulting in death under § 948.40(4)(a) is not multiplicitous. The offenses each require proof of a fact that the other does not and there is no evidence that the legislature did not intend multiple punishments. Further, a violation of § 948.40(4)(a) is not "a less serious type of criminal homicide" under § 939.66(2) and thus is not a lesser included offense of first degree reckless homicide. State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909.

1. Section 940.02(2) defines a crime denominated "first degree reckless homicide" which applies to causing death by furnishing controlled substances. This offense was not part of the original homicide revision bill but was created by separate legislation referred to at the time as the "Len Bias Law." (See 1987 Wisconsin Act 339.) It was reenacted as part of the homicide revision.

2. This instruction is drafted for "delivery" of a controlled substance. For a case involving "manufacture," see Wis JI-Criminal 6021 and use the first and second elements of that instruction in place of the first element provided here. Also see the discussion of "distribute" above, in the comment preceding note 1.

3. This statement of the offense is essentially the same as the one found in § 940.02(2)(a). A different variation is found in subsection (2)(b) which applies where the defendant causes death by "administering or assisting in administering" a controlled substance.

The balance of the instruction recasts the statutory statement of the offense by first establishing the requirements for a delivery in violation of § 961.41 and then adding the requirement that the victim die as a result of using the substance so delivered.

4. The first three elements are based on those required for delivery of a controlled substance under § 961.41(1). See Wis JI-Criminal 6020. The fourth element uses the language of § 940.02(2)(a).

5. See note 2, supra.

6. This definition was adopted from that found in § 961.01(6), which reads as follows:

"Deliver" or "delivery" means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

The statute applies where the controlled substance is diluted after delivery and to each person who transfers the substance. Section 940.02(2)(a) provides that "[t]his paragraph applies:

> . . . .
>
> 2. Whether or not the controlled substance or controlled substance analog is mixed or combined with any compound, mixture, diluent or other substance after the violation of s. 961.41 occurs.
>
> 3. To any distribution or delivery described in this paragraph, regardless of whether the distribution or delivery is made directly to the human being who dies. If possession of the controlled substance . . . is transferred more than once prior to the death as described in this paragraph, each person who distributes or delivers the controlled substance or controlled substance analog in violation of s. 961.41 is guilty under this paragraph."

7. Section 940.02(2) applies to controlled substances listed in Schedule I or II, which are listed in §§ 961.14 and 961.16, respectively. The statute also applies to delivery of "a controlled substance analog of a controlled substance included in Schedule I or II or of ketamine or flunitrazepam." See 940.02(2)(a). The instruction has been drafted to provide for the insertion of the specific name of the substance. It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the alleged substance tested positive for cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the alleged substance tested positive for "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," *not* that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

Whether the defendant actually delivered the substance, remains a question for the jury (see the first element).

8. For offenses under § 961.41, the defendant must know that the substance was a controlled substance. State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973). Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978).

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should

be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

It is no defense that the defendant delivered a controlled substance which he erroneously believed to be a different controlled substance at least where both substances are listed in the same schedule. State v. Smallwood, 97 Wis.2d 673, 294 N.W.2d 51 (1980).

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

It is sometimes a problem in controlled substance cases that the substance is known by its street name rather than by its proper scientific or chemical name. In such a case, Wis JI-Criminal 6020 recommends adding the following:

This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance), and that the defendant knew or believed the substance he is alleged to have delivered was (street name), you may find that he knew or believed the substance was a controlled substance.

9. The Committee has 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 death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.
> See note 9, supra.

Section 940.02(2) states the causal requirement in two different ways. It requires that the defendant "cause the death of another human being" by, for example, manufacture of a controlled substance which a person uses "and dies as a result of that use." The statute is one of several criminal statutes using "results in" or "as a result" to establish the causal connection between the actor's conduct and the prohibited result. The Committee has concluded that "as a result" or "results in" should be interpreted to mean "cause," traditionally defined in terms of "substantial factor." This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court construed "results in" as used in § 346.17(3).

The court held that the statute was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant's conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

10. Several cases have addressed the definition of "substantial factor." In the context of felony murder, the Wisconsin Supreme Court has held that a "'substantial factor' need not be the sole cause of death." See State v. Oimen, 184 Wis.2d 423, 516 N.W.2d 399 (1994). In State v. Owen, 202 Wis.2d 620, 631, 551 N.W.2d 50, (Ct. App. 1996), the court concluded, "A substantial factor need not be the sole or primary factor causing the great bodily harm."

In State v. Miller, 231 Wis.2d 447, 457, 605 N.W.2d 567 (1999) the court determined that the Oimen and Owen holdings are not inconsistent with each other. The Miller court noted, "Both cases use a definite article in explaining that a substantial factor need not be limited to one sole or primary cause" . . . "[O]ur reading of Oimen and Owen convinces us that a substantial factor contemplates not only the immediate or primary cause, but other significant factors that lead to the ultimate result." Id. At 457.

In Burrage v. United States, 571 U.S. 204, 134 S.Ct. 881 (2014), the U.S. Supreme Court interpreted a federal statute – 21 USC § 844(a)(1), (b)(1)A-C – which provides for a 20-year mandatory minimum sentence where death or great bodily harm results from the use of a controlled substance. The Court held that "results from" means "actual cause" and that "actual cause" means that the harm would not have occurred but-for the defendant's conduct. The Court rejected the government's argument [a position also adopted by several federal circuits] that it was sufficient if the defendant's conduct was a "contributing cause" of the harm. In rejecting that argument, the court referred to [but did not necessarily accept] the government's characterization that "contributing cause" and "substantial factor" cause were the same thing. That reference should have no impact on Wisconsin law because Burrage is a decision interpreting a federal criminal statute and is not binding in Wisconsin. Further, the Wisconsin "substantial factor" test requires "actual" or "physical" cause [and thus would satisfy the concerns addressed in Burrage if that decision did apply].

11. See note 10, supra. The bracketed language is an adaptation of language provided in Wis JI-Criminal 901 concerning cases where there is evidence of more than one cause.

12. See note 9, supra.

13. The paragraph in brackets is intended to explain the rule stated in § 940.02(2)(a):

> (a) This paragraph applies:
>
> . . .
>
> 3. To any distribution or delivery described in this paragraph, regardless of whether the distribution or delivery is made directly to the human being who dies. If possession of the controlled substance . . . is transferred more than once prior to the death as described in this paragraph, each person who distributes or delivers the controlled substance or controlled substance analog in violation of s. 961.41 is guilty under this paragraph.

14. See note 8, supra.

# 1030 FELONY MURDER: UNDERLYING CRIME COMPLETED — § 940.03

## Statutory Definition of the Crime

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while committing the crime of (name of crime).[1]

## State's Burden of Proof

Before you may find the defendant guilty of felony murder, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following elements were present.

## Elements of Felony Murder That the State Must Prove

1. The defendant committed the crime of (name of crime).
2. The death of (name of victim) was caused by the commission of the (name of crime).[2]

## Determining Whether the Defendant Committed (name of crime)

The first element of felony murder requires that the defendant committed the crime of (name of crime).

(Name of crime), as defined in section _____[3] of the Criminal Code of Wisconsin, is committed by one who (here refer to the instruction for the underlying crime to fully define the elements of that crime).[4]

**Determining Whether Death was Caused by the Commission of (name of crime)**

The second element of felony murder requires that the death of (name of victim) was caused by the commission of the (name of crime).

**The Meaning of "Cause"**

"Cause" means that the commission of the (name of crime) was a substantial factor in producing the death.[5]

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM A CRIME.[6]

[The phrase "the commission of" the crime includes the period of immediate flight from that crime.]

**Jury's Decision on Felony Murder**

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of (name of crime) and that the death of (name of victim) was caused by the commission of the (name of crime), you should find the defendant guilty of felony murder.

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

**COMMENT**

Wis JI-Criminal 1030 was originally published in 1989 and revised in 1994, 1998, 2003, 2007, and 2013. The 2007 revision reflected the addition of several felonies to the list of those that can provide the predicate for a felony murder charge. This revision was approved by the Committee in April 2022; it also reflected the addition of a new felony to the list of those that can provide the predicate for a felony murder charge based on 2021 Wisconsin Act 209 [effective date: March 25, 2022].

This instruction is for a felony murder case based on the complete commission of the underlying crime. For cases involving an attempt to commit the underlying crime, see Wis JI-Criminal 1031. For cases based on committing the crime as a party to the crime, see Wis JI-Criminal 1032.

2005 Wisconsin Act 313 amended § 940.03, Felony murder, to add the following offenses as predicate offenses:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.30 False imprisonment
- § 940.31 Kidnapping

2021 Wisconsin Act 209 amended § 940.03, Felony murder, to add the following offense as a predicate offense:

- §940.204 Battery or threat to health care providers and staff

The complete list of predicate offenses is provided in footnote 1. The list of uniform criminal jury instructions for the predicate offenses is provided in footnote 4.

Note that the offenses added by Act 313 include two offenses that define misdemeanor offenses: § 940.19(1) and § 940.195(1). It is not clear whether the application of the revised felony murder statute was intended to be based on the commission of a misdemeanor. Wisconsin had misdemeanor manslaughter statutes until the Criminal Code was revised in 1955. See, for example, § 340.10, 1953 Wis. Stats.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This was a change from 20 years under prior law. Adding 15 years to the total term of imprisonment yields a new "unclassified felony" under § 973.01(2)(b)10. 75% of the term is the maximum period of confinement; 25% of the term is the extended supervision maximum. State v. Mason, 2004 WI App 176, 276 Wis.2d 434, 687 N.W.2d 526.

This instruction is for a violation of § 940.03, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a discussion of the homicide revision generally, and of the offense covered by this instruction, see "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

The underlying felony is a lesser included offense of felony murder. State v. Carlson, 5 Wis.2d 595, 608, 93 N.W.2d 355 (1958); State v. Gordon, 111 Wis.2d 133, 330 N.W.2d 564 (1983). Thus, the felony could be submitted to the jury as a lesser included offense if the evidentiary standard is met; it should not be charged as separate count. Carlson dealt with § 940.03 of the statutes in effect in 1957, defining "third degree murder." The current statute is essentially the same as the statute in Carlson, except it is limited to designated felonies. Carlson held that "the correct procedure" would be:

> in the first instance to bring but a single charge of third-degree murder and for the court to submit to the jury verdicts of third-degree murder, arson, and not guilty. The arson could properly be submitted to the jury because it is an included crime within the meaning of sec. 939.66(1) of the Criminal Code. But the jury should be instructed to sign but one verdict, so that if they found the defendant guilty of third-degree murder they would make no finding with respect to the separate form of verdict of arson. On the other hand if they found the defendant not guilty of third-degree murder they might still find him guilty of arson, if they found that he set the fire but that it did not cause the death.
> 5 Wis.2d 595, 608 09.

The felony murder statute applies to a situation where a co-felon is killed by the intended victim of the felony. State v. Oimen, 184 Wis.2d 423, 516 N.W.2d 399 (1994). It also applies when a person present at the crime is killed by the intended victim of the felony. State v. Rivera, 184 Wis.2d 485, 516 N.W.2d 391 (1994). In both cases, the court held that the plain language of the statute applies: the defendants caused the death while committing the felony. The so-called agency approach that limits liability in similar situations in some jurisdictions was rejected.

In Oimen, the court also addressed the proper way to integrate party to the crime with felony murder: ". . . [W]e wish to point out that [Oimen] should not have been charged as a party to the crime of felony murder. Oimen was appropriately charged as a party to the underlying offense, attempted armed robbery. Charging felony murder as a party to the crime is redundant and unnecessary. A person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony." 184 Wis.2d 423, 449. The court of appeals affirmed a conviction for felony murder, party to the crime, in a case decided shortly before Oimen. See State v. Chambers, 183 Wis.2d 316, 515 N.W.2d 531 (Ct. App. 1994). See Wis JI-Criminal 1032 and 1032 EXAMPLE for uniform instructions combining felony murder and party to the crime.

In State v. Briggs, 218 Wis.2d 61, 579 N.W.2d 783 (Ct. App., 1998), the court held that there is no crime of "attempted felony murder," meaning that the defendant must be allowed to withdraw his negotiated plea of no contest to that offense. Briggs and his accomplice were interrupted by the victim as they were stealing her car and ordered her back into the house at gun point. They forced her to the floor, placed a pillow over her head, and Briggs's companion shot her in the head, causing her very serious, permanent injuries. Briggs was charged as party to the crimes of attempted first degree intentional homicide, armed car theft, armed robbery, armed burglary, and criminal damage to property. He reached an agreement with the state to plead no contest to both counts of an amended information charging him with attempted felony murder and armed burglary, both as a party to crime. He later moved to vacate his conviction, contending that the circuit court lacked subject-matter jurisdiction because the crime of attempted felony murder does not exist. The court of appeals agreed, relying in part on State v. Carter, 44 Wis.2d 151, 155, 170 N.W.2d 681, 683 (1969), which had concluded that felony murder does not require intent, and therefore, "is not reconcilable with the concept of attempt."

1. As amended by 2021 Wisconsin Act 209, § 940.03 specifies fourteen statutes defining crimes that can be the basis for a felony murder charge. The fourteen crimes are:

- § 940.19 Battery
- § 940.195 Battery to an unborn child

- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.204 Battery or threat to health care providers and staff
- § 940.225(1) First Degree Sexual Assault
- § 940.225(2)(a) Second Degree Sexual Assault
- § 940.30 False imprisonment
- § 940.31 Kidnapping
- § 943.02 Arson
- § 943.10(2) Aggravated Burglary
- § 943.23(1g) "Carjacking"
- § 943.32(2) Armed Robbery

As to violations of § 940.225(1), note that sexual contact or sexual intercourse under three different circumstances could be involved:

(a) without consent and causing pregnancy or great bodily harm
(b) without consent by use or threat of a dangerous weapon or article
(c) without consent, while aided and abetted and by use or threat of force.

2. "While committing or attempting to commit" is the phrase used by § 940.03 to identify the connection between the underlying felony and the death. In applying the statutory phrase in the instruction, the Committee adopted the following rationale: the defendant causes the death if he or she was concerned in the commission of the felony and the commission of the felony caused the death. This is consistent with the rationale in the Oimen and Rivera cases, see the comment preceding note 1, and was approved as a correct statement of the law in State v. Krawczyk, 2003 WI App 6, ¶23, 259 Wis.2d 843, 657 N.W.2d 77.

The version of the Wisconsin felony murder statute that preceded current § 940.03 required that the death be caused "as a natural and probable consequence of the commission of or attempt to commit a felony." The nature of the connection between the felony and the death has been a source of considerable difficulty in many states which have felony murder statutes. See the Introductory Comment at Wis JI-Criminal 1000 and LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222-28 (West 1986).

Some of the difficulty in defining the connection between the causing of death and the commission of the felony has been the result of the wide range of felonies to which the felony murder rule could apply. Wisconsin's statute as revised in 1989 addressed that problem by specifying a limited number of felonies – 5 – that could be predicates for felony murder. One felony was added by 2001 Wisconsin Act 109 – s. 943.23(1g). Seven crimes were added by 2005 Wisconsin Act 313. One more felony was added by 2021 Wisconsin Act 209 – s. 940.204. Thus, at least with the original limited list of predicate felonies, it could be argued that it is appropriate to extend liability for deaths caused by those felonies, even to those deaths that are more remote.

The other issue that may come up with respect to the cause issue involves relating the time of the death to the time the felony was committed. Since § 940.03 specifically includes attempts to commit the named felonies, the primary questions are likely to arise with respect to deaths caused after the felony is technically complete. For example, does the statute apply to deaths caused by the felon while fleeing the scene of the crime? Statutes in some states include deaths caused "while fleeing immediately after committing" a felony

(§ 2903.01, Ohio Rev. Codes) or those caused in the "immediate flight after committing" the felony (17 A § 202, Me. Rev. Stats.). Wisconsin has reached the same result by case law. See note 6, below.

The Committee concluded that questions about the connection between the felony and deaths caused after the felony is committed are best resolved by asking: Did the commission of the felony cause the death? As stated in the LaFave treatise: ". . . If this causal connection does exist, the killing may take place at some time before or after . . . whether there was sufficient causal connection between the felony and the homicide depends on whether the defendant's felony dictated his conduct which led to the homicide." LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222 and 227 (West 1986).

3. Here include the statute violated, for example: "The crime of first degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin. . ." This is the way the first sentence of the uniform instruction for the underlying felony will read.

4. The uniform jury instructions for the potential underlying felonies are as follows:

- for § 940.19 Battery – Wis JI-Criminal 1220-1226
- for § 940.195 Battery to an unborn child – Wis JI-Criminal 1227
- for § 940.20 Battery: special circumstances – Wis JI-Criminal 1228-1237
- for § 940.201 Battery or threat to witness – Wis JI-Criminal 1238
- for § 940.203 Battery or threat to judge – Wis JI-Criminal 1248
- for § 904.204(2) Battery or threat to a staff member of a health care facility – Wis JI-Criminal 1247A
- for § 904.204(3) Battery or threat to a health care provider – Wis JI-Criminal 1247B
- for § 940.225(1) First Degree Sexual Assault – Wis JI-Criminal 1200-1207
- for § 940.225(2)(a) Second Degree Sexual Assault – Wis JI-Criminal 1208, 1209
- for § 940.30 False imprisonment – Wis JI-Criminal 1275
- for § 940.31 Kidnapping – Wis JI-Criminal 1280-1282
- for § 943.02 Arson – Wis JI-Criminal 1404, 1405
- for § 943.10(2) Armed Burglary – Wis JI-Criminal 1422
- for § 943.23(1g) "Carjacking" – Wis JI-Criminal 1463
- for § 943.32(2) Armed Robbery – Wis JI-Criminal 1480, 1480A

If an attempt to commit one of these felonies is the basis for the charge, Wis JI-Criminal 1031 provides a model.

5. 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 immediately preceding the sentence in the instruction beginning with "before":

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

Also see Wis JI-Criminal 901, Cause.

6. In State v. Oimen, 184 Wis.2d 423, 428, 516 N.W.2d 399 (1994), the Wisconsin Supreme Court concluded "as a matter of law that the phrase in § 940.03, 'while committing or attempting to commit',

encompasses the immediate flight from a felony." The court further directed that in the future, courts should utilize an instruction that includes the quoted language.

The Oimen decision upheld the felony murder conviction of the "mastermind" of an armed burglary which resulted in the shooting death of his co-felon by the intended victim of the burglary. The death occurred as the co felon fled the scene.

# 1031 FELONY MURDER: UNDERLYING CRIME ATTEMPTED — § 940.03

## Statutory Definition of the Crime

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while attempting to commit the crime of (name of crime).[1]

## State's Burden of Proof

Before you may find the defendant guilty of felony murder, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following elements were present.

## Elements of Felony Murder That the State Must Prove

1. The defendant attempted to commit the crime of (name of crime).

2. The death of (name of victim) was caused by the attempt to commit (name of crime).[2]

## Determining Whether the Defendant Attempted to Commit (name of crime)

The first element of felony murder requires that the defendant attempted to commit the crime of (name of crime).

The crime of attempted (name of crime), as defined in § 939.32 and §_____[3] of the Criminal Code of Wisconsin, is committed by one who, with intent to commit (name of crime) does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the

crime except for the intervention of another person or some other extraneous factor.[4]

First consider whether the defendant intended to commit (name of crime).

(Name of crime) is committed by one who

LIST THE ELEMENTS OF THE INTENDED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[5]

The crime involved in this case, however, is not (name of crime) as defined, but an attempt to commit the crime of (name of crime).

Next consider whether the defendant did acts toward the commission of the crime of (name of crime) which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have committed the crime of (name of crime) except for the intervention of another person or some other extraneous factor.

**Meaning of "Unequivocally"**

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

**Meaning of "Another Person"**

"Another person" means anyone but the defendant and may include the intended victim.

**Meaning of "Extraneous Factor"**

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

**Deciding About Intent**

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

**Determining Whether Death was Caused by the Attempt to Commit of (name of crime)**

The second element of felony murder requires that the death of (name of victim) was caused by the attempt to commit (name of crime).

**The Meaning of "Cause"**

"Cause" means that the attempt to commit (name of crime) was a substantial factor in producing the death.[6]

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM AN ATTEMPTED FELONY.[7]

[The phrase "the attempt to commit" the crime includes the period of immediate flight from that crime.]

**Jury's Decision on Felony Murder**

If you are satisfied beyond a reasonable doubt that the defendant attempted to commit the crime of (name of crime) and that the death of (name of victim) was caused by the attempt to commit (name of crime), you should find the defendant guilty of felony murder. If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI-Criminal 1031 was originally published in 2003 and revised in 2007 and 2013. The 2007 revision reflected the addition of several felonies to the list of those that can provide the predicate for a felony murder charge. This revision was approved by the Committee in April 2022; it also reflected the addition of a new felony to the list of those that can provide the predicate for a felony murder charge based on 2021 Wisconsin Act 209 [effective date: March 25, 2022].

This instruction is for a felony murder case based on the attempt to commit the underlying felony. For cases involving complete commission of the underlying felony, see Wis JI-Criminal 1030. For cases based on committing the felony as a party to the crime, see Wis JI-Criminal 1032.

2005 Wisconsin Act 313 amended § 940.03, Felony murder, to add the following offenses as predicate offenses:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.30 False imprisonment
- § 940.31 Kidnapping

2021 Wisconsin Act 209 amended § 940.03, Felony murder, to add the following offense as a predicate offense:

- §940.204 Battery or threat to health care providers and staff

The complete list of predicate offenses is provided in footnote 1. The list of uniform criminal jury instructions for the predicate offenses is provided in footnote 4.

Note that the offenses added by Act 313 include two offenses that define misdemeanor offenses: § 940.19(1) and § 940.195(1). It is not clear whether the application of the revised felony murder statute was intended to be based on the commission of a misdemeanor. Wisconsin had misdemeanor manslaughter statutes until the Criminal Code was revised in 1955. See, for example, § 340.10, 1953 Wis. Stats.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This was a change from 20 years under prior law. Adding 15 years to the total term of imprisonment yields a new "unclassified felony" under § 973.01(2)(b)10. 75% of the term is the maximum period of confinement; 25% of the term is the extended supervision maximum. State v. Mason, 2004 WI App 176, 276 Wis.2d 434, 687 N.W.2d 526.

The underlying felony is a lesser included offense of felony murder. State v. Carlson, 5 Wis.2d 595, 608, 93 N.W.2d 355 (1958); State v. Gordon, 111 Wis.2d 133, 330 N.W.2d 564 (1983). Thus, the felony could be submitted to the jury as a lesser included offense if the evidentiary standard is met; it should not be charged as separate count. Carlson dealt with § 940.03 of the statutes in effect in 1957, defining "third

degree murder." The current statute is essentially the same as the statute in Carlson, except it is limited to designated felonies. Carlson held that "the correct procedure" would be:

> in the first instance to bring but a single charge of third-degree murder and for the court to submit to the jury verdicts of third-degree murder, arson, and not guilty. The arson could properly be submitted to the jury because it is an included crime within the meaning of sec. 939.66(1) of the Criminal Code. But the jury should be instructed to sign but one verdict, so that if they found the defendant guilty of third-degree murder they would make no finding with respect to the separate form of verdict of arson. On the other hand if they found the defendant not guilty of third-degree murder they might still find him guilty of arson, if they found that he set the fire but that it did not cause the death.
> 5 Wis.2d 595, 608 9.

The felony murder statute applies to a situation where a co-felon is killed by the intended victim of the felony. State v. Oimen, 184 Wis.2d 423, 516 N.W.2d 399 (1994). It also applies when a person present at the crime is killed by the intended victim of the felony. State v. Rivera, 184 Wis.2d 485, 516 N.W.2d 391 (1994). In both cases, the court held that the plain language of the statute applies: the defendants caused the death while committing the felony. The so-called agency approach that limits liability in similar situations in some jurisdictions was rejected.

In Oimen, the court also addressed the proper way to integrate party to the crime with felony murder: ". . . [W]e wish to point out that [Oimen] should not have been charged as a party to the crime of felony murder. Oimen was appropriately charged as a party to the underlying offense, attempted armed robbery. Charging felony murder as a party to the crime is redundant and unnecessary. A person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony." 184 Wis.2d 423, 449. The court of appeals affirmed a conviction for felony murder, party to the crime, in a case decided shortly before Oimen. See State v. Chambers, 183 Wis.2d 316, 515 N.W.2d 531 (Ct. App. 1994). See Wis JI-Criminal 1032 and 1032 EXAMPLE for uniform instructions combining felony murder and party to the crime.

In State v. Briggs, 218 Wis.2d 61, 579 N.W.2d 783 (Ct. App., 1998), the court held that there is no crime of "attempted felony murder," meaning that the defendant must be allowed to withdraw his negotiated plea of no contest to that offense. Briggs and his accomplice were interrupted by the victim as they were stealing her car and ordered her back into the house at gun point. They forced her to the floor, placed a pillow over her head, and Briggs's companion shot her in the head, causing her very serious, permanent injuries. Briggs was charged as party to the crimes of attempted first degree intentional homicide, armed car theft, armed robbery, armed burglary, and criminal damage to property. He reached an agreement with the state to plead no contest to both counts of an amended information charging him with attempted felony murder and armed burglary, both as a party to crime. He later moved to vacate his conviction, contending that the circuit court lacked subject-matter jurisdiction because the crime of attempted felony murder does not exist. The court of appeals agreed, relying in part on State v. Carter, 44 Wis.2d 151, 155, 170 N.W.2d 681, 683 (1969), which had concluded that felony murder does not require intent, and therefore, "is not reconcilable with the concept of attempt."

1. As amended by Wisconsin Act 209, § 940.03 specifies fourteen statutes defining crimes that can be the basis for a felony murder charge. The fourteen crimes are:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20. Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.204 Battery or threat to health care providers and staff
- § 940.225(1) First Degree Sexual Assault
- § 940.225(2)(a) Second Degree Sexual Assault
- § 940.30 False imprisonment
- § 940.31 Kidnapping
- § 943.02 Arson
- § 943.10(2) Aggravated Burglary
- § 943.23(1g) "Carjacking"
- § 943.32(2) Armed Robbery

As to violations of § 940.225(1), note that sexual contact or sexual intercourse under three different circumstances could be involved:

(a) without consent and causing pregnancy or great bodily harm
(b) without consent by use or threat of a dangerous weapon or article
(c) without consent, while aided and abetted and by use or threat of force.

2. "While committing or attempting to commit" is the phrase used by § 940.03 to identify the connection between the underlying felony and the death. In applying the statutory phrase in the instruction, the Committee adopted the following rationale: the defendant causes the death if he or she was concerned in the commission of the felony and the commission of the felony caused the death. This is consistent with the rationale in the Oimen and Rivera cases, see the comment preceding note 1, and was approved as a correct statement of the law in State v. Krawczyk, 2003 WI App 6, ¶23, 259 Wis.2d 843, 657 N.W.2d 77. For a charge based on an attempted felony, the statement is modified to refer to death being caused by the attempt to commit the felony.

The version of the Wisconsin felony murder statute that preceded current § 940.03 required that the death be caused "as a natural and probable consequence of the commission of or attempt to commit a felony." The nature of the connection between the felony and the death has been a source of considerable difficulty in many states which have felony murder statutes. See the Introductory Comment at Wis JI-Criminal 1000 and LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222-28 (West 1986).

Some of the difficulty in defining the connection between the causing of death and the commission of the felony has been the result of the wide range of felonies to which the felony murder rule could apply. Wisconsin's statute addresses that problem by specifying a limited number of felonies. Thus, it could be argued that it is appropriate to extend liability for deaths caused by those felonies, even to those deaths that are more remote.

The other issue that may come up with respect to the cause issue involves relating the time of the death to the time the felony was committed. Since § 940.03 specifically includes attempts to commit the named felonies, the primary questions are likely to arise with respect to deaths caused after the felony is technically complete. For example, does the statute apply to deaths caused by the felon while fleeing the scene of the

crime? Statutes in some states include deaths caused "while fleeing immediately after committing" a felony (§ 2903.01, Ohio Rev. Codes) or those caused in the "immediate flight after committing" the felony (17 A § 202, Me. Rev. Stats.). Wisconsin has reached the same result by case law. See note 6, below.

The Committee concluded that questions about the connection between the felony and deaths caused after the felony is committed are best resolved by asking: Did the commission of the felony cause the death? As stated in the LaFave treatise: ". . . If this causal connection does exist, the killing may take place at some time before or after . . . whether there was sufficient causal connection between the felony and the homicide depends on whether the defendant's felony dictated his conduct which led to the homicide." LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222 and 227 (West 1986).

3. Here include the statute violated, for example: "The crime of first degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin. . ." This is the way the first sentence of the uniform instruction for the underlying felony will read.

4. This statement and the material immediately following are based on Wis JI-Criminal 580, Attempt. See the Comment and footnotes for that instruction for explanation of the issues relating to defining attempt.

5. The uniform jury instructions for the potential underlying felonies are as follows:

- for § 940.19 Battery – Wis JI-Criminal 1220-1226
- for § 940.195 Battery to an unborn child – Wis JI-Criminal 1227
- for § 940.20 Battery: special circumstances – Wis JI-Criminal 1228-1237
- for § 940.201 Battery or threat to witness – Wis JI-Criminal 1238
- for § 940.203 Battery or threat to judge – Wis JI-Criminal 1248
- for § 904.204(2) Battery or threat to a staff member of a health care facility – Wis JI-Criminal 1247A
- for § 904.204(3) Battery or threat to a health care provider – Wis JI-Criminal 1247B
- for § 940.225(1) First Degree Sexual Assault – Wis JI-Criminal 1200-1207
- for § 940.225(2)(a) Second Degree Sexual Assault – Wis JI-Criminal 1208, 1209
- for § 940.30 False imprisonment – Wis JI-Criminal 1275
- for § 940.31 Kidnapping – Wis JI-Criminal 1280-1282
- for § 943.02 Arson – Wis JI-Criminal 1404, 1405
- for § 943.10(2) Armed Burglary – Wis JI-Criminal 1422
- for § 943.23(1g) "Carjacking" – Wis JI-Criminal 1463
- for § 943.32(2) Armed Robbery – Wis JI-Criminal 1480, 1480A

If an attempt to commit one of these felonies is the basis for the charge, Wis JI-Criminal 1031 provides a model.

6. 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 immediately preceding the sentence in the instruction beginning with "before":

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

Also see Wis JI-Criminal 901, Cause.

7. In State v. Oimen, 184 Wis.2d 423, 428, 516 N.W.2d 399 (1994), the Wisconsin Supreme Court concluded "as a matter of law that the phrase in § 940.03, 'while committing or attempting to commit', encompasses the immediate flight from a felony." The court further directed that in the future, courts should utilize an instruction that includes the quoted language.

The Oimen decision upheld the felony murder conviction of the "mastermind" of an armed burglary which resulted in the shooting death of his co-felon by the intended victim of the burglary. The death occurred as the co felon fled the scene.

# 1032 FELONY MURDER: DEATH CAUSED WHILE COMMITTING A CRIME AS A PARTY TO THE CRIME: AIDING AND ABETTING — §§ 940.03 and 939.05

## Statutory Definition of the Crime

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while committing[1] the crime of (name of crime)[2] as a party to the crime.

## State's Burden of Proof

Before you may find the defendant guilty of felony murder, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following elements were present.

## Elements of Felony Murder That the State Must Prove

1. The defendant was a party to the crime of (name of crime).
2. The death of (name of victim) was caused by the commission of the (name of crime).[3]

## Determining Whether the Defendant Was A Party To the Crime of (name of crime)

The first element of felony murder requires that the defendant was a party to the crime of (name of crime). This determination has two parts. I will first define what it means to be a party to the crime, which is the first part. Then I will define the elements of (name of crime), which is the second part.

**Party To A Crime**

"Party to a crime" means that all persons concerned in the commission of a crime may be found to have committed that crime although they did not commit it directly.[4]

The State contends[5] that the defendant was concerned in the commission of the crime of (name of crime) by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

**Definition of Aiding and Abetting**

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either

- assists the person who commits the crime, or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name of crime), the defendant must know that another person is committing or intends to commit the crime of (name of crime) and have the purpose to assist the commission of that crime.[6]

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

(However, a person does not aid and abet if (he) (she) is only a bystander or spectator

and does nothing to assist the commission of a crime.)

**Jury's Decision – Party To A Crime**

Before you may find that the defendant was a party to the crime of (name of crime), the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant directly committed the crime of (name of crime) or that the defendant intentionally aided and abetted the commission of that crime.

**Unanimous Agreement Not Required Regarding Theory Of Party To A Crime**

All twelve jurors do not have to agree as to whether the defendant directly committed the crime or aided and abetted the commission of the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those ways.[7]

**Elements of (name of crime) That the State Must Prove**

Now I will define the elements of (name of crime).

(Name of crime), as defined in section _____[8] of the Criminal Code of Wisconsin, is committed by one who (here refer to the instruction for the underlying crime to fully define the elements of that crime).[9]

**Determining Whether Death was Caused by the Commission of (name of crime)**

The second element of felony murder requires that the death of (name of victim) was caused by the commission of the (name of crime).[10]

**The Meaning of "Cause"**

"Cause" means that the commission of the (name of crime) was a substantial factor in producing the death.[11]

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM A FELONY.[12]

[The phrase "the commission of" the crime includes the period of immediate flight from that crime.]

**Jury's Decision on Felony Murder**

If you are satisfied beyond a reasonable doubt that the defendant was a party to the crime of (name of crime) and that the death of (name of victim) was caused by the commission of (name of crime) as that crime has been defined, you should find the defendant guilty of felony murder.

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

**COMMENT**

Wis JI-Criminal 1032 was originally published in 1998 and revised in 2003, 2007, and 2013. The 2007 revision reflected the addition of several felonies to the list of those that can provide the predicate for a felony murder charge. This revision was approved by the Committee in April 2022; it also reflected the addition of a new felony to the list of those that can provide the predicate for a felony murder charge based on 2021 Wisconsin Act 209 [effective date: March 25, 2022].

This instruction tailors Wis JI-Criminal 1030, Felony Murder, to a case based on the defendant's being party to the felony that caused the death. It integrates material from Wis JI-Criminal 400, Party To Crime: Aiding and Abetting: Defendant Either Directly Committed Or Intentionally Aided the Crime Charged, and Wis JI-Criminal 1030, Felony Murder.

2005 Wisconsin Act 313 amended §940.03, Felony murder, to add the following offenses as predicate offenses:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.30 False imprisonment
- § 940.31 Kidnapping

2021 Wisconsin Act 209 amended § 940.03, Felony murder, to add the following offense as a predicate offense:

- §940.204 Battery or threat to health care providers and staff

The complete list of predicate offenses is provided in footnote 1. The list of uniform criminal jury instructions for the predicate offenses is provided in footnote 4.

Note that the offenses added by Act 313 include two offenses that define misdemeanor offenses: § 940.19(1) and § 940.195(1). It is not clear whether the application of the revised felony murder statute was intended to be based on the commission of a misdemeanor. Wisconsin had misdemeanor manslaughter statutes until the Criminal Code was revised in 1955. See, for example, § 340.10, 1953 Wis. Stats.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This was a change from 20 years under prior law. Adding 15 years to the total term of imprisonment yields a new "unclassified felony" under § 973.01(2)(b)10. 75% of the term is the maximum period of confinement; 25% of the term is the extended supervision maximum. State v. Mason, 2004 WI App 176, 276 Wis.2d 434, 687 N.W.2d 526.

The proper way to integrate party to the crime with felony murder was addressed by the Wisconsin Supreme Court in State v. Oimen, 184 Wis.2d 423, 449, 516 N.W.2d 399 (1994):

> . . . [W]e wish to point out that [Oimen] should not have been charged as a party to the crime of felony murder. Oimen was appropriately charged as a party to the underlying offense, attempted armed robbery. Charging felony murder as a party to the crime is redundant and unnecessary. A person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony.

1. This instruction is for the case where the underlying felony was committed. For a case based on the attempt to commit the underlying felony, this instruction must be adapted to the format provided in Wis JI-Criminal 1031.

2. As amended by Wisconsin Act 209, § 940.03 specifies fourteen statutes defining crimes that can be the basis for a felony murder charge. The fourteen crimes are:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.204 Battery or threat to health care providers and staff
- § 940.225(1) First Degree Sexual Assault
- § 940.225(2)(a) Second Degree Sexual Assault
- § 940.30 False imprisonment
- § 940.31 Kidnapping
- § 943.02 Arson
- § 943.10(2) Aggravated Burglary
- § 943.23(1g) "Carjacking"
- § 943.32(2) Armed Robbery

As to violations of § 940.225(1), note that sexual contact or sexual intercourse under three different circumstances could be involved:

(a) without consent and causing pregnancy or great bodily harm
(b) without consent by use or threat of a dangerous weapon or article
(c) without consent, while aided and abetted and by use or threat of force.

3. "While committing or attempting to commit" is the phrase used by § 940.03 to identify the connection between the underlying felony and the death. In applying the statutory phrase in the instruction, the Committee adopted the following rationale: the defendant causes the death if he or she was concerned in the commission of the felony and the commission of the felony caused the death. This is consistent with the rationale in the Oimen and Rivera cases, see the comment preceding note 1, and was approved as a correct statement of the law in State v. Krawczyk, 2003 WI App 6, ¶23, 259 Wis.2d 843, 657 N.W.2d 77.

The version of the Wisconsin felony murder statute that preceded current § 940.03 required that the death be caused "as a natural and probable consequence of the commission of or attempt to commit a felony." The nature of the connection between the felony and the death has been a source of considerable difficulty in many states which have felony murder statutes. See the Introductory Comment at Wis JI-Criminal 1000 and LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222-28 (West 1986).

Some of the difficulty in defining the connection between the causing of death and the commission of the felony has been the result of the wide range of felonies to which the felony murder rule could apply. Wisconsin's statute addresses that problem by specifying a limited number of felonies. Thus, it could be argued that it is appropriate to extend liability for deaths caused by those felonies, even to those deaths that are more remote.

The other issue that may come up with respect to the cause issue involves relating the time of the death to the time the felony was committed. Since § 940.03 specifically includes attempts to commit the named felonies, the primary questions are likely to arise with respect to deaths caused after the felony is technically complete. For example, does the statute apply to deaths caused by the felon while fleeing the scene of the crime? Statutes in some states include deaths caused "while fleeing immediately after committing" a felony (§ 2903.01, Ohio Rev. Codes) or those caused in the "immediate flight after committing" the felony (17 A

§ 202, Me. Rev. Stats.). Wisconsin has reached the same result by case law. See note 6, below.

The Committee concluded that questions about the connection between the felony and deaths caused after the felony is committed are best resolved by asking: Did the commission of the felony cause the death? As stated in the LaFave treatise: ". . . If this causal connection does exist, the killing may take place at some time before or after . . . whether there was sufficient causal connection between the felony and the homicide depends on whether the defendant's felony dictated his conduct which led to the homicide." LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222 and 227 (West 1986).

4. This is a paraphrase of § 939.05(2), which provides: "Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it. . . ."

5. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). If the defendant has not been charged as a party to crime, the material in the second set of brackets should be used.

6. The definition of "intentionally" deals with the clear cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis-JI Criminal 923.2. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

7. The jurors need not be instructed that they must unanimously agree on the basis of liability, that is, whether the defendant directly committed the crime or aided and abetted its commission. Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

8. Here include the statute violated, for example: "The crime of first degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin. . ." This is the way the first sentence of the uniform instruction for the underlying felony will read.

9. The uniform jury instructions for the potential underlying felonies are as follows:

- for § 940.19 Battery – Wis JI-Criminal 1220-1226
- for § 940.195 Battery to an unborn child – Wis JI-Criminal 1227
- for § 940.20 Battery: special circumstances – Wis JI-Criminal 1228-1237
- for § 940.201 Battery or threat to witness – Wis JI-Criminal 1238
- for § 940.203 Battery or threat to judge – Wis JI-Criminal 1248
- for § 904.204(2) Battery or threat to a staff member of a health care facility – Wis JI-Criminal 1247A
- for § 904.204(3) Battery or threat to a health care provider – Wis JI-Criminal 1247B
- for § 940.225(1) First Degree Sexual Assault – Wis JI-Criminal 1200-1207
- for § 940.225(2)(a) Second Degree Sexual Assault – Wis JI-Criminal 1208, 1209
- for § 940.30 False imprisonment – Wis JI-Criminal 1275
- for § 940.31 Kidnapping – Wis JI-Criminal 1280-1282
- for § 943.02 Arson – Wis JI-Criminal 1404, 1405

- for § 943.10(2) Armed Burglary – Wis JI-Criminal 1422
- for § 943.23(1g) "Carjacking" – Wis JI-Criminal 1463
- for § 943.32(2) Armed Robbery – Wis JI-Criminal 1480, 1480A

If an attempt to commit one of these felonies is the basis for the charge, Wis JI-Criminal 1031 provides a model.

10. See note 2, supra.

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 immediately preceding the sentence in the instruction beginning with "before":

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

Also see Wis JI-Criminal 901, Cause.

12. In State v. Oimen, 184 Wis.2d 423, 428, 516 N.W.2d 399 (1994), the Wisconsin Supreme Court concluded "as a matter of law that the phrase in § 940.03, 'while committing or attempting to commit', encompasses the immediate flight from a felony." The court further directed that in the future, courts should utilize an instruction that includes the quoted language.

The Oimen decision upheld the felony murder conviction of the "mastermind" of an armed burglary which resulted in the shooting death of his co-felon by the intended victim of the burglary. The death occurred as the co-felon fled the scene.

# 1204 FIRST DEGREE SEXUAL ASSAULT: AGAINST AN INDIVIDUAL WHO IS 60 YEARS OF AGE OR OLDER — § 940.225(1)(d)

## Statutory Definition of the Crime

First degree sexual assault, as defined in § 940.225(1)(d) of the Criminal Code of Wisconsin, is committed by [CHOOSE ONE OF THE FOLLOWING][1].

- [one who has sexual (contact) (intercourse) with another person who is 60 years of age or older without consent and by use or threat of force or violence]
- [one who has sexual (contact) (intercourse) with another person who is 60 years of age or older without consent and causes (injury) (illness) (disease or impairment of a sexual or reproductive organ) (mental anguish requiring psychiatric care)]
- [one who has sexual (contact) (intercourse) with a person who is 60 years of age or older who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition]
- [one who has sexual (contact) (intercourse) with a person who is 60 years of age or older who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and has the purpose to have sexual (contact) (intercourse) with the person while the person is incapable of giving consent]
- [one who has sexual (contact) (intercourse) with a person who is 60 years of age

or older who the defendant knows is unconscious]

- [one who has sexual (contact) (intercourse) with another person who is 60 years of age or older without consent and is aided and abetted[2] by one or more other persons]
- [one who is an employee of a (type of facility or program)[3] and has sexual (contact) (intercourse) with a (patient) (resident) of that (facility) (program) who is 60 years of age or older]
- [a correctional staff member who has sexual (contact) (intercourse) with an individual who is 60 years of age or older who is confined in a correctional institution][4]
- [a (probation) (parole) (extended supervision) agent who has sexual (contact) (intercourse) with an individual who is 60 years of age or older on (probation) (parole) (extended supervision), and who supervises that individual in his or her capacity as an agent][5]
- [a licensee, employee, nonclient resident, of an entity, who has sexual (contact) (intercourse) with a client of the entity who is 60 years of age or older]

**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 _____[6] elements were present.

**Elements of the Crime That the State Must Prove**

1. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[7]

[LIST THE ELEMENTS OF THE CRIME CHARGED UNDER § 940.225(2) AS INDICATED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS OF THE UNIFORM INSTRUCTION AS NECESSARY][8]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all _____[9] elements of first degree sexual assault 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 1204 was approved by the Committee in December 2021.

This instruction is drafted for offenses involving first degree sexual assault of an individual who is 60 years or older as provided in Wis. Stat 940.225(1)(d). § 940.225(1)(d) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Section 940.225(1)(d) recognizes ten grounds for committing first-degree sexual assault against an individual who is 60 years of age or older. The Committee concluded that the best way to address the complexity that has resulted is to provide a single model instruction which can be modified to refer to the appropriate violation provided in subsection 940.225(2). For an example showing how the instruction would read when typical alternatives are selected, see Wis JI-Criminal 1204 EXAMPLE.

1. The applicable definition should be selected. The alternatives are those provided in sub. 940.225(2)(a) through (j).

2. Section 940.225(2)(f) uses the phrase "aided or abetted" (emphasis added). Since traditional criminal statutes have referred to "aiding and abetting," the Committee has used that construction in

the instruction. The Committee feels that this does not change the meaning of the statute or of the aiding and abetting concept. In State v. Thomas, 128 Wis.2d 93, 381 N.W.2d 567 (Ct. App. 1985), the court held that "aided or abetted" in § 940.225(1)(c) has the same meaning as the phrase "aids and abets" in § 939.05 and therefore is not unconstitutionally vague.

3. Section 940.225(2)(g) was amended by 1993 Wisconsin Act 445. The former statute applied to an employee of "an inpatient facility or a state treatment facility." The revised statutes applies to an employee of "a facility or program under s. 940.295(2)(b), (c), (h) or (k)." Those facilities or programs are:

- (2)(b) an adult family home
- (2)(c) a community-based residential facility
- (2)(h) an inpatient health care facility
- (2)(k) a state treatment facility

The Committee recommends naming the type of facility in this paragraph, for example: ". . . an employee of a state treatment facility."

4. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

5. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

6. Insert the appropriate number of elements from the uniform instruction for the crime charged as modified under § 940.225(1)(d).

7. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

8. For comments and footnotes applicable to the predicate offense, refer to the comment section of the specific uniform instruction. See Wis JI-Criminal 1208 – 1217A.

9. Insert the appropriate number of elements from the uniform instruction for the crime charged as modified under § 940.225(1)(d).

# 1204 EXAMPLE FIRST DEGREE SEXUAL ASSAULT: AGAINST AN INDIVIDUAL WHO IS 60 YEARS OF AGE OR OLDER — § 940.225(1)(d)

THE FOLLOWING ILLUSTRATES HOW WIS JI-CRIMINAL 1204 WOULD BE ADAPTED IF THE PREDICATE SECOND DEGREE SEXUAL ASSAULT IS A VIOLATION OF SEC. 940.225(2)(a)

## Statutory Definition of the Crime

First degree sexual assault, as defined in § 940.225(1)(d) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with another person who is 60 years of age or older without consent and by use or threat of force or violence.

## 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. (Name of victim) was 60 years of age or older at the time of the offense.

   Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[1]

2. The defendant had sexual (contact) (intercourse) with (name of victim).

3. (Name of victim) did not consent to the sexual (contact) (intercourse).

4. The defendant had sexual (contact) (intercourse) with (name of victim) by use or threat of force or violence.

The use or threat of force or violence may occur before or as part of the sexual (contact) (intercourse).

SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE

[This element is satisfied if the use or threat of force or violence compelled (name of victim) to submit.]

[Use or threat of force or violence on one date can carry over to an alleged sexual assault on a later date if the use or threat of force or violence continued to weigh on (name of victim) and caused (him) (her) to cooperate out of fear for (his) (her) safety.]

[The phrase "by use of force" includes forcible sexual contact or force used as the means of making sexual contact.]

**Meaning of ["Sexual Contact"] ["Sexual Intercourse"]**

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

**Meaning of "Did Not Consent"**

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of first degree sexual assault 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 1204 EXAMPLE was approved by the Committee in February 2022.

This instruction illustrates how the general model provided in Wis JI-Criminal 1204 would be adapted for a violation based on § 940.225(2)(a): sexual contact or intercourse with another person without consent of that person by use or threat of force or violence. This offense is a Class B felony – see § 940.225(1).

Modification of the language used in this example may be necessary depending on which predicate second degree sexual assault is being prosecuted.

1. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

# 1208 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT BY USE OR THREAT OF FORCE OR VIOLENCE — § 940.225(2)(a)

## Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(a) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with another person without consent and by use or threat of force or violence.

## 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 had sexual (contact) (intercourse) with (name of victim).

2. (Name of victim) did not consent to the sexual (contact) (intercourse).

3. The defendant had sexual (contact) (intercourse) with (name of victim) by use or threat of force or violence.[1]

   The use or threat of force or violence may occur before or as part of the sexual (contact) (intercourse).[2]

   SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE

   [This element is satisfied if the use or threat of force or violence compelled (name of victim) to submit.][3]

[Use or threat of force or violence on one date can carry over to an alleged sexual assault on a later date if the use or threat of force or violence continued to weigh on (name of victim) and caused (him) (her) to cooperate out of fear for (his) (her) safety.][4]

[The phrase "by use of force" includes forcible sexual contact or force used as the means of making sexual contact.][5]

**Meaning of ["Sexual Contact"] ["Sexual Intercourse"]**

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

**Meaning of "Did Not Consent"**[6]

"Did not consent" means that (name of victim) did not freely agree to have sexual (contact) (intercourse) with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[7]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

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

**COMMENT**

This instruction was originally published in 1980 as Wis JI-Criminal 1208 [for sexual intercourse offenses] and Wis JI-Criminal 1209 [for sexual contact offenses]. Those instructions were revised in 1983 and 1990. A revision combining the instructions as Wis JI-Criminal 1208 was published in 1996 and revised in 2002, 2004, 2005, and 2016. The 2016 revision involved a nonsubstantive change in the text and an addition to footnote 3. This revision was approved by the Committee in December 2021; it added to the comment.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. The phrase, "by use or threat of force or violence," as used in subsection (2)(a) of § 940.225, was construed in State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981). The court held that jury agreement is not required on "use" as opposed to "threat" or on "force" as opposed to "violence." Thus, instructing the jury in the disjunctive is acceptable in this instance, although the Committee recommends selecting one of the alternatives whenever the evidence supports only one.

2. "[T]he use or threat of force or violence element of second degree sexual assault includes forcible contact or force used as a means of making the sexual contact. Thus, the element is satisfied whether the force is used or threatened as part of the sexual contact itself or whether it is used or threatened before the sexual contact." State v. Hayes, 2003 WI App 99, ¶15, 264 Wis.2d 377, 633 N.W.2d 351, citing State v. Bonds, supra. (Affirmed, 2004 WI 80, 273 Wis.2d 1, 681 N.W.2d 203.)

3. State v. Hayes, 2004 WI 80, ¶59, 273 Wis.2d 1, 681 N.W.2d 203:

The "use or threat of force or violence" element . . . is satisfied if the use or threat of force or violence is directed to compelling the victim's submission. The element is satisfied whether the force is used or threatened as part of the sexual contact or whether it is used or threatened as part of the sexual contact to compel the victim's submission.

Also see, State v. Long, 2009 WI 36, 317 Wis.2d 92, 765 N.W.2d 557, where the court found that the evidence was sufficient to establish the "use of force" element: "force has been used when the victim is compelled to submit." 317 Wis.2d 92, 96.

4. State v. Jaworski, 135 Wis.2d 235, 239 40, 400 N.W.2d 29 (Ct. App. 1986):

[W]e reject Jaworski's argument that . . . the state must therefore establish a separate threat for each count

charged.

. . . The crucial inquiry is whether on each date sexual intercourse was achieved by threat of violence. . . .A reasonable trier of fact could well conclude . . . that the initial threat of violence lingered on the latter dates. . . Part of S.H.'s fear may also have been attributable to Jaworski's alleged threats to tell other inmates as well as S.H.'s family and friends what had happened. However, that fact does not preclude a finding that the original threat of violence continued to weigh upon S.H. and caused him to cooperate out of fear for his safety.

State v. Speese, 191 Wis.2d 205, 213 14, 528 N.W.2d 63 (Ct. App. 1995):

In State v. Jaworski, . . . we held that a reasonable trier of fact could infer that an initial threat of violence, made two to five days earlier than the charged sexual assaults, had lingered on the days the charged assaults occurred, and that the earlier threat had caused the victim to submit out of fear. . . .

Speese . . . asserts that her subjective fear was unreasonable and insufficient to prove the threat or use of force. We disagree.

The jury could infer from the evidence that Teresa had good reason to fear Speese, he having used force on her on at least one prior occasion when she refused to have sexual intercourse with him. The fact finder may take into account the context of the threat. . . The context here is the relationship between Speese and Teresa and their respective ages. The relationship of some ten years' duration is between a stepfather and his juvenile female stepchild whom he has sexually abused throughout the period and beaten.

5. State v. Bonds, 165 Wis.2d 27, 32, 477 N.W.2d 265 (1991):

. . . Section 940.225(2)(a) does not state that the force used or threatened may not be the force employed in the actual nonconsensual contact. Nor does it state that the force must be directed toward compelling the victim's submission. The phrase "by use of force" includes forcible contact or the force used as the means of making contact.

. . . Force used at the time of the contact can compel submission as effectively as force or threat occurring before contact. Regardless of when the force is applied, the victim is forced to submit. When force is used at the time of contact, the victim has no choice at the moment of simultaneous use of force and making of contact. When force is used before contact, the choice is forced. In both cases, the victim does not consent to the contact.

6. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (cm), (d), (g), (h) and (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal

conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

7. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

# 1209 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT CAUSING INJURY, ILLNESS, DISEASE OR IMPAIRMENT OF A SEXUAL OR REPRODUCTIVE ORGAN, OR MENTAL ANGUISH REQUIRING PSYCHIATRIC CARE — § 940.225(2)(b)

## Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with another person without consent and causes (injury) (illness) (disease or impairment of a sexual or reproductive organ) (mental anguish requiring psychiatric care).

## 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 had sexual (contact) (intercourse) with (name of victim).
2. (Name of victim) did not consent to the sexual (contact) (intercourse).
3. The defendant caused (injury to (name of victim)) (illness to (name of victim)) (disease or impairment of a sexual or reproductive organ of (name of victim)) (mental anguish requiring psychiatric care for (name of victim)).[1]

**Meaning of ["Sexual Contact"] ["Sexual Intercourse"]**

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

**Meaning of "Did Not Consent"**[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[3]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

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

**Comment**

This instruction was originally published in 1980 as Wis JI-Criminal 1210 [for sexual intercourse offenses] and Wis JI-Criminal 1211 [for sexual contact offenses]. Those instructions were revised in 1983 and 1990. A revision combining the instructions as Wis JI-Criminal 1209 was published in 1996 and revised in 2001 and 2009. The 2009 revision involved amendments to footnote 1. This revision was approved by the Committee in December 2021; it added to the comment.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing

separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. No further definition is attempted for any of the alternatives for this element. Before the 2008 revision, the text referred to "bodily injury." The Committee decided to delete "bodily" because it does not appear in the definition of the offense and may invite problems in connection with defining "injury." "Injury" is not defined in the sexual assault statute, in the general definitions provided in Chapter 939, or by a published court decision. While the Criminal Code uses the closely related term "bodily harm," caution should be used in equating the two because unpublished decisions of the Wisconsin Court of Appeals have reached conflicting results, focusing on whether "pain" is sufficient to constitute "injury." In a prosecution under § 940.225(2)(b), the court held that the trial court erred in defining "injury" using the Criminal Code definition of "bodily harm" [see § 939.22(4)] because "injury" does not include "pain." State v. Gonzalez, No. 2006AP2977 CR, March 20, 2008. [Ordered not published, April 30, 2008.] However, in a prosecution under § 346.63(2)(a), where "injury" is also used, the court held that the word "injury" encompasses physical pain. State v. Maddox, No. 03 0227 CR, July 8, 2003. [Ordered not published, August 27, 2003.] Neither of these decisions may be cited as authority because they were not published. See § 809.23(3). But they indicate the need for caution in equating "injury" with "bodily harm."

It is not clear what is intended by the reference in the statute to "sexual or reproductive organs." The phrase is not defined in the statutes or by prior case law, although the Sexual Assault Law uses the term "intimate parts" in defining sexual contact (§ 940.225(5)(b)). According to cases from other states, "sexual or reproductive organs" include the immediate vicinity of the genital organs as well as the organs themselves, State v. Nash, 83 N.H. 536, 145 A. 262 (N.H. 1929); and it does not include the breasts, State v. Moore, 194 Ore. 232, 241 P.2d 455 (Ore. 1952).

2. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally

ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

3. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

# 1211 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON SUFFERING FROM MENTAL ILLNESS — § 940.225(2)(c)

## Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(c) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition.

## 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 had sexual (contact) (intercourse) with (name of victim).
2. (Name of victim) suffered from a mental (illness) (deficiency) at the time of the sexual (contact) (intercourse).[1]
3. The mental (illness) (deficiency) rendered (name of victim) temporarily or permanently incapable of appraising her[2] conduct. In other words, (name of victim) must have lacked the ability to evaluate the significance of her conduct because of her mental (illness) (deficiency).[3]

4. The defendant knew that (name of victim) was suffering from a mental (illness) (deficiency) and knew that the mental condition rendered (name of victim) temporarily or permanently incapable of appraising her conduct.[4]

**Meaning of ["Sexual Contact"] ["Sexual Intercourse"]**

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

ADD THE FOLLOWING IF THERE IS EVIDENCE RELATING TO THE VICTIM'S CONDUCT THAT IS RELEVANT TO THE THIRD OR FOURTH ELEMENTS.[5]

**[Use of Consent Evidence]**

[Consent to sexual (contact) (intercourse) is not a defense. However, you may consider any words or actions of (name of victim) indicating consent in determining (whether (name of victim) was suffering from a mental (illness) (deficiency) that rendered her incapable of appraising her conduct) (or) (whether the defendant knew that (name of victim) was suffering from a mental (illness) (deficiency) that rendered her incapable of appraising her conduct).]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

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

**COMMENT**

This instruction was originally published in 1980 as Wis JI-Criminal 1212 [for sexual intercourse offenses] and Wis JI-Criminal 1213 [for sexual contact offenses]. Those instructions were revised in 1983, 1990, and 1993. A revision combining the instructions as Wis JI-Criminal 1211 was published in 1996 and revised in 1998, ~~and~~ 2002, and 2015. This revision was approved by the Committee in December 2021; it added to the comment.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Section 940.225(2)(c) provides that it is second degree sexual assault if one "[h]as sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition." This offense is similar to a violation under § 940.225(3), Third Degree Sexual Assault, which prohibits sexual intercourse without consent, where, in satisfying the consent element, the state relies on the presumption of no consent under § 940.225(4)(b), which applies where the victim "suffers from a mental illness or defect which impairs capacity to appraise personal conduct." This statement in subsection (4)(b) is almost identical to the wording of § 940.225(2)(c) but is not exactly the same.

The distinguishing feature of the more serious offense under subsection (2)(c) is that the defendant must know of the victim's mental illness or deficiency. Such knowledge is not required where the presumption applies under subsection (4)(b), so in this sense the subsection (2)(c) offense requires greater proof than does the offense under subsection (3). However, "without consent" is not an element of the (2)(c) offense, while it is an element of the (3) offense. Each offense therefore requires proof of an element that the other does not, although the victim could be essentially the same under either offense. Therefore, under the strict Wisconsin test (see § 939.66 and Randolph v. State, 83 Wis.2d 630, 266 N.W.2d 334 (1978)), third degree sexual assault apparently cannot be a lesser included offense of a crime charged under subsec. (2)(c).

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. The Committee decided not to define "mental illness or deficiency" in the uniform instruction. Existing statutory definitions did not seem suitable because they are written in the context of determining when treatment is required or when involuntary commitment of the mentally ill person is appropriate. (See, for example, Wis. Stat. § 51.01(13)(a) and (b) and § 51.75(2)(c) and (d).) For the purposes of the Sexual Assault Law, the Committee concluded that the term "mental illness or deficiency" has a meaning within the common understanding of the jury. Additional guidance as to the type of illness or deficiency required is offered by the qualifying phrase in the statute: ". . . which renders that person temporarily or permanently incapable of appraising the person's conduct."

In State v. Perkins, 2004 WI App 213, ¶19, 277 Wis.2d 243, 689 N.W.2d 684, the court of appeals court cited the discussion above with apparent approval. The court held that "[W]hen, as here, there is lay opinion testimony supported by ample testimony as to the victim's behavior, the existence of a mental illness or deficiency that rendered the victim temporarily or permanently incapable of appraising his or her conduct can be established without the presentation of expert testimony." Also see State v. Onyeukwu, 2104AP518 CR, [not published] for an example of a decision finding the evidence sufficient to establish "mental deficiency" based on evidence showing that the 22 year old victim "was probably functioning on a sixth-grade level." ¶16.

2. The Committee finds that it is possible to avoid using a gender-specific pronoun in almost all situations. However, eliminating it in this situation proved to be extremely difficult. Thus, the text uses "her" in both the third and fourth elements and in the summary paragraph at the end of the instruction. Obviously, the sexual assault law is gender neutral; if the victim is a male "her" must be changed to "him."

3. This is an attempt to elaborate on the meaning of "rendered the person temporarily or permanently incapable of appraising the person's conduct." It is adapted from the discussion in State v. Smith, 215 Wis.2d 84, 94, 572 N.W.2d 496 (Ct. App. 1997).

4. Section 940.225(2)(c) requires that the defendant know of the victim's condition. The Committee concluded that this requires knowledge of the existence of the mental illness or deficiency and knowledge that the illness or deficiency "renders the person temporarily or permanently incapable of appraising the person's conduct."

5. Section 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (d) and (g)." Thus, "without consent" is not an element of this offense and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

While consent is not a defense as such, evidence of facts indicating that the victim appeared to give consent might be relevant to other elements of the crime: whether the victim was mentally incapable of appraising her conduct; and, whether the defendant knew that the victim was suffering from a mental illness that rendered her incapable of appraising her conduct.

# 1212 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO IS UNDER THE INFLUENCE OF AN INTOXICANT — § 940.225(2)(cm)

## Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(cm) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and has the purpose to have sexual (contact) (intercourse) with the person while the person is incapable of giving consent.

## 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 five elements were present.

## Elements of the Crime That the State Must Prove

1. The defendant had sexual (contact) (intercourse) with (name of victim).

2. (Name of victim) was under the influence of an intoxicant at the time of the sexual (contact) (intercourse).

   [ _____ is an intoxicant.][1]

   ["Intoxicant" means any alcohol beverage, hazardous inhalant, controlled substance, controlled substance analog or other drug, any combination thereof.][2]

3. (Name of victim) was under the influence of an intoxicant to a degree which rendered (him) (her) incapable of giving consent.

   This requires that (name of victim) was incapable of giving freely given agreement to engage in sexual (intercourse) (contact).[3]

4. The defendant had actual knowledge[4] that (name of victim) was incapable of giving consent.

5. The defendant had the purpose to have sexual (contact) (intercourse) while (name of victim) was incapable of giving consent.[5]

**Meaning of ["Sexual Contact"] ["Sexual Intercourse"]**

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

**Deciding About Purpose and Actual Knowledge**

You cannot look into a person's mind to find purpose and actual knowledge. Purpose and actual 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 purpose and actual knowledge.

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all five elements of second degree sexual assault 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 1212 was originally published in 1998 and revised in 2002, 2007, and 2014. This revision was approved by the Committee in December 2021; it added to the comment.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Section 940.225(2)(cm) was created by 1997 Wisconsin Act 220 (effective date: May 14, 1998). It originally provided that it was second degree sexual assault if one "[h]as sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of appraising the person's conduct, and the defendant knows of such condition." Although the statute referred to "intoxicant," alcohol, the most common intoxicant, was excluded from the definition. The original statute was apparently intended to address the so-called date rape drugs such as "gamma hydroxybutyrate" or "GHB," "gamma hydroxybutyrolactone" or "GBL," ketamine, or flunitrazepam, the possession of which was also criminalized by the same legislation creating this sexual assault offense. See § 961.41(3g)(f) as created by 1997 Wisconsin Act 220.

Section 940.225(2)(cm) was amended by 2005 Wisconsin Act 436 (effective date: June 6, 2006). Act 436 made the following changes:

- it included "alcohol beverage" in the definition of "intoxicant" in sub. (5)(ai);
- it changed "incapable of appraising the person's conduct" to "incapable of giving consent";
- it restated the knowledge requirement as "has actual knowledge that the person is incapable of giving consent"; and,
- it added: "and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent."

Section 940.225(2)(cm) was further amended by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013] to add "hazardous inhalant" to the definition of "intoxicant." Act 83 also created a definition of "hazardous inhalant" in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault

"against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. If the charging document specifies one of the substances that qualifies as an "intoxicant" under § 940.225(5)(ai), the Committee suggests simply telling the jury that, for example: "A controlled substance is an intoxicant." If one of the alternatives is not specified or if reading the full statutory definition is believed to be preferable, that definition is provided in the second set of brackets.

2. This is the definition of "intoxicant" in § 940.223(5)(ai). The definition was revised by 2005 Wisconsin Act 436 to include "alcohol beverage" as an "intoxicant." It was further revised by 2013 Wisconsin Act 83 to include "hazardous inhalant."

3. 2005 Wisconsin Act 436 amended s. 940.225(2)(cm) to refer to the victim being under the influence to a degree which renders that person "incapable of giving consent" in place of "rendered the person incapable of appraising the person's conduct." The statement in the instruction incorporates the key parts of the definition of "consent" in s. 940.225(4).

Act 436 did not amend the second sentence of s. 940.225(4), which provides that "consent is not an issue in alleged violations of sub. (2)( c), (cm) . . ." While "without consent" is not an element of this offense, evidence relating to consent may be relevant to the elements that refer to the victim being incapable of giving consent. Thus, the revised instruction does not include the statement found in the prior version that informs the jury that "consent is not a defense." See, for example, Wis JI-Criminal 1211.

4. Section 940.225(2)(cm), as amended by 2005 Wisconsin Act 436, requires that the defendant "has actual knowledge that the person is incapable of giving consent." "Actual knowledge" replaced "knows" used in the prior version of the statute. The Committee interprets this change as emphasizing the subjective nature of the mental element required for this offense.

5. Section 940.225(2)(cm), as amended by 2005 Wisconsin Act 436, requires that the defendant "has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent." The 2006 revision of the instruction added the fifth element to reflect this addition to the statutory definition.

# 1213 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON THE DEFENDANT KNOWS IS UNCONSCIOUS — § 940.225(2)(d)

## Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(d) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with a person who the defendant knows is unconscious.

## 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 had sexual (contact) (intercourse) with (name of victim).
2. (Name of victim) was unconscious[1] at the time of the sexual (contact) (intercourse).
3. The defendant knew that (name of victim) was unconscious at the time of the sexual (contact) (intercourse).[2]

## Meaning of ("Sexual Contact") ("Sexual Intercourse")

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

ADD THE FOLLOWING IF THERE IS EVIDENCE RELATING TO THE VICTIM'S CONDUCT THAT IS RELEVANT TO THE SECOND OR THIRD ELEMENTS.[3]

**[Use of Consent Evidence]**

[Consent to sexual (contact) (intercourse) is not a defense. However, you may consider any words or actions of (name of victim) indicating consent in determining (whether (name of victim) was unconscious) (or) (whether the defendant knew that (name of victim) was unconscious).]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

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

**COMMENT**

This instruction was originally published in 1980 as Wis JI-Criminal 1214 [for sexual intercourse offenses] and Wis JI-Criminal 1215 [for sexual contact offenses]. Those instructions were revised in 1983, 1990, and 1993. A revision combining the instructions as Wis JI-Criminal 1213 was published in 1996 and revised in 1998. This revision was approved by the Committee in April 2022, it amended footnote 1 by revising the term "heavy sleep" to "sleep." It also added to the comment.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Third-degree and fourth-degree sexual assault are not lesser included offenses of this subsection because they require proof of an element that second-degree sexual assault of an unconscious victim does not. Specifically, proof that the victim did not consent to the sexual contact or intercourse.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. The statute does not define "unconscious." The Committee decided not to include a definition in the text of the instruction because a definition would be most helpful if tied to the facts of the case. When a case involves a substantial question about the meaning of "unconscious," the following material may be helpful.

Webster's New Collegiate Dictionary defines "unconscious" as "not knowing or perceiving, or being unaware." The Committee believes the common meaning of unconscious includes the loss of awareness caused by intoxication, the taking of drugs, or sleep. In State v. Curtis, 144 Wis.2d 691, 695 96, 424 N.W.2d 719 (Ct. App. 1988), the court held that "unconscious" under § 940.225(2)(a) includes "a loss of awareness which may be caused by sleep" and that it was proper for the trial court to instruct the jury in those terms.

The constitutionality of § 940.225(2)(d) was upheld in State v. Pittman, 174 Wis.2d 255, 496 N.W.2d 74 (1993). The court held that the statutory standard "provides clear notice that sexual intercourse with a person who is asleep is illegal." 174 Wis.2d 255, 277. Further, the statute "provides an objective standard for those applying the law," id., since sleep is within the common knowledge of the jury. (The jury in Pittman was instructed, in accord with Curtis, supra, that "unconsciousness is a loss of awareness which may be caused by sleep.") Pittman also affirmed the exclusion of expert testimony on the effects of alcohol on sleep and consciousness, holding that it was irrelevant and tended to convey to the jury the expert's belief that the complaining witness was lying.

2. Knowledge that the victim is unconscious is expressly required by § 940.225(2)(d).

3. Section 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d) and (g)." Thus, "without consent" is not an element of this offense and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

While consent is not a defense as such, evidence of facts indicating that the victim appeared to give consent might be relevant to other elements of the crime: whether the victim was incapable of appraising her conduct; and, whether the defendant knew that the victim was under the influence to a degree that rendered her incapable of appraising her conduct.

# 1214 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT WHILE AIDED AND ABETTED — § 940.225(2)(f)

## Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(f) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with another person without consent and is aided and abetted[1] by one or more other persons.

## 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 had sexual (contact) (intercourse) with (name of victim).

2. (Name of victim) did not consent to the sexual (contact) (intercourse).

3. The defendant was aided and abetted by one or more other persons.

## Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

## Meaning of "Did Not Consent"[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual

(contact) (intercourse) with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[3]

**Meaning of "Aiding and Abetting"**

The defendant was aided and abetted if another person knew that the defendant was having or intended to have sexual [contact] [intercourse] without consent and either:

- provided assistance to the defendant; or,
- was willing to assist the defendant if needed and the defendant knew of the willingness to assist.

Assistance may be provided by words, acts, encouragement, or support.[4]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[5]

[However, a person does not aid and abet if the person is only a bystander or spectator and does nothing to assist or encourage the commission of a crime.]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

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

**COMMENT**

This instruction was originally published in 1988 as Wis JI-Criminal 1217.1 [for sexual intercourse offenses] and Wis JI-Criminal 1217.2 [for sexual contact offenses]. Those instructions were revised in 1990. A revision combining the instructions as Wis JI-Criminal 1214 was published in 1996 and 2002. This revision was approved by the Committee in December 2021; it added to the comment.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

This offense was created by 1987 Wisconsin Act 245, effective date: April 21, 1988. A related offense is defined as first degree sexual assault by § 940.225(1)(c); it has the additional element of the "use or threat of force or violence." See Wis JI-Criminal 1205.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. Section 940.225(2)(f) uses the phrase "aided or abetted" (emphasis added). Since traditional criminal statutes have referred to "aiding and abetting," the Committee has used that construction in the instruction. The Committee feels that this does not change the meaning of the statute or of the aiding and abetting concept. In State v. Thomas, 128 Wis.2d 93, 381 N.W.2d 567 (Ct. App. 1985), the court held that "aided or abetted" in § 940.225(1)(c) has the same meaning as the phrase "aids and abets" in § 939.05 and therefore is not unconstitutionally vague.

2. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally

ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

3. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

4. The use of the aiding and abetting concept in § 940.225(1)(c) is somewhat different from that of traditional criminal statutes, because this statute provides for increased penalty for the principal actor where he is aided by others. The usual situation, for example, Wis. Stat. § 939.05(2)(b), Parties to Crime, involves defining the culpability of the aider and abettor. For further definition of "aiding and abetting," see Wis JI-Criminal 400 and the 1953 Judiciary Committee Report on the Criminal Code, Comment to § 339.05.

The requirement that the aider(s) must have known that the defendant was committing the sexual assault is added to the instruction on the basis of the definition of the aider's culpability in § 939.05. Section 939.05 refers to "intentionally aid and abets," which has been interpreted as "acting with knowledge or belief that another person is committing or intends to commit a crime." The Committee also concluded that the defendant must know of the aider's presence or willingness to assist.

Another question arising under this subsection relates to the liability of the aider. Is the aider guilty of second or third degree sexual assault? If aiding is established, the principal is guilty of the second degree offense. Usually, the aider is guilty of the same offense as the principal. In the sexual assault case, however, the crime the aider intended to aid was arguably a third degree offense, Sexual Intercourse Without Consent under § 940.225(3). The aiding is the only factor that elevates the offense as far as the principal is concerned. Does it also increase the seriousness for the aider? The Wisconsin Court of Appeals so held in State v. Curbello Rodriguez, 119 Wis.2d 414, 351 N.W.2d 758 (Ct. App. 1984), with respect to the same situation under § 940.225(1)(c).

5. The sentence in brackets is recommended for use when the evidence raises an issue whether the person actually gave assistance or merely stood by without intending to assist.

# 1215 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PATIENT OR RESIDENT — § 940.225(2)(g)

## Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(g) of the Criminal Code of Wisconsin, is committed by one who is an employee of a (type of facility or program)[1] and has sexual (contact) (intercourse) with a (patient) (resident) of that (facility) (program).

## 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 was an employee of (name of facility or program).[2]
2. (Name of victim) was a (patient)[3] (resident)[4] of (name of facility or program).[5]
3. (Name of facility or program) was (an adult family home) (a community based residential facility) (an inpatient health care facility) (a state treatment facility).[6]

   (Name alternative selected) is (specify the part of the statutory definition that applies).[7]
4. The defendant had sexual (contact) (intercourse) with (name of victim).

## Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF

"SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Consent to sexual (contact) (intercourse) is not a defense.[8]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

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

**COMMENT**

This instruction was originally published in 1988 as Wis JI-Criminal 1217.3 [for sexual intercourse offenses] and Wis JI-Criminal 1217.4 [for sexual contact offenses]. Those instructions were revised in 1990 and 1994. A revision combining the instructions as Wis JI-Criminal 1215 was published in 1996 and revised in 2002 and 2007. This revision was approved by the Committee December 2021; it added to the comment.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

This instruction is for violations of § 940.225(2)(g), as amended by 1993 Wisconsin Act 445, effective date: May 12, 1994.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. Section 940.225(2)(g) was amended by 1993 Wisconsin Act 445. The former statute applied to an employee of "an inpatient facility or a state treatment facility." The revised statutes applies to an employee of "a facility or program under s. 940.295(2)(b), (c), (h) or (k)." Those facilities or programs are:

- (2)(b) an adult family home
- (2)(c) a community-based residential facility
- (2)(h) an inpatient health care facility
- (2)(k) a state treatment facility

The Committee recommends naming the type of facility in this paragraph, for example: ". . . an employee of a state treatment facility."

2. Here insert the name of the facility or program. For example: "St. Mary's Hospital."
3. "Patient" is defined as follows in § 940.225(5)(am):

"Patient" means any person who does any of the following:

1. Receives care or treatment from a facility or program under s. 940.295(2)(b), (c), (h) or (k), from an employe of a facility or program or from a person providing services under contract with a facility or program.

2. Arrives at a facility or program under s. 940.295(2)(b), (c), (h) or (k) for the purpose of receiving care or treatment from a facility or program under s. 940.295(2)(b), (c), (h) or (k), from an employee of a facility or program under s. 940.295(2)(b), (c), (h) or (k), or from a person providing services under a contract with a facility or program under s. 940.295(2)(b), (c), (h) or (k).

4. "Resident" is defined as follows in § 940.225(ar): ". . . any person who resides in a facility under s. 940.295(2)(b), (c), (h), or (k)."

5. Here insert the name of the facility or program. For example: "St. Mary's Hospital."

6. Here insert the name of the facility or program and select the applicable type of facility or program. For example: "St. Mary's Hospital was an inpatient health care facility."

7. Here name the applicable type of facility or program and select the relevant part of the statutory definition for that type of facility or program. For example: "An inpatient health care facility is any hospital licensed or approved by the Department of Health and Family Services under (specify licensing statute)."

Section 940.225(2)(g) applies to offenses involving employees and patients or residents in facilities or programs "under s. 940.295(2)(b), (c), (h), or (k)." Those subsections of § 940.295 refer to definitions in other statutes, resulting in extensive and complex references. The Committee recommends that care be taken to assure that essential parts of the applicable definitions are included.

The facilities or programs under s. 940.295(2)(b), (c), (h), or (k) and the cross-referenced definitions are as follows:

- (2)(b) adult family home. § 940.295(1)(am) provides that "'adult family home' has the meaning given in s. 50.01(1)."

- (2)(c) community-based residential facility. § 940.295(1)(c) provides that "'community-based

residential facility' has the meaning given in s. 50.01(1g)."

- (2)(h) inpatient health care facility. § 940.295(1)(i) provides that "'inpatient health care facility' has the meaning given in s. 50.135(1)."

- (2)(k) state treatment facility. § 940.295(1)(r) provides that "'state treatment facility' has the meaning given in s. 50.01(15)."

Many of the cross-referenced definitions include their own references to other statutes, sometimes to indicate exceptions. The potential for complexity is illustrated by State v. Powers, 2004 WI App 156, ¶6, 276 Wis.2d 107, 687 N.W.2d 50, where the court of appeals held that an employee of a health care facility operated by the United States Department of Veterans Affairs [the VA Medical Center at Tomah] is not subject to prosecution for an alleged violation of § 940.225(2)(g). As applicable to this situation, sub. (2)(g) requires that the victim of the offense be a patient or resident of a facility or program under § 940.295(2)(h) – an inpatient health care facility. Section 940.295(1)(i) provides that "'inpatient health care facility' has the meaning given in s. 50.135(1)." Section 50.135(1) requires that this type of facility be licensed by the state. The state conceded that as a VA facility, the Tomah Medical Center is not licensed by the state, so the court held that § 940.225(2)(g) does not apply.

While Powers was an appeal of the denial of a pretrial motion, the Committee concluded that the state must prove that the facility or program involved in the case is covered by one of the referenced definitions. If not agreed to by the parties, this will present a factual issue for the jury.

8. Section 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (d) and (g)."

# 1216 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE BY A CORRECTIONAL STAFF MEMBER — § 940.225(2)(h)

## Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(h) of the Criminal Code of Wisconsin, is committed by a correctional staff member who has sexual (contact) (intercourse) with an individual who is confined in a correctional institution.

## 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 was a correctional staff member.

   "Correctional staff member" means an individual who works at a correctional institution [and includes a volunteer].[1]

2. The defendant had sexual (contact) (intercourse) with (name of victim).[2]

   Consent to sexual (contact) (intercourse) is not a defense.[3]

3. (Name of victim) was confined in a correctional institution.

   (Name institution) is a correctional institution.[4]

## Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL

CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault 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 1216 was originally published in 2004 and revised in 2007, 2012, and 2018. This revision was approved by the Committee in December 2021; it added to the comment.

This instruction is drafted for violations of § 940.225(2)(h), created by 2003 Wisconsin Act 51, effective date: September 5, 2003.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. This is the definition provided in § 940.225(5)(ad). The Committee recommends including the bracketed reference to a volunteer only when there is evidence that the defendant was a volunteer.

A Milwaukee County sheriff's deputy, assigned to work as a bailiff in the courthouse, is not a "correctional staff member" for purposes of § 940.225(2)(h), even though the deputy's duties included escorting inmates from the criminal justice facility to the courthouse holding cell. State v. Terrell, 2006 WI App 166, 295 Wis.2d 619, 721 N.W.2d 527.

2. The definition of the offense in § 940.225(2)(h) includes the following statement:

> This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

It is not clear to the Committee whether this statement presents an issue for the court or for the jury. In addition, it is not clear what "subject to prosecution" means. The legislative history indicates that this language was added to the original bill in response to concerns of the Attorney General that "the bill as [originally] drafted would make a crime any incident in which a correctional officer is a victim of a sexual assault." Letter of February 26, 2003, from Attorney General Lautenschlager to Reps. Bies and Albers, Co-Chairpersons, Assembly Committee on Corrections and the Courts. (Emphasis in original.)

In State v. Blum, an unpublished decision (No. 2010AP2363 CR, decided August 1, 2012), the court of appeals concluded that the "subject to prosecution" issue is a question of law for the court, not an affirmative defense that should be determined by the fact finder at trial. [Cited for informational purposes; see § 809.23(3)(b).]

3. "Without consent" is not an element of this offense because it is not included in the offense definition. Further, § 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g),(h), and (i)." The Committee concluded that it may be helpful to advise the jury of this fact.

4. Section 940.225(5)(acm) provides:

> "Correctional institution" means a jail or correctional facility, as defined in s. 961.01(12m), a juvenile correctional facility, as defined in s. 938.02(10p), or a juvenile detention facility, as defined in s. 938.02(10r).

By following these cross references, one may find a statute that provides that a particular institution or facility is a correctional institution. See, for example, the list of "state prisons" in § 302.01. When a statute so provides, the Committee recommends advising the jury that, for example, "The Waupun Correctional Institution is a correctional institution." It will be for the jury to determine whether, in fact, the victim was confined to that institution.

A "person detained at his or her residence by virtue of participation in the home detention program is 'confined in a correctional institution' for purposes of § 940.225(2)(h)." State v. Hilgers, 2017 WI App 12, ¶17, 373 Wis.2d 756, 893 N.W.2d 261.

# 1217 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE BY A PROBATION, PAROLE, OR EXTENDED SUPERVISION AGENT — § 940.225(2)(i)

## Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(i) of the Criminal Code of Wisconsin, is committed by a (probation) (parole) (extended supervision) agent who has sexual (contact) (intercourse) with an individual on (probation) (parole) (extended supervision), and who supervises that individual in his or her capacity as an agent.

## 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 was a (probation) (parole) (extended supervision) agent.[1]
2. The defendant had sexual (contact) (intercourse) with (name of victim).[2]

   Consent to sexual (contact) (intercourse) is not a defense.[3]
3. (Name of victim) was on [probation] [parole] [extended supervision].
4. The defendant supervised (name of victim) in (his) (her) capacity as a (probation) (parole) (extended supervision) agent.[4]

## Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL

CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault 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 1217 was originally published in 2004 and revised in 2007 and 2013. This revision was approved by the Committee in December 2021; it updated the comment.

This instruction is drafted for violations of § 940.225(2)(i), created by 2003 Wisconsin Act 51, effective date: September 5, 2003.

The instruction uses a simplified statement of the statutory description of the supervision requirement in sub. (2)(i), which reads in part as follows:

> . . . agent who supervises the individual, either directly or through a subordinate, . . . or who has influenced or has attempted to influence another probation, parole, or extended supervision agent's supervision of the individual.

If a case involves supervising "through a subordinate" or "influencing or attempting to influence" another agent's supervision, the introductory definition of the offense and the fourth element must be modified.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. The statute does not provide a definition of "probation, parole or extended supervision agent." However, another Criminal Code statute, § 940.20(2m)(a)2. provides the following:

"Probation, extended supervision and parole agent" means any person authorized by the

department of corrections to exercise control over a probationer, parolee or person on extended supervision.

2. The definition of the offense in § 940.225(2)(i) includes the following statement:

This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

It is not clear to the Committee whether this statement presents an issue for the court or for the jury. In addition, it is not clear what "subject to prosecution" means. The legislative history indicates that this language was added to the original bill in response to concerns of the Attorney General that "the bill as [originally] drafted would make a crime any incident in which a correctional officer is a victim of a sexual assault." Letter of February 26, 2003, from Attorney General Lautenschlager to Reps. Bies and Albers, Co-Chairpersons, Assembly Committee on Corrections and the Courts. (Emphasis in original.)

In State v. Blum, an unpublished decision (No. 2010AP2363 CR, decided August 1, 2012), the court of appeals concluded that the "subject to prosecution" issue is a question of law for the court, not an affirmative defense that should be determined by the fact finder at trial. [Cited for informational purposes; see § 809.23(3)(b).] Blum involved a prosecution under § 940.225(2)(h), which has the same statement relating to "subject to prosecution."

3. "Without consent" is not an element of this offense because it is not included in the offense definition. Further, § 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g),(h), and (i)." The Committee concluded that it may be helpful to advise the jury of this fact.

4. This is a simplified statement of the statutory description of the supervision requirement in sub. (2)(i), which reads in part as follows:

. . . agent who supervises the individual, either directly or through a subordinate, . . . or who has influenced or has attempted to influence another probation, parole, or extended supervision agent's supervision of the individual.

The fourth element must be modified if the case involves supervision "through a subordinate" or "influencing or attempting to influence" another agent's supervision.

# 1217A SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE BY AN EMPLOYEE OF AN ENTITY — § 940.225(2)(j)

## Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(j) of the Criminal Code of Wisconsin, is committed by a licensee, employee, or nonclient resident of an entity who has sexual (contact) (intercourse) with a client of the entity.

## 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 was a (licensee) (employee) (nonclient resident)[1] of an entity.

2. The defendant had sexual (contact) (intercourse) with (name of victim).

   Consent to sexual (contact) (intercourse) is not a defense.[2]

3. (Name of victim) was a client of the entity.

   "Client" means an individual who receives direct care or treatment services from an entity.[3]

## Meaning of "Entity"

"Entity" means _____.[4]

## Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

## Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault 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 1217A was approved by the Committee in August 2006. This revision was approved by the Committee in December 2021; it added to the comment.

Section 940.225(2)(j) was created by 1997 Wisconsin Act 388 (effective date: Dec. 1, 2006).

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. Section 940.225(5)(ak), created by 2005 Wisconsin Act 388, defines "nonclient resident" as follows: ". . . an individual who resides, or is expected to reside, at an entity, who is not a client of the entity, and who has, or is expected to have, regular, direct contact with the clients of the entity."

2. "Without consent" is not an element of this offense because it is not included in the offense definition. The Committee concluded that it may be helpful to advise the jury of this fact.

3. This is the definition provided in s. 940.225(5)(abm), which was created by 2005 Wisconsin Act 388.

4. Section 940.225(2)(j) refers to "an entity," as defined in s. 48.685(1)(b) or 50.065(1)(c). The Committee recommends choosing the applicable part of applicable definition and inserting it in the blank.

# 1217B SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE BY A LAW ENFORCEMENT OFFICER WITH A PERSON DETAINED OR IN CUSTODY — § 940.225(2)(k)

## Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(k) of the Criminal Code of Wisconsin, is committed by a law enforcement officer who has sexual (contact) (intercourse) with any person who (is detained by any law enforcement officer, as provided under s. 968.24) (is in the custody of any law enforcement officer).

## 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 was a law enforcement officer.

   "Law enforcement officer" means any person employed by the state or any political subdivision of the state, for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances that the person is employed and sworn to enforce. ["Law enforcement officer" includes a university police officer, as defined in s. 175.42 (1) (b)].[1]

2. The defendant had sexual (contact) (intercourse) with (name of victim).

Consent to sexual (contact) (intercourse) is not a defense.[2]

3. (Name of victim) was (detained by any law enforcement officer, as provided under s. 968.24) (in the custody of any law enforcement officer).

This applies (whether the custody is lawful or unlawful) (whether the detainment or custody is actual or constructive).[3]

[Section 968.24 provides that after having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.][4]

**Meaning of ("Sexual Contact") ("Sexual Intercourse")**

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault 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 1217B was approved by the Committee in June 2022.

This instruction is drafted for violations of § 940.225(2)(k), created by 2021 Wisconsin Act 188 [effective date: March 19, 2022].

1. This is the definition provided in Wis. Stat. § 165.85 (2) (c). The Committee recommends including the bracketed reference to a university police officer only when there is evidence that the defendant was a university police officer.

2. Section 940.225(2)(k) provides in part "Consent is not an issue in an action under this paragraph." Thus, "without consent" is not an element of this offense and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

3. The definition of the offense in § 940.225(2)(k) provides this language. § 940.225 does not define "actual" or "constructive" custody.

4. Section 968.24 concerns the temporary questioning of a person in a public place without arrest. More specifically, the section is the statutory codification of "Terry stop" authority. Because the connection between the statutory offense and an on-the-street detention may be confusing to a jury, the Committee concluded it may be helpful to include the bracketed statement if the facts of the case so require.

# 1226 BATTERY WITH SUBSTANTIAL RISK OF GREAT BODILY HARM — § 940.19(6)

## Statutory Definition of the Crime

Battery, as defined in § 940.19(6) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to another by conduct which creates a substantial risk of great bodily harm.

## 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 caused bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[1]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

   "Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct

was practically certain to cause bodily harm to another human being.[4]

3. The defendant's conduct created a substantial risk of great bodily harm.[5]

"Great bodily harm" means serious bodily injury.[6] [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 is great bodily harm.]

[IF THERE IS EVIDENCE THAT THE VICTIM HAD A PHYSICAL DISABILITY, ADD THE FOLLOWING.][7]

[If you find that (name of victim) had a physical disability at the time of the offense, and that the disability was discernible by an ordinary person viewing the victim, or was actually known by the defendant,[8] you may find from that fact alone that the defendant's conduct created a substantial risk of great bodily harm. But you are not required to do so, and you must be satisfied beyond a reasonable doubt from all the evidence that the defendant's conduct created a substantial risk of great bodily harm.][9]

4. The defendant knew that (his) (her) conduct created a substantial risk of great bodily harm.[10]

**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.[11]

**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.

**COMMENT**

Wis JI-Criminal 1226 was originally published in 1994 and revised in 2001 and 2014. This revision was approved by the Committee in October 2021; it made changes pursuant to 2021 Wisconsin Act 76.

This offense was originally defined in § 940.19(3), created by Chapter 113, Laws of 1979. It was renumbered § 940.19(6) by 1993 Wisconsin Act 441 and the penalty increased to a Class D felony. The law was originally drafted as a straightforward "Battery To Older Persons" provision, with an increased penalty for battery committed against persons 60 years of age or older (see 1979 Assembly Bill 8). The bill was amended to apply to all batteries involving a "high probability of great bodily harm," with the facts that the victim was over age 62 or suffering from physical disability creating "a rebuttable presumption of conduct creating a high probability of great bodily harm." The 1994 revision changed "high probability" to "substantial risk." § 940.19(6), the provision that presumed that a defendant's conduct created a substantial risk of great bodily harm when the victim was 62 years of age or older, was repealed by 2021 Wisconsin Act 76 [effective date: August 8, 2021]. 2021 Act 76 also created various provisions related to crimes and other proceedings involving individuals who are 60 years of age or older. For the new crime of physical abuse to an elder person, see Wis JI-Criminal 1249A through 1249F.

Instructing the jury when the "presumption" is in the case is discussed at notes 7 and 9, below.

The 1994 revision corrected what was probably an inadvertent technical error in the former statute. The introductory section of § 940.19(3), 1991 92 Wis. Stats., reads as follows (emphasis added):

Whoever intentionally causes bodily harm to another by conduct which creates a high probability of great bodily harm is guilty of a Class E felony. A rebuttable presumption of conduct creating a substantial risk of great bodily harm arises . . .

1993 Wisconsin Act 441 preserved the inconsistency when it recreated former sub. (3) as sub. (b), but "high probability" was changed to "substantial risk" by a "revisor's bill," 1994 Wisconsin Act 483.

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. 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 or more persons might jointly produce it.

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

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

5. For offenses committed before August 8, 2021, include the following language after the definition of "great bodily harm" in element 3.

> [IF THERE IS EVIDENCE THAT THE VICTIM WAS 62 YEARS OF AGE OR OLDER, ADD THE FOLLOWING.]
>
> [If you find that (name of victim) was age 62 or older at the time of the offense, you may find from that fact alone that the defendant's conduct created a substantial risk of great bodily harm, but you are not required to do so, and you must be satisfied beyond a reasonable doubt from all the evidence that the defendant's conduct created a substantial risk of great bodily harm.]

This paragraph on the "rebuttable presumption" established by § 940.19(3) follows the rule set out in § 903.03(3) for instructing the jury on presumptions in criminal cases. See Wis JI-Criminal 225 for a discussion of the Committee's approach to instructing on "presumptions" and "prima facie" cases. See also, footnote 7, regarding the submission of presumptions to the jury.

6. The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

7. See § 903.03(2) regarding the submission of presumptions to the jury. It provides in part:

> When the presumed fact establishes guilt or is an element of the offense or negates a defense, the judge may submit the question of guilt or the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt.

Therefore, there must be sufficient evidence of the "presumed fact" – substantial risk of great bodily harm – to enable a reasonable juror to be convinced of its existence beyond a reasonable doubt, before an instruction on the "presumption" flowing from the "basic facts" of disability may be submitted.

The Wisconsin Supreme Court addressed the "physical disability" presumption in State v. Crowley, 143 Wis.2d 324, 422 N.W.2d 847 (1988). The court dealt with two issues: the general validity of the presumption relating a physical disability to the likelihood of great bodily harm; and the validity of associating physical disability with the condition of the victim in the case before the court.

As to the first issue, the court applied the rule of Ulster County Court v. Allen, 442 U.S. 140 (1979), described as holding that "a presumption may be impermissible if there is no reasonable nexus or relationship between the evidentiary facts and the fact to be presumed." 143 Wis.2d 324, 339. The court concluded that "the relationship, the nexus, between physical disability and the likelihood that violence against one physically disabled will lead to great bodily harm, is unassailable. . . ." 143 Wis.2d 324, 339.

The court also concluded that the victim in the Crowley case, who was 48 years old, weighed 96 lbs., was 4' 9" in height, and was legally blind, was "physically disabled" within the meaning of the statute. The court concluded that disability need not be found as a medical fact but only as a matter discernibly evident to a lay person. Further, the court held that it is not necessary that the victim qualify as a "handicapped person" as that term is used in the Fair Employment laws.

8. The 1994 revision of the statute added the phrase, "or that is actually known by the actor," to sub. (6)(b).

9. This paragraph on the "rebuttable presumption" established by § 940.19(3) follows the rule set out in § 903.03(3) for instructing the jury on presumptions in criminal cases. See Wis JI-Criminal 225 for a discussion of the Committee's approach to instructing on "presumptions" and "prima facie" cases.

10. Subsection 940.19(6) applies to those who "intentionally cause bodily harm by conduct which creates a substantial risk of great bodily harm." Subsection 939.23(3) provides that when "intentionally" is used in a criminal statute, it requires that the actor "have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally'." The Committee concluded that this requires that the defendant charged under § 940.19(6) must have known that his conduct created a substantial risk of great bodily harm. The Committee further concluded that it need not be established that the defendant knew that the victim was over the age of 62 or suffering from a physical disability, because those two factors are essentially treated only as evidence of the fourth element of the crime: that the defendant's conduct has created a substantial risk of great bodily harm. See notes 6 through

10, supra.

11. 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.

# 1228A BATTERY BY A PERSON COMMITTED UNDER § 980.04 or § 980.065 — § 940.20(1g)

## Statutory Definition of the Crime

Section 940.20(1g) of the Criminal Code of Wisconsin is violated by a person who is placed in facility under (§ 980.04) (§ 980.065) and who intentionally causes bodily harm to an officer, employee, agent, visitor, or other resident of the facility without (his) (her) consent.

## 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 five elements were present.

## Elements of the Crime That the State Must Prove

1. The defendant was placed in a facility under (§ 980.04) (§ 980.065).[1]

   (Name of institution) is a facility under (§ 980.04) (§ 980.065).[2]

2. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.[3]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition[4].

3. (Name of victim) was (an officer) (an employee) (an agent) (a visitor) (a resident) of the facility.

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

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

**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 five 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 1228A was approved by the Committee in June 2014. This revision was approved by the Committee in October; it reflects changes made by 2021 Wisconsin Act 13.

This instruction is drafted for violations of § 940.20(1g) which applies to batteries committed by one committed as a "sexually violent person" under Chapter 980. The statute was created by 2005 Wisconsin Act 434 [effective date: August 1, 2006].

2021 Wisconsin Act 13 [effective date: March 28, 2021] amended § 940.20 (1g) to include persons who are not yet formally committed pursuant to § 980.065 and § 980.06 but who are detained in a facility while awaiting a Chapter 980 trial.

1. The offense definition refers to "Any person who is placed in a facility under s. 980.04 or 980.065." Section 980.04 designates the place of placement for a person who has had a finding of probable cause against them that they are "eligible for commitment under s. 980.05 (5)," but who has yet to be adjudicated under § 980.06. A detention order under § 980.04 "remains in effect until the petition is dismissed after a hearing under sub. (3) or after a trial under s. 980.05 (5) or until the effective date of a commitment order under s. 980.06, whichever is applicable." Section 980.065 designates the place of placement for "a person committed under s. 980.06." A commitment under § 980.06 is the final commitment of a person who has been found to be a sexually violent person.

2. The institution's status as one of the designated facilities should not be a contested issue in most cases, and the Committee concluded that it is appropriate for the trial court to so instruct the jury.

The question of what institutions are covered by the statute is arguably difficult only with regard to "state detention facilities." "County detention facility" most likely refers to a county jail (and possibly to the House of Correction in Milwaukee County); "municipal detention facility" most likely refers to city jails. But it is not clear what institutions are included in the term "state detention facility." The Committee concluded that the statute may be applied to persons placed in mental health institutes provided their confinement is a result of criminal charges.

3. 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.

4. This is the definition provided in § 939.22(4).

5. 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.

6. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). Thus, the defendant must know that the victim did not consent to the causing of bodily harm.

# 1231 BATTERY OR THREAT TO A PROBATION, EXTENDED SUPERVISION AND PAROLE AGENT, COMMUNITY SUPERVISION AGENT, OR AN AFTERCARE AGENT — § 940.20(2m)

## Statutory Definition of the Crime

Section 940.20(2m) of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent) where at the time of the (act) (threat) the defendant knows or has reason to know that the victim is (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent) (a family member of (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent)), the (act) (threat) is in response to an action by the agent acting in (his) (her) official capacity, and there is no consent by the person (harmed) (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 the 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 probation, extended supervision and parole agent)[4] (a community supervision agent)[5] (an aftercare agent)[6]) (a family member of (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent)).

[For the purpose of this offense, a (e.g., child) is a family member.][7]

3. At the time of the (act) (threat) the defendant knew, or had reason to know, that (name of victim) was (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent) (a family member of (a probation, extended supervision and parole agent) (a community supervision

agent) (an aftercare agent)).[8]

4. The (act) (threat) was in response to an action taken by the agent acting in (his) (her) official capacity.

   (Probation, extended supervision and parole agents) (community supervision agents) (aftercare agents) act in an official capacity when they perform duties that they are employed[9] to perform.[10] [These duties include: _____.][11]

5. The defendant (caused) (threatened to cause) bodily harm without the consent[12] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant intended to (cause) (threaten to cause) bodily harm to (name of victim) and knew that (name of victim) did not consent to the causing of bodily harm.[13]

**Meaning of "Intentionally"**

Intent to (cause) (threaten to cause) bodily harm means that the defendant had the mental purpose to (cause) (threaten to cause) bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another.[14]

**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 1231 was originally published in 1994 and revised in 1996, 2005, 2008, and 2019. This revision was approved by the Committee in April 2022; it amended the body of the instruction and the comment based on 2021 Wisconsin Act 187.

Section 940.20(2m) was created by 1989 Wisconsin Act 336 and originally applied to battery of probation and parole agents. It was amended by 1995 Wisconsin Act 77 to include battery to "aftercare agents." [Effective date: July 1, 1996]. "Extended supervision agents" were added by 1997 Wisconsin Act 283. [Effective date: June 24, 1998]. 2015 Wisconsin Act 55 added "community supervision agents" [with a delayed effective date of September 24, 2017]. § 940.20 (2m)(b) 2021 was amended by Wisconsin Act 187 to provide that it is a Class H felony to commit, or threaten to commit, battery against an agent or the family member of an agent. The Act also amended the definitions of "aftercare agent" and "community supervision agent" [Effective date: March 19, 2022].

1. This is the definition 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 or 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. Section 940.20(2m)(a)2. provides that "'probation, extended supervision and parole agent' means any person authorized by the department of corrections to exercise control over a probationer, parolee, or person on extended supervision or authorized by a federally recognized American Indian tribe or band to exercise control over a probationer, parolee, or person on extended supervision or a comparable program that is authorized by the tribe or band."

5. "Community supervision agent" is defined as follows in § 940.20(2m)(a)1m.: ". . . any person authorized by the department of corrections to exercise control over a juvenile on community supervision or authorized by a federally recognized American Indian tribe or band to exercise control over a juvenile on community supervision or a comparable program that is authorized by the tribe or band."

6. "Aftercare agent" is defined as follows in § 940.20(2m)(a)1.: ". . . any person authorized by the department of corrections to exercise control over a juvenile on aftercare or authorized by a federally recognized American Indian tribe or band to exercise control over a juvenile on aftercare or a comparable

program that is authorized by the tribe or band."

7. Section 940.20 (2m) (a) 1p. provides:

"Family member" means a spouse, child, stepchild, foster child, parent, sibling, or grandchild.

8. The "knew or had reason to know" requirement is taken directly from § 940.20(2m)(b)1. It is treated as a separate element rather than being combined with the sixth element where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as a probation, extended supervision and parole agent, a community supervision agent, or an aftercare agent, or a member of the agent's family and the agent "acting in an official capacity." The statute expressly applies "reason to know" only to status as a probation, extended supervision and parole agent, a community supervision agent, or an aftercare agent, or a member of the agent's family. But the two requirements are so closely connected that the Committee concluded the same knowledge standard has to apply to each.

9. "Employed" is used here in the general sense of being engaged in the performance of a duty.

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

11. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. 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.

Wisconsin Administrative Code, Chapter DOC 328, Community Supervision Of Offenders, provides "rules, services, and programs for offenders who are under the supervision of the department." DOC 328.04(2) extensively describes the duties of agents who provide community supervision. All the agents specified in § 940.20(2m) must be "authorized by the department to exercise control" over specific categories of persons who are being supervised. See the definitions quoted in footnotes 3, 4, and 5 above. Thus, it appears that all would be subject to the standards and grants of authority in DOC 328.

12. 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.

13. Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal

which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.20(2m)(b) which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2m)(b)1., through 2. and 3. Sub. (2m)(b)1. has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2m)(b) proper and the other facts that follow.

14. See note 12, supra.

# 1237 BATTERY TO AN EMERGENCY MEDICAL CARE PROVIDER[1] — § 940.20(7)

INSTRUCTION WITHDRAWN FOR OFFENSES OCCURRING AFTER MARCH 24, 2022, BECAUSE THE STATUTE TO WHICH IT PERTAINED WAS REPEALED BY 2021 WISCONSIN ACT 209. FOR OFFENSES OCCURRING AFTER MARCH 24, 2022, SEE WIS JI-CRIMINAL 1247A AND 1247B.

## Statutory Definition of the Crime

Section 940.20(7) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to an (identify appropriate category for the victim)[2], where at the time of the act the defendant knows or has reason to know that the victim is an (identify appropriate category for the victim) acting in an official capacity and there is no consent of the victim harmed.

## 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 bodily harm to (name of victim).

"Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[3]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

2. (Name of victim) was a (identify appropriate category for the victim). [A _____ is (identify appropriate category for the victim).][5]

3. (Name of victim) was acting in an official capacity.

   This means (name of victim) was performing duties that (he) (she) was employed[6] to perform.[7] [The duties of a _____ include: _____.][8]

4. The defendant knew, or had reason to know, that (name of victim) was acting in an official capacity.[9]

5. (Name of victim) did not consent to the causing of bodily harm.

6. The defendant acted intentionally.

   This requires that the defendant intended to cause bodily harm to (name of victim) and knew that (name of victim) did not consent to the causing of bodily harm.[10]

   Intent to cause bodily harm means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that his conduct was practically certain to cause bodily harm to another.[11]

**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 1237 was originally published in 1996 and revised in 2004, 2008, and 2018. This revision was approved by the Committee in June 2020; it reflects statutory amendments made by 2019 Wisconsin Act 97. Its withdrawal for offenses occurring after the effective date of 2021 Wisconsin Act 209 was approved by the Committee in April 2022.

Section 940.20(7) was created by 1995 Wisconsin Act 145 [effective date: March 20, 1996].

2017 Wisconsin Act 12 [effective date: June 23, 2017] changed the terminology used in the statute from "emergency medical technician" to "emergency medical services practitioner" and from "first responder" to "emergency medical responder."

2019 Wisconsin Act 97 [effective date: February 7, 2020] added the category of "a health care provider who works in a hospital" to the list of applicable victims. The Act also amended the definition of "emergency department."

1. The statute applies to five different categories of person; for each category, the statute provides a full or partial definition. The instruction provides a blank where it is necessary to identify the category applicable to the victim. The category is to be defined, if necessary, in the second element.

2. Identify the appropriate category for the victim in this blank and the other blanks in the instruction: a health care provider who works in a hospital; emergency department worker; emergency medical services practitioner; emergency medical responder; or ambulance driver. The terms will be defined, if necessary, in the second element.

3. 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 or more persons might jointly produce it.

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

5. If it is believed to be necessary, provide a definition for the type of victim involved. For "emergency department worker," see § 940.20(7)(a)2. For "emergency medical services practitioner," § 940.20(7)(a)2g provides that the definition in § 256.01(5) applies. For "emergency medical responder," § 940.20(7)(a)2d provides that the definition in § 256.01(4p) applies. For "ambulance driver" § 940.20(7)(a)1e provides that the definition of "ambulance" in § 256.01(1t) applies.

§ 940.20(7)(a) provides: "'Emergency department' means a room or area in a hospital that is primarily used to provide emergency care, diagnosis or radiological treatment."

§ 940.20(7)(a)3 provides: "'health care provider' means any person who is licensed, registered, permitted or certified by the department of health services or the department of safety and professional services to provide health care services in this state." For "hospital" § 940.20(7)(a)4 provides that the definition in § 50.33 (2) applies.

6. "Employed" is used here in the general sense of being engaged or involved in performing a duty or service.

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

8. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. 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.

9. The "knew or had reason to know" requirement is taken directly from § 940.20(7)(b). It is treated as a separate element rather than being combined with the sixth element where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as an emergency medical care provider and to "acting in an official capacity." The statute expressly applies "reason to know" only to status as an officer or employee. But the two requirements are so closely connected that the Committee concluded the same knowledge standard has to apply to each.

10. Knowledge that the victim was acting in an official capacity and that the victim did not consent is required because the word "intentionally" is used in the statute. That requires not only intent to cause

bodily harm but also "knowledge of those facts necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'." § 939.23(3).

11. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

12. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee has concluded that this shorter version is appropriate for most cases. The complete, traditional, statement is found at Wis JI-Criminal 923A.

# 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."

# 1241A BATTERY TO GUARDIAN AD LITEM, CORPORATION COUNSEL, TRIBAL COURT ADVOCATE, OR ATTORNEY — § 940.203(3)

## Statutory Definition of the Crime

Section 940.203(3) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to the (person) (family member) of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney) where at the time of the act the person knows[1] that the victim is [(a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)] [a family member of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)], the act is in response to an action taken in the (guardian ad litem's) (corporation counsel's) (tribal court advocate's) (attorney's) official capacity and there is no consent by the person harmed.

## State's Burden of Poof

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 bodily harm to (name of victim).

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

"Bodily harm" means physical pain or injury, illness, or any impairment of

physical condition.[3]

2. (Name of victim) was a [current or former (guardian ad litem)[4] (corporation counsel)[5] (tribal court advocate)[6] (attorney)[7]] [family member of a current or former (guardian ad litem) (corporation counsel) (tribal court advocate) (attorney)].

   [For the purpose of this offense, a (e.g., child) is a family member.][8]

3. The defendant knew[9] that (name of victim) was [(a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)] [a family member of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)].

4. The defendant caused bodily harm in response to an action taken in the (guardian ad litem's) (corporation counsel's) (tribal court advocate's) (attorney's) official capacity in a [specify the proceeding under Wisconsin statutes chapter _____] [specify the proceeding in a tribal court similar to Wisconsin statutes chapter _____.][10]

   (Guardians ad litem) (Corporation counsel) (Tribal court advocates) (Attorneys) act in an official capacity when they perform duties that they are employed[11] to perform.[12] [The duties of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney) include: _____].[13]

   [A _____ is a proceeding under chapter (specify the Wisconsin

Statutes chapter )].[14]

[A _____ is a proceeding in a tribal court.][15]

5. The defendant caused bodily harm to (name of victim) without the consent[16] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to cause bodily harm to (name of victim).[17]

**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 1241A was approved by the Committee in July 2018. This revision was approved by the Committee in June 2022; it amended the body of the instruction and the comment based on 2021 Wisconsin Act 191 [effective date: March 19, 2022].

Section 940.203 originally applied only to the offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law

enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 [effective date: April 13, 2018]. The title of § 940.203 was amended to read as "Battery or threat to a judge, prosecutor, an officer of the court or law enforcement officer." "Advocate" was added by 2021 Wisconsin Act 191 [effective date: March 19, 2022].

This instruction is drafted for violations under § 940.203(3) involving battery to a current or former guardian ad litem, corporation counsel, advocate, or attorney; for violations based on threats to a current or former guardian ad litem, corporation counsel, advocate, or attorney, see Wis JI-Criminal 1241B. For battery and threats to a judge, see Wis JI-Criminal 1240A and 1240B. For battery and threats to a prosecutor or law enforcement officer, see Wis JI-Criminal 1240C and 1240D.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and guardian ad litem's, corporation counsel's, advocate's, attorney's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

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 or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

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

4. Section 54.40(2) provides the duties of "guardian ad litem."

5. Section 59.42 provides the duties of "corporation counsel."

6. Section 940.203 (1)(ab) provides that "Advocate" means an individual who is representing the interests of a child, the tribe, or another party in a tribal court proceeding.

7. Section 940.203(1)(ac) provides that "attorney" means a legal professional practicing law as defined in SCR 23.01. The practice of law in in Wisconsin is defined in SCR 23.01 as "[t]he application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) where there is a client relationship of trust or reliance and which require the knowledge, judgment, and skill of a person trained as a lawyer. The practice of law includes but is not limited to:

1. Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
2. Selection, drafting, or completion for another entity or person of legal documents or agreements which affect the legal rights of the other entity or person(s).

3. Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
4. Negotiation of legal rights or responsibilities on behalf of another entity or person(s).
5. Any other activity determined to be the practice of law by the Wisconsin Supreme Court.

8. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

9. See note 1, supra.

10. Section 940.203(3)(b) specifies that the act be in response to "an action taken by the current or former guardian ad litem, corporation counsel, advocate, or attorney in his or her official capacity in a proceeding under ch. 48, 51, 54, 55, 767, 813, or 938 or in a similar proceeding in a tribal court."

11. "Employed" is used here in the general sense of being engaged in the performance of a duty.

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

13. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. 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.

14. Wisconsin Statutes ch. 48, 51, 54, 55, 767, 813, or 938.

15. One of the alternatives in brackets should be selected.

16. If the 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.

17. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203 which divides the facts necessary to constitute the crime among several

subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

# 1241B THREAT TO GUARDIAN AD LITEM, CORPORATION COUNSEL, TRIBAL COURT ADVOCATE, OR ATTORNEY — § 940.203(3)

## Statutory Definition of the Crime

Section 940.203(3) of the Criminal Code of Wisconsin is violated by one who intentionally threatens to cause bodily harm to the (person) (family member) of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney) where at the time of the threat the person knows[1] that the victim is [(a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)] [a family member of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)], the threat is in response to an action taken in the (guardian ad litem's) (corporation counsel's) (tribal court advocate's) (attorney's) official capacity and there is no consent by the person 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 threatened to cause bodily harm to (name of victim).

[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.][2]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a [current or former (guardian ad litem)[4] (corporation counsel)[5] (tribal court advocate)[6] (attorney)[7] ] [family member of a current or former (guardian ad litem) (corporation counsel) (tribal court advocate) (attorney)].

   [For the purpose of this offense, a (e.g., child) is a family member.][8]

3. The defendant knew[9] that (name of victim) was [(a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)] [a family member of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)].

4. The threat was in response to an action taken in the current or former (guardian ad litem's) (corporation counsel's) (tribal court advocate's) (attorney's) official capacity in a

   [specify the proceeding under Wisconsin statutes chapter _____] [specify the proceeding in a tribal court similar to Wisconsin statutes chapter _____.][10]

(Guardians ad litem) (Corporation counsel) (Tribal court advocates) (Attorneys) act in an official capacity when they perform duties that they are employed[11] to perform.[12] [The duties of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney) include: _____].[13]

[A _____ is a proceeding under chapter (specify the Wisconsin Statutes chapter)].[14]

[A _____ is a proceeding in a tribal court.][15]

5. The defendant threatened to cause bodily harm to (name of victim) without the consent[16] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to threaten bodily harm to another human being.[17]

**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 case this 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 1241B was approved by the Committee in July 2018. This revision was approved by the Committee in June 2022; it amended the body of the instruction and the comment based on 2021 Wisconsin Act 191 [effective date: March 19, 2022].

Section 940.203 originally applied only to the offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 [effective date: April 13, 2018]. The title of § 940.203 was amended to read as "Battery or threat to a judge, prosecutor, an officer of the court or law enforcement officer." "Advocate" was added by 2021 Wisconsin Act 191 [effective date: March 19, 2022].

This instruction is drafted for violations under § 940.203(3) involving threats to a current or former guardian ad litem, corporation counsel, advocate, or attorney; for violations based on battery to a current or former guardian ad litem, corporation counsel, advocate, or attorney, see Wis JI-Criminal 1241A. For battery and threats to a judge, see Wis JI-Criminal 1240A and 1240B. For battery and threats to a prosecutor or law enforcement officer, see Wis JI-Criminal 1240C and 1240D.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and guardian ad litem's, corporation counsel's, advocate's, or attorney's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. 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. Perkins 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 the statute criminalizing 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 context 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…"

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

4. Section 54.40(2) provides the duties of "guardian ad litem."

5. Section 59.42 provides the duties of "corporation counsel."

6. Section 940.203 (1)(ab) provides that "Advocate" means an individual who is representing the interests of a child, the tribe, or another party in a tribal court proceeding.

7. Section 940.203(1)(ac) provides that "attorney" means a legal professional practicing law as defined in SCR 23.01. The practice of law in in Wisconsin is defined in SCR 23.01 as "[t]he application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) where there is a client relationship of trust or reliance and which require the knowledge, judgment, and skill of a person trained as a lawyer. The practice of law includes but is not limited to:

1. Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
2. Selection, drafting, or completion for another entity or person of legal documents or agreements which affect the legal rights of the other entity or person(s).
3. Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
4. Negotiation of legal rights or responsibilities on behalf of another entity or person(s).
5. Any other activity determined to be the practice of law by the Wisconsin Supreme Court.

The applicable term should be inserted in the blank.

8. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

9. See note 1, supra.

10. Section 940.203(3)(b) specifies that the act be in response to "an action taken by the current or former guardian ad litem, corporation counsel, advocate, or attorney in his or her official capacity in a proceeding under ch. 48, 51, 54, 55, 767, 813, or 938 or in a similar proceeding in a tribal court."

11. "Employed" is used here in the general sense of being engaged in the performance of a duty.

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

13. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. 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.

14. Wisconsin Statutes ch. 48, 51, 54, 55, 767, 813, or 938.

15. One of the alternatives in brackets should be selected.

16. If the 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.

17. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

# 1242 BATTERY OR THREAT TO A DEPARTMENT OF REVENUE EMPLOYEE — § 940.205

## Statutory Definition of the Crime

Section 940.205 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of any Department of Revenue employee[1] where at the time of the (act) (threat), the person knows[2] that the victim is a (Department of Revenue employee) (family member of a Department of Revenue employee), [the Department of Revenue employee is acting in an official capacity], [the (act) (threat) is in response to an action taken in the Department of Revenue employee's official capacity],[3] and there is no consent by the person (harmed) (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.[4]

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

["Cause" means that the defendant's act was a substantial factor in producing the bodily harm.][5]

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.][6]

2. (Name of victim) was a (Department of Revenue employee) (family member of a Department of Revenue employee).

[For the purpose of this offense, a (e.g., child) is a family member.][7]

3. At the time of the (act) (threat) the defendant knew[8] that (name of victim) was a (Department of Revenue employee) (family member of a Department of Revenue employee).

4. [The Department of Revenue employee was acting in an official capacity at the time of the (act) (threat).] [The (act) (threat) was in response to an action taken in the Department of Revenue employee's official capacity.][9]

Department of Revenue employees act in an official capacity when they

perform duties that they are employed[10] to perform.[11] (The duties of a Department of Revenue employee include: _____.)[12]

5. The defendant (caused) (threatened to cause) bodily harm without the consent[13] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) bodily harm.[14]

**Deciding About Intent**

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

**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 1242 was originally published in 1994 and revised in 2004, and 2008. The 2004 revision added a definition of "true threat." The 2008 revision amended the definition of "official capacity." This revision was approved by the Committee in April 2022; it added to the comment.

Section 940.205 was created by 1985 Wisconsin Act 29.

1. Section 940.205 applies to offenses against the person or family of any department of revenue "official, employee or agent." The instruction refers to "employee" throughout, since that appears to be the most inclusive term.

2. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the Department of Revenue employee's official capacity. That is, the threat or act must be committed either when the Department of Revenue employee is acting in an official capacity or in response to an action taken in the Department of Revenue employee's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

3. One of the alternatives in brackets should be selected.

4. This is the definition provided in § 939.22(4).

5. 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.

6. 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…

7. Section 940.205(1) provides:

> "In this section, family member" means a parent, spouse, sibling, child, stepchild, foster child or treatment foster child.

The applicable term should be inserted in the blank.

8. See note 2, supra.

9. One of the alternatives in brackets should be selected.

10. "Employed" is used here in the general sense of being engaged in the performance of a duty.

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

12. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. 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.

13. 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.

14. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.205 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

# 1243 BATTERY TO A NURSE — § 940.20(2r)

INSTRUCTION WITHDRAWN FOR OFFENSES OCCURRING AFTER MARCH 24, 2022, BECAUSE THE STATUTE TO WHICH IT PERTAINED WAS REPEALED BY 2021 WISCONSIN ACT 209. FOR OFFENSES OCCURRING AFTER MARCH 24, 2022, SEE WIS JI-CRIMINAL 1247A AND 1247B.

## Statutory Definition of the Crime

Section 940.20(2r) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to (a nurse) (an individual acting under the supervision of a nurse) where at the time of the act the defendant knows or has reason to know that the victim is (a nurse) (an individual acting under the supervision of a nurse) acting in a professional capacity and there is no consent by the victim harmed.

## 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 bodily harm to (name of victim).

"Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[1]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. (Name of victim) was (a nurse)[3] (an individual acting under the supervision of a nurse).
3. (Name of victim) was acting in (his) (her) professional capacity.[4]
4. The defendant knew, or had reason to know, that (name of victim) was (a nurse acting in a professional capacity) (an individual acting under the supervision of a nurse acting in a professional capacity).[5]
5. The defendant caused bodily harm without the consent of (Name of victim).
6. The defendant acted intentionally.

   This requires that the defendant intended to cause bodily harm to (name of victim) and knew that (name of victim) did not consent to the causing of bodily harm.[6]

**Meaning of "Intentionally"**

Intent to cause bodily harm means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another.[7]

**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 1243 was approved by the Committee in August 2020. Its withdrawal for offenses occurring after the effective date of 2021 Wisconsin Act 209 was approved by the Committee in April 2022.

Section 940.20(2r) was created by 2019 Wisconsin Act 97 [effective date: February 7, 2020].

1. 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 or more persons might jointly produce it.

Also see Wis JI-Criminal 901 Cause.

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

3. § 940.20(2r)(a) provides that "nurse" means an individual who is licensed (as a registered nurse) pursuant to § 441.06 or (as a practical nurse) pursuant to 441.10.

4. If further instruction on "professional capacity" is necessary, see secs. 441.001(3) and (4), which define practical and professional nursing.

5. The "knew or had reason to know" requirement is taken directly from § 940.20(2r). It is treated as a separate element rather than being combined with the sixth element where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as a nurse or an individual acting under the supervision of a nurse and to "acting in official capacity."

6. Knowledge that the victim was acting in a professional capacity and that the victim did not consent is required because the word "intentionally" is used in the statute. That requires not only intent to cause bodily harm but also "knowledge of those facts necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'." § 939.23(3).

7. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

# 1244 BATTERY OR THREAT TO A DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES OR DEPARTMENT OF WORKFORCE DEVELOPMENT EMPLOYEE — § 940.207

## Statutory Definition of the Crime

Section 940.207 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of any Department of (Safety and Professional Services) (Workforce Development) employee[1] where at the time of the (act) (threat), the person knows[2] that the victim is a (department employee) (family member of a department employee), [the employee is acting in an official capacity], [the (act) (threat) is in response to an action taken in the employee's official capacity],[3] and there is no consent by the person (harmed) (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.[4]

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

["Cause" means that the defendant's act was a substantial factor in producing the bodily harm.][5]

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.][6]

2. (Name of victim) was (an employee of) (a family member of an employee of) the Department of (Safety and Professional Services) (Workforce Development).

[For the purpose of this offense, a (e.g., child) is a family member.][7]

3. At the time of the (act) (threat) the defendant knew[8] that (name of victim) was (an employee of) (a family member of an employee of) the Department of (Commerce) (Workforce Development).

4. [The employee was acting in an official capacity at the time of the (act) (threat).] [The (act) (threat) was in response to an action taken in the employee's official capacity.][9]

Employees act in an official capacity when they perform duties that they are

employed[10] to perform.[11] [The duties of a Department of (Safety and Professional Services) (Workforce Development) employee include:_____.][12]

5. The defendant (caused) (threatened to cause) bodily harm without the consent[13] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) bodily harm.[14]

**Deciding About Intent**

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

**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 1244 was originally published in 1994 and revised in 1998, 2004, 2008, and 2012. The 2012 revision changed the reference from Department of Commerce to Department of Safety and Professional Services. This revision was approved by the Committee in April 2022; it added to the comment.

Section 940.207 was created by 1993 Wisconsin Act 86. A series of legislative changes affected the types of employees covered by the statute. As amended by 1997 Wisconsin Act 3, the statute applies to battery or threat to employees and family members of employees of the Department of Commerce and the Department of Workforce Development. 2011 Wisconsin Act 32 changed "Department of Commerce" to "Department of Safety and Professional Services."

1. Section 940.207 applies to offenses against the person or family of any department "official, employee or agent." The instruction refers to "employee" throughout, since that appears to be the most inclusive term.

2. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the employee's official capacity. That is, the threat or act must be committed either when the employee is acting in an official capacity or in response to an action taken in the employee's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

3. One of the alternatives in brackets should be selected.

4. This is the definition provided in § 939.22(4).

5. 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.

6. 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…

7. Section 940.207(1) provides:

"In this section, family member" means a parent, spouse, sibling, child, stepchild, foster child or treatment foster child.

The applicable term should be inserted in the blank.

8. See note 2, supra.

9. One of the alternatives in brackets should be selected.

10. "Employed" is used here in the general sense of being engaged in the performance of a duty.

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

12. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. 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.

General powers and duties of the Department of Commerce are set forth in § 101.02, Wis. Stats.; those

of the Department of Workforce Development are set forth in § 103.005, Wis. Stats.

13. 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.

14. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.207 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

# 1247A BATTERY OR THREAT TO A STAFF MEMBER OF A HEALTH CARE FACILITY — § 940.204(2)

## Statutory Definition of the Crime

Section 940.204(2) of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of any health care facility worker[1] where at the time of the (act) (threat), the person knows[2] that the victim ((works) (formerly worked) in a health care facility) (is a family member of a person who (works) (formerly worked) in a health care facility), [the (act) (threat) is in response to an action occurring at the health care facility], [the (act) (threat) is in response to an action taken in the employee's official capacity],[3] and there is no consent by the person (harmed) (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.[4]

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

["Cause" means that the defendant's act was a substantial factor in producing the bodily harm.][5]

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.][6]

2. (Name of victim) was ((a worker at) (a former worker at)) (a family member of (a worker at) (a former worker at)) a health care facility.[7]

[For the purpose of this offense, a (e.g., child) is a family member.][8]

3. At the time of the (act) (threat) the defendant knew or should have known[9] that (name of victim) was ((a worker at) (a former worker at)) (a family member of (a worker at) (a former worker at)) a health care facility.

4. [The (act) (threat) was in response to an action occurring at the health care facility.] [The (act) (threat) was in response to an action taken by the official, employee, or agent of a health care facility acting in their official capacity.][10]

IF THE CASE INVOLVES AN OFFICIAL, EMPLOYEE, OR AGENT OF THE HEALTH CARE FACILITY ACTING IN AN OFFICIAL CAPACITY, ADD THE FOLLOWING:

Officials, employees, or agents of the health care facility act in an official capacity when they perform duties that they are authorized to perform.

5. The defendant (caused) (threatened to cause) bodily harm without the consent[11] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) bodily harm.[12]

**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.[13]

**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 was 1247A approved by the Committee in April 2022.

Section 940.204(2) was created by 2022 Wisconsin Act 209 [effective date: March 25, 2022]. This instruction applies to battery or threat to a staff member of a health care facility and family members of a staff member of a health care facility. For battery or threat to a health care provider, see Wis JI-Criminal 1247B.

1. Section 940.204(2) applies to offenses against the person or family of anyone "who works in a health care facility." The instruction refers to "worker" throughout, since that appears to be the most inclusive term.

2. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the employee's official capacity. That is, the act or threat must be committed either in response to an action occurring at the health care facility or in response to an action taken in the employee's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

3. One of the alternatives in brackets should be selected.

4. This is the definition provided in § 939.22(4).

5. 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.

6. 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…

7. Section 940.204(1)(b) provides:

"In this section: 'health care facility' means any of the following:

1. A hospital, as defined in s. 50.33 (2).
2. A clinic, which is a location with the primary purpose of providing outpatient diagnosis, treatment, or management of health conditions.
3. A pharmacy that is licensed under s. 450.06.
4. An adult day care center, as defined in s. 49.45(47).
5. An adult family home, as defined in s. 50.01 (1).
6. A community−based residential facility, as defined in s. 50.01 (1g).
7. A residential care apartment complex, as defined in s. 50.01 (6d).
8. A nursing home, as defined in s. 50.01 (3).
9. A mental health or substance use disorder facility, which is a location that provides diagnosis, treatment, or management of mental health or substance use disorders.
10. An ambulatory surgical center, as defined in 42 CFR 416.2."

8. Section 940.204(1)(a) provides:

"In this section: 'family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

9. See note 2, supra.

10. Based on the evidence, one or both of the alternatives in brackets should be selected. If the evidence supports selecting both, the alternatives should be separated by the disjunctive "or."

11. 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.

12. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.204(2) which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

13. 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.

# 1247B BATTERY OR THREAT TO A HEALTH CARE PROVIDER — § 940.204(3)

## Statutory Definition of the Crime

Section 940.204(3) of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of any health care provider where at the time of the (act) (threat), the person knows[1] that the victim is a (health care provider) (family member of a health care provider), the (act) (threat) is in response to an action by the health care provider acting in their official capacity, and there is no consent by the person (harmed) (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.[2]

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

   ["Cause" means that the defendant's act was a substantial factor in producing the bodily harm.][3]

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.][4]

2. (Name of victim) was a (health care provider) (family member of a health care provider).

[a (e.g., nurse) is a health care provider.][5]

[a (e.g., child) is a family member.][6]

3. At the time of the (act) (threat) the defendant knew or should have known[7] that (name of victim) was a (health care provider) (family member of a healthcare provider).

4. The (act) (threat) was in response to an action by the health care provider acting in their official capacity.

Health care providers act in an official capacity when they perform duties that they are authorized to perform.

5. The defendant (caused) (threatened to cause) bodily harm without the consent[8] of

(name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) bodily harm.[9]

**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.[10]

**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 1247B was approved by the Committee in April 2022.

Section 940.204(3) was created by 2022 Wisconsin Act 209 [effective date: March 25, 2022]. This instruction applies to battery or threat to a health care provider and family members of a health care provider. For battery or threat to a staff member of a health care facility, see Wis JI-Criminal 1247A.

1. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see subsec. (3)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the health care provider's official capacity. That is, the act or threat must be committed in response to an action

by the health care provider acting in his or her capacity as a health care provider. In this situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. This is the definition provided in § 939.22(4).

3. 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.

4. 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…

5. In the Committee's judgement, the jury may be told, for example, that a nurse is a health care provider. It is still for the jury to be satisfied that, in the example, the victim was a nurse. Section 940.204(1)(c) provides a definition of "health care provider" for the purposes of this offense:

"Health care provider" means any of the following:

1. A nurse licensed under ch. 441.
2. A chiropractor licensed under ch. 446.
3. A dentist licensed under ch. 447.
4. A physician, perfusionist, or respiratory care practitioner licensed or certified under subch. II of ch. 448.
5. A naturopathic doctor or limited-scope naturopathic doctor licensed under ch. 466.
6. A physical therapist or physical therapist assistant who is licensed under subch. III of ch. 448 or who holds a compact privilege under subch. X of ch. 448.
7. A podiatrist licensed under subch. IV of ch. 448.
8. A dietitian certified under subch. V of ch. 448.
9. An athletic trainer licensed under subch. VI of ch. 448.
10. An occupational therapist or occupational therapy assistant who is licensed under subch. VII of ch. 448 or who holds a compact privilege under subch. XI of ch. 448.
11. A physician assistant licensed under subch. VIII of ch. 448.
12. An optometrist licensed under ch. 449.
13. A pharmacist or pharmacy technician licensed or registered under ch. 450.
14. An acupuncturist certified under ch. 451.
15. A psychologist who is licensed under ch. 455, who is exercising the temporary authorization to practice, as defined in s. 455.50 (2) (o), in this state, or who is practicing under the authority to practice interjurisdictional telepsychology, as defined in s. 455.50 (2) (b).
16. A social worker, marriage and family therapist, or professional counselor certified or licensed under ch. 457.
17. A speech-language pathologist or audiologist licensed under subch. II of ch. 459 or a speech and language pathologist licensed by the department of public instruction.
18. A massage therapist or bodywork therapist licensed under ch. 460.
19. An ambulance service provider, as defined in s. 256.01 (3).
20. An emergency medical services practitioner, as defined in s. 256.01 (5).
21. An emergency medical responder, as defined in s. 256.01 (4p).
22. A radiographer or limited X−ray machine operator licensed or permitted under ch. 462.
23. A driver of an ambulance, as defined in s. 256.01(1t)."

The applicable term should be inserted in the blank.

6. Section 940.204(1)(a) provides:

"In this section: 'family member' means a parent, spouse, sibling, child, stepchild, or foster

child."

The applicable term should be inserted in the blank.

7. See note 2, supra.

8. 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.

9. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.204(3) which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (3)(a), through (b) and (c). Sub. (3)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (3) proper and the other facts that follow.

10. 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.

# 1249A PHYSICAL ABUSE OF AN ELDER PERSON: INTENTIONAL CAUSATION OF GREAT BODILY HARM — § 940.198(2)(a)

## Statutory Definition of the Crime

Physical abuse of an elder person[1], as defined in § 940.198(2)(a) of the Criminal Code of Wisconsin, is committed by one who intentionally causes great bodily harm to an elder person.

## 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 caused great bodily harm to (name of victim).

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

   "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.[3]

2. The defendant intentionally[4] caused great bodily harm to (name of victim).

This requires that the defendant had the mental purpose to cause great bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

3. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[5]

**Deciding About Intent**

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

**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.

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

**COMMENT**

Wis JI-Criminal 1249A was approved by the Committee in October 2021.

This instruction is drafted for offenses involving intentional physical abuse of an elder person causing great bodily harm as provided in Wis. Stat 940.198(2)(a). § 940.198(2)(a) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Prior to the enactment of § 940.198, battery committed against persons 62 years of age or older was covered by WI JI-Criminal 1226 Battery With Substantial Risk of Great Bodily Harm. That instruction

applied to all batteries involving a "substantial risk of great bodily harm," with the fact that the victim was over age 62 creating "a rebuttable presumption of conduct creating a substantial risk of great bodily harm."

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The definition of "elder person" is the one provided in § 940.198(1)(a) which provides: "'Elder person' means any individual who is 60 years of age or older."

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 or more persons might jointly produce it.

If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

3. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976). The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

4. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and B.

5. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

# 1249B PHYSICAL ABUSE OF AN ELDER PERSON: INTENTIONAL CAUSATION OF BODILY HARM — § 940.198(2)(b)

## Statutory Definition of the Crime

Physical abuse of an elder person[1], as defined in § 940.198(2)(b) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to an elder person.

## 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 caused bodily harm to (name of victim).

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

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. The defendant intentionally[4] caused bodily harm to (name of victim).

   This requires that the defendant had the mental purpose to cause bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

3. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[5]

**Deciding About Intent**

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

**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.

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

**COMMENT**

Wis JI-Criminal 1249B was approved by the Committee in October 2021.

This instruction is drafted for offenses involving intentional physical abuse of an elder person causing bodily harm as provided in Wis. Stat 940.198(2)(b). § 940.198(2)(b) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Prior to the enactment of § 940.198, battery committed against persons 62 years of age or older was covered by WI JI-Criminal 1226 Battery With Substantial Risk of Great Bodily Harm. That instruction applied to all batteries involving a "substantial risk of great bodily harm," with the fact that the victim was over age 62 creating "a rebuttable presumption of conduct creating a substantial risk of great bodily harm."

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The definition of "elder person" is the one provided in § 940.198(1)(a) which provides: "'Elder

person' means any individual who is 60 years of age or older."

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 or more persons might jointly produce it.

If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

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

4. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and B.

5. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

# 1249C PHYSICAL ABUSE OF AN ELDER PERSON: INTENTIONAL CAUSATION OF BODILY HARM TO AN ELDER PERSON UNDER CIRCUMSTANCES OR CONDITIONS THAT ARE LIKELY TO PRODUCE GREAT BODILY HARM — § 940.198(2)(c)

## Statutory Definition of the Crime

Physical abuse of an elder person[1], as defined in § 940.198(2)(c) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to an elder person under circumstances or conditions that are likely to produce great bodily harm.

## 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 five elements were present.

## Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

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

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. The defendant intentionally[4] caused bodily harm to (name of victim).

   This requires that the defendant had the mental purpose to cause bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain

to cause that result.

3. The circumstances or conditions under which the defendant caused bodily harm were likely to produce great bodily harm.

"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.[5]

4. The defendant knew that the circumstances or conditions under which (he) (she) caused bodily harm were likely to produce great bodily harm.[6]

5. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[7]

**Deciding About Intent**

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

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all five 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 1249C was approved by the Committee in October 2021.

This instruction is drafted for offenses involving intentional physical abuse of an elder person causing bodily harm under circumstances or conditions that are likely to produce great bodily harm as provided in Wis. Stat 940.198(2)(c). § 940.198(2)(c) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Prior to the enactment of § 940.198, battery committed against persons 62 years of age or older was covered by WI JI-Criminal 1226 Battery With Substantial Risk of Great Bodily Harm. That instruction applied to all batteries involving a "substantial risk of great bodily harm," with the fact that the victim was over age 62 creating "a rebuttable presumption of conduct creating a substantial risk of great bodily harm."

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The definition of "elder person" is the one provided in § 940.198(1)(a) which provides: "'Elder person' means any individual who is 60 years of age or older."

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 or more persons might jointly produce it.

If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

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

4. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and B.

5. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976). The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

6. Section 940.198(2)(c) applies to those who "intentionally cause bodily harm to an elder person under circumstances or conditions that are likely to produce great bodily harm," Section 939.23(3) provides

that when "intentionally" is used in a criminal statute, it requires that the actor "have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally'." The Committee concluded that this requires that the defendant charged under § 940.198(2)(c) must have known that the circumstances or conditions under which the he or she caused bodily harm were likely to produce great bodily harm.

7. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

# 1249D PHYSICAL ABUSE OF AN ELDER PERSON: RECKLESS CAUSATION OF GREAT BODILY HARM — § 940.198(3)(a)

## Statutory Definition of the Crime

Physical abuse of an elder person[1], as defined in § 940.198(3)(a) of the Criminal Code of Wisconsin, is committed by one who recklessly causes great bodily harm to an elder person.

## 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 caused great bodily harm to (name of victim).

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

   "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.[3]

2. The defendant recklessly caused great bodily harm to (name of victim).

This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).[4]

In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim).[5]

3. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[6]

**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.

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

**COMMENT**

Wis JI-Criminal 1249D was approved by the Committee in October 2021.

This instruction is drafted for offenses involving reckless physical abuse of an elder person causing great bodily harm as provided in Wis. Stat 940.198(3)(a). § 940.198(3)(a) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Prior to the enactment of § 940.198, battery committed against persons 62 years of age or older was covered by WI JI-Criminal 1226 Battery With Substantial Risk of Great Bodily Harm. That instruction applied to all batteries involving a "substantial risk of great bodily harm," with the fact that the victim was over age 62 creating "a rebuttable presumption of conduct creating a substantial risk of great bodily harm."

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The definition of "elder person" is the one provided in § 940.198(1)(a) which provides: "'Elder person' means any individual who is 60 years of age or older."

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 or more persons might jointly produce it.

If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

3. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976). The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

4. The definition of "recklessly" is the one provided in § 940.198(1)(b). Note that this definition is different from the definition of "criminal recklessness" in § 939.24.

5. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though "recklessly" is defined differently in § 940.198(1)(b), the basic concept is the same – all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

6. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the rule stated in § 939.43(2). Although that statute refers to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is

clearer; no change in meaning is intended.

# 1249E PHYSICAL ABUSE OF AN ELDER PERSON: RECKLESS CAUSATION OF BODILY HARM — § 940.198(3)(b)

## Statutory Definition of the Crime

Physical abuse of an elder person[1], as defined in § 940.198(3)(b) of the Criminal Code of Wisconsin, is committed by one who recklessly causes bodily harm to an elder person.

## 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 caused bodily harm to (name of victim).

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

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. The defendant recklessly caused bodily harm to (name of victim).

   This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).[4]

In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim).[5]

3. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[6]

**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.

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

**COMMENT**

Wis JI-Criminal 1249E was approved by the Committee in October 2021.

This instruction is drafted for offenses involving reckless physical abuse of an elder person causing bodily harm as provided in Wis. Stat 940.198(3)(b). § 940.198(3)(b) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Prior to the enactment of § 940.198, battery committed against persons 62 years of age or older was covered by WI JI-Criminal 1226 Battery With Substantial Risk of Great Bodily Harm. That instruction

applied to all batteries involving a "substantial risk of great bodily harm," with the fact that the victim was over age 62 creating "a rebuttable presumption of conduct creating a substantial risk of great bodily harm."

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The definition of "elder person" is the one provided in § 940.198(1)(a) which provides: "'Elder person' means any individual who is 60 years of age or older."

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 or more persons might jointly produce it.

If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

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

4. The definition of "recklessly" is the one provided in § 940.198(1)(b). Note that this definition is different from the definition of "criminal recklessness" in § 939.24.

5. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though "recklessly" is defined differently in § 940.198(1)(b), the basic concept is the same – all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

6. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the rule stated in § 939.43(2). Although that statute refers to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

# 1249F PHYSICAL ABUSE OF AN ELDER PERSON: RECKLESS CAUSATION OF BODILY HARM TO AN ELDER PERSON UNDER CIRCUMSTANCES OR CONDITIONS THAT ARE LIKELY TO PRODUCE GREAT BODILY HARM — § 940.198(3)(c)

## Statutory Definition of the Crime

Physical abuse of an elder person[1], as defined in § 940.198(3)(c) of the Criminal Code of Wisconsin, is committed by one who recklessly causes bodily harm to an elder person under circumstances or conditions that are likely to produce great bodily harm.

## 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 caused bodily harm to (name of victim).

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

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. The defendant recklessly caused bodily harm to (name of victim).

This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).[4]

In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim).[5]

3. The circumstances or conditions under which the defendant caused bodily harm were likely to produce great bodily harm.

"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.[6]

4. (Name of victim) was 60 years of age or older at the time of the offense.

Knowledge of (name of victim)'s age by the defendant is not required and a mistake regarding the (name of victim)'s age is not a defense.[7]

## 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.

**COMMENT**

Wis JI-Criminal 1249F was approved by the Committee in October 2021.

This instruction is drafted for offenses involving reckless physical abuse of an elder person causing great bodily harm as provided in Wis. Stat 940.198(3)(a). § 940.198(3)(c) was created by 2021 Wisconsin Act 76 [effective date: August 8, 2021].

Prior to the enactment of § 940.198, battery committed against persons 62 years of age or older was covered by WI JI-Criminal 1226 Battery With Substantial Risk of Great Bodily Harm. That instruction applied to all batteries involving a "substantial risk of great bodily harm," with the fact that the victim was over age 62 creating "a rebuttable presumption of conduct creating a substantial risk of great bodily harm."

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The definition of "elder person" is the one provided in § 940.198(1)(a) which provides: "'Elder person' means any individual who is 60 years of age or older."

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 or more persons might jointly produce it.

If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

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

4. The definition of "recklessly" is the one provided in § 940.198(1)(b). Note that this definition is different from the definition of "criminal recklessness" in § 939.24.

5. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though "recklessly" is defined differently in § 940.198(1)(b), the basic concept is the same – all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

6. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976). The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

7. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the rule stated in § 939.43(2). Although that statute refers to "the age of a minor," sub. (4) of § 940.198 provides a similar rule for this offense: "This section applies irrespective of whether the defendant had actual knowledge of the crime victim's age. A mistake regarding the crime victim's age is not a defense to prosecution under this section." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

# 1255 STRANGULATION AND SUFFOCATION — § 940.235

## Statutory Definition of the Crime

Section 940.235 of the Criminal Code of Wisconsin is violated by one who intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.

## 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 two elements were present.

## Elements of the Crime That the State Must Prove

1. The defendant impeded the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of (name of victim).

2. The defendant did so intentionally.

   This requires that the defendant acted with the mental purpose to impede normal breathing or circulation of blood or was aware that (his) (her) conduct was practically certain to cause that result.[1]

**Deciding About Intent**

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

**Jury's Decision**

If you are satisfied beyond a reasonable doubt 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.

> ADD THE FOLLOWING QUESTION IF THE DEFENDANT HAS A PREVIOUS CONVICTION UNDER § 939.632(1)(e)1 AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACTOR IS ESTABLISHED[2]

If you find the defendant guilty, you must answer the following question(s):

[Did the defendant have a previous conviction for (identify the crime)[3] ?]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

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

**COMMENT**

Wis JI-Criminal 1255 was originally published in 2009. The comment was revised in 2014. This revision was approved by the Committee in October 2021; it added the penalty-increasing special question. It also added to the Comment.

This instruction addresses violations of § 940.235, created by 2007 Wisconsin Act 127 [effective date: April 4, 2008].

1. Section 939.23(3). Also see Wis JI-Criminal 923A and B.

2. Section 940.235(2) provides that this offense is a Class G felony if "the actor has a previous conviction under this section or a previous conviction for a violent crime, as defined in § 939.632(1)(e)1." Violent crimes defined in s. 939.632(1)(e)1. are felonies under 34 specified statutes.

The statutorily-authorized penalty-increasing provision in subsection (2) requires proof of a prior conviction. Therefore, the fact that the defendant was convicted of a "violent crime" under § 939.632(1)(e)1. must be found by the jury. For example, in State v. Warbelton, 2009 WI 6, ¶3, 315 Wis.2d 253, 759 N.W.2d 557, the Wisconsin Supreme Court held that a prior conviction for a violent crime under § 940.32(2m)(a) "is an element of the stalking crime, rather than a penalty enhancer." The Committee concluded that presenting the penalty-increasing fact as a special question, as done in this instruction, is not inconsistent with its status as an element of the crime.

Warbelton also held that if a defendant stipulates to the existence of the prior conviction, the prior conviction element is still to be presented to the jury in the absence of a jury trial waiver on that element. In the Warbelton case, the parties stipulated to the fact of prior conviction. The stipulation was accepted, but the state refused to consent to a jury trial waiver on the prior conviction element. The Wisconsin Supreme Court held the trial court did not err in submitting the element to the jury. The Court held that State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997), which allows withdrawal of the "status element" in a case involving a charge of operating with a prohibited alcohol concentration, is limited to prosecutions for driving while under the influence of an intoxicant or with a prohibited alcohol concentration. For a discussion of stipulations that go to elements of the crime and jury trial waivers in that context, see Wis JI-Criminal 162A, Law Note: Stipulations.

3. The applicable crimes are: a "violent crime" as defined in § 939.632(1)(e)1.

# 1296 INTIMIDATION OF A VICTIM — §§ 940.44 and 940.45

## Statutory Definition of the Crime

Intimidation of a victim, as defined in § 940.44 of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] another person who has been the victim of any crime from making any report of the victimization to any peace officer or law enforcement agency.[2]

## 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. (Name of victim) was a victim of a crime.

   "Victim" means a person against whom a crime has been committed or attempted in this state.[3]

   In this case, it is alleged that (name of victim) was a victim of (name of crime). (Name of crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).[4] Before you may find the defendant guilty of intimidation of a victim, you must be satisfied beyond a reasonable doubt that (name of victim) was the victim of (name of crime).

2. The defendant (prevented) (dissuaded)[5] (attempted to prevent) (attempted to dissuade) (name of victim) from reporting the crime to any law enforcement agency.[6]

3. The defendant acted knowingly and maliciously.[7]

This requires that the defendant knew (name of victim) was a victim of a crime and that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

**Deciding About Knowledge and Intent**

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent 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 and intent.[8]

**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 [and answer the following question "yes" or "no"].[9]

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

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:[10]

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

[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative)[11] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of victim)] [(identify relative)[21] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45)?"][13]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][14]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

[FOR CHARGES UNDER SUB. (7)][15]

[Was the underlying crime an act of domestic abuse[16] or one subject to a domestic

abuse surcharge?[17]]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question "yes."

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

**COMMENT**

Wis JI-Criminal 1296 was originally published in 1987 and revised in 1991, 1994, 1998, 2001, 2010, and 2020. The 2001 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment. The revised instruction applies to both misdemeanor and felony offenses; it also replaces Wis JI-Criminal 1294. This revision was approved by the Committee in February 2022; it corrected an inadvertent error in sub. (7) of § 940.45, which was created by 2019 Wisconsin Act 112. See footnote 15.

This instruction is drafted for use in both misdemeanor and felony charges under §§ 940.44 and 940.45. A separate instruction is drafted for cases involving intimidation of a person acting on behalf of a victim. See Wis JI-Criminal 1296A.

The definition of the three basic elements is based on § 940.44 and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in subs. (1)-(7) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

1. Section 940.44 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The concluding phrase of this paragraph, ". . . from making any report of the victimization to any peace officer or law enforcement agency," is a simplified paraphrasing of subsec. (1) of 940.44. There are two other subsections that are not addressed by the instruction. The three subsections read as follows:

> (1) Making any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency, or to any judge.
> (2) Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof. [See Wis JI-Criminal 1297.]
> (3) Arresting or causing or seeking the arrest of any person in connection with the victimization.

3. The definition of "victim" in the instruction is a simplified version of the definition provided in § 940.41(2):

> (2) "Victim" means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

4. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

> The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI-Criminal 1294

would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI-Criminal 1294. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, supra.

5. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

6. This statement substitutes "reporting the crime" for the statute's "report of the victimization" on the grounds that it means the same thing and will be more understandable. The second element reflects one alternative of several that are possible under the statute. See note 2, supra.

7. Section 940.44 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and "maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

8. This is the shorter version used to describe the process of finding knowledge and 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 JI 923.1].

9. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

10. Section 940.45 specifies seven different facts that increase the penalty for the basic misdemeanor offense to that for a Class G felony. A bracketed question is provided for each statutory option.

11. The penalty increase provided by § 940.45(1) applies to the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

12. The same relatives are covered as under sub. (1) of the statute. See note 11, supra.

13. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the

subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

14. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

15. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: "(7) Where the underlying crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following a conviction, is subject to the surcharge in s. 973.055."

16. Subsection 968.075(1)(a) defines "domestic abuse" as follows:

> "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:
>
> 1. Intentional infliction of physical pain, physical injury or illness.
> 2. Intentional impairment of physical condition.
> 3. A violation of s. 940.225 (1), (2) or (3).
> 4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3..

For an instruction on committing a domestic abuse crime, see Wis JI-Criminal 984.

[**Reporter's Note**: Issues relating to instructing the jury on a domestic abuse surcharge pursuant to s. 973.055(4) will be published in the future.]

17. A person is subject to a domestic abuse surcharge of $100 if a person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain specified crimes and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.

# 1296A INTIMIDATION OF A PERSON ACTING ON BEHALF OF A VICTIM — §§ 940.44 and 940.45

## Statutory Definition of the Crime

Intimidation of a person acting on behalf of a victim, as defined in § 940.44 of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] a person who is acting on the behalf of the victim of any crime from making any report of the victimization to any peace officer or law enforcement agency.[2]

## 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. (Name of victim)[3] was a victim of a crime.

   "Victim" means a person against whom a crime has been committed or attempted in this state.[4]

   In this case, it is alleged that (name of crime victim) was a victim of (name of crime). (Name of crime), as defined in § ____ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).[5] Before you may find the defendant guilty of intimidation

of a person acting on behalf of a victim, you must be satisfied beyond a reasonable doubt that (name of crime victim) was the victim of (name of crime).

2. (Name of person acting on behalf of crime victim)[6] was acting on behalf of (name of crime victim).

3. The defendant (prevented) (dissuaded)[7] (attempted to prevent) (attempted to dissuade) (name of person acting on behalf of crime victim) from reporting the crime to any law enforcement agency.[8]

4. The defendant acted knowingly and maliciously.[9]

This requires that the defendant knew (name of crime victim) was a victim of a crime and knew that (name of person acting on behalf of crime victim) was acting on behalf of (name of crime victim). This also requires that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

**Deciding About Knowledge and Intent**

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent 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 and intent.[10]

**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 [and answer the following question "yes" or "no"].[11]

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

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:[12]

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

[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative)[13] of (name of victim)]?"][14]

[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of victim)] [(identify relative)[15] of (name of victim)]?"][16]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45)?"][17]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][18]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to

940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

[FOR CHARGES UNDER SUB. (7)][19]

[Was the underlying crime an act of domestic abuse[20] or one subject to a domestic abuse surcharge?[21]]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question "yes."

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

**COMMENT**

Wis JI-Criminal 1296A was originally published in 2001 and revised in 2010 and 2020. This revision was approved by the Committee in February 2022; it corrected an inadvertent error in sub. (7) of § 940.45, which was created by 2019 Wisconsin Act 112. See footnote 19.

This instruction adapts Wis JI-Criminal 1296 for charges alleging intimidation of a person acting on behalf of a crime victim. It is drafted for use in both misdemeanor and felony charges under §§ 940.44 and 940.45. The definition of the four basic elements is to be used in both situations; for felony offenses, a question is to be added so that the jury makes a finding as to whether the fact embodied in the question is proved. Each of the facts increases the penalty to that for a Class G felony.

See the Comment to Wis JI-Criminal 1296 for general information about §§ 940.41 940.49.

1. Section 940.44 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included

when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The concluding phrase of this paragraph, ". . . from making any report of the victimization to any peace officer or law enforcement agency," is a simplified paraphrasing of subsec. (1) of 940.44. There are two other subsections that are not addressed by the instruction. The three subsections read as follows:

(1) Making any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency, or to any judge.
(2) Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof. [See Wis JI-Criminal 1297.]
(3) Arresting or causing or seeking the arrest of any person in connection with the victimization.

3. Where the instruction calls for the "name of crime victim" use the name of the person who is alleged to be the victim of the underlying crime. The victim of the offense defined in this instruction is indicated by blanks labeled "name of person acting on behalf of the crime victim." See note 4, below.

4. The definition of "victim" in the instruction is a simplified version of the definition provided in § 940.41(2):

> (2) "Victim" means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

5. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

> The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant

> guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI-Criminal 1296A would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI-Criminal 1296A. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, supra.

6. Where the instruction calls for the "name of person acting on behalf of crime victim" use the name of the person who is alleged to be the victim of the crime defined by this instruction. The victim of the underlying crime is referred to in the instruction as the "crime victim." See note 3, supra.

7. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

8. This statement substitutes "reporting the crime" for the statute's "report of the victimization" on the grounds that it means the same thing and will be more understandable. The second element reflects one alternative of several that are possible under the statute. See note 2, supra.

9. Section 940.44 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and "maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

10. This is the shorter version used to describe the process of finding knowledge and 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 JI 923.1].

11. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

12. Section 940.45 specifies seven different facts that increase the penalty for the basic misdemeanor offense to that for a Class G felony. A bracketed question is provided for each statutory option.

13. The penalty increase provided by § 940.45(1) applies the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

14. The Committee concluded that the aggravating factors described in subs. (1), (2), and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

15. The same relatives are covered as under sub. (1) of the statute. See note 13, supra.

16. The Committee concluded that the aggravating factors described in subs. (1), (2), and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

17. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

The Committee concluded that the aggravating factors described in subs. (1), (2) and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

18. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

19. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: "(7) Where the underlying crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following a conviction, is subject to the surcharge in s. 973.055."

20. Subsection 968.075(1)(a) defines "domestic abuse" as follows:

> "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or

against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225 (1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

For an instruction on committing a domestic abuse crime, see Wis JI-Criminal 984.

[**Reporter's Note**: Issues relating to instructing the jury on a domestic abuse surcharge pursuant to s. 973.055(4) will be published in the future.]

21. A person is subject to a domestic abuse surcharge of $100 if a person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain specified crimes and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.

# 1297 INTIMIDATION OF A VICTIM — §§ 940.44(2) and 940.45

## Statutory Definition of the Crime

Intimidation of a victim, as defined in § 940.44(2) of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] another person who has been the victim of any crime from causing a complaint, indictment, or information to be sought and prosecuted and assisting in the prosecution thereof.

## 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. (Name of victim) was a victim of a crime.

   "Victim" means a person against whom a crime has been committed or attempted in this state.[2]

   In this case, it is alleged that (name of victim) was a victim of (name of crime). (Name of crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).[3] Before you may find the defendant guilty of intimidation

of a victim, you must be satisfied beyond a reasonable doubt that (name of victim) was the victim of (name of crime).

2. The defendant (prevented) (dissuaded)[4] (attempted to prevent) (attempted to dissuade) (name of victim) from [causing a (complaint) (indictment) (information) to be sought] (or) [causing a (complaint) (indictment) (information) to be prosecuted] (or) [assisting in the prosecution of a (complaint) (indictment) (information)].[5]

3. The defendant acted knowingly and maliciously.[6]

This requires that the defendant knew (name of victim) was a victim of a crime and that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

**Deciding About Knowledge and Intent**

You cannot look into a person's mind to find knowledge and intent. They 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 and intent.[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 [and answer the following question "yes" or "no"].[8]

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

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:[9]

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

[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative)[10] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of victim)] [(identify relative)[11] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45)?"][12]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][13]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

[FOR CHARGES UNDER SUB. (7)][14]

[Was the underlying crime an act of domestic abuse[15] or one subject to a domestic abuse surcharge?[16]]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question "yes."

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

**COMMENT**

Wis JI-Criminal 1297 was originally published in 2010 and revised in 2016 and 2020. This revision was approved by the Committee in February 2022; it corrected an inadvertent error in sub. (7) of § 940.45, which was created by 2019 Wisconsin Act 112. See footnote 14.

This instruction is drafted for use for both misdemeanor and felony charges under §§ 940.44(2) and 940.45. For violations of § 940.44(1) see Wis JI-Criminal 1296. A separate instruction is drafted for cases involving intimidation of a person acting on behalf of a victim. See Wis JI-Criminal 1296A.

Section 940.44(2) was amended by 2013 Wisconsin Act 14 [effective date: April 10, 2015] to codify the interpretation of the statute in State v. Freer, 2010 WI App 9, 323 Wis.2d 29, 779 N.W.2d 12. The text of the instruction already reflected the Freer interpretation so it was not affected by Act 14. See footnote 5, below.

The definition of the three basic elements is based on § 940.44(2) and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in subs. (1)-(6) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

1. Section 940.44 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The definition of "victim" in the instruction is a simplified version of the definition provided in § 940.41(2):

> (2) "Victim" means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

3. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

> The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the

> predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI-Criminal 1294 would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI-Criminal 1294. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, supra.

4. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

5. Subsection (2) of § 940.44 reads as follows: "Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof." The instruction provides for three alternatives as set forth in State v. Freer, 2010 WI App 9, 323 Wis.2d 29, 779 N.W.2d 12, which concluded that the statute was ambiguous because "'and' in the statutes is not always interpreted as a conjunctive term." The court relied on an LRB analysis of the bill to interpret the statute as though it read "or" instead of "and":

> In light of the LRB analysis, we conclude that the legislature intended the victim intimidation statute to prohibit any act of intimidation that seeks to prevent or dissuade a crime victim from assisting in the prosecution. Accordingly, we read "and" in the phrase "causing a complaint . . . to be sought and prosecuted and assisting in the prosecution thereof" in the disjunctive, and thereby conclude that Wis. Stat. § 940.44(2) prohibits knowingly or maliciously preventing or dissuading a crime victim from providing any one or more of the following forms of assistance to prosecutors: (1) causing a complaint, indictment or information to be sought; (2) causing a complaint to be prosecuted; or (3) assisting in the prosecution.
> 2010 WI App 9, ¶24.

Section 940.44(2) was amended by 2013 Wisconsin Act 14 [effective date: April 10, 2015] to codify the interpretation of the statute in Freer. The text of the instruction already reflected the Freer interpretation so it was not affected by Act 14.

6. Section 940.44 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and "maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

7. This is the shorter version used to describe the process of finding knowledge and 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. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

9. Section 940.45 specifies seven different facts that increase the penalty for the basic misdemeanor offense to that for a Class D felony. A bracketed question is provided for each statutory option.

10. The penalty increase provided by § 940.45(1) applies to the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

11. The same relatives are covered as under sub. (1) of the statute. See note 10, supra.

12. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

13. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

14. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: "(7) Where the underlying crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following a conviction, is subject to the surcharge in s. 973.055."

15. Subsection 968.075(1)(a) defines "domestic abuse" as follows:

"Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:
1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225 (1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

For an instruction on committing a domestic abuse crime, see Wis JI-Criminal 984.

[**Reporter's Note**: Issues relating to instructing the jury on a domestic abuse surcharge pursuant to s. 973.055(4) will be published in the future.]

16. A person is subject to a domestic abuse surcharge of $100 if a person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain specified crimes and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.

OFFICE OF JUDICIAL EDUCATION
2022

# WISCONSIN JURY INSTRUCTIONS

# CRIMINAL

## VOLUME IIA

**Wisconsin Criminal Jury Instructions Committee**

[Cite as Wis JI-Criminal]

- Includes 2022 Supplement (Release No. 60)

# WIS JI-CRIMINAL

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# 1300 NEGLIGENT OPERATION OF A VEHICLE — § 941.01

## Statutory Definition of the Crime

Negligent operation of a vehicle, as defined in § 941.01 of the Criminal Code of Wisconsin, is committed by one who endangers another's safety by a high degree of negligence in the operation of a vehicle, not upon a highway.[1]

## 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 operated a vehicle,[2] not upon a highway.[3]

   A vehicle is operated when it is set in motion[4]

2. The defendant operated a vehicle in a manner constituting a high degree of negligence.

3. The defendant's high degree of negligence endangered the safety of another person.

## The Meaning of "High Degree of Negligence"

"High degree of negligence" means:[5]

- the defendant's operation of a vehicle created a risk of death or great bodily harm; and

- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[6]

IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE THAT APPLIES TO VEHICLES "NOT ON A HIGHWAY" HAS BEEN RECEIVED, ADD THE FOLLOWING:[7]

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that (summarize the statute). Violating this statute does not necessarily constitute a high degree of negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted a high degree of negligence.]

**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.

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

**COMMENT**

Wis JI-Criminal 1300 was originally published in 1969 and revised in 1986, 1988, 1995, and 2007. The 2007 revision involved adoption of a new format and nonsubstantive changes to the text. This revision was approved by the Committee in February 2022; it added a definition of "operated" to the instructions and amended footnote 4 of the comment.

Section 941.01 was modified by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. Former subsection (2) was repealed. It had defined the term "high degree of negligence." It was apparently intended that the definition of "criminal negligence" in § 939.25, also created by the homicide revision, apply to violations of § 941.01, although no specific cross reference was included. The Judicial Council Note to § 941.01 in 1987 Senate Bill 191 provided: "See s. 939.25, stats., and the NOTE thereto." Section 939.25 is the statute defining "criminal negligence."

Since the statute continues to use "high degree of negligence," the instruction follows the statutory language. The definition of the term is essentially the same as the definition used for "criminal negligence," since it appears clear that the use of the definition was intended. In any event, the change is not believed to be a substantively significant one. The only difference between the definition for "criminal negligence" under the revised statute and "high degree of negligence" under prior law is the substitution of "substantial" for "high probability of" in the phrase, "substantial and unreasonable risk of death or great bodily harm."

Related offenses are defined in § 346.62, Reckless Driving. They apply to offenses committed on a highway. See Wis JI-Criminal 2650 2654.

1. Section 941.01 applies to "the operation of a vehicle, not upon a highway as defined in § 340.01." This distinguishes the offense from reckless driving under § 346.62, which requires that the vehicle be operated "on a highway" or on "premises held out to the public for use of their vehicles. . . ." See § 346.61 and Wis JI-Criminal 2600, Sec. I.

"Highway" includes the entire platted or dedicated right of way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983).

2. If there is a question whether a device is a "vehicle," add the following which is adapted from § 939.22(44):

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

3. Regarding the "not upon a highway" requirement, see note 1, supra.

4. This instruction uses "set in motion" as the definition of "operated." This same definition was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because this definition is prefaced by the phrase "in this section," the Committee determined that it applies only to matters covered under section 346.63, "Operating under influence of intoxicant or other drug."

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. The definition of "high degree of negligence" uses the definition of "criminal negligence" provided in § 939.25. See the Comment preceding note 1, supra.

The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

6. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

7. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). See note 6, Wis JI-Criminal 1170. To be applicable to this offense, it must be established that the safety statute does apply to operating "not on a highway."

# 1336 CARRYING A CONCEALED KNIFE — § 941.231

## Statutory Definition of the Crime

Section 941.231 of the Criminal Code of Wisconsin is violated by a person who goes armed with a concealed knife that is a dangerous weapon if that person has been convicted of a felony.[1]

## 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 went armed with a concealed knife.

   "Went armed" means that the knife must have been either on the defendant's person or that the knife must have been within the defendant's reach.[2]

   "Concealed" means hidden from ordinary observation. The knife does not have to be completely hidden.[3]

2. The concealed knife was a dangerous weapon.

   A knife is a dangerous weapon if[4]

   [it is designed as a weapon and is capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.]

   [in the manner in which it is used or intended to be used, it is calculated or

likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.][5]

3. The defendant had been convicted of a felony before (date of offense).

[ (Name of felony) is a felony in Wisconsin.][6]

[The parties have agreed that the defendant was convicted of a felony before (date of offense) and you must accept this as conclusively proved.][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.

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

**COMMENT**

Wis JI-Criminal 1336 was approved by the Committee in 2016. This revision was approved by the Committee in December 2021; it added to the comment.

Section 941.231, Carrying a Concealed Knife, was created by 2015 Wisconsin Act 149 [effective date: February 8, 2016]. Act 149 also repealed former § 941.24, Possession of a Switchblade Knife.

The statutory text of § 941.231 provides that "[a]ny person who is prohibited from possessing a firearm under s. 941.29 [Possession of a Firearm] who goes armed with a concealed knife that is a dangerous weapon is guilty of a Class A misdemeanor." If the instruction were to use this statutory text, both the Statutory Definition of the Crime and the list of Elements of the Crime would refer to § 941.29. Referring to § 941.29 would require defining why the defendant is prohibited from possessing a firearm under that statute. The Committee concluded that it would be simpler and more direct to omit the reference to the defendant being "prohibited from possessing a firearm under section 941.29 of the Wisconsin Statutes" and state the status element in terms of the reason why the defendant is prohibited from possessing a firearm

under § 941.29.

1. The instruction is drafted for cases involving going armed with a concealed knife that is a dangerous weapon by a person convicted of a felony, which is the most common basis for the prohibition on firearm possession under § 941.29. See § 941.29(1m)(a), (b), and (bm). However, the prohibition in § 941.231 applies to other categories of persons who are prohibited from possessing a firearm under § 941.29. See § 941.29(1m)(c) to (g). For cases involving subs. (1)(c) through (g), the instruction must be modified. For cases involving subs. (1m)(f) and (g), the modification may be based on Wis JI-Criminal 1344, Possession of a Firearm by a Person Subject to an Injunction.

2. The definition of "went armed" in the instruction is based on the one articulated in case law under the old carrying a concealed weapon statute. See State v. Mularkey, 201 Wis. 429, 432, 230 N.W. 76 (1930), and other cases cited in footnote 4, Wis JI-Criminal 1335.

3. The "hidden from ordinary observation" requirement is adapted from State v. Mularkey, 201 Wis. 429, 432, 230 NW 76 (1930). Also see, State v. Asfoor, 75 Wis.2d 411, 433, 249 N.W.2d 529 (1976), which approved an instruction that included this requirement.

4. Choose the alternative supported by the evidence. These are two of the four alternatives in the standard definition of "dangerous weapon." See § 939.22(10). Eliminated are those relating to firearms and electric weapons, which would not apply to a knife. See Wis JI-Criminal 910 for footnotes discussing each alternative.

5. This instruction uses the standard definition of "dangerous weapon" provided in § 939.22(10), in which a knife is applicable. However, 2015 Wisconsin Act 149 also created subsection 941.23(1)(ap) which provides that "Notwithstanding s. 939.22(10), 'dangerous weapon' does not include a knife." Because § 941.23(1)(ap) is prefaced by the phrase "in this section," the exclusion applies only to offenses provided in § 941.23.

6. The prohibition on firearm possession in § 941.29 applies to person convicted of a felony in Wisconsin and also to persons convicted of crimes in other jurisdictions that would be felonies in Wisconsin. In the Committee's judgment, the way the third element is phrased should be suitable for handling either alternative. See footnote 7, Wis JI-Criminal 1343, for additional considerations relating to out of state convictions.

The Committee also concluded that the statute need not be interpreted to require that the defendant "know he was convicted of a felony" or know that he was prohibited from carrying a concealed knife that is a dangerous weapon. A person may fairly be held to know the nature of a crime of which he was convicted and to know the disabilities that may attend that conviction.

7. Defendants may offer to stipulate to the fact of their felon status. The bracketed statement in the instruction includes the standard statement on the effect of a stipulation found in Wis JI-Criminal 162, Agreed Facts. The effect of a stipulation in a prosecution for violating § 941.29 has been described as follows:

> . . . where prior conviction of a felony is an element of the offense with which the defendant is charged and the defendant is willing to stipulate that he or she is a convicted felon, evidence of

> the nature of the felony is irrelevant if offered solely to establish the felony conviction element of the offense. The trial court therefore abused its discretion in allowing the prosecutor to inform the jury as to the nature of McAllister's crime.

State v. McAllister, 153 Wis.2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989). The Committee concluded the effect of a stipulation to felon status should be the same in a prosecution under § 941.231.

The fact of felon status may still be revealed; it is the nature of the felony that is not to be disclosed. State v. Nicholson, 160 Wis.2d 803, 804, 467 N.W.2d 139 (Ct. App. 1991).

Care must be taken where a stipulation goes to an element of a crime. A waiver should be obtained. See Wis JI-Criminal 162A Law Note: Stipulations. An example of a complete waiver inquiry is provided in footnote 8, Wis JI-Criminal 1343.

# 1424 BURGLARY WITH INTENT TO COMMIT A FELONY[1] – § 943.10(1)

## Statutory Definition of the Crime

Burglary, as defined in § 943.10 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building[2] without the consent of the person in lawful possession and with intent to commit a felony therein.

## 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 intentionally entered a building.[3]
2. The defendant entered the building without the consent[4] of the person in lawful possession.[5]
3. The defendant knew that the entry was without consent.[6]
4. The defendant entered the building with intent to commit (state felony)[7], [that is, that the defendant intended to commit (state felony) at the time the defendant entered the building].[8]

   [IF THE JURY IS ALSO INSTRUCTED ON THE INTENDED FELONY, IT IS SUFFICIENT TO REFER TO THAT INSTRUCTION AND NOT REPEAT IT HERE.]

[IF THE INTENDED FELONY IS NOT CHARGED, DEFINE THE CRIME, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE.]

**When Must Intent Exist?**

The intent to commit a felony must be formed before entry is made. The intent to commit (state felony) which is an essential element of burglary is no more or less than the mental purpose[9] to commit (state felony) formed at any time before the entry, which continued to exist at the time of the entry.

**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.

**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.

IF ONE OF THE AGGRAVATING FACTORS SET FORTH IN § 943.10(2) IS CHARGED AND SUPPORTED BY THE EVIDENCE, ADD WIS JI-CRIMINAL 1425A, 1425B, OR 1425C.[10]

**COMMENT**

Wis JI-Criminal 1421 was originally published in 1966 and revised in 1985, 1991, 1994, 1995, 1998, 2001, and 2020. The 2001 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment. The 2020 revision added to footnote 2 of the comment. This revision was approved by the Committee in October 2021; it added footnote 7 to the comment.

1. This instruction is drafted for burglary with the "intent to commit a felony." If "intent to steal" is charged, see Wis JI-Criminal 1421. For burglary offenses committed "while armed" or under aggravating circumstances as prohibited by § 943.10(2), see Wis JI-Criminal 1425A, 1425B, and 1425C.

In State v. O'Neill, 121 Wis.2d 300, 359 N.W.2d 906 (1984), the Wisconsin Supreme Court held that ". . . the legislature intended to include only offenses against persons and property within the felonies which could form the basis of a burglary charge" under subsec. 943.10(1)(a). O'Neill involved a burglary charge against a campus police supervisor who allegedly conducted an illegal entry and search of an apartment. The theory of prosecution was that the illegal entry and search constituted misconduct in public office which could serve as the underlying felony for the burglary charge. The supreme court reversed the burglary conviction, holding that "misconduct in public office is not the type of felony contemplated by sec. 943.10(1)."

The text of the instruction has not been changed to accommodate the O'Neill decision because the Committee concluded that the question of whether a particular felony could form the basis for a burglary charge would be one of law for the trial court rather than one of fact for the jury.

In State v. Semrau, 2000 WI APP 54, 233 Wis.2d 508, 608 N.W.2d 376, the court applied O'Neill and concluded that bail jumping could be the intended felony upon which a burglary charge can be based.

"Felon in possession of a firearm" in violation of § 941.29 is a crime against persons or property and can be the basis for the intent to commit a felony element of burglary. State v. Steele, 2001 WI APP 34, ¶ 21, 241 Wis.2d 269, 625 N.W.2d 595.

2. The model instruction is drafted for a case involving entry into a "building." It must be modified if entry involved any of the other places listed in § 943.10(1)(a) through (f): any building or dwelling; an enclosed railroad car; an enclosed portion of any ship or vessel; a locked enclosed cargo portion of a truck or trailer; a motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or a room in any of the above.

The instruction has never included a definition of "building." The meaning of the term has been considered to be the same for burglary and arson cases. In an arson case, State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991), the Wisconsin Supreme Court held it was error for the trial court to state that "a mobile home is a building." The court said this created a "mandatory conclusive presumption . . . regarding an element of the arson offense." However, the court further held that the error was harmless because it played no role in the jury's verdict:

> We conclude that no rational juror could plausibly find that the structure in question was a mobile home without also finding that the structure was a building. . . . If the jury found this structure

> to be a mobile home, as that term is commonly understood, this finding would be the 'functional equivalent' of finding that the structure was a building.

160 Wis.2d 722, 740.

In United States of America v. Franklin, 2019 WI 64, 387 Wis.2d 259, 272, 928 N.W.2d 545, the Wisconsin Supreme Court concluded that the locational alternatives provided in Wis. Stat. § 943.01(1m)(a)-(f) are alternative factual means of committing one element of burglary. Providing context to this holding, the court referenced an example previously incorporated in State v. Pinder, 2018 WI 106, ¶60, 384 Wis. 2d 416, 919 N.W.2d 568. Although the issue in Pinder concerned the validity of a search warrant issued for the placement and use of a GPS tracking device on a motor vehicle, the court did make a ruling in which it denied an ineffective assistance of counsel claim for failure to object to the burglary jury instruction Wis. JI-Criminal 1421. Addressing this claim, the court emphasized the latitude afforded in the crafting of a burglary jury instruction so as to comport with the evidence of the case, noting that:

> "[w]hile the circuit court could have used the phrase 'a room within a building' instead of the words 'office' or 'building,' the facts adduced would not confuse the jury as to what it was called upon to decide regardless of which of these words might be used." Id. at 456.

The court in Franklin cited the analysis of the statutory text, the legislative history and context of the statute, along with the nature of the conduct, and the appropriateness of multiple punishments in its conclusion that Wis. Stat. § 943.01 "identifies alternative means of committing one element of the crime of burglary under § 943.01 (1m)(a)-(f)." Franklin at 273. Furthermore, the court found that the crime of burglary does not include a separate locational element, and jury unanimity on finding guilt beyond a reasonable doubt as to locational alternatives provided in § 943.01(1m)(a)-(f) is not necessary to convict. Id. 273.

If a definition of "building" is necessary, resort to a standard dictionary may be helpful. For example, Webster's Ninth New Collegiate Dictionary provides that a "building" refers to "a usually roofed and walled structure built for permanent use (as for a dwelling)."

In Clark v. State, 69 Wis. 203, 33 N.W. 436 (1887), the issue was whether an unfinished house from which tools were taken was covered by § 4409 R.S. which made it a burglary to break "and enter in the night-time any office, shop, or any other building not adjoining or occupied with any dwelling house, or any ship, steamboat, vessel, railroad freight car or passenger car, with intent to commit the crime of larceny or other felony." The court held that the unfinished house was a "building" for purposes of burglary and defined the term as follows:

> . . . an edifice or structure erected upon land, and so far completed that it may be used temporarily or permanently for the occupation or shelter of man or beast, or for the storage of tools or other personal property for safe-keeping. . . . "The well-understood meaning of the word is a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property."

69 Wis. 203, 206-07

A more recent case discusses "building" in connection with zoning rules prohibiting "mobile homes" but allowing "modular homes" and other buildings. The person's home had been mobile once, but at the

site was affixed to a foundation and attached to utilities with steel undercarriage and trailer hitch removed. The court of appeals used the county's own definition of "building" and found that the home in question qualified:

> . . . the county relies on the terms "building" and "mobile home" to classify structures. A building is "any structure used, designed or intended to be used for the protection, shelter or enclosure of persons, animals or property." It is clear that Hansman's structure is intended for the protection, shelter and enclosure of persons.

Hansman v. Oneida Co., 123 Wis.2d 511, 513, 366 N.W.2d 901 (Ct. App. 1985).

3. The offense of burglary is complete upon the slightest entry by the defendant into any one of the places described in § 943.10(1)(a)-(f) without the consent of the person in lawful possession, when such entry is made with the required intent. The least entry with any part of the body is sufficient. State v. Barclay, 54 Wis.2d 651, 655n.10, 196 N.W.2d 745 (1972).

The crime of burglary is completed once "the defendant jimmied the lock and pushed against the door, pushing it inward, [and making] entry onto the premises. . . . Whether he stepped in or, as he testified, later reached in to close the door, would not matter. It is not how or why the door was closed that matters. It is the fact that it was opened by a person with intent to steal that furnishes both entry and intent, the prerequisite for the crime of burglary." Morones v. State, 61 Wis.2d 544, 548-49, 213 N.W.2d 31 (1973).

4. The defendant's entry into the place involved was without consent if the person in lawful possession did not consent in fact or if consent was given under the circumstances provided by Wis. Criminal Code § 939.22(48)(a)-(c). "Consent to enter which is obtained by the use or threat of force or by pretense of legal authority is in legal effect entry 'without consent.' The same ordinarily is true of consent obtained because the person giving the consent is mistaken as to the nature of the thing to which he consents. . . ." 1953 Legislative Council Committee Report on the Criminal Code, page 102.

Entry into a place when it is open to the public is not "without consent," see § 943.10(3). Thus, entry into a hotel lobby open to the public, although done with the intent to steal, is not burglary. Champlin v. State, 84 Wis.2d 621, 267 N.W.2d 295 (1978).

However, one who enters with consent may remain "at a time or place beyond his authority. 'Entry' in § 943.10(1)(a), Stats., must be construed to mean not only the simple act of passing through the outer wall of a structure but also the result of such action, namely, presence within the structure." Levesque v. State, 63 Wis.2d 412, 217 N.W.2d 317 (1974). Thus, an otherwise lawful entry became unlawful when Levesque hid himself in the false ceiling of the men's room and remained there until after the restaurant was closed.

State v. Schantek, 120 Wis.2d 79, 353 N.W.2d 832 (Ct. App. 1984), involved an entry of a gas station by an employee after regular business hours. The station closed at 9:00 p.m. and Schantek entered at around 11:30 p.m., using his own key. He took money from a cash box. The court upheld the conviction for burglary, stating that the extent of consent under these circumstances must be determined on the facts of each case:

> The task in most cases will be to determine the limits of such consent and the defendant's knowledge or lack of it.
>
> . . . . We do conclude, however, that the arrangement between Schantek and his employer clearly rendered certain presence inappropriate and thus beyond the limits of the employer's consent and Schantek's knowledge. A fair reading of the evidence does not allow for the strained conclusion that Benco gave Schantek all-encompassing consent to enter the premises at all times for all purposes – including criminal adventure. Nor does the evidence remotely allow for Schantek's claim of knowledge of such all-encompassing consent. We therefore conclude under the facts of this case that the employer did not give Schantek consent to enter the premises, and Schantek had knowledge of such nonconsent.

120 Wis.2d 79, 85.

The Schantek approach was applied in State v. Karow, 154 Wis.2d 375, 453 N.W.2d 181 (Ct. App. 1990). In Karow, the defendant claimed the entry was with consent because the victim allowed him to come into the house and use the telephone. After entering, Karow and accomplices killed the victim. The court of appeals affirmed the burglary conviction, finding that the entry was "without consent" because of an "implied limitation on the scope of the invitation to enter":

> We hold that an implied limitation on the scope of the consent to enter may be recognized, and we recognize it here. The record supports an inference, not patently incredible, that the consent Brown granted to Karow, a stranger, was limited to a specific area and a single purpose. That consent can in no way be reasonably construed to extend beyond the purpose for which it was granted.

154 Wis.2d 375, 384.

5. Under § 943.10, the question is one of lawful possession and not legal title. Ordinarily, the question of who is in lawful possession, while presenting a mixed question of law and fact, can be decided by the court as a matter of law on admitted or undisputed facts.

6. Knowledge that the entry is without consent is an element of the offense of burglary because of the standard interpretation of criminal statutes required by § 939.23(3): Where the word "intentionally" is used, "the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" The decision in Hanson v. State, 52 Wis.2d 396, 190 N.W.2d 129 (1971), is sometimes cited for the contrary position. However, Hanson involved a defendant's postconviction challenge to the validity of his guilty plea and simply held that there was an adequate factual basis for a finding that there was no consent in fact to the defendant's entry. Under such circumstances, said the court, there was no additional burden on the state to show that the defendant did not "purport to be acting under legal authority," one of the alternatives to "no consent in fact" provided in the statutory definition of without consent, § 939.22(48). Recent decisions have reaffirmed that knowledge that entry is without consent is an essential element of burglary. See State v. Schantek, supra, note 4, and State v. Wilson, 160 Wis.2d 774, 467 N.W.2d 130 (Ct. App. 1991).

7. If multiple felonies are alleged, identify and define each felony. A defendant is not entitled to a unanimity instruction regarding the felonies that form the basis of their intent to enter a dwelling. In State

v. Hammer, 216 Wis. 2d 214, 576 N.W.2d 285 (Ct. App. 1997) the court of appeals considered whether, in order to support a conviction for burglary, the jury had to be unanimous as to the predicate felony that the defendant intended to commit when entering a dwelling. The circuit court had instructed the jury that three different acts (first-degree sexual assault, armed robbery, and battery causing substantial bodily harm) were felonies but declined to instruct the jury that the verdict had to be unanimous as to the predicate felony that the defendant intended to commit. Id. at 217-18. Affirming Hammer's conviction, the court concluded that the language of Wis. Stat. § 943.10(1) "indicates that the crime is one single offense with multiple modes of commission." Id. at 220. Although there are different ways to satisfy the intent element of the crime of burglary, "the different ways do not create separate and distinct offenses." Id. at 220. Furthermore, the statute focuses on the intent to commit a felony, not any particular felony. Therefore, all the felonies are conceptually similar for the purposes of unanimity. Id. at 222.

8. The intent to commit the felony must exist at the time the defendant entered the place. It is not sufficient that the defendant formed an intent to commit the felony after entry. Such intent, however, is usually proved circumstantially by what defendant did after he entered the place.

Care must be taken to assure that the crime intended was a felony. In State v. Gilbertson, 69 Wis.2d 587, 230 N.W.2d 874 (1975), a burglary conviction was reversed because there was insufficient proof of intent to commit a felony. The underlying crime was alleged to be criminal damage to property which becomes a felony only if there is intent to reduce the property's value by the requisite felony level. The insufficiency of the evidence on this point required reversal.

9. Under the Criminal Code, the phrase "with intent to" means that the defendant either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result. Subsection 939.23(4) and Wis JI-Criminal 923A and 923B.

10. Burglary, as defined in § 943.10(1), is punished as a Class C felony. The penalty increases to a Class B felony if a burglary is committed under any of the circumstances defined in subsec. (2). The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Instructions are provided for three of the four factors identified in subsec. (2): while armed (see Wis JI-Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (see Wis JI-Criminal 1425B); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); and, while in the enclosure, the person commits a battery upon a person lawfully therein (see Wis JI-Criminal 1425C).

# 1441 THEFT — § 943.20(1)(a)

## Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(a) of the Criminal Code of Wisconsin, is committed by one who intentionally (takes and carries away) (uses) (transfers) (conceals) (retains possession of)[1] movable property of another without consent and with intent to deprive the owner permanently of possession of the property.

## 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 intentionally took and carried away movable property of another.[2]

   The term "intentionally" means that the defendant must have had the mental purpose to take and carry away property.[3]

   "Movable property" means property whose physical location can be changed.[4]

2. The owner of the property did not consent[5] to taking and carrying away the property.

3. The defendant knew that the owner did not consent.[6]

4. The defendant intended to deprive the owner permanently of the possession of the property.

**Deciding About Knowledge and Intent**

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent 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 and intent.[7]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of theft have been proved, you should find the defendant guilty.

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

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.[8]

**[Determining Value]**

[If you find the defendant guilty, answer the following question:

("Was the value of property stolen more than $100,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $10,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $5,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $2,500?"

Answer: "yes" or "no.")

"Value" means the market value of the property at the time of the theft or the replacement cost, whichever is less.[9]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[10]

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.].

**COMMENT**

Wis JI-Criminal 1441 was originally published in 1966 and revised in 1977, 1987, 1991, 1999, 2000, 2002, 2003, 2006, 2009, and 2018. This revision was approved by the Committee in February 2022; it updated footnote 10 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(a). The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. See footnote 8, below. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. The penalty increases to a Class D felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

For a general discussion of past and current Wisconsin theft statutes, see Melli & Remington, "Theft

A Comparative Analysis," 1954 Wis. L. Rev. 253; Baldwin, "Criminal Misappropriations in Wisconsin—Part I," 44 Marq. L. Rev. 253 (1960 61).

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes "ownership" and "possession" in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

Charging ten counts of theft and five counts of concealing stolen property for taking ten firearms during a burglary and concealing five of them does not violate rules prohibiting multiple charges. State v. Trawitzki, 2001 WI 77, 244 Wis.2d 523, 628 N.W.2d 801. "[T]he theft and concealment of each firearm increases the danger posed to society. Accordingly, it is appropriate to punish the taking and the concealing of each firearm separately." 2001 WI 77 ¶36.

1. One of the five alternatives in parentheses should be selected. The rest of the instruction is drafted for a case where the act is alleged to be "takes and carries away," which, in the Committee's judgment, is the most commonly charged alternative.

In State v. Genova, 77 Wis.2d 141, 252 N.W.2d 380 (1977), the Wisconsin Supreme Court approved the construction of the theft statute adopted in this instruction. A theft charge had been dismissed on the basis that the complaint charged only that the defendant had transferred property and not that he had taken the property and transferred it. The supreme court held that the complaint had been sufficient in charging only "transfer." The statute should be read as though the following "or"" appeared in it: takes and carries away, or uses, or transfers, or conceals, or retains. A violation of the statute need not include a taking from the owner.

2. Define "property of another" if necessary. The term is defined as follows in §§ 939.22(28) and 943.20(2)(c):

> 939.22(28) "Property of another" means property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property.
>
> 943.20(2)(c) "Property of another" includes property in which the actor is a co owner and property of a partnership of which the actor is a member, unless the actor and the victim are husband and wife.

3. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

4. This is based on the definition of "movable property" in § 943.20(2)(a) which provides:

(a) "Movable property" is property whose physical location can be changed, without limitation including electricity and gas, documents which represent or embody intangible rights, and things growing on, affixed to or found in land.

Section 943.20(2) defines "property" as follows:

(b) "Property" means all forms of tangible property, whether real or personal, without limitation including electricity, gas and documents which represent or embody a chose in action or other intangible rights.

5. 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.

6. Knowledge that the taking was without consent is required because the definition of this offense begins with the word "intentionally." Section 939.23(3) provides that the word "intentionally" requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally'" in the statute.

7. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

8. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000 2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18, 2018]. The penalties provided in subs. (3)(a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000 but not $100,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

2007 Wisconsin Act 64 [effective date: March 26, 2008] added the following to § 943.20(2)(d): "If the property stolen is scrap metal, as defined in s. 134.405(1)(f), 'value' also includes any costs that would be incurred in repairing or replacing any property damaged in the theft or removal of the scrap metal."

The questions in the instruction omit the upper limits of the penalty categories; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

9. This is the most often used part of the definition of "value" provided in § 943.20(2)(d). The full definition as amended by 2007 Wisconsin Act 64 and 2011 Wisconsin Act 194, reads as follows:

> Except as otherwise provided in this paragraph, "value" means the market value at the time of the theft or the cost to the victim of replacing the property within a reasonable time after the theft, whichever is less. If the property stolen is a document evidencing a chose in action or other intangible right, "value" means either the market value of the chose in action or other right or the intrinsic value of the document, whichever is greater. If the property stolen is scrap metal, as defined in s. 134.405(1)(f), or "plastic bulk merchandise container" as defined in s. 134.405(1)(em), "value" also includes any costs that would be incurred in repairing or replacing any property damaged in the theft or removal of the scrap metal or plastic bulk merchandise container. If the thief gave consideration for, or had a legal interest in, the stolen property, the amount of such consideration or value of such interest shall be deducted from the total value of the property.

The Wisconsin Supreme Court in Sartin v. State, 44 Wis.2d 138, 170 N.W.2d 727 (1969), a theft case, refused to adopt either a retail or wholesale value definition of the term "value." It is felt that in the theft statute, "[t]he statutory scheme clearly contemplates a determination of the cost of replacement to the victim." Sartin at 149.

10. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme.
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it. or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles

(valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

# 1443 THEFT BY CONTRACTOR — §§ 779.02(5) and 943.20(1)(b)

## Statutory Definition of the Crime

Theft by contractor, as defined in § 779.02(5) of the Wisconsin Construction Lien Law and in § 943.20(1)(b) of the Criminal Code of Wisconsin, is committed by one who, under an agreement for the improvement of land, receives money from the owner, and who, without consent of the owner, contrary to his or her authority, intentionally uses any of the money for any purpose other than the payment of claims due or to become due from the defendant for labor or materials used in the improvements before all claims[1] are paid[2] [in full] [or] [proportionally in cases of deficiency].[3]

## 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 five elements were present.

## Elements of the Crime That the State Must Prove

1. The defendant entered into an oral or written agreement for the improvement of land.

   (Building) (Repairing) (Altering) (_____) a (house) (garage) (_____) is an improvement of land.[4]

2. The defendant received money from the owner under the agreement for the improvement of land.[5]

["Owner" means the owner of any interest in land who, personally or through an agent, enters into a contract for the improvement of the land.]

3. The defendant intentionally used any of the money for a purpose other than the payment of claims due or to become due from the defendant for labor or materials used in the improvements before all claims were paid [in full][6] [proportionally in cases of deficiency].[7]

4. The use of the money was without the consent of the owner of the land and contrary to the defendant's authority.

5. The defendant knew that the use of the money was without the consent of the owner of the land and contrary to the defendant's authority.[8]

**Deciding About Knowledge and Intent**

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent 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 and intent.[9]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all five elements of theft by contractor have been proved, you should find the defendant guilty.

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

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD

SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[10]

**[Determining Value]**

[If you find the defendant guilty, answer the following question:

("Was the value of the money used more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $2,500?"

Answer: "yes" or "no.")

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[11]

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

**COMMENT**

Wis JI-Criminal 1443 was originally published in 1976 and revised in 1985, 1991, 1994, 2002, 2003, 2006, 2007, 2014, and 2019. The 2014 revision added references to proportional payment in cases of deficiency to the text at footnotes 3 and 7. The 2019 revision updated the text and footnote 10 to reflect a new penalty category. This revision was approved by the Committee in February 2022; it updated footnote 11 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of §§ 779.02(5) and 943.20(1)(b). The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the money used exceeds specified levels. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 10, below.

Section 779.02(5) provides that any use by a contractor of money paid for improvements except to pay the claims of those who furnished labor and materials is theft and is "punishable under sec. 943.20." Longstanding Wisconsin case law has interpreted this offense and the reference to sec. 943.20 as not simply a reference to the penalty provision but rather to the definition of theft by trustee under sec. 943.20(1)(b), thereby incorporating the elements of that offense. Pauly v. Keebler, 175 Wis. 428, 185 N.W.2d 554 (1921); State v. Halverson, 32 Wis.2d 503, 145 N.W.2d 749 (1966).

The history and development of this offense were traced in footnote 9 to the 1976 version of JI-1443. It explained the early cases as follows:

> 9. This instruction on the nature of theft by a contractor demonstrates that it is a sophisticated cousin of ordinary embezzlement. The relationship between a misappropriation by a contractor and ordinary embezzlement was first made clear in Pauly v. Keebler (1921), 175 Wis. 428, 185 N.W. 554. At that time the misappropriation by a contractor was called "embezzlement" (Wis. Stat. § 3315(3) (1921)), which corresponded to the terminology used in the criminal code at the time. Wis. Stat. § 4418 (1921).
>
> In Pauly, supra, the court indicated that the elements which are essential to an ordinary embezzlement conviction may be implied into this statute, outside the criminal code, making misappropriations by contractors illegal. 175 Wis. at 436. In that particular case, the court implied the element of wrongful intent into the contractors statute because such intent was part of the ordinary embezzlement provisions of the criminal code. Since that case, nothing has happened which indicates that the court or the legislature intended any result other than the inclusion of all essential elements of the criminal embezzlement offense in the offense of theft by a contractor. In fact, the available evidence tends to reaffirm the view expressed in Pauly. In 1955, the legislature passed a complete revision of the criminal code to be effective July 1, 1956. Chapter 696, Laws of Wisconsin (Vol. II, 1955). In section 943.20 of the code revision act, the old embezzlement statute was revised by removing the word "embezzlement" and replacing it with the word "theft," and by merging it with other misappropriation laws to make one multiparagraph section on criminal misappropriation. Section I (943.20(1)(b)), Chapter 696, Laws of Wisconsin (Vol. II, 1955). In an effort to keep the close relationship between the old embezzlement law and the embezzlement by contractors provision constant, the legislature also amended section 289.02(4) to change the word "embezzlement" to "theft" in the contractors statute. Section 55 (289.02(4), Chapter 696, Laws of Wisconsin (Vol. II, 1955). Furthermore, in State v. Halverson, (1966) 32 Wis.2d 503, 154 N.W.2d 739, the court stated that the statutes

> governing what used to be known as embezzlement in the criminal code and a statute nearly identical to the theft by contractors one involved here (Wis. Stat. § 235.701 (1965)) were to be read together. In the Halverson case, the court also indicated that the trustee referred to in the criminal code provision on misappropriation would include a contractor who held funds advanced to him pursuant to the trust created by the statute in his hands. Wis. Stat. §§ 289.02(5) or 706.11(3).

More recent cases indicate that "criminal intent," rather than "intent to defraud" is sufficient to constitute the crime, and Wis JI-Criminal 1443 now reflects this conclusion. See discussion at note 6, below.

1. Section 779.02 applies only to claims that are "not the subject of a bona fide dispute." If there is evidence of a bona fide dispute about the claims, the phrase "not the subject of a bona fide dispute" should be added immediately after the word "claims." Also see note 6, below.

2. The statement of the definition of the offense is a slightly simplified version of the full statutory text. No change in meaning is intended.

In cases involving mortgages, "proceeds of any mortgage" may be used in place of "money" and "mortgagee" used in place of or in addition to "owner." The changes would be necessary throughout the instruction.

3. Use the first phrase in brackets when there is no issue relating to proportional payment in a case involving a deficiency. Use the second phrase in brackets when there is an issue relating to proportional payment; see note 7, below. Use both phrases, connected with "or," when there is conflicting evidence about whether the case involves a deficiency.

4. If a more formal definition of "improvement" is needed, see sec. 779.01(2)(a) which provides as follows:

> (a) "Improve" or "improvement" includes any building, structure, erection, fixture, demolition, alteration, excavation, filling, grading, tiling, planting, clearing or landscaping which is built, erected, made or done on or to land for its permanent benefit. This enumeration is intended as an extension rather than a limitation of the normal meaning and scope of "improve" and "improvement."

5. This definition is adapted from the one found in sec. 779.01(2)(c).

6. The third element was affirmed as a correct statement of the law in State v. Sobkowiak, 173 Wis.2d 327, 336-39, 496 N.W.2d 620 (Ct. App. 1992): "The intent establishing the violation is the intent to use moneys subject to a trust for purposes inconsistent with the trust." No further intent – to defraud or to permanently deprive – is required. See note 8, below, which Sobkowiak cited with apparent approval.

If there is evidence in the case that the unpaid claims, or portions of the unpaid claims, were the subject of a bona fide dispute, add the following as a second paragraph of the definition of the third element:

The third element also requires that the claims for labor or materials were not the subject of a bona fide dispute. The state must prove either that there was no bona fide dispute about the claim or, that aside

from any bona fide dispute, the defendant failed to pay claims that were not disputed. A "bona fide dispute" means a dispute based on a reasonable belief about the basis for or the amount of a claim.

7. Use this bracketed material when the case involves a deficiency in the amount available to pay the lienholders. In this situation, § 779.02(5) requires that the trust fund money be paid proportionally. See, State v. Keyes, 2008 WI 54, 309 Wis.2d 516, 750 N.W.2d 30, at ¶24-34.

8. In State v. Hess, 99 Wis.2d 22, 298 N.W.2d 111 (Ct. App. 1980), the court held that theft by contractor requires only "criminal intent" and not "intent to defraud." Hess seems to indicate the "criminal intent" boils down to knowledge that the defendant is in the position of trustee and that he or she intentionally uses the money for some other purpose than paying the suppliers. Wis JI-Criminal 1443 is drafted on the premise that using the funds for any purpose other than paying off the lien claimants is theft by contractor. This position is consistent with Hess, and with other recent cases: State v. Blaisdell, 85 Wis.2d 172, 270 N.W.2d 69 (1978); State v. Wolter, 85 Wis.2d 353, 270 N.W.2d 230 (Ct. App. 1978).

The 1976 version of Wis JI-Criminal 1443 included a sixth element which emphasized that the defendant must act with intent to convert the funds to his own personal use. This element has been eliminated as possibly confusing in light of the Hess, Blaisdell, and Wolter decisions discussed above. The matter is not as clear as one would like, since Hess and Wolter both cite the 1976 version of Wis JI-Criminal 1443 with approval while reaching conclusions that are arguably inconsistent with the instruction's emphasis on "personal use." The Committee takes the position that using the trust fund money for any purpose other than paying off the lienholders is "personal use" and thus the sixth element in the 1976 instruction was redundant.

This note was cited with apparent approval in State v. Sobkowiak, note 6, supra.

In Tri-Tech Corp. v. Americomp Services, 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822 – a civil case – the court referred to the "six elements" of theft by contractor without referring to this instruction or to State v. Sobkowiak, (see note 6, supra). The Committee concluded that this reference did not require a change in the conclusion that the offense can be defined with five elements as described above.

9. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal-923A.

10. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). [In the context of this offense, the "property" is the money used for purposes other than paying the claims due.] While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

11. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

# 1443A THEFT BY CONTRACTOR: DEFENDANT IS A CORPORATE OFFICER — §§ 779.02(5) and 943.20(1)(b)

## Statutory Definition of the Crime

Theft by contractor, as defined in § 779.02(5) of the Wisconsin Construction Lien Law and in § 943.20(1)(b) of the Criminal Code of Wisconsin, is committed by one who is (an officer) (a director) (an agent) of a corporation which, under an agreement for the improvement of land, receives money from the owner, and which, without consent of the owner, contrary to its authority, intentionally uses any of the money for any purpose other than the payment of claims due or to become due from the corporation for labor or materials used in the improvements before all claims[1] are paid[2] [in full] [or] [proportionately in cases of deficiency].[3]

## 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 seven elements were present.

## Elements of the Crime That the State Must Prove

1. The defendant was (an officer) (a director) (an agent) of (name) corporation.
2. The (name) corporation entered into an oral or written agreement for the improvement of land.

(Building) (Repairing) (Altering) (_____) a (house) (garage) (_____) is an

improvement of land.

3. The (name) corporation received money from the owner under the agreement for the improvement of land.

["Owner" means the owner of any interest in land who, personally or through an agent, enters into a contract for the improvement of the land.][5]

4. The (name) corporation misappropriated money received from the owner.

"Misappropriate" means intentionally use any of the money for a purpose other than the payment of claims due or to become due from the corporation for labor or materials used in the improvements before all claims were paid[6] [in full] [or] [proportionately in cases of deficiency].[7]

5. The defendant was responsible for the misappropriation.

6. The misappropriation was without the consent of the owner of the land and contrary to the corporation's authority.

7. The defendant knew that the use of the money was without the consent of the owner of the land and contrary to the corporation's authority.[8]

**Deciding About Knowledge and Intent**

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent 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 and intent.[9]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all seven elements of theft by contractor have been proved, you should find the defendant guilty.

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

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[10]

**[Determining Value]**

[If you find the defendant guilty, answer the following question:

("Was the value of the money used more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $2,500?"

Answer: "yes" or "no.")

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[11]

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

**COMMENT**

Wis JI-Criminal 1443A was originally published in 2008 and revised in 2019. This revision was approved by the Committee in February 2022; it updated footnote 11 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is drafted for violations of §§ 779.02(5) and 943.20(1)(b) that involve the third sentence of § 779.02(5) which provides for liability of corporate officers, etc., if the prime contractor is a corporation:

> If the prime contractor or subcontractor is a corporation, limited liability company, or other legal entity other than a sole proprietorship, such misappropriation also shall be deemed theft by any officers, directors, members, partners, or agents responsible for the misappropriation.

The instruction is drafted for violations involving an officer, director, or agent of a corporation. The statute also applies to "members" and "partners" of a "limited liability company, or other legal entity other than a sole proprietorship." If other alternatives are involved, the instruction must be modified accordingly.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the money used exceeds specified levels. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 10, below.

Section 779.02(5) provides that any use by a contractor of money paid for improvements except to pay the claims of those who furnished labor and materials is theft and is "punishable under sec. 943.20." Longstanding Wisconsin case law has interpreted this offense and the reference to sec. 943.20 as not simply a reference to the penalty provision but rather to the definition of theft by trustee under sec. 943.20(1)(b), thereby incorporating the elements of that offense. Pauly v. Keebler, 175 Wis. 428, 185 N.W.2d 554 (1921); State v. Halverson, 32 Wis.2d 503, 145 N.W.2d 749 (1966).

The history and development of this offense are discussed in the Comment, Wis JI-Criminal 1443.

1. Section 779.02 applies only to claims that are "not the subject of a bona fide dispute." If there is

evidence of a bona fide dispute about the claims, the phrase "not the subject of a bona fide dispute" should be added immediately after the word "claims." Also see note 6, below.

2. The statement of the definition of the offense is a slightly simplified version of the full statutory text. No change in meaning is intended.

In cases involving mortgages, "proceeds of any mortgage" may be used in place of "money" and "mortgagee" used in place of or in addition to "owner." The changes would be necessary throughout the instruction.

3. Use the first phrase in brackets when there is no issue relating to proportional payment in a case involving a deficiency. Use the second phrase in brackets when there is an issue relating to proportional payment; see note 7, below. Use both phrases, connected with "or," when there is conflicting evidence about whether the case involves a deficiency.

4. If a more formal definition of "improvement" is needed, see sec. 779.01(2)(a) which provides as follows:

> (a) "Improve" or "improvement" includes any building, structure, erection, fixture, demolition, alteration, excavation, filling, grading, tiling, planting, clearing or landscaping which is built, erected, made or done on or to land for its permanent benefit. This enumeration is intended as an extension rather than a limitation of the normal meaning and scope of "improve" and "improvement."

5. This definition is adapted from the one found in sec. 779.01(2)(c).

6. This element was affirmed as a correct statement of the law in State v. Sobkowiak, 173 Wis.2d 327, 336-39, 496 N.W.2d 620 (Ct. App. 1992): "The intent establishing the violation is the intent to use moneys subject to a trust for purposes inconsistent with the trust." No further intent – to defraud or to permanently deprive – is required. See note 8, below, which Sobkowiak cited with apparent approval.

If there is evidence in the case that the unpaid claims, or portions of the unpaid claims, were the subject of a bona fide dispute, add the following as a second paragraph of the definition of the third element:

> The third element also requires that the claims for labor or materials were not the subject of a bona fide dispute. The state must prove either that there was no bona fide dispute about the claim or, that aside from any bona fide dispute, the defendant failed to pay claims that were not disputed. A "bona fide dispute" means a dispute based on a reasonable belief about the basis for or the amount of a claim.

7. Use this bracketed material when the case involves a deficiency in the amount available to pay the lienholders. In this situation, § 779.02(5) requires that the trust fund money be paid proportionally. See, State v. Keyes, 2008 WI 54, 309 Wis.2d 516, 750 N.W.2d 30, at ¶24-34.

8. In State v. Hess, 99 Wis.2d 22, 298 N.W.2d 111 (Ct. App. 1980), the court held that theft by contractor requires only "criminal intent" and not "intent to defraud." Hess seems to indicate the "criminal intent" boils down to knowledge that the defendant is in the position of trustee and that he or she intentionally uses the money for some other purpose than paying the suppliers. Wis JI-Criminal 1443 is

drafted on the premise that using the funds for any purpose other than paying off the lien claimants is theft by contractor. This position is consistent with Hess, and with other recent cases: State v. Blaisdell, 85 Wis.2d 172, 270 N.W.2d 69 (1978); State v. Wolter, 85 Wis.2d 353, 270 N.W.2d 230 (Ct. App. 1978).

The 1976 version of Wis JI-Criminal 1443 included a sixth element which emphasized that the defendant must act with intent to convert the funds to his own personal use. This element has been eliminated as possibly confusing in light of the Hess, Blaisdell, and Wolter decisions discussed above. The matter is not as clear as one would like, since Hess and Wolter both cite the 1976 version of Wis JI-Criminal 1443 with approval while reaching conclusions that are arguably inconsistent with the instruction's emphasis on "personal use." The Committee takes the position that using the trust fund money for any purpose other than paying off the lienholders is "personal use" and thus the sixth element in the 1976 instruction was redundant.

This note was cited with apparent approval in State v. Sobkowiak, note 6, supra.

In Tri-Tech Corp. v. Americomp Services, 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822 – a civil case – the court referred to the "six elements" of theft by contractor without referring to this instruction or to State v. Sobkowiak, (see note 6, supra). The Committee concluded that this reference did not require a change in the conclusion that the offense can be defined with five elements as described above.

9. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

10. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957).

[In the context of this offense, the "property" is the money used for purposes other than paying the claims due.] While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18, 2018]. The penalties provided in subs. (3)(a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class

G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

11. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single

or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

# 1444 THEFT BY EMPLOYEE, TRUSTEE, OR BAILEE (EMBEZZLEMENT) — § 943.20(1)(b)

## Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(b) of the Criminal Code of Wisconsin, is committed by one who,[1] by virtue of his or her employment, has possession of money belonging to another and intentionally uses[2] the money without the owner's consent, contrary to his or her authority, and with intent to convert it to [his or her own use] [the use of another].

## 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 had possession of money belonging to another because of (his) (her) employment.[3]
2. The defendant intentionally used the money without the owner's consent and contrary to the defendant's authority.

   The term "intentionally" means that the defendant must have had the mental purpose to use the money without the owner's consent[4] and contrary to the defendant's authority.[5]
3. The defendant knew that the use of the money was without the owner's consent

and contrary to the defendant's authority.[6]

4. The defendant intended to convert the money to [(his) (her) own use] [the use of any other person].[7]

**Deciding About Knowledge and Intent**

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent 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 and intent.[8]

**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.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[9]

**[Determining Value]**

[If you find the defendant guilty, answer the following question:

("Was the value of the money used more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $2,500?"

Answer: "yes" or "no.")

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[10]

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

**COMMENT**

Wis JI-Criminal 1444 was originally published in 1966 and revised in 1991, 1994, 2002, 2003, 2006, and 2019. This revision was approved by the Committee in February 2022; it updated the text and footnote 10 to reflect a new sub category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(b). For theft by contractor offenses involving the combination of § 943.20(1)(b) with § 779.02(5), see Wis JI-Criminal 1443.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the money used exceeds specified amounts. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 9, below.

The four elements used in this instruction have been cited as a correct breakdown of this offense. See, State v. Halverson, 32 Wis.2d 503, 509, 145 N.W.2d 739 (1966); State v. Blaisdell, 85 Wis.2d 172, 176, 270 N.W.2d 69 (1978).

The essential distinction between a violation of section 943.20(1)(a) and section 943.20(1)(b) of the Criminal Code is that, under subsection (1)(a), the intention to return the property is a defense; whereas, under subsection (1)(b), an intention to return the property is not a defense since an intent to deprive the owner permanently is not essential to constitute the offense. Baldwin, "Criminal Misappropriations in Wisconsin – Part I," 44 Marq. L. Rev. 253, 275 (1960-1961). A distinction between theft under subsection (1)(b) and subsection (1)(d) is that, under the former section, the defendant has obtained only possession of the property; whereas, under the latter section, the defendant has obtained title to the property by false pretenses. See State v. Burke, 189 Wis. 641, 207 N.W. 406 (1926).

1. The summary of this offense in the first paragraph, and the elements of the instruction, represent a considerable simplification of a rather complex statutory definition. "By virtue of his employment" could be replaced by any of the following: "by virtue of his office"; "by virtue of his business"; "as a trustee"; or "as a bailee." "Having possession" is a choice over "having possession or custody." "Money" is one of several options, the others being "negotiable security," "instrument," "paper," or "other negotiable writing of another." If the theft of something other than money is involved, it may be necessary to define "value." See § 943.20(2)(d). "Uses" was selected rather than "transfers," "conceals," or "retains possession of." But see note 4, below. Finally, the statute also provides an alternative to "convert to his own use": "to the use of any other person except the owner." Rather than carry all these alternatives in parentheses throughout the instruction, the Committee concluded it was more efficient to select the simpler statement that ought to be general enough to cover the most common cases.

2. If the charge does not specify one of the alternatives in the statute – "use, transfer, conceal or retain possession of" – the jury instruction should either elect one of the alternatives or advise the jury they must unanimously agree if more than one alternative is submitted. In State v. Seymour, 183 Wis.2d 683, 515 N.W.2d 874 (1994), the Wisconsin Supreme Court held that it was error to instruct the jury in the disjunctive – "used, transferred, concealed or retained possession of . . ." – without requiring the jury to agree unanimously on which alternative applied. Rather, the statute "uses words which were intended to describe independent offenses rather than simply delineating methods by which the same offense may be committed." 183 Wis.2d 683, 685. This affirmed the court of appeals, which had reached the same conclusion. See 177 Wis.2d 305, 502 N.W.2d 591 (Ct. App. 1993). [See Wis JI-Criminal 517 for a suggested instruction requiring jury agreement.].

3. The Committee concluded that the general phrase, "because of (his) (her) employment," will be preferable in most cases to using one of the more specific statutory terms – "office," "business," "trustee," or "bailee." See note 1, supra.

However, in a case involving a bailment, it may be necessary for the court to give the jury additional instruction in the light of the particular facts of the case. The situations here are so varied that the Committee has not attempted to set forth a standard definition, and the necessity and form for an instruction in that respect must be determined on a case-by-case basis. See Burns v. State, 145 Wis. 373, 380, 128 N.W. 987 (1911). Whether the relationship of bailee or trustee or the like is created does, however, sometimes present a question of fact. No particular ceremony is necessary for the creation of such a relationship under the Criminal Code. In Burns v. State, supra, the supreme court said, in part, at page 380:

> It seems to be thought that a bailment was not established by the evidence because some sort of contract inter partes was essential thereto. No particular ceremony or actual meeting of minds is necessary to the creation of a bailment. If one, without the trespass which characterizes ordinary larceny, comes into possession of any personalty of another and is in duty bound to exercise some degree of care to preserve and restore the thing to such other or to some person for that other, or otherwise account for the property as that of such other, according to circumstances, – he is a bailee. It is the element of lawful possession, however created, and duty to account for the thing as the property of another, that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense or not.

What constitutes a "bailment" was discussed in State v. Kuhn, 178 Wis.2d 428, 504 N.W.2d 405 (Ct. App. 1993). Kuhn affirmed the conviction of the owner of an auction gallery who took in goods consignment, sold them, and then failed to pay the person who consigned the goods to her. Her business was failing, and she apparently used the full sale proceeds to pay off debts. The court held that this consignment arrangement did constitute a "bailment" for purpose of § 943.20(1)(b), rejecting the defendant's argument that the formal definition of "bailment" in the Uniform Commercial Code should apply.

4. The defendant accused of this offense has by definition been given consent to hold or use the property for some purpose. It is the use beyond the scope of this consent that is the essence of this crime. Consent to the use of property may be expressed or implied and may result from words or from conduct involving a course of dealings between the parties. See Boyd v. State, 217 Wis. 149, 258 N.W. 330 (1935).

Liabilities growing out of a debtor-creditor relationship cannot be made the basis of the charge of theft. See Hanser v. State, 217 Wis. 587, 592, 259 N.W. 418 (1935). Also see Peters v. State, 42 Wis.2d 541, 167 N.W.2d 250 (1969), where the evidence was found to be sufficient to establish that a loan did not exist.

5. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

In State v. Bryzek, 2016 WI App 48, 370 Wis.2d 237, 882 N.W.2d 483, the trial court added to the standard instruction to include a definition of "power of attorney" in connection with the "contrary to the defendant's authority" element. The court of appeals reversed the conviction because the statute upon which the definition was based was not enacted until after the date of the offense.

6. The word "intentionally," as defined by § 939.23(3), requires "knowledge of those facts necessary to make the conduct criminal" and which appear after the word "intentionally" in the statute.

7. Under section 943.20(1)(b), an intent to pay back the money or restore the property at a later time is not a defense even though such intent existed contemporaneously with the act of conversion. Boyd v. State, supra; McGeever v. State, 239 Wis. 87, 93-94, 300 N.W. 486 (1941).

The evidence was found sufficient to establish "intent to convert to one's own use" in State v. Doss, 2008 WI 93, ¶¶57-64, 312 Wis.2d 570, 754 N.W.2d 150. Also see State v. Kuhn, 178 Wis.2d 426, 505 N.W.2d 405 (Ct. App. 1993).

The jury is under no obligation to accept direct evidence of intent furnished by the defendant, and it may infer intent from such of the defendant's acts as objectively evidence his state of mind. State v. Kuenzli, 208 Wis. 340, 346, 242 N.W. 147 (1932). In Boyd v. State, supra, the supreme court said ". . . acts intentionally committed under circumstances such as to constitute a crime are not justified by the claim of innocent intent." Boyd, 217 Wis. at 163.

Section 943.20(1)(b) includes a provision establishing refusal to deliver the property upon demand as "prima facie evidence" of intent to convert to his own use. The last sentence of that subsection provides:

> A refusal to deliver any money or a negotiable security, instrument, paper or other negotiable writing, which is in his possession or custody by virtue of his office, business or employment, or as trustee or bailee, upon demand of the person entitled to receive it, or as required by law, is prima facie evidence of an intent to convert to his own use within the meaning of this paragraph.

Wis JI-Criminal 225 provides a recommended model for implementing "prima facie evidence" provisions.

The definition of "conversion" is discussed in the context of a civil case in Kozak v. United States Fidelity & Guaranty Co., 120 Wis.2d 462, 355 N.W.2d 362 (Ct. App. 1984).

8. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

9. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for

example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

10. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser

> included charges, see: Devroy v. State (1942), 239 Wis. 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

# 1450 THEFT BY ONE HAVING AN UNDISPUTED INTEREST IN PROPERTY FROM ONE HAVING SUPERIOR RIGHT OF POSSESSION — § 943.20(1)(c)

## Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(c) of the Criminal Code of Wisconsin, is committed by one who, having a legal interest in movable property, intentionally and without consent, takes the property out of the possession of a person having a superior right of possession[1] with intent thereby to deprive that person permanently of possession of the property.

## 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 five elements were present.

## Elements of the Crime That the State Must Prove

1. The defendant intentionally took movable property out of the possession of (name person who had possession).

   The term "intentionally" means that the defendant must have had the mental purpose to take movable property.[2]

   "Movable property" means property whose physical location can be changed.[3]

2. (Name person who had possession) had a right of possession of the property superior to that of the defendant.

3. (Name person who had possession) did not consent[4] to the defendant taking the

property.

4. The defendant knew that (name person who had possession) had a right of possession superior to defendant's and knew that (name person who had possession) did not consent to taking the property.[5]

5. The defendant took the property with intent thereby to deprive (name person who had possession) permanently of the possession of the property.

**Deciding About Knowledge and Intent**

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent 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 and intent.[6]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all five 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.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.[7]

**[Finding Value]**

[If you find the defendant guilty, answer the following question:

("Was the value of property stolen more than $100,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $10,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $5,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $2,500?"

Answer: "yes" or "no.")

"Value" means the market value of the property at the time of the theft or the replacement cost, whichever is less.[8]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[9]

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

**COMMENT**

Wis JI-Criminal 1450 was originally published in 1966 and revised in 1992, 2002, 2006, and 2019. This revision was approved by the Committee in February 2022; it updated the text and footnote 9 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(c). The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 7, below. The penalty increases to a Class D felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes "ownership" and "possession" in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

1. The instruction does not include the statutory alternative of "pledgee," assuming that the broader statement is sufficient in most cases. If a pledge situation is involved, the term should be defined for the jury. No standard definition is offered because the facts of each case will need to be included.

2. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

3. This is based on the definition of "movable property" in § 943.20(2)(a) which provides:

> (a) "Movable property" is property whose physical location can be changed, without limitation including electricity and gas, documents which represent or embody intangible rights, and things growing on, affixed to or found in land.

Section 943.20(2) defines "property" as follows:

> (b) "Property" means all forms of tangible property, whether real or personal, without limitation including electricity, gas and documents which represent or embody a chose in action or other intangible rights.

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. Knowledge that the other person had a superior right of possession and that the taking was without consent is required because the definition of this offense begins with the word "intentionally." Section 939.23(3) provides that the word "intentionally" requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally'" in the statute.

6. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

7. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

8. This is the most often used part of the definition of "value" provided in § 943.20(2)(d). The full definition follows:

"Value" means that market value at the time of the theft or the cost to the victim of replacing the property within a reasonable time after the theft, whichever is less, but if the property stolen is a document evidencing a chose in action or other intangible right, value means either the market value of the chose in action or other right or the intrinsic value of the document, whichever is greater. If the thief gave consideration for, or had a legal interest in, the stolen property, the amount of such consideration or value of such interest shall be deducted from the total value of the property.

The Wisconsin Supreme Court in Sartin v. State, 44 Wis.2d 138, 170 N.W.2d 727 (1969), a theft case, refused to adopt either a retail or wholesale value definition of the term "value." It is felt that in the theft statute, "[t]he statutory scheme clearly contemplates a determination of the cost of replacement to the victim." Sartin at 149.

9. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis. 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

# 1453A THEFT BY FRAUD: REPRESENTATIONS MADE TO THE OWNER, DIRECTLY OR BY A THIRD PERSON — § 943.20(1)(d)

## Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(d) of the Criminal Code of Wisconsin, is committed by one who obtains title to property of another person by intentionally deceiving that person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made.

## 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 seven elements were present.

## Elements of the Crime That the State Must Prove

1. (Name) was the owner of property.

2. The defendant made a false representation to the owner.

   This requires that the false representation be one of past or existing fact. It does not include expressions of opinions or representations of law.[1]

   ADD THE FOLLOWING IF THE ALLEGED REPRESENTATION WAS MADE TO A THIRD PERSON.[2]

   [It is not required that the defendant directly communicated with the owner. The defendant is responsible for a statement made to a third person if the defendant intended or had reason to expect that the statement would be repeated to, or its

substance communicated to, the owner and that it would influence the owner's conduct in the transaction.]

IF THERE WAS A PROMISE IN ADDITION TO THE REPRESENTATION OF PAST OR EXISTING FACT, ADD THE FOLLOWING PARAGRAPH USING "ALSO INCLUDES." IF THE ONLY REPRESENTATION WAS A PROMISE, STRIKE THE PREVIOUS TWO SENTENCES AND GIVE THE FOLLOWING PARAGRAPH INSTEAD, USING "IN THIS CASE MEANS."

[A false representation (also includes) (in this case means) a promise made with intent not to perform it, if the promise is a part of a false and fraudulent scheme.][3]

3. The defendant knew the representation was false.

4. The defendant made the representation with intent to deceive and to defraud the owner.

This requires that the defendant made the representations with the purpose to deceive and defraud the owner or that the defendant was practically certain that (his) (her) representations would deceive and defraud the owner.

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE:

[It is not required that the defendant knew the identity of the owner.][4]

5. The defendant obtained title[5] to the property of the owner by the false representation.

IF MONEY WAS OBTAINED, USE THE FOLLOWING:

[Money is property. Title to money is obtained by gaining possession.]

IF PROPERTY OTHER THAN MONEY WAS OBTAINED, USE THE FOLLOWING:

[Title to property may be obtained by [execution and delivery of a (deed) (bill of sale) (conditional sales contract) (land contract) (assignment) (other instrument transferring ownership)] [sale and delivery of the property] [gift] [gaining possession of property through a lease.][6]

6. The owner was deceived by the representation.

"Deceived" means "misled."

7. The owner was defrauded by the representation.

This requires that the owner did in fact part with title to property in reliance (at least in part) on the false representation.[7]

**Deciding About Intent**

You cannot look into a person's mind to find intent. Intent 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.[8]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all seven 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.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE OR OTHER FACT MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE PROPERTY WAS MORE THAN THE AMOUNT STATED IN THE

QUESTION. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.[9]

**[Determining Value]**

[If you find the defendant guilty, answer the following question:

("Was the value of the property obtained more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $2,500?"

Answer: "yes" or "no.")

"Value" means the market value of the property at the time of the theft or the replacement cost, whichever is less.[10]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[11]

[In determining the value of the property obtained, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

**COMMENT**

This instruction is based on Wis JI-Criminal 1453, which was originally published in 1967 and revised in 1977, 1983, 1988, 1991, 2003, 2006, and 2019. This revision was approved by the Committee in February 2022; it updated footnote 11 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(d) that involve representations made to the owner of the property. If representations were made to an agent of the owner, see Wis JI-Criminal 1453B. Representations communicated via a third person do not necessarily involve an agency relationship. See State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, discussed in footnote 2, below.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 9, below. The penalty increases to a Class H felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes "ownership" and "possession" in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

Multiple counts of theft by fraud were found to be appropriate when each required proof of a fact the other did not. State v. Swinson, 2003 WI App 45, 261 Wis.2d 633, 660 N.W.2d 12.

It is lawful to charge theft by fraud in violation of § 943.20(1)(d) where a more specific statute may apply – in this case, § 98.15(1), which makes it a misdemeanor to manipulate the quality of milk samples. State v. Ploeckelman, 2007 WI App 31, 199 Wis.2d 251, 729 N.W.2d 784.

1. It is generally held that the representation must be one of fact (Corscott v. State, 178 Wis. 661, 671, 190 N.W. 465 (1922)) and that a representation of law or an opinion does not fall within the statute. 32 Am. Jur. False Pretenses §§ 15 and 17 (1939). The difficulty, however, is in drawing the distinction between representation of "facts" and representations of "opinions" or "law." Declarations of value, it has been held, can be fraud (United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932)) and whether a statement is one of fact or of law may be a close question. See Melli and Remington, "Theft - A Comparative Analysis," 1954 Wis. L. Rev. 253, 263-65; Baldwin, "Criminal Misappropriations in Wisconsin - Part I," 44 Marq. L. Rev. 253, 282-87 (1960-61).

Conduct can constitute a "representation" under the theft by fraud statute. State v. Ploeckelman 2007 WI App 31, 199 Wis.2d 251, 729 N.W.2d 784.

"[P]roviding fictitious business names and stolen personal identifying information to a phone company as a way of avoiding payment falls within the meaning of 'false representation.'" State v. Steffes, 2013 WI 33, ¶4, 347 Wis.2d 683, 832 N.W.2d 101.

2. This material is intended to reflect the decision in State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, which held that the theft by fraud statute applies in a case where the defendant did not

communicate directly with the victim of his fraudulent scheme. Communication was achieved via a third person, whom, the court concluded, was not the agent of the defendant or the victim. The court relied on the Restatement (Second) of Torts which recognizes "civil liability for misrepresentation where it is foreseeable and intended that a fraudulent misrepresentation will be repeated to third parties and acted upon by them." 2002 WI App 304, ¶ 31. Though the decision addressed plea withdrawal, it appears to be clear authority for the proposition that the same rule is sufficient for criminal liability.

3. Section 943.20(1)(d) changed old case law to the effect that a false promise was not sufficient to satisfy the statute. See, e.g., State ex rel. Labuwi v. Hathaway, 168 Wis. 518, 170 N.W. 654 (1919). The false promise must be part of a "false and fraudulent scheme." This means that the defendant must have made the promise without any intention of carrying the promise out and for the purpose of causing the victim to part with his property. The mere failure to carry out the promise alone is, necessarily, not sufficient to support a conviction. See Melli and Remington, "Theft – A Comparative Analysis," 1954 Wis. L. Rev. 253, 271; Platz, "The Criminal Code," 1956 Wis. L. Rev. 350, 374-75; Baldwin, "Criminal Misappropriations in Wisconsin – Part I," 44 Marq. L. Rev. 253, 283-84 (1960-61). One example that the drafters of the Criminal Code had in mind was that of unscrupulous building contractors who accepted a down payment on a house they did not intend to build. See 1953 Report on the Criminal Code, p. 112. The contractor's failure to act (failure to build the house) may be considered in trying to decide whether the contractor intended not to perform the promise (to build the house) at the time the promise was made. It would be appropriate to add a reference to "failure to act" to "Deciding About Intent" paragraph of the instruction.

4. The Committee concluded that the defendant need not know the identity of the person who was ultimately defrauded, as where, for example, the fraudulent representations are not made directly to the ultimate victim. See, for example, State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, discussed in footnote 2, supra.

5. It is the opinion of the Committee that it is unnecessary that the defendant obtain full legal title to support a conviction under this section, although the section does specifically refer to obtaining "title." Obtaining property under a conditional sales contract, for example, would support a conviction under this section. See Whitmore v. State, 238 Wis. 79, 298 N.W. 194 (1941); Baldwin, "Criminal Misappropriations in Wisconsin - Part I," 44 Marq. L. Rev. 253, 280-81 (1960-61). Also see note 6, below.

"Property" is defined in § 943.20(2)(b). In State v. Steffes, 2013 WI 33, ¶¶8 and 26, 347 Wis.2d 683, 832 N.W.2d 101, the court answered "yes" to the following question: "[W]hether the applied electricity that AT&T uses to power its network is included in the definition of 'property' under § 943.20(2)(b)."

"Property of another" is defined by §§ 939.22(28) and 943.20(2)(d).

The proper construction of "obtains title" was discussed by the Wisconsin Court of Appeals in State v. O'Neil, 141 Wis.2d 535, 416 N.W.2d 77 (Ct. App. 1987). The O'Neil decision held that the defendant need not personally receive title to the property to satisfy the statute's requirement that title be "obtained." The court noted that the version of Wis JI-Criminal 1453 then in effect was inconsistent with this holding since it defined the fourth element as requiring that "there must have been a transfer of title from the owner to the defendant." The 1988 revision of the instruction deletes that phrase.

In the O'Neil case, the defendant was the interim director of a corporation that did business with Eau Claire County. Based on records altered by the defendant, the county was overbilled. The funds so obtained

were deposited in the corporation's account. The court of appeals held that O'Neil "obtained" the money even though she did not directly receive it herself:

> If a person induces another to part with money by fraudulent misrepresentations, then title to that property has been obtained within the meaning of the statute. The crime is complete when the title has been obtained. 141 Wis.2d 535, 536-37.

For a case like O'Neil, a definition of "obtains" would apparently be acceptable if it provided: "'Obtains' means to induce another to part with title to property." In the Committee's judgment, depending on the facts of the case, that definition might not go far enough. The common meaning of "obtains" appears to have two aspects: relinquishing of title by the owner and receipt by someone else. It is the receipt aspect that O'Neil leaves open. It was not a problem in O'Neil because of the defendant's close connection with the actual recipient of the money (director of the corporation). It could be argued that a complete definition ought to include an expression of the required relationship between the defendant and the actual recipient.

6. In State v. Meado, 163 Wis.2d 789, 472 N.W.2d 567 (Ct. App. 1991), the court concluded that "the phrase 'obtains title to property,' as used in § 943.20(1)(d), Stats., is intended to include cases where a person induces another to part with property under a lease agreement by fraudulent representation." 163 Wis.2d 789, 799. Meado had obtained a van from a dealer under a lease agreement. He gave the dealer a check as the down payment and the check bounced. The check was written on an account that was closed before the check was written; Meado had also given a false home address to the dealer. The court said that Meado had gained the benefit of the van through false representation, thereby violating "the leading idea" of the statute which is "to prohibit the deprivation of the owner's property by fraudulent, non-violent means." 163 Wis.2d 789, 798.

7. Section 943.20(1)(d) requires that the defendant obtain title to the property by deceiving the victim and that the victim be defrauded by the false representation. See Frank v. State ex rel. Meiers, 244 Wis. 658, 660, 12 N.W.2d 923 (1944); Palotta v. State, 184 Wis. 290, 199 N.W. 72 (1924). The victim is not under a duty to investigate the truth of the representations, and any negligence by the victim in not discovering the fraud is not a defense. See State v. Lambert, 73 Wis.2d 590, 243 N.W.2d 524 (1976); State v. Lunz, 86 Wis.2d 695, 273 N.W.2d 767 (1979); and Palotta v. State, supra.

What now appears at elements 6 and 7 was revised in 1983 as suggested by State v. Kennedy, 105 Wis.2d 625, 314 N.W.2d 884 (Ct. App. 1981). Kennedy also held that an ultimate financial loss by the victim is not required: ". . . the victim's final accounting is irrelevant." 105 Wis.2d at 640.

8. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A. If the case involves a promise made with intent not to perform it, it is appropriate to add reference to "failure to act" to this paragraph. See footnote 3, supra.

9. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

10. Section 943.20(2)(d).

11. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles

(valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis. 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.
>
> 71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

# 1453B THEFT BY FRAUD: REPRESENTATIONS MADE TO AN AGENT — § 943.20(1)(d)

## Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(d) of the Criminal Code of Wisconsin, is committed by one who obtains title to property of another person by intentionally deceiving an agent of that person with a false representation which is known to be false, made with intent to defraud, and which does defraud the owner of the property.

## 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 eight elements were present.

## Elements of the Crime That the State Must Prove

1. (Name) was the owner of property.

2. (Name) was the agent of the owner.

   An agent is a person authorized to act on the owner's behalf.[1]

3. The defendant made a false representation to the agent.

   This requires that the false representation be one of past or existing fact. It does not include expressions of opinions or representations of law.[2]

   IF THERE WAS A PROMISE IN ADDITION TO THE REPRESENTATION OF PAST OR EXISTING FACT, ADD THE FOLLOWING PARAGRAPH USING "ALSO INCLUDES." IF THE ONLY REPRESENTATION WAS A PROMISE, STRIKE THE

PREVIOUS TWO SENTENCES AND GIVE THE FOLLOWING PARAGRAPH INSTEAD, USING "IN THIS CASE MEANS."

[A false representation (also includes) (in this case means) a promise made with intent not to perform it, if the promise is a part of a false and fraudulent scheme.][3]

4. The defendant knew the representation was false.

5. The defendant made the representation with intent to deceive the agent and to defraud the owner.

This requires that the defendant made the representation with the purpose to deceive the agent and defraud the owner or that the defendant was practically certain that (his) (her) representation would deceive the agent and defraud the owner.

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE:

[It is not required that the defendant knew the identity of the owner.][4]

6. The defendant obtained title[5] to the property of the owner by making the false representation to the agent.

IF MONEY WAS OBTAINED, USE THE FOLLOWING:

[Money is property. Title to money is obtained by gaining possession.]

IF PROPERTY OTHER THAN MONEY WAS OBTAINED, USE THE FOLLOWING:

[Title to property may be obtained by [execution and delivery of a (deed) (bill of sale) (conditional sales contract) (land contract) (assignment) (other instrument

transferring ownership)] [sale and delivery of the property] [gift] [gaining possession of property through a lease.][6]

7. The agent was deceived by the representation.

"Deceived" means "misled."

8. The owner was defrauded by the representation.

This requires that the owner of property did in fact part with title to property in reliance (at least in part) on the false representation.[7]

**Deciding About Intent**

You cannot look into a person's mind to find intent. Intent 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.[8]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all eight 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.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE OR OTHER FACT MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE PROPERTY WAS MORE THAN THE AMOUNT STATED IN THE QUESTION. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.[9]

**[Determining Value]**

[If you find the defendant guilty, answer the following question:

("Was the value of the property obtained more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the property obtained more than $2,500?"

Answer: "yes" or "no.")

"Value" means the market value of the property at the time of the theft or the replacement cost, whichever is less.[10] Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[11]

[In determining the value of the property obtained, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

**COMMENT**

This instruction is based on Wis JI-Criminal 1453, which was originally published in 1967 and revised in 1977, 1983, 1988, 1991, 2003, 2006, 2019. This revision was approved by the Committee in February 2022; it updated footnote 11 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(d) that involve representations made to the agent of the owner of the property. If representations were made directly to the owner, see Wis JI-Criminal 1453A. Representations communicated via a third person do not necessarily involve an agency relationship. See State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, discussed in footnote 2, Wis JI-Criminal 1453A.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 9, below. The penalty increases to a Class H felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes "ownership" and "possession" in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

Multiple counts of theft by fraud were found to be appropriate when each required proof of a fact the other did not. State v. Swinson, 2003 WI App 45, 261 Wis.2d 633, 660 N.W.2d 12.

1. A fraudulent representation may be communicated via a third person without that third person being an agent of the defendant or the owner. See, for example, State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, discussed in footnote 2, Wis JI-Criminal 1453A.

2. A false representation to an agent of the owner is within the statute. The Committee is of the opinion that if the representation is made in writing, addressed to a corporation or a partnership, etc., it is made directly to the owner, but if addressed to an officer or employee, it is made to an agent of the owner.

3. See § 943.20(1)(d). The statute changes old case law to the effect that a false promise was not sufficient to satisfy the statute. See, e.g., State ex rel. Labuwi v. Hathaway, 168 Wis. 518, 170 N.W. 654 (1919). The false promise must be part of a "false and fraudulent scheme." § 943.20(1)(d). This means that the defendant must have made the promise without any intention of carrying the promise out and for the purpose of causing the victim to part with his property. The mere failure to carry out the promise alone is, necessarily, not sufficient to support a conviction. See Melli and Remington, "Theft – A Comparative Analysis," 1954 Wis. L. Rev. 253, 271; Platz, "The Criminal Code," 1956 Wis. L. Rev. 350, 374-75; Baldwin, "Criminal Misappropriations in Wisconsin – Part I," 44 Marq. L. Rev. 253, 283-84 (1960-61).

4. The Committee concluded that the defendant need not know the identity of the person who was ultimately defrauded, as where, for example, the fraudulent representations are not made directly to the ultimate victim. See, for example, State v. Timblin, 2002 WI App 304, 259 Wis.2d 299, 657 N.W.2d 89, discussed in footnote 2, Wis JI-Criminal 1453A.

5. It is the opinion of the Committee that it is unnecessary that the defendant obtain full legal title to support a conviction under this section, although the section does specifically refer to obtaining "title." Obtaining property under a conditional sales contract, for example, would support a conviction under this section. See Whitmore v. State, 238 Wis. 79, 298 N.W. 194 (1941); Baldwin, "Criminal Misappropriations in Wisconsin - Part I," 44 Marq. L. Rev. 253, 280-81 (1960-61). Also see note 6, below.

"Property of another" is defined by §§ 939.22(28) and 943.20(2)(d).

The proper construction of "obtains title" was discussed by the Wisconsin Court of Appeals in State v. O'Neil, 141 Wis.2d 535, 416 N.W.2d 77 (Ct. App. 1987). The O'Neil decision held that the defendant need not personally receive title to the property to satisfy the statute's requirement that title be "obtained." The court noted that the version of Wis JI-Criminal 1453 then in effect was inconsistent with this holding since it defined the fourth element as requiring that "there must have been a transfer of title from the owner to the defendant." The 1988 revision of the instruction deletes that phrase.

In the O'Neil case, the defendant was the interim director of a corporation that did business with Eau Claire County. Based on records altered by the defendant, the county was overbilled. The funds so obtained were deposited in the corporation's account. The court of appeals held that O'Neil "obtained" the money even though she did not directly receive it herself:

> If a person induces another to part with money by fraudulent misrepresentations, then title to that property has been obtained within the meaning of the statute. The crime is complete when the title has been obtained. 141 Wis.2d 535, 536-37.

For a case like O'Neil, a definition of "obtains" would apparently be acceptable if it provided: "'Obtains' means to induce another to part with title to property." In the Committee's judgment, depending on the facts of the case, such a definition might not go far enough. The common meaning of "obtains" seems to have two aspects: relinquishing of title by the owner and receipt by someone else. It is the receipt aspect that O'Neil leaves open. It was not a problem in O'Neil because of the defendant's close connection with the actual recipient of the money (director of the corporation). It could be argued that a complete definition ought to include an expression of the required relationship between the defendant and the actual recipient.

6. In State v. Meado, 163 Wis.2d 789, 472 N.W.2d 567 (Ct. App. 1991), the court concluded that "the phrase 'obtains title to property,' as used in § 943.20(1)(d), Stats., is intended to include cases where a person induces another to part with property under a lease agreement by fraudulent representation." 163 Wis.2d 789, 799. Meado had obtained a van from a dealer under a lease agreement. He gave the dealer a check as the down payment and the check bounced. The check was written on an account that was closed before the check was written; Meado had also given a false home address to the dealer. The court said that Meado had gained the benefit of the van through false representation, thereby violating "the leading idea" of the statute which is "to prohibit the deprivation of the owner's property by fraudulent, non-violent means." 163 Wis.2d 789, 798.

7. Section 943.20(1)(d) requires that the defendant obtain title to the property by deceiving the victim and that the victim be defrauded by the false representation. See Frank v. State ex rel. Meiers, 244 Wis. 658, 660, 12 N.W.2d 923 (1944); Palotta v. State, 184 Wis. 290, 199 N.W. 72 (1924). The victim is not under a duty to investigate the truth of the representations, and any negligence by the victim in not discovering the fraud is not a defense. See State v. Lambert, 73 Wis.2d 590, 243 N.W.2d 524 (1976); State v. Lunz, 86 Wis.2d 695, 273 N.W.2d 767 (1979); and Palotta v. State, supra.

What now appears at elements 6 and 7 was revised in 1983 as suggested by State v. Kennedy, 105 Wis.2d 625, 314 N.W.2d 884 (Ct. App. 1981). Kennedy also held that an ultimate financial loss by the victim is not required: ". . . the victim's final accounting is irrelevant." 105 Wis.2d at 640.

8. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A. If the case involves a promise made with intent not to perform it, it is appropriate to add reference to "failure to act" to this paragraph. See footnote 3, supra.

9. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

10. Section 943.20(2)(d).

11. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;

(b) The property belonged to the same owner and was stolen by a person in possession of it; or

(c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.

(d) If The property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

# 1453C THEFT BY FRAUD: FAILURE TO DISCLOSE AS A REPRESENTATION – § 943.20(1)(d)

## Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(d) of the Criminal Code of Wisconsin, is committed by one who obtains title to property of another person by intentionally deceiving that person by failing to disclose a fact that (he) (she) had a duty to disclose, done with intent to defraud, and which does defraud that person.

## 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 obtained title[1] to the property of (name of victim).

   IF MONEY WAS OBTAINED, USE THE FOLLOWING:

   [Money is property. Title to money is obtained by gaining possession.]

   IF PROPERTY OTHER THAN MONEY WAS OBTAINED, USE THE FOLLOWING:

   [Title to property may be obtained by [execution and delivery of a (deed) (bill of sale) (conditional sales contract) (land contract) (assignment) (other instrument transferring ownership)] [sale and delivery of the property] [gift] [gaining possession of property through a lease.][2]

2. The defendant obtained title to the property of (name of victim) by failing to disclose a fact to (name of victim).

3. The defendant had a duty to disclose that fact.

A duty to disclose a fact exists under the following circumstances:[3]

• the fact is material to the transaction; and,

• the defendant knew that (name of victim) was about to enter into the transaction under a mistake as to the fact; and,

• the fact was peculiarly and exclusively within the knowledge of the defendant, and (name of victim) could not reasonably be expected to discover it; and,

• (name of victim) reasonably expected disclosure of the fact.

4. The defendant failed to disclose the fact with intent to deceive and to defraud (name of victim).

This requires that the defendant failed to disclose the fact with the purpose to deceive and defraud (name of victim) or that the defendant was practically certain that (his) (her) failure to disclose the fact would deceive and defraud (name of victim).

5. (Name of victim) was deceived by the failure to disclose the fact.

"Deceived" means "misled."

6. (Name of victim) was defrauded by the failure to disclose the fact.

This requires that (name of victim) did part with title to property in reliance (at least in part) on the failure to disclose.[4]

**Deciding About Intent**

You cannot look into a person's mind to find intent. Intent 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.[5]

**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.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE OR OTHER FACT MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE PROPERTY WAS MORE THAN THE AMOUNT STATED IN THE QUESTION. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.[6]

**[Determining Value]**

[If you find the defendant guilty, answer the following question:

("Was the value of the money used more than $100,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the money used more than $2,500?"

Answer: "yes" or "no.")

"Value" means the market value of the property at the time of the theft or the replacement cost, whichever is less.[7] Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[8]

[In determining the value of the property obtained, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

**COMMENT**

Wis JI-Criminal 1453C was originally published in 2008 and revised in 2019. This revision was approved by the Committee in February 2022; it updated footnote 8 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(d) that involve failure to disclose facts to the owner of the property. See State v. Ploeckelman, 2007 WI App 31, 299 Wis.2d 251, 729 N.W.2d 784, discussed in footnote 3. For cases involving an agent of the owner, see Wis JI-Criminal 1453B for possible changes in the instruction. Representations communicated via a third person do not necessarily involve an agency relationship.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 7,

below. The penalty increases to a Class H felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes "ownership" and "possession" in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

Multiple counts of theft by fraud were found to be appropriate when each required proof of a fact the other did not. State v. Swinson, 2003 WI App 45, 261 Wis.2d 633, 660 N.W.2d 12.

1. It is the opinion of the Committee that it is unnecessary that the defendant obtain full legal title to support a conviction under this section, although the section does specifically refer to obtaining "title." Obtaining property under a conditional sales contract, for example, would support a conviction under this section. See Whitmore v. State, 238 Wis. 79, 298 N.W. 194 (1941); Baldwin, "Criminal Misappropriations in Wisconsin - Part I," 44 Marq. L. Rev. 253, 280-81 (1960-61).

"Property of another" is defined by §§ 939.22(28) and 943.20(2)(d).

The proper construction of "obtains title" was discussed by the Wisconsin Court of Appeals in State v. O'Neil, 141 Wis.2d 535, 416 N.W.2d 77 (Ct. App. 1987). The O'Neil decision held that the defendant need not personally receive title to the property to satisfy the statute's requirement that title be "obtained." The court noted that the version of Wis JI-Criminal 1453 then in effect was inconsistent with this holding since it defined the fourth element as requiring that "there must have been a transfer of title from the owner to the defendant." The 1988 revision of Wis JI-Criminal 1453 deleted that phrase.

In the O'Neil case, the defendant was the interim director of a corporation that did business with Eau Claire County. Based on records altered by the defendant, the county was overbilled. The funds so obtained were deposited in the corporation's account. The court of appeals held that O'Neil "obtained" the money even though she did not directly receive it herself:

> If a person induces another to part with money by fraudulent misrepresentations, then title to that property has been obtained within the meaning of the statute. The crime is complete when the title has been obtained. 141 Wis.2d 535, 536-37.

For a case like O'Neil, a definition of "obtains" would apparently be acceptable if it provided: "'Obtains' means to induce another to part with title to property." In the Committee's judgment, depending on the facts of the case, that a definition might not go far enough. The common meaning of "obtains" appears to have two aspects: relinquishing of title by the owner and receipt by someone else. It is the receipt aspect that O'Neil leaves open. It was not a problem in O'Neil because of the defendant's close connection with the actual recipient of the money (director of the corporation). It could be argued that a complete definition ought to include an expression of the required relationship between the defendant and the actual recipient.

2. In State v. Meado, 163 Wis.2d 789, 472 N.W.2d 567 (Ct. App. 1991), the court concluded that "the phrase 'obtains title to property,' as used in § 943.20(1)(d), Stats., is intended to include cases where a person induces another to part with property under a lease agreement by fraudulent representation." 163 Wis.2d 789, 799. Meado had obtained a van from a dealer under a lease agreement. He gave the dealer a check as the down payment and the check bounced. The check was written on an account that was closed

before the check was written; Meado had also given a false home address to the dealer. The court said that Meado had gained the benefit of the van through false representation, thereby violating "the leading idea" of the statute which is "to prohibit the deprivation of the owner's property by fraudulent, non-violent means." 163 Wis.2d 789, 798.

3. This definition is based on the standard adopted in State v. Ploeckelman, 2007 WI App 31, 299 Wis.2d 251, 729 N.W.2d 784:

> ¶18. A representation can be acts or conduct. In Kaloti Enters., Inc. v. Kellogg Sales Co., 2005 WI 111, our supreme court laid out the circumstances where a failure to disclose can constitute a representation. The court concluded:
>
> A party to a business transaction has a duty to disclose a fact where: (1) the fact is material to the transaction; (2) the party with knowledge of that fact knows that the other party is about to enter into the transaction under a mistake as to the fact; (3) the fact is peculiarly and exclusively within the knowledge of one party, and the mistaken party could not reasonably be expected to discover it; and (4) on account of the objective circumstances, the mistaken party would reasonably expect disclosure of the fact.

If a duty to disclose exists, the failure to disclose is a representation.

4. Section 943.20(1)(d) requires that the defendant obtain title to the property by deceiving the victim and that the victim be defrauded by the false representation. See note 7, Wis JI-Criminal 1453A.

5. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

6. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957).

[In the context of this offense, the "property" is the money used for purposes other than paying the claims due.] While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18, 2018]. The penalties provided in subs. (3)(a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,

- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

7. Section 943.20(2)(d). The "value of the property" is the value of the property the defendant received due to the failure to disclose. Note the final sentence of sec. 943.20(2)(d): "If the thief gave consideration for, or had a legal interest in, the stolen property, the amount of such consideration or value of such interest shall be deducted from the total value of the property."

8. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State

v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

# 1455 THEFT BY FAILURE TO RETURN LEASED OR RENTED PROPERTY — § 943.20(1)(e)

## Statutory Definition of the Crime

Theft, as defined in § 943.20(1)(e) of the Criminal Code of Wisconsin, is committed by one who intentionally fails to return any personal property which is in his or her possession or under his or her control by virtue of a written lease or written rental agreement within 10 days after the lease or rental agreement has expired.

## 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 had personal property in (his) (her) possession or under (his) (her) control by virtue of a written lease or written rental agreement.
2. The defendant failed to return the property within 10 days after the lease or rental agreement expired.[1]
3. The defendant intentionally failed to return the property.

   The term "intentionally" means that the defendant must have the mental purpose not to return the property within 10 days after the lease or rental agreement expired.

4. The defendant knew that the property belonged to another person and knew that the written lease or rental agreement had expired.

**Deciding About Knowledge and Intent**

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent 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 and intent.[2]

**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.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.[3]

**[Determining Value]**

[If you find the defendant guilty, answer the following question:

("Was the value of property stolen more than $100,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $10,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $5,000?"

Answer: "yes" or "no.")

("Was the value of property stolen more than $2,500?"

Answer: "yes" or "no.")

"Value" means the market value of the property at the time of the theft or the replacement cost, whichever is less.[4]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 971.36(3)(a).[5]

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.]

**COMMENT**

Wis JI-Criminal 1455 was originally published in 1976 and revised in 1992, 2002, 2003, 2006 and 2019. This revision was approved by the Committee in February 2022; it updated footnote 5 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(e). The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. See footnote 3, below. The penalty increases to a Class D felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes "ownership" and "possession" in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

In State v. Roth, 115 Wis.2d 163, 339 N.W.2d 807 (Ct. App. 1983), the court held that § 943.20(1)(e) does not allow unconstitutional imprisonment for debt. The court also held that "intent to defraud" is not an element of the crime.

The essence of this offense is an omission – the failure to return the property. Criminal liability for an omission generally requires the ability to perform the required acts. See State v. Williquette, 129 Wis.2d 239, 251, 385 N.W.2d 145 (1986), citing LaFave and Scott, Criminal Law, sec. 28 at 182. See Wis JI-Criminal 905 Liability For Failure To Act – Criminal Omissions.

1. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

2. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

3. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding $100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18. 2018]. The penalties provided in subs. (3) (a) through (cm) are as follows:

- if the value of the property does not exceed $2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony;
- if the value of the property exceeds $10,000, the offense is a Class G felony; and,
- if the value of the property exceeds $100,000, the offense is a Class F felony.

The questions in the instruction omit the upper limits of the categories for Class I, Class H, and Class G felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

4. This is the most often used part of the definition of "value" provided in § 943.20(2)(d). The full definition follows:

> "Value" means that market value at the time of the theft or the cost to the victim of replacing the property within a reasonable time after the theft, whichever is less, but if the property stolen is a document evidencing a chose in action or other intangible right, value means either the market value of the chose in action or other right or the intrinsic value of the document, whichever is greater. If the thief gave consideration for, or had a legal interest in, the stolen property, the amount of such consideration or value of such interest shall be deducted from the total value of the property.

The Wisconsin Supreme Court in Sartin v. State, 44 Wis.2d 138, 170 N.W.2d 727 (1969), a theft case, refused to adopt either a retail or wholesale value definition of the term "value." It is felt that in the theft statute, "[t]he statutory scheme clearly contemplates a determination of the cost of replacement to the victim." Sartin at 149.

5. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme.
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it.
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. However, the Committee's conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction,

apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury is instructed to "consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design."

# 1473B EXTORTION: INJURE OR THREATEN TO INJURE — § 943.30(1)

## Statutory Definition of the Crime

Section 943.30(1) of the Criminal Code of Wisconsin is violated by one who (injures) ((verbally) (by written communication) (by printed communication) threatens to injure) the person, property, or business of another, with intent thereby (to extort money) (to compel the person to (do any act against the person's will) (omit to do any lawful act)).[1]

## 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 two elements were present.

## Elements of the Crime That the State Must Prove

1. The defendant (injured) (threatened to injure) the person, property,[2] or business of another person.

   [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]

[The person threatened need not be the one from whom (money) (the doing of an act) (the failure to do a lawful act) is being sought.][4]

2. The defendant acted with intent [to extort money] [to compel (name of person) to do any act against the person's will] [to compel (name of person) to omit to do any lawful act].

["To extort" means to obtain from another by coercion or intimidation.][5]

**Deciding About Intent**

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

**Jury's Decision**

If you are satisfied beyond a reasonable doubt 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 1473B was originally published in 1974 and revised in 1977, 1994, 2004, and 2005. This revision was approved by the Committee in April 2022; it added a definition of "true threat."

This instruction is drafted for violations of § 943.30(1) involving injury or threats to injure the person, property, or business of another. For violations involving threats or accusations that another committed a crime see Wis JI-Criminal 1473A.

In State v. Dauer, 174 Wis.2d 418, 497 N.W.2d 766 (Ct. App. 1993), the court of appeals held that extortion is not a lesser included offense robbery because it requires proof of facts in addition to those required for robbery: proof of a threat made by verbal, printed, or written communication.

1. This summary of the offense is a substantial shortening of the full statutory definition. The instruction refers to a threat or injury to the "person, property, or business," omitting the following that is included in the statute: ". . . calling or trade, or the profits and income of any business, profession, calling or trade . . ." It also refers to "intent to extort money," deleting the statute's "or any pecuniary advantage whatever." The instruction must be modified if the omitted alternatives are involved.

Finally, the word "maliciously" is not used in this instruction. The Committee reads the statute as connecting "maliciously" only with the "threatens to accuse or accuses another of any crime or offense" alternative. The Committee concluded that two alternatives are possible under the statute: "maliciously threatening to accuse or accusing of crime" and "threatening or committing any injury. . . ." The blameworthiness of the conduct covered by this instruction is provided by the requirement that the threat or injury to be done with the intent to extort money or to make the person do an act against the person's will.

2. In State v. Manthey, 169 Wis.2d 673, 689, 487 N.W.2d 44 (Ct. App. 1992), the court held that "property" under § 943.30(1) is "broad enough to encompass an interest in a lawsuit." Thus, a complaint charging extortion was sufficient where it alleged that the defendant threatened to testify falsely unless paid.

Threats "to do everything he could to ensure that the student would have to end his studies in the United States and return to Panama" could constitute threats to the student's profession or to the student's "calling." State v. Kittilstad, 231 Wis.2d 245, ¶ 49-51, 603 N.W.2d 732 (1999).

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 the statute criminalizing 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 context 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 2 which requires that "the defendant acted with intent [to extort money]…"

4. The Committee concluded that threats to do harm to a third person are covered by the statute. Thus, for example, if the defendant has threatened injury to John Smith's son if John Smith does not perform a certain act, the defendant's conduct falls within the statute.

This result is consistent with the conclusion reached in the previously published versions of this instruction, which cited the following as authority: Baldwin, "Criminal Misappropriations in Wisconsin – Part II," 44 Marq. L. Rev. 430, 443 (1961). This article referred to the version of the extortion statute in effect in 1961, describing it as a codification of the common law version of the crime, in roughly the same terms used in Wisconsin dating back to 1849. The article concluded, without citation to other authority, that "it is not required that the threat be to injure the person from whom the property, advantage or other action is demanded."

The statute was revised in 1969, 1977, 1979, and 1981. The 1977 changes came as part of the legislation which created the criminal penalty classification system and amended the statute to read essentially as it does today. The revisions at one time clarified the threat to harm others issue by treating it in a separate subsection. See § 943.30(2), 1969 Wis. Stats. But that section was merged with present sub. (1) by Chapter 173, Laws of 1977, leaving the matter unclear.

The Committee concluded that the present statute is very much like the 1961 version, which had been interpreted to cover threats to harm third persons. In the absence of any indication of legislative intent to change that interpretation, the present version of the instruction preserves the statement that the person threatened with harm need not be the person from whom the doing of an act or the payment of money is being sought.

5. This is the definition provided in the American Heritage Dictionary of the English Language (3rd Edition 1992).

# 1532 INCEST: SEXUAL INTERCOURSE BETWEEN BLOOD RELATIVES — § 944.06)

## Statutory Definition of the Crime

Incest, as defined in § 944.06 of the Criminal Code of Wisconsin, is committed by one who has nonmarital sexual intercourse with a person (he) (she) knows is a blood relative and such relative is in fact related in a degree within which the marriage of the parties is prohibited by the law of this state.

## 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 had sexual intercourse with (name of victim).

REFER TO WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.[1]

2. The defendant knew that (name of victim) was related to (him) (her) by blood.[2]

3. (Name of victim) was related to the defendant in a degree of kinship closer than second cousin.[3]

## 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.

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

**COMMENT**

This instruction was originally published as Wis JI-Criminal 1510 in 1983 and was revised in 1989. It was renumbered Wis JI-Criminal 1532 and revised in 2007. It was revised again in 2008 and 2010. The 2010 revision changed the definition of "sexual intercourse" as described in footnote 1. This revision was approved by the Committee in October 2021; it added the table showing degrees of kinship found at s. 990.001(16) of the Wisconsin Statutes to the comment.

Wis JI-Criminal 1510 was originally drafted to apply to incest offenses involving father and daughter. The 2007 revision revised it to apply generally to all "blood relatives" as provided by the statute.

Incest offenses involving children as victims are covered by a separate statute – see § 948.06, Incest With A Child, and Wis JI-Criminal 2130 and 2131.

1. 2009 Wisconsin Act 13 amended§ 944.06 to provide that "sexual intercourse" has the meaning provided in § 948.01(6). Wis JI-Criminal 2101B provides definitions for the alternatives presented by the statutory definition.

2. The knowledge requirement is included in the statutory definition of the offense. Note that the knowledge required is that the defendant and the victim are "related." The statute further requires that they be related "in a degree closer than second cousin," but the knowledge requirement apparently does not extend to the degree of relation.

3. This restates the requirement of the statutory definition that refers to "related in a degree within which the marriage of the parties is prohibited by the law of this state." Section 765.03 provides that "[n]o marriage shall be contracted . . . between persons who are nearer of kin than second cousins . . ." "Second cousin" is defined in Black's Law Dictionary (7th Edition) as follows: "A person related to another by descending from the same great-grandfather or great-grandmother." For a chart showing the degrees of kinship see § 990.001(16) and the Comment of Wis JI-Criminal 2130.

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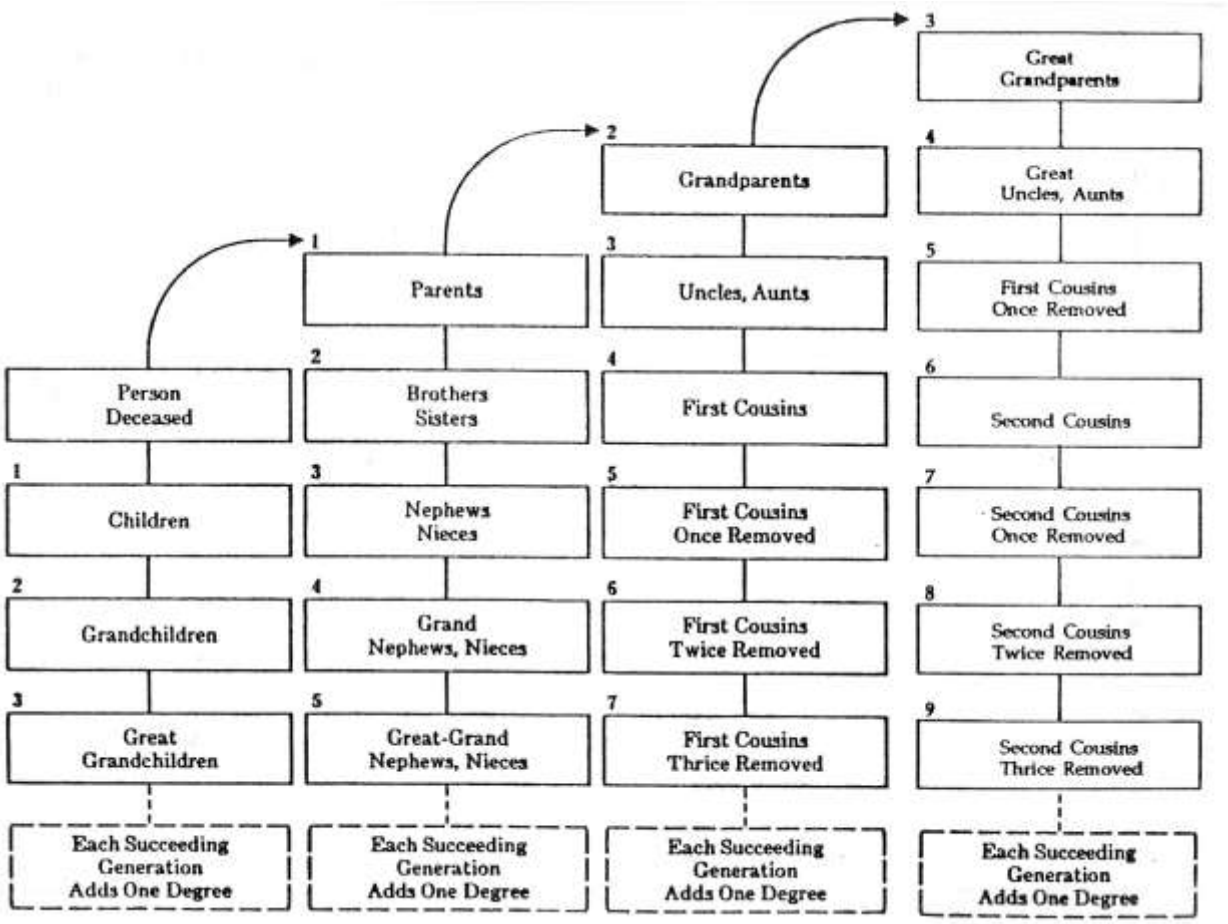
**Degree of Kinship**

The following chart is based on the table showing degrees of kinship found at s. 990.001(16) of the Wisconsin Statutes. The column at the far right has been added to show how the various degrees of kinship compare to second cousins. The added column is based on the chart appearing at page 48, Decedents' Estates and Trusts, by Ritchie, Alford, and Effland, 4th Edition, © 1971, Foundation Press. Note that the degree of kinship of second cousins is indicated by the number "6." Thus, all those degrees indicated by the number "5" or less are "related in a degree closer than second cousin" and fall within the prohibition of s. 948.096(1).


Person Deceased
Children
Grandchildren
Great Grandchildren
Each Succeeding Generation Adds One Degree
Parents
Brothers Sisters
Nephews Nieces
Grand Nephews, Nieces
Great-Grand Nephews, Nieces
Each Succeeding Generation Adds One Degree
Grandparents
Uncles, Aunts
First Cousins
First Cousins Once Removed
First Cousins Twice Removed
First Cousins Thrice Removed
Each Succeeding Generation Adds One Degree
Great Grandparents
Great Uncles, Aunts
First Cousins Once Removed
Second Cousins
Second Cousins Once Removed
Second Cousins Twice Removed
Second Cousins Thrice Removed
Each Succeeding Generation Adds One Degree

OFFICE OF JUDICIAL EDUCATION
2022

# WISCONSIN JURY INSTRUCTIONS

# CRIMINAL

## VOLUME III

**Wisconsin Criminal Jury Instructions Committee**

[Cite as Wis JI-Criminal]

- Includes 2022 Supplement (Release No. 60)

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* * *

# 1900 DISORDERLY CONDUCT — § 947.01

## Statutory Definition of the Crime

Disorderly conduct, as defined in § 947.01 of the Criminal Code of Wisconsin, is committed by a person who, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance.

## 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 two elements were present.

## Elements of the Crime That the State Must Prove

1. The defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct.[1]
2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

## Meaning of "Disorderly Conduct"

"Disorderly conduct" may include physical acts or language or both.[2]

[The general phrase "otherwise disorderly conduct" means conduct having a tendency to disrupt good order and provoke a disturbance.[3] It includes all acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether

committed by words or acts. Conduct is disorderly although it may not be violent, abusive, indecent, profane, boisterous, or unreasonably loud if it is of a type which tends to disrupt good order and provoke a disturbance.][4]

The principle upon which this offense is based is that in an organized society a person should not unreasonably offend others in the community.[5] This does not mean that all conduct that tends to disturb another is disorderly conduct. Only conduct that unreasonably offends the sense of decency or propriety of the community is included. It does not include conduct that is generally tolerated by the community at large but that might disturb an oversensitive person.

**Meaning of "Tend to Cause or Provoke a Disturbance"**

It is not necessary that an actual disturbance must have resulted from the defendant's conduct. The law requires only that the conduct be of a type that tends to cause or provoke a disturbance, under the circumstances as they then existed.[6] You must consider not only the nature of the conduct but also the circumstances surrounding that conduct. What is proper under one set of circumstances may be improper under other circumstances. This element requires that the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

WHERE THE STATE'S CASE RELIES IN PART ON EVIDENCE THAT THE DEFENDANT WAS CARRYING A FIREARM AT THE TIME OF THE ALLEGED OFFENSE, ADD THE FOLLOWING:[7]

[Loading, carrying, or going armed with a firearm does not, by itself, constitute disorderly conduct unless other facts and circumstances indicate a criminal or malicious intent.]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt 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 1900 was originally published in 1966. Non-substantive revisions and additions to the comment were made in 1989, 1991, 1998, 1999, 2001, 2002, 2004, and 2009. In 2012, revisions were made that involved the addition of the bracketed material preceding the "Jury's Decision" paragraph to reflect 2011 Wisconsin Act 35. This revision was approved by the Committee in June 2022; it added to the comment.

In State v. Givens, 28 Wis.2d 109, 135 N.W.2d 780 (1965), the court affirmed the convictions of several civil rights demonstrators on the grounds that the defendants' conduct met the requirements of the disorderly conduct statute as to being disruptive of good order and tending to provoke a disturbance and on the additional grounds that each defendant deliberately and knowingly violated commands of persons in authority. In so ruling, the court held that persons in authority over public buildings must be accorded discretion to regulate conduct therein. In appropriate cases, the jury should be instructed on failure to obey lawful commands of persons in authority as constituting disorderly conduct. See note 4, below.

The application of disorderly conduct and related statutes often involves claims that the exercise of constitutional rights prevents such application or excuses what would otherwise be a criminal violation. For recent discussions, see the following: City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989) (disorderly conduct ordinance); State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989) (criminal trespass to medical facility statute); Milwaukee v. K.F., 145 Wis.2d 24, 426 N.W.2d 329 (1988) (juvenile loitering ordinance); Milwaukee v. Nelson, 149 Wis.2d 434, 439 N.W.2d 562 (1989) (adult

loitering ordinance); State v. Dronso, 90 Wis.2d 110, 279 N.W.2d 710 (Ct. App. 1979) (§ 947.01). Also see Texas v. Johnson, 109 S. Ct. 2533 (1989), dealing with the federal flag desecration statute.

In State v. Olsen, 99 Wis.2d 572, 299 N.W.2d 632 (Ct. App. 1980), the defendants were charged with disorderly conduct as a result of demonstrations against a shipment of spent fuel from a nuclear power plant. The court of appeals held that the trial court acted properly in excluding evidence offered by the defendant to show that his conduct was privileged under the defense of necessity as set forth in § 939.47. The court held that necessity is limited to the pressure of natural physical forces such as "storms, fires and privations" and therefore is not available in the context of a protest against the transportation of spent nuclear fuel. 99 Wis.2d 572, 576.

1. The Committee recommends selecting one of the terms in parentheses where possible but believes it is proper to instruct on all alternatives that are supported by the evidence. The Wisconsin Supreme Court affirmed this position in Doubek v. Kaul, 2022 WI 31, ¶14, --N.W.2d--, stating that "[T]he language of Wis. Stat. § 947.01(1) is most naturally read as creating a single crime of disorderly conduct, while listing alternative means to satisfy its first element. The focus of the list is any type of conduct that is disorderly." Based on this finding, the court concluded that "Wisconsin's disorderly conduct statute is indivisible, and enumerates different means of committing the same crime." Id.

Speech alone in certain contexts can constitute disorderly conduct. State v. A.S., 2001 WI 48, ¶1, 243 Wis.2d 173, 626 N.W.2d 712. Also see, State v. Douglas D., 2001 WI 47, ¶3, 243 Wis.2d 204, 626 N.W.2d 725. Verbal or written statements may constitute "abusive conduct" if they "tended to provoke retaliatory conduct on the part of the person or persons to whom the statements were addressed." A.S., ¶29. Also see Douglas D., ¶32. Speech can be considered "otherwise disorderly" if it is of a type that tends to disrupt good order. A.S., ¶33. If the statements constitute threats, they must be "true threats." Douglas D., ¶32; A.S., ¶22. Both A.S. and Douglas D. applied a definition of "true threat" announced in State v. Perkins, 2001 WI 46, ¶29, 243 Wis.2d 141, 626 N.W.2d 762. Perkins involved a charge under § 940.203, which prohibits threats to a judge. Wis JI-Criminal 1240B, Threat To A Judge, offers the following definition of "true threat," based on Perkins:

> 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.

2. Teske v. State, 256 Wis. 440, 444, 41 N.W.2d 642 (1950).

A common disorderly conduct situation involves directing abusive language to police officers. The Wisconsin Supreme Court has discussed the general principles applicable to this situation in a civil case where a person arrested for disorderly conduct sued the arresting officer for false imprisonment:

> The fact that the abusive language is directed to a policeman or other law enforcement officer and is not overheard by others does not prevent it from being a violation . . . [of a disorderly conduct statute or ordinance].

> However, a police officer cannot provoke a person into a breach of the peace, such as directing abusive language to the police officer, and then arrest him without a warrant. Lane v. Collins, 29 Wis.2d 66, 72, 138 N.W.2d 264 (1965) (footnote omitted).

3. In State v. Givens, 28 Wis.2d 109, 115, 135 N.W.2d 780 (1965), the court held that the phrase "otherwise disorderly conduct" which tends to provoke a disturbance means conduct of a type not previously enumerated in the statute but similar thereto in having a tendency to disrupt good order and to provoke a disturbance. This interpretation rests upon the rule of ejusdem generis. The statute is not unconstitutionally vague.

In State v. Schwebke, 2002 WI 55, 253 Wis.2d 1, 644 N.W.2d 666, the court upheld the application of the disorderly conduct statute to mailings sent by the defendant to three different victims. The conduct can be considered "otherwise disorderly conduct" under § 947.01:

> . . . [T]he disorderly conduct statute does not necessarily require disruptions or disturbances that implicate the public directly. The statute encompasses conduct that tends to cause a disturbance or disruption that is personal or private in nature, as long as there exists the real possibility that this disturbance or disruption will spill over and disrupt the peace, order or safety of the surrounding community as well. Conduct is not punishable under the statute when it tends to cause only personal annoyance to a person. See Douglas D., 2001 WI 47, ¶27. An examination of the circumstances in which the conduct occurred must take place, considering such factors as the location of the conduct, the parties involved, and the manner of the conduct. 2002 WI 55, ¶30.
>
> . . . [T]he disorderly conduct statute requires, at a minimum, that, when the conduct tends to cause or provoke a disturbance that is private or personal in nature, there must exist the real possibility that this disturbance will spill over and cause a threat to the surrounding community as well. 2002 WI 55, ¶31.
>
> . . . [W]e conclude that the disorderly conduct statute was appropriately applied to Schwebke's conduct in this case. In each instance, the conduct at issue, in light of the circumstances, went beyond conduct that merely tended to annoy or cause personal discomfort in another person. In each instance, the mailings constituted conduct that not only caused disturbances to the lives of the recipients, but the conduct was of the type that would be disruptive to peace and good order in the community. 2002 WI 55, ¶32.

4. The paragraph in brackets is intended for use primarily where the "otherwise disorderly conduct" alternative is used. In Teske v. State, supra, the court quotes this definition from 17 Am. Jur. Disorderly Conduct § 1 (1957), which is also adopted by the court in State v. Givens, supra.

In City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989), the Wisconsin Supreme Court reviewed the application of a disorderly conduct ordinance (modeled after § 947.01) to a television reporter who refused to obey police orders to leave the scene of the 1985 Midwest Express airplane crash. The court held that the defendant's conduct violated the statute under the "otherwise disorderly" provision. There was a legitimate need to maintain control at the crash site which was threatened by the defendant's refusal to obey the police order to stay out of the restricted area. The conduct tended to cause a disturbance because others may have followed the defendant if he had been allowed to disobey the officer.

5. This statement is based on the decision in State v. Givens, supra, where the court quoted from the comment to a proposed disorderly conduct section contained in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The 1999 revision made minor changes in this statement in the interest of clarity; no change in meaning was intended.

Deciding whether conduct "unreasonably" offends the sense of decency or propriety of the community may be aided by comparing the harm to the public and the social value of the defendant's conduct.

An instruction attempting to explain this comparison might read as follows:

> In determining whether the conduct "unreasonably" offends the public sense of decency and propriety, you should weigh the degree to which decency and propriety were offended by the conduct against any contribution to the public interest made by the conduct. In this case, (here specify the reason the conduct was engaged in). [EXAMPLE: In this case the defendant has testified that he engaged in the conduct in order to protest the Viet Nam War.] Conduct unreasonably offends the public sense of decency and propriety if, but only if, the harm to the public outweighs the social value achieved by the defendant's conduct.

6. This statement is found in the comment to proposed § 347.01 in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The phrase "tending to create or provoke a breach of the peace," as found in § 943.145, Criminal Trespass To A Medical Facility, was discussed in State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989).

7. Section 947.01 was amended by 2011 Wisconsin Act 35, the "licensed carry" law. The current statute was renumbered § 947.01(1) and a new subsection (2) was created to read:

> (2) Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section for loading, carrying, or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried.

The Committee concluded that the new provision is best addressed by adding a statement for cases where there is evidence that the defendant was carrying a firearm at the time of the alleged disorderly conduct.

The phrase "criminal or malicious intent" is used in new sub. (2) of § 947.01. The Committee concluded that "criminal intent" means "intent to commit a crime." "Malicious" does not have an established meaning in the current Wisconsin Criminal Code [with one exception: see § 940.41(1r), that is not applicable here].

# 2199 SEX OFFENDER NAME CHANGE — § 301.47(2)(a)-(b)

## Statutory Definition of the Crime

Section 301.47(2)(a) and (b) of the Wisconsin Statutes is violated by one who is subject to the requirements of section 301.45, and who intentionally changes his or her name or identifies themselves by a name which he or she is not identified with the Wisconsin Department of Corrections.

## 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 two elements were present.

## Elements of the Crime That the State Must Prove

1. The defendant was a sex offender[1] subject to the reporting requirements of section 301.45.
2. Before being released from the reporting requirements of section 301.45, the defendant intentionally [changed (his) (her) name][2] [identified (himself) (herself) by a name other than one by which (he) (she) is identified with the Wisconsin Department of Corrections].

   This requires that the defendant acted with the mental purpose to [change (his) (her) name] [identify (himself) (herself) by a name other than one by which (he) (she) is identified with the Wisconsin Department of Corrections].[3]

[It is not a defense to prosecution under this section that the department failed to (attempt to) notify the defendant of the prohibition (against using a name by which he or she is not identified with the department).][4]

**Deciding About Intent**

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

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all two 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 2199 was approved by the Committee in October 2021.

This instruction is for violations of § 301.47(2)(a) and (b), created by 2003 Wisconsin Act 53 [effective date: September 5, 2003]. Section 301.47(3) provides: "Except as provided in par. (b), the person is guilty of a Class H felony."

1. Wis. Stat. § 301.47(1) provides "In this section, 'sex offender' means a person who is subject to s. 301.45 (1g) but does not include a person who, as a result of a proceeding under s. 301.45 (1m), is not required to comply with the reporting requirements of s. 301.45."

2. In State v. C. G., 396 Wis.2d 105, 955 N.W.2d 443 (Ct. App. 2020), the court held that the name-change ban in Wis. Stat. § 301.47 does not implicate the First Amendment because the statute does not prohibit registrants from using whatever name they choose. Further, the court determined that even if it

were to conclude the ban implicated the First Amendment, strict scrutiny does not apply because the ban is content neutral. The ban satisfies intermediate scrutiny because it is sufficiently tailored to the State's important interest in protecting the public and aiding law enforcement. Id. at ¶40. See also, Williams v. Racine County Circuit Court, 197 Wis.2d 841, 541 N.W. 2d 514 (Ct. App. 1995).

3. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

4. This instruction should be given when warranted by the evidence. § 301.47(4).

OFFICE OF JUDICIAL EDUCATION
2022

# WISCONSIN JURY INSTRUCTIONS

# CRIMINAL

## VOLUME IV

**Wisconsin Criminal Jury Instructions Committee**

[Cite as Wis JI-Criminal]

- Includes 2022 Supplement (Release No. 60)

# WIS JI-CRIMINAL

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# 2664A OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF A COMBINATION OF AN INTOXICANT AND A CONTROLLED SUBSTANCE — 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 highway[1] while under the influence of a combination of an intoxicant and a controlled substance.

## Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[2] 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 vehicle[3] on a highway.[4]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][5]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][6]

2. The defendant was under the influence of a combination of an intoxicant and (name controlled substance)[7] at the time the defendant (drove) (operated) a motor vehicle.

   [(Name controlled substance) is a controlled substance.][8]

**The Definition of "Under the Influence"**

"Under the influence" means that the defendant's ability to operate a vehicle was impaired because of consumption of a combination of an alcoholic beverage and a controlled substance.[9]

[Not every person who has consumed alcoholic beverages and controlled substances is "under the influence" as that term is used here.][10] What must be established is that the person has consumed a sufficient amount of alcohol or of a controlled substance or both 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, ADD THE FOLLOWING.[11]

[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). An analysis showing that there was [.04 grams or more but less than .08 grams of alcohol in 100 milliliters of the defendant's blood] [.04 grams or more but less than .08 grams of alcohol in 210 liters of the defendant's breath] at the time the test was taken may be considered by

you in determining whether the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating). However, by itself it is not a sufficient basis for finding that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating).

Therefore, you may consider this evidence regarding an alcohol concentration test along with all of the other credible evidence in the case, giving to it the weight you believe it is entitled to receive.]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[12] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[13] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[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 to a reasonable certainty by evidence which is clear, satisfactory, and convincing.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[14]

[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 State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State 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 2664A was originally published in 1986 and revised in 1993, 2004, 2005, and 2020. This 2020 revision added to the Comment. See footnotes 7 and 8 below. This revision was approved by the Committee in December 2021; it added suggested language concerning test results showing 0.08 grams or more in the defendant's blood.

This instruction is for a first offense under § 346.63(1)(a), involving the combined influence of an intoxicant a controlled substance. For offenses involving operating under the influence of a controlled substance alone, see Wis JI-Criminal 2664. For offenses involving operating under the influence of "any other drugs," see Wis JI-Criminal 2666.

Wisconsin case law interpreted earlier versions of the drunk driving statutes in a way that would seem to cover situations involving the combined influence of alcohol and controlled substances or drug. Waukesha v. Godfrey, 41 Wis.2d 401, 406, 164 N.W.2d 314 (1960), cited with approval a Pennsylvania case holding that:

If liquor shares its influence with another influence and is still the activating cause of the condition

which the statute denounces it can be truthfully said that the driver was under the influence of liquor. Commonwealth v. Rex (1951), 168 Pa. Super. 628, 632, 82 Atl.2d 315.

The Godfrey rule also applies to situations where an intoxicant combines its influence with medication or where a person's poor health or physical condition reduces tolerance to alcohol. 41 Wis.2d 401, 407.

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 of individual instructions. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. 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.

3. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

6. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. To avoid confusion, the Committee strongly suggests that only the name of the statutorily listed controlled substance be used throughout the instruction, even if the specific substance alleged to have been in the defendant's blood is not listed in Chapter 961. For example, if the substance is heroin, "heroin," should be used throughout. Conversely, if the substance is a synthetic cannabinoid not listed by name in Section 961.14(4)(tb), "synthetic cannabinoid" should be used throughout the instruction, not the specific variation alleged to have been in the defendant's blood. Section 340.01(9m) provides that for purpose of the Vehicle Code, "controlled substance" has the meaning specified in § 961.01(4), which provides: "'Controlled substance' means a drug, substance or immediate precursor included in schedules I to V of sub. II." The schedules are found in §§ 961.14, 961.16, 961.18, 961.20, and 961.22.

8. It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the defendant's blood tested positive for cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the defendant's blood tested positive for "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," not that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

9. This definition of "under the influence" is adapted from the one used for offenses involving alcoholic beverages. See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The sentence in brackets is appropriate for cases involving the consumption of substances which are roughly similar in their effect on a person as alcohol. That is, a person could use some substances in a limited degree and, like the person who consumes a limited amount of alcohol, not be "under the influence" as that term is used here.

Some controlled substances, however, have such extreme effects that the sentence in brackets should not be used.

11. 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."

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

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

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

# 2666A OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ANY COMBINATION OF AN INTOXICANT AND ANY OTHER DRUG TO A DEGREE THAT RENDERS HIM OR HER INCAPABLE OF SAFELY DRIVING – § 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 highway[1] while under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

## 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 the following two elements were present.

## Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[2] on a highway.[3]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][4]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][5]

2. The defendant was under the combined influence of an intoxicant and (name of drug) to a degree which rendered (him) (her) incapable of safely driving at the

time the defendant (drove) (operated) a motor vehicle.[7]

[(Name of drug) is a drug.][8]

**Definition of "Under the Influence"**

"Under the influence" means that the defendant's ability to operate a vehicle was impaired because of consumption of a combination of an alcoholic beverage and any other drug.[9]

[Not every person who has consumed alcoholic beverages and any other drug is "under the influence" as that term is used here.][10] What must be established is that the person has consumed a sufficient amount of alcohol or of any other drug or both 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, ADD THE FOLLOWING.[11]

[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). An analysis showing that there was [.04 grams or more but less than .08 grams of alcohol in 100

milliliters of the defendant's blood] [.04 grams or more but less than .08 grams of alcohol in 210 liters of the defendant's breath] at the time the test was taken may be considered by you in determining whether the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating). However, by itself it is not a sufficient basis for finding that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating).

Therefore, you may consider this evidence regarding an alcohol concertation test along with all of the other credible evidence in the case, giving to it the weight you believe it is entitled to receive.]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[12] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[13] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt 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 beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[14]

[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 State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State 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 2666A was approved by the Committee in 2019. This revision was approved by the Committee in December 2021; it added suggested language concerning test results showing 0.08 grams or more in the defendant's blood.

This instruction is for a criminal offense under § 346.63(1)(a), involving the combined influence of an intoxicant and any other drug. For offenses involving operating under the influence of a drug alone, see Wis JI-Criminal 2666. For offenses involving operating under the influence of a controlled substance, see Wis JI-Criminal 2664.

Wisconsin case law interpreted earlier versions of the drunk driving statutes in a way that would seem to cover situations involving the combined influence of alcohol and a controlled substance or drug. Waukesha v. Godfrey, 41 Wis.2d 401, 406, 164 N.W.2d 314 (1960), cited with approval a Pennsylvania case holding that:

> If liquor shares the influence with another influence and is still the activating cause of the condition which the statute denounces it can be truthfully said that the driver was under the influence of liquor. Commonwealth v. Rex (1951), 168 Pa. Super. 628, 632, 82 Atl.2d 315.

The Godfrey rule also applies to situations where the intoxicant combines its influence with medication or where a person's poor health or physical condition reduces tolerance to alcohol. 41 Wis.2d 401, 407.

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 of individual instructions. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

3. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

4. This is the definition of "drive" provided in § 346.63(3)(a).

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. The Committee suggests that the name of the drug, if known, be used throughout the instruction. Section 340.01(15mm) provides that for the purpose of the Vehicle Code, "drug" has the meaning specific in § 450.01(10).

This instruction assumes that the identity of the drug is known. If the identity of the drug is not known, proving that a drug is involved may be extremely difficult in light of the statutory definition of "drug" that applies. Section 340.01(15mm) provides that the applicable definition is the one found in § 450.01(10), which reads as follows:

"Drug" means:

(a) Any substance recognized as a drug in the official U.S. pharmacopoeia and national formulary or official homeopathic pharmacopoeia of the United States or any supplement to either of them;
(b) Any substance intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease or other conditions in persons or animals;
(c) Any substance other than a device or food intended to affect the structure or any function of the body or persons or other animals; or
(d) Any substance intended for use as a component if any article specified in pars. (a) to (c) but does not include gases or devices or articles intended for use or consumption in or for mechanical, industrial, manufacturing or scientific applications or purposes.

7. The statute requires not only operating while "under the influence" but also that the defendant be

under the influence "to a degree which renders him or her incapable of safely driving." The "incapable of safely driving" requirement appears to be more restrictive than the "ability to operate is impaired" standard that is part of the uniform definition of "under the influence." See, for example, Wis JI-Criminal 2663. Since this requirement of the statute supersedes the usual "under the influence" definition, no definition is included in the instruction.

See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

8. The Committee concluded that it adds clarity to refer to the name of the alleged drug, if known. See note 6, supra. Whether the defendant was actually under the combined influence of an intoxicant and the drug named remains a jury question.

9. This definition of "under the influence" is adapted from the one used for offenses involving alcoholic beverages. See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The sentence in brackets is appropriate for cases involving the consumption of a drugs which are roughly similar in their effect on a person as alcohol. That is, a person could use some drug in a limited degree and, like the person who consumes a limited amount of alcohol, not be "under the influence" as that term is used here.

Some drugs, however, have such extreme effects that the sentence in brackets should not be used.

11. 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."

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

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

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

## 6001 FINDING THE AMOUNT OF CONTROLLED SUBSTANCE

ADD THE FOLLOWING TO INSTRUCTIONS FOR CASES INVOLVING THE MANUFACTURE, DISTRIBUTION, OR DELIVERY OF A CONTROLLED SUBSTANCE OR THE POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO MANUFACTURE, DISTRIBUTE, OR DELIVER, WHERE THE EVIDENCE IS SUFFICIENT TO SUPPORT A FINDING THAT THE AMOUNT POSSESSED EXCEEDED THE REQUIRED AMOUNT[1]:

If you find the defendant guilty, you must answer the following question(s)[2] "yes" or "no":

Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it,[3] more than (state amount which determines the penalty)?

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the amount was more than (state amount).

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

IF THERE IS A REASONABLE BASIS IN THE EVIDENCE FOR FINDING THAT A LARGER AMOUNT WAS NOT ESTABLISHED AND THAT A SMALLER AMOUNT WAS, ADD THE FOLLOWING AND REPEAT IF NECESSARY.

If you answer the first question "no," you must answer the following question "yes" or "no":

Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, more than (state amount which

determines the penalty)?[4]

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the amount was more than (state amount).

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

**COMMENT**

Wis JI-Criminal 6001 was originally published in October 1986 and revised in 1989, 1991, 1992, 1996, 2010, and 2018. The 2010 revision adopted a new format and updated the Comment. The 2018 revision added a model for submitting more than one question regarding the amount involved. This revision was approved by the Committee in April 2022; it added to the comment.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

This instruction provides for a jury finding of the amount of controlled substance involved in offenses under Chapter 961. It is modeled after the instruction for finding value in theft cases. See Wis-JI Criminal 1441A. See Wis JI-Criminal 6001A EXAMPLE for an adaptation of this instruction for methamphetamine cases.

The penalty-depending-upon-weight provision originally applied to cocaine offenses only but was expanded to cover other substances in 1989. (See 1987 Wisconsin Act 339.) The amounts vary depending on the kind of controlled substance. Because many variables are involved, the Committee decided to revise this instruction to provide a general framework into which the proper amounts must be inserted.

The following statutes provided for penalties based on the amount of controlled substance involved: § 961.41(1), subsections (cm) through (im), for manufacture, distribution, or delivery offenses; and § 961.41(1m), subsections (cm) through (im), for offenses involving possession with intent to manufacture, distribute, or deliver. Under each statute, the subsections deal with the same substances: (cm) cocaine and cocaine base; (d) heroin; (dm) fentanyl, a fentanyl analog; (e) phencyclidine, amphetamine, methamphetamine, et al.; (em) synthetic cannabinoids; (f) lysergic acid diethylamide; (g) psilocin or psilocybin; (h) tetrahydrocannabinols; (hm) certain other Schedule 1 controlled substances and ketamine; and, (im) flunitrazepam.

Sections 961.41(1)(h) and (1m)(h) include penalty grades based on the number of plants containing tetrahydrocannabinols possessed. In such cases, the reference in the question would have to be changed to refer to the number of plants rather than the "amount of" substance.

The Committee suggests the following as an addition to the guilty verdict form:

(Answer the following "yes" or "no"):

Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, more than (state amount which determines the penalty)?

1. The Committee concluded that it was preferable to state the question in terms of whether the required amount is present rather than to ask the jury to agree on a specific amount. Requiring agreement might cause a delay in reaching a verdict that is not related to any essential issue.

The Committee also concluded that it is not necessary to include the upper threshold – e.g., "but not more than 10 grams" – to avoid unnecessary jury debate about whether or not the upper threshold was exceeded.

2. It may be appropriate to submit more than one question if there is a reasonable basis for finding that a larger amount was not established and that a smaller amount was established (as in a lesser included offense situation).

3. With regard to determining the amount of the controlled substance, § 961.41(1r) provides as follows:

> 961.41(1r) In determining amounts under . . . subs. (1) and (1m), an amount includes the weight of the [controlled substance or controlled substance analog] . . . together with any compound, mixture, diluent, plant material, or other substance mixed or combined with the controlled substance or controlled substance analog.

In Chapman v. United States, 500 U.S. 453 (1991), the United States Supreme Court reviewed federal sentencing provisions that are similar to § 961.41(1r) in including the weight of material mixed or combined with the controlled substance. The Court held that the sentencing provisions were constitutional in the context of a case where the weight of the blotter paper containing LSD, not the weight of the pure LSD alone, was used to determine the amount for sentencing purposes.

"Stems or branches supporting the marijuana leaves or buds . . . are not excluded as 'mature stalks'" under the definition of "controlled substance" in § 961.01(14). State v. Martinez, 210 Wis.2d 396, 412 13, 563 N.W.2d 922 (Ct. App. 1997).

4. If the case involves possession with intent to manufacture or deliver, the Committee recommends restating this sentence as follows: "Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, possessed with intent to (manufacture) (deliver) more than _____?" The purpose is to avoid any argument that the necessary amount was simply possessed as opposed to being possessed with intent to deliver. Simple possession is not subject to the added penalties addressed by this instruction.

# SM-9 WHEN A JURY REQUESTS TO HEAR/SEE AUDIO/VISUAL EVIDENCE DURING DELIBERATIONS

This Special Material outlines the procedure that a trial judge should follow when an audio/visual recording has been received into evidence and played at trial and a jury requests to listen to or watch the recording during deliberations. Discussed below are the two Wisconsin cases that have addressed this issue.

**Deciding whether to replay the recording**

The decision to replay an audio/visual recording is within the trial court's discretion.[1] Factors the court should consider in deciding whether to replay the exhibit include:

- whether the recording will aid the jury in proper consideration of the case;
- whether a party will be unduly prejudiced by replaying the exhibit;
- whether the exhibit could be improperly used by the jury, and;
- whether granting a replay request will unfairly over emphasize a particular piece of evidence.[2]

Before responding to a jury request for a replay, the court shall advise the parties of the request and solicit comment, ideally with the defendant present.[3] Only the portions of the recording played during trial may be played during deliberations.[4] Allowing jurors to take notes during the replay is within the discretion of the trial judge.[5]

**Recommended procedure for replaying a recording**

If the court decides to replay the recording, the best practice is for the trial judge to bring the jury back to the courtroom and replay the recording with all parties present in open court. In Franklin v. State, the defendant's audio-recorded confession was played for the jury during trial. 74 Wis. 2d 717, 720, 247 N.W.2d 721 (1976). During deliberations, the jury requested to hear it again. Over defense counsel's objection, the trial judge sent the tape back into the jury room with a tape player. The Wisconsin Supreme Court held, "[w]e cannot approve of this practice which entails the risk of breakage or accidental erasure of the tape while it is beyond the trial court's supervision and which presents the danger of overemphasis of the confession relative to testimony given from the witness stand." Id. at 724. The Court held that the proper procedure was that the trial court retain control of the jury's exposure to confessions. Id. at 724-25. Thus, if the court decides to replay a recorded confession, the jury should return to the courtroom where the confession is replayed or reread. Id. at 725.

Thirty years after Franklin, the Court addressed this issue again in State v. Anderson, this time in the context of a video recorded forensic interview of a child victim. 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74.[6] The forensic interview was received into evidence and played in its entirety at trial. Id. ¶7. During deliberations, the jury requested that the "victim's videotaped interview, be sent to the jury room and that a television and VCR be provided so that the jurors could watch the victim's videotaped interview." Id. ¶10. The

trial court granted the request over defense counsel's objection. Id. ¶11. The Court concluded that the circuit court properly exercised its discretion in allowing the jury to hear and see the victim's videotaped interview but failed to apply the correct legal standard when it allowed the jury to view the videotape in the jury room. Id. at ¶29. The trial court should have followed the procedure outlined in Franklin and brought the jury back into the courtroom to view the victim's interview in open court. Id. at ¶30. This procedure "minimizes the risk of breakage or erasure of the recording and, more importantly, allows a circuit court to guide the jury, with the assistance of all counsel, so that no part of the recording is overemphasized relative to the testimony given from the witness stand." Id.

While the case law only addresses recorded statements, the Committee has concluded that the above-described procedure applies to any recorded evidence. When only a portion of the recording was played during trial, the court must take special care to ensure that only that section is played during deliberations. The court or the parties should make a record of exactly what was played during deliberations by noting the beginning and end times from the exhibit.

**COMMENT**

SM-9 was approved by the Committee in June 2022.

1. See State v. Anderson, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74. (Overruled in part on other grounds. See State v. Alexander, 2013 WI 70, ¶¶26-28, 349 Wis. 2d 327, 833 N.W.2d 126).

2. Id. at ¶105.

3. See State v. Bjerkaas, 163 Wis. 2d 949, 957, 472 N.W.2d 615 (Ct. App. 1991) and State v. Alexander, 2013 WI 70, ¶29, 349 Wis. 2d 327, 833 N.W.2d 126.

4. See State v. Hines, 173 Wis. 2d 850, 861, 496 N.W.2d 720 (Ct. App. 1993).

5. Wis. Stat. § 972.10(1)(a)1.

6. State v. Anderson, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74 was overruled in part on other grounds. See State v. Alexander, 2013 WI 70, ¶¶26-28, 349 Wis. 2d 327, 833 N.W.2d 126).

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