OFFICE OF JUDICIAL EDUCATION
7/2026

RELEASE NO. 71	EDITION (1980)	July 2026

TO: Consumers of the Wisconsin Jury Instructions – Criminal

FROM: Wisconsin Court System, Office of Judicial Education

Enclosed is Release No. 71 for the 1980 edition of Wis JI-Criminal. The release contains material approved by the Wisconsin Criminal Jury Instructions Committee through June 2026.

The following material is included in Release No. 71:

New Instructions							
935	1231A	1232B	1238B	1242A	1244A	1247C	1328A
1353A	1353B	1353C	1397	1523	1922	2128	

Revised Instructions									
550	934	984	1194	1200A	1218A	1218B	1240B	1240D	1241B
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1498D

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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
7/2026

RELEASE NO. 71	EDITION (1980)	JULY 2026

The following pages should be removed from and inserted into each volume of the Wis JI-Criminal binders as indicated below. Follow all placement notes carefully before filing.

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OFFICE OF JUDICIAL EDUCATION
7/2026

WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME I

Wisconsin Criminal Jury Instructions Committee

[Cite as Wis JI-Criminal]

- Includes 7/2026 Supplement (Release No. 71)

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WISCONSIN JURY INSTRUCTIONS — CRIMINAL

Committee Member List

Prepared for the Wisconsin Judicial Conference by its Criminal Jury Instructions Committee, with assistance from the Attorney General's Office, the State Public Defender's Office, and the Office of Judicial Education.

Committee Members Judges	
Name	**Role / Title**
Hon. Maureen Boyle	Chair
Hon. Scott Horne	Member
Hon. Nicholas McNamara	Member
Hon. Michael Moran	Member
Hon. Thomas Walsh	Member
Hon. Patricia Baker	Member
Hon. Michelle Havas	Member
Hon. Ralph Ramirez	Member
Hon. Laura Crivello	Member
Hon. Mark Sanders	Member
Hon. Scott Blader	Member
Assistance Provided By	
Christine Remington	Assistant Attorney General
Katie York	Assistant State Public Defender
Bryce Pierson	Office of Judicial Education Legal Advisor

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Wisconsin Jury Instructions

Criminal

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Criminal Jury Instructions Committee

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550 SOLICITATION AS A CRIME — § 939.30

Statutory Definition of the Crime

The crime of solicitation, as defined in § 939.30 of the Criminal Code of Wisconsin, is committed by one who, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has that intent. The defendant in this case is charged with advising that the crime of (name of felony) be committed. (Name of felony) is a felony.

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 intended that the crime of (name of felony) be committed.

   The crime of (name of felony) is committed by one who

   > [DEFINE THE CRIME INVOLVED, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE][1]

2. The defendant advised another person, by the use of words or other expressions, to commit the crime of (name of felony) and did so under circumstances that indicate, unequivocally, that the defendant intended that (name of felony) be committed.

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts.[2]

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 550 was originally published in 1962 and revised in 1994, 2000, and 2020. 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 June 2026. It updated the penalty class information included in the comment.

This instruction is for the inchoate crime of solicitation, as defined in § 939.30. Liability as a party to crime under § 939.05, based on "soliciting" another to commit a crime, is addressed by Wis JI–Criminal 415.

Solicitation under § 939.30 is generally a Class H felony. See § 939.30(1). There are two penalty exceptions in § 939.30(2): solicitation to commit a crime punishable by life imprisonment is a Class F felony, and solicitation to commit a Class I felony is a Class I felony. Section 939.30(1) also recognizes the separate treatment of solicitation under § 961.455, which occurs in the manner described in § 939.30 but is subject to the penalties provided in § 961.455.

In State v. Yee, 160 Wis.2d 15, 465 N.W.2d 260 (Ct. App. 1990), Yee asked Dino Corti to find someone who would break the arms and legs of Mr. Li and later kill him. Corti informed the police and

Yee was arrested. The court of appeals reversed the trial court's dismissal of solicitation charges, holding: "if A, with intent that a felony be committed, advises B to procure C to commit the felony under circumstances which indicate unequivocally that A has such intent, A is guilty of the crime of solicitation, contrary to sec. 939.30. . . ." 160 Wis.2d 15, 16.

In State v. Manthey, 169 Wis.2d 673, 487 N.W.2d 44 (Ct. App. 1992), Manthey, a potential witness in a malpractice action, indicated to the plaintiff's husband that she would testify favorably only if paid by the plaintiff. The court of appeals applied the Yee rationale to this case, which did not involve a "C": ". . . Manthey advised Otis to engage in the commission of the crime of perjury when she offered to commit perjury if he paid her. The Yee rationale, therefore, does not require the existence of 'C'." The court referred to this type of case as one involving a "double inchoate crime." 169 Wis.2d 673, 687.

In State v. Boehm, 127 Wis.2d 351, 379 N.W.2d 874 (Ct. App. 1985), Boehm solicited Larry Poor to murder Ron Hitchler. Before anything was done, she told Poor that she was "done with" the killing and called the whole thing off. The court of appeals held that a defense of renunciation or withdrawal does not apply to the crime of solicitation under § 939.30:

> Renunciation or withdrawal cannot undo that which has been done and therefore has no effect on the elements of solicitation, once completed. Renunciation or withdrawal therefore cannot be a defense to the completed crime of solicitation, in the absence of statute.

In State v. Kloss, 2019 WI App 13, 386 Wis.2d 314, 925 N.W.2d 563, Kloss solicited his wife to shoot a gun through the front door if any police officers returned to their house. The State charged Kloss with one count of solicitation of first-degree reckless injury, Wis. Stat. § 940.23(1)(a). Kloss was convicted and appealed, arguing in part that it is not possible for a person to intend that another person succeed in causing great bodily harm by reckless conduct because whether harm will result from the other person's reckless conduct is entirely unpredictable. The court of appeals held that a solicitor can intend at the time of the solicitation, that great bodily harm result from the solicitee's reckless conduct. While the uncertainty of whether an injury will in fact result from the solicitee's conduct at the time of the solicitation is "inescapable in an inchoate crime such as solicitation," no level of certainty is required to form a purpose to cause a particular result. Kloss, 386 Wis.2d 314, 322 (2019).

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1. If the instruction on the intended crime involves considerable elaboration, it may aid jury understanding to move this description to the end of the instruction, immediately preceding the "Jury's Decision" paragraphs.

2. This is the definition of "unequivocally" used in Wis JI–Criminal 580, Attempt.

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934 SEXUAL CONTACT — § 939.22(34)

SELECT ONE OF THE FOLLOWING ALTERNATIVES RELATING TO THE TYPE OF SEXUAL CONTACT AND INSERT IT IN THE INSTRUCTION FOR THE OFFENSE.[1]

Meaning of "Sexual Contact"

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF THE INTIMATE PARTS OF ANOTHER PERSON [§ 939.22(34)(a)]:

[Sexual contact is an intentional touching of the (name intimate part)[2] of (name of victim) (by the defendant) (by another person upon the defendant's instruction).[3] The touching may be of the (name intimate part) directly or it may be through the clothing. The touching may be done by any body part or by any object or device, but it must be an intentional touching.

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).][4]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF ANY PART OF ANOTHER PERSON'S BODY WITH THE INTIMATE PARTS OF THE DEFENDANT OR OF ANOTHER PERSON [§ 939.22(34)(b)]:

[Sexual contact is an intentional touching of any part of the body, clothed or unclothed, of (name of victim) with the (name intimate part), clothed or unclothed, of (the defendant) (another person upon the defendant's instruction).[5]

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).][6]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL PENILE EJACULATION OR INTENTIONAL EMISSION OF URINE OR FECES UPON ANOTHER PERSON [§ 939.22(34)(c)]:

[Sexual contact is (intentional penile ejaculation of ejaculate) (or) (intentional emission of urine or feces) (by the defendant) (by another person upon the defendant's instruction)[7] upon any part of the body, clothed or unclothed, of (name of victim).[8]

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).][9]

FOR SEXUAL CONTACT INVOLVING INTENTIONALLY CAUSING ANOTHER PERSON TO EJACULATE OR EMIT URINE OR FECES ON ANY PART OF THE DEFENDANT'S BODY [§ 939.22(34)(d)]:

[Sexual contact is (ejaculation) (or) (emission of urine or feces) by (name of victim) on any part of the defendant's body, clothed or unclothed, which the defendant intentionally causes.[10]

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).][11]

GIVE THE FOLLOWING IN ALL CASES.

Deciding About Intent and Purpose

You cannot look into a person's mind to find intent or purpose. Intent or purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent and purpose.

CONTINUE WITH THE INSTRUCTION FOR THE OFFENSE.

COMMENT

Wis JI–Criminal 934 was approved by the Committee in June 2010. This revision was approved by the Committee in June 2026; it updated the comment.

The Wisconsin criminal statutes provide three definitions of "sexual contact" which are substantially similar but not identical. This instruction addresses § 939.22(34), which applies to criminal offenses requiring sexual contact and not appearing in § 940.225 or in Chapter 948. See, for example, sub. (1)(a) of § 940.302, Human Trafficking, and sub. (5) of § 944.30, Prostitution.

The other two definitions of "sexual contact" are found in:

- § 940.225(5)(b), which applies to offenses defined in § 940.225 [see Wis JI–Criminal 1200A]; and,
- § 948.01(5), which applies to offenses defined in Chapter 948 [see Wis JI–Criminal 2101A].

This instruction provides all four alternatives specified by § 939.22(34); each alternative includes the type of touching or emission of bodily substances and the purpose of the touching or emission. This is intended to be more convenient to the users of the instructions and to make it easier to prepare an instruction that is tailored to the facts of the case.

See Wis JI–Criminal 935 (Law Note: The Definition of "Sexual Contact") for a comparison of this definition with the adult sexual-assault definition in § 940.225(5)(b) (addressed in Wis JI–Criminal 1200A) and the child-victim definition in § 948.01(5) (addressed in Wis JI–Criminal 2101A), and for guidance on which definition applies to specific offenses.

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1. The definition of "sexual contact" in § 939.22(34) applies to offenses not found in § 940.225, where the definition in § 940.225(5)(b) applies, or Chapter 948, where the definition in § 948.01(5) applies. Section 939.22(34) identifies two types of intentional touchings and two alternatives involving intentional emission of bodily substances. The instruction provides a separate paragraph for each statutory alternative. The applicable paragraph should be selected and added to the instruction for the charged offense.

Each alternative includes the second part of the statutory sexual contact definition: that the contact was for a prohibited purpose. See note 4, below.

2. Section 939.22(19) defines "intimate parts": "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved in the sexual contact.

In State v. Morse, 126 Wis.2d 1, 374 N.W.2d 388 (Ct. App. 1985), the court of appeals held that a trial court did not improperly broaden the scope of the sexual contact definition in § 939.22(19) by defining "intimate part" to include "the vaginal area."

"[T]he plain language of Wis. Stat. § 939.22(19) is meant to include a female and a male breast because each is 'the breast . . . of a human being' and thereby the touching of a [15 year old] boy's breast constitutes

'sexual contact' within the meaning of Wis. Stat. §948.02(2)." State v. Forster, 2003 WI App 29, 260 Wis.2d 149, 659 N.W.2d 144.

3. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

4. Each alternative definition includes the requirement that the contact be for a prohibited purpose. The Committee concluded that including purpose as part of each alternative will reduce the possibility that it would be inadvertently overlooked. Failure to include the purpose of the contact as part of the jury instruction is reversible error. State v. Krueger, 2001 WI App 14, 240 Wis.2d 644, 623 N.W.2d 211. Likewise, failure to include reference to purpose when accepting a guilty plea may be grounds for withdrawal of the plea. State v. Bollig, 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199; State v. Jipson, 2003 WI App 222, 267 Wis.2d 467, 671 N.W.2d 18; and State v. Nichelson, 220 Wis.2d 214, 582 N.W.2d 460 (1998).

5. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

6. Each alternative definition includes the requirement that the contact be for a prohibited purpose. See note 4, supra.

7. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

8. This is the type of "sexual contact" defined in § 939.22(34)(c). It was created by 1995 Wisconsin Act 69, which first applied to offenses committed on December 2, 1995.

9. Each alternative definition includes the requirement that the contact be for a prohibited purpose. See note 4, supra.

10. This is the type of "sexual contact" defined in § 939.22(34)(d). It was created by 2005 Wisconsin Act 273, which first applied to offenses committed on April 20, 2006.

11. Each alternative definition includes the requirement that the contact be for a prohibited purpose. See note 4, supra.

935 LAW NOTE: THE DEFINITION OF "SEXUAL CONTACT" IN WISCONSIN CRIMINAL PROCEEDINGS

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I. Statutory Framework

Wisconsin law provides three distinct definitions of "sexual contact," each set forth in a separate statutory section with its own scope and elements. Courts must identify and apply the correct definition based on the statute under which the defendant is charged. The three definitions are: (1) the general definition in § 939.22(34), which applies to offenses in chs. 939 to 948 and 951 except where the context manifestly requires a different construction or where the word is defined in § 948.01 for purposes of ch. 948; (2) the adult-victim definition in § 940.225(5)(b), which applies to sexual-assault offenses charged under § 940.225; and (3) the child-victim definition in § 948.01(5), which governs offenses under Chapter 948.

A. General Definition — § 939.22(34)

Section 939.22(34) applies to crimes in chapters 939 to 948 and 951, unless a particular statute clearly requires a different meaning or the term is separately defined in § 948.01 for purposes of chapter 948. It defines "sexual contact" as four categories of conduct undertaken for the purpose of sexual humiliation, degradation, arousal, or gratification.[1] The statute recognizes the following four categories:

- **Touching another's intimate parts** (§ 939.22(34)(a)): Intentional touching by the defendant or, upon the defendant's instruction, by a third person, of the complainant's clothed or unclothed intimate parts with any part of the body, or with any object or device.

- **Touching the complainant with intimate parts** (§ 939.22(34)(b)): Intentional touching by the defendant or, upon the defendant's instruction, by a third person, of any part of the complainant's body (clothed or unclothed) with the intimate parts of the body, clothed or unclothed.

- **Emission on the complainant** (§ 939.22(34)(c)): Intentional penile ejaculation of ejaculate or the intentional emission of urine or feces by the defendant, or upon the defendant's instruction, by a third person, upon any part of the body, clothed or unclothed, of another person.

- **Causing another to emit on the actor** (§ 939.22(34)(d)): Intentionally causing another person to ejaculate or emit urine or feces on any part of the actor's body, whether clothed or unclothed.

Importantly, § 939.22(34) does not itself include conduct in which the complainant intentionally touches the defendant's intimate parts. That circumstance is addressed separately in § 948.01(5) for child-victim offenses and in § 940.225(5)(b)1. for adult-victim offenses charged under § 940.225.

B. Adult Sexual Assault Definition — § 940.225(5)(b)

Section 940.225 governs sexual assault offenses involving adult complainants. Subsection (5)(b) provides a specialized definition of "sexual contact" that applies only to offenses charged under § 940.225. The definition has three subdivisions: subdivision 1., with sub-subdivisions a., b., and c., addresses intentional touching; subdivision 2. addresses penile ejaculation or the emission of urine or feces onto the complainant's body; and subdivision 3. addresses intentionally causing the complainant to emit onto the defendant's body.

Subdivision 1. is distinctive because, in addition to conduct undertaken for the purpose of sexual degradation, humiliation, arousal, or gratification, it also includes touching that "contains the elements of actual or attempted battery under s. 940.19(1)," an alternative not found in the general definition in § 939.22(34) or the child-victim definition in § 948.01(5).

Subdivision 1. further expressly covers three forms of intentional touching: touching of the complainant's intimate parts by the defendant under subd. 1.a.; touching by the complainant of the defendant's or another person's intimate parts at the defendant's instruction or through the use or threat of force under subd. 1.b.; and, as added by 2023 Wis. Act 61, touching by the complainant of any person's ejaculate, urine, or feces at the defendant's instruction, through the use or threat of force, or as the result of an intentional act by the defendant under subd. 1.c. Because this definition is expressly limited to offenses under § 940.225, it should not be applied to other statutes that use the term "sexual contact."[2] See Wis JI–Criminal 1219 for the pattern jury instruction treatment of § 940.225(5)(b)1.

C. Child-Victim Definition — § 948.01(5)

Section 948.01(5) provides a specialized definition of "sexual contact" for offenses against children under Chapter 948. Each alternative retains a purpose requirement, namely sexual degradation or humiliation of the complainant, or sexual arousal or gratification of the defendant. The statute also expands the scope of covered conduct beyond § 939.22(34) in several important respects. Specifically, "sexual contact" under § 948.01(5) includes:

- **Intentional touching of intimate parts** (§ 948.01(5)(a)1.–2.): Intentional touching, directly or through clothing by the use of any body part or object, of the complainant's intimate parts by the defendant or, upon the defendant's instruction, by another person (subd. 1.); and intentional touching by the complainant of the defendant's intimate parts, or, upon the defendant's instructions, the intimate parts of another person (subd. 2.).

- **Contact with ejaculate, urine, or feces** (§ 948.01(5)(a)3., created by 2023 Wis. Act 61): Touching by the complainant of the ejaculate, urine, or feces of any person, upon the intentional instructions of the defendant, upon the use or threat of force or violence by the defendant, or upon an intentional act of the defendant.

- **Defendant's emission on the child** (§ 948.01(5)(b)): Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant, or, upon the

defendant's instruction, by another person upon any part of the body, clothed or unclothed, of the complainant. The "by another person upon the defendant's instruction" language was added by 2019 Wis. Act 16.

- **Causing the complainant to emit on the defendant** (§ 948.01(5)(c)): Intentionally causing the complainant to ejaculate or to emit urine or feces on any part of the defendant's body, whether clothed or unclothed, for the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant.

This expanded definition applies to all Chapter 948 offenses unless a more specific definition is provided elsewhere. Notably, it expressly includes conduct in which the child touches, or is caused by the defendant to touch the defendant's intimate parts, thereby covering scenarios omitted from § 939.22(34). See Wis JI–Criminal 2101A for the pattern jury-instruction treatment of § 948.01(5).

II. Elements and Components

All three definitions share three core components:

- **Intentional Conduct**: The act, whether touching, emission, or causing emission, must be intentional. Passive or accidental contact is not enough. However, intentionally allowing a child to engage in the touching may satisfy this requirement, because purposeful conduct may be inferred from the defendant's acquiescence.[3]

- **Involvement of Intimate Parts or Bodily Emissions**: Section 939.22(19) defines "intimate parts" as "the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." The definition is not limited by the person's gender, and includes both male and female breasts. The statutes also extend to bodily emissions, specifically ejaculate, urine, or feces, whether (i) produced by the defendant through ejaculation or intentional emission, (ii) caused by the defendant to be produced by the complainant, or (iii)—under § 940.225(5)(b)1.c. and § 948.01(5)(a)3.—merely touched by the complainant (as distinct from being produced) upon the defendant's instruction, upon the use or threat of force or violence, or upon an intentional act of the defendant.[4]

- **Sexual Purpose**: The act must be committed for the purpose of the actor's sexual arousal or gratification, or to sexually degrade or humiliate the complainant. This purpose may be established through circumstantial evidence and does not require an admission by the defendant.[5]

III. When Each Definition Applies

A. Rule-Based Application of Sexual Contact Definitions

- **Charges Under Chapter 948**. When a defendant is charged under § 948.02 (sexual assault of a child) or any other Chapter 948 offense that criminalizes "sexual contact," courts must apply the definition in § 948.01(5). § 939.22 expressly yields to § 948.01 definitions for ch. 948 purposes.[6] This definition is broader than the general definition and includes scenarios in which the child touches the defendant's intimate parts, as well as conduct involving bodily emissions.

- **Charges Under § 940.225**. When the charging statute is § 940.225, courts must apply the definition of "sexual contact" provided in § 940.225(5)(b). Section 940.225(5)(b) is a statute-specific definition that applies exclusively to offenses charged under § 940.225. See Wis JI–Criminal 1219. It parallels the general definition's categories of touching, emission, and causing emission, and uniquely includes a battery-alternative under § 940.225(5)(b)1. ("contains the elements of actual or attempted battery under s. 940.19 (1)"). Subdivision 1.c., added by 2023 Wis. Act 61, covers the complainant's touching of ejaculate, urine, or feces of any person upon the defendant's instruction or coercion. Accordingly, for charges under § 940.225, the court should instruct using § 940.225(5)(b), not the general definition in § 939.22(34).

- **Charges Under Other Statutes Using "Sexual Contact"** (Including Chapter 940 Offenses Other Than § 940.225; Chapter 942; and Similar Statutes). For statutes that use the term "sexual contact" but do not supply a different definition (and are not charged under § 940.225 or Chapter 948), courts generally apply the general definition in § 939.22(34). This general definition encompasses intentional touching of intimate parts and bodily emission scenarios, but it does not cover instances in which the complainant touches the defendant's intimate parts.

- **Mixed or Ambiguous Statutes**. When a statute incorporates language from both Chapter 948 and other chapters (e.g., persistent repeater provisions), courts must examine the statutory language to determine which definition of sexual contact the legislature intended to apply. The Wisconsin Supreme Court has clarified, for example, that "sexual contact" is not an element of child enticement; rather, it is one of six enumerated "modes of commission."[7] In such cases, the court need not define "sexual contact" when accepting a plea. For trial purposes, however, Wis JI–

Criminal 2134, 2134A, and 2134B continue to recommend that the term be defined for the jury.

- **Special Statutes with Independent Definitions**. Certain offenses include their own definition of "sexual contact" or use alternative language. For example, § 944.18(1)(d) defines "sexual contact" for purposes of the bestiality/sexual-contact-with-an-animal statute in a manner entirely distinct from §§ 939.22(34), 940.225(5)(b), and 948.01(5). The charging statute should always be reviewed carefully to determine whether a specific definition is provided or incorporated.

B. Practical Checklist for Determining the Applicable Definition of Sexual Contact

Use the following guide to determine which statutory definition of "sexual contact" applies, based on the offense charged:

- **§ 940.225(2)(a), (3)** – Sexual Assault by Contact (adult victim): Apply the definition of sexual contact in § 940.225(5)(b). See Wis JI–Criminal 1218B (third degree) and 1219 (fourth degree).

- **§§ 948.02(1)–(2)** – First-/Second-Degree Sexual Assault of a Child by Contact: Apply the child-specific definition in § 948.01(5). See Wis JI–Criminal 2101A.

- **§ 948.025** – Repeated Sexual Assault of a Child: Apply § 948.01(5)

- **§ 948.093** – Underage Sexual Activity: Apply § 948.01(5). Although § 948.093 does not expressly cross-reference § 948.01(5), § 948.093 is a Chapter 948 offense and § 939.22 directs that where a word is defined in § 948.01 for purposes of ch. 948, that definition controls.[8]

- **§ 948.07** – Child Enticement: Do not treat "sexual contact" as an element for Bangert plea-colloquy purposes. Instead, identify the specific improper purpose(s) alleged (e.g., intent to have sexual contact, intent to have sexual intercourse) and instruct accordingly. Note: Wis JI–Criminal 2134, 2134A, and 2134B still recommend defining "sexual contact" for trial purposes even though it is not a strict "element."[9]

- **§ 948.085 and § 948.095** – Sexual Assault of a Child Placed in Substitute Care; Sexual Assault of a Child by a School Staff Person: Apply § 948.01(5).

- **Other Chapter 948 Offenses** (e.g., sexual exploitation of a child under § 948.05; incest with a child under § 948.06; sexual assault of a child placed in substitute care under § 948.085): Apply § 948.01(5) unless the offense statute includes its own definition of "sexual contact." Always review the specific statute for alternative language.

- **§ 944.18** – Sexual Contact with an Animal: Apply the independent definition in § 944.18(1)(d), not §§ 939.22(34), 940.225(5)(b), or 948.01(5).

IV. Case Law Synthesis

The following sections organize Wisconsin case law by recurring issues related to sexual contact.

A. Intent and Purpose Requirements

- **Sexual Purpose Element**: Courts consistently require the State to prove that the conduct was undertaken for the purpose of either (1) the actor's sexual arousal or gratification, or (2) the sexual humiliation or degradation of the complainant. This element may be established through circumstantial evidence and does not require direct proof of the defendant's subjective intent. In State v. Drusch, 139 Wis. 2d 312, 407 N.W.2d 328 (Ct. App. 1987), the court held that the defendant's intent to obtain sexual gratification may be inferred from his conduct—specifically, repeatedly lifting young girls with a hand between their legs, lying about his identity to the children, and lying to police about his contact. The decision reinforces that juries may draw reasonable inferences about sexual purpose from the totality of the circumstances.[10]

- **Allowing vs. Initiating Contact**: The Court of Appeals has rejected the view that "sexual contact" requires the defendant to affirmatively initiate the physical touching. In State v. Traylor, 170 Wis. 2d 393, 489 N.W.2d 626 (Ct. App. 1992), the court held that intentionally allowing a child to make oral contact with the defendant's penis constituted "intentional touching" within the meaning of § 948.01(5). The court reasoned that by permitting the contact—without intervening

or withdrawing—the defendant engaged in purposeful conduct from which a jury could infer the requisite sexual intent.[11]

- **Child Enticement vs. Sexual Assault**: In State v. Hendricks, 2018 WI 15, 379 Wis. 2d 549, 906 N.W.2d 666, the Wisconsin Supreme Court clarified that "sexual contact" is not an element of the crime of child enticement under § 948.07. Rather, it is one of six enumerated "modes of commission." The offense centers on the act of enticement itself, not the nature of the underlying conduct. As a result, courts are not required to define "sexual contact" during plea colloquies[12] for child-enticement charges, although Wis JI–Criminal 2134, 2134A, and 2134B continue to recommend defining the term at trial. However, when the charge is sexual assault of a child, the purpose element is essential, and trial courts must ensure it is properly instructed and supported by the evidence.

B. Body-Part Coverage and the Definition of "Intimate Parts"

- **Male Breasts Are Covered**: In State v. Forster, 2003 WI App 29, 260 Wis. 2d 149, 659 N.W.2d 144, the defendant contended that touching a 15-year-old boy's chest did not constitute "sexual contact." The Court of Appeals rejected this claim, holding that the statutory definition of "intimate parts" in § 939.22(19) includes the breast of "any human being."[13] The court emphasized that the absence of a gender distinction reflects a legislative intent to cover male breasts.

- **"Vaginal Area" Is a Permissible Instruction**: In State v. Morse, 126 Wis. 2d 1, 374 N.W.2d 388 (Ct. App. 1985), the court held that the trial court did not improperly broaden the scope of § 939.22(19) by instructing that "intimate part" included "the vaginal area." [14] Jury instructions may refer to the "vaginal area" without error or ambiguity.[15]

- **Other Covered Body Parts**: The statutory definition of "intimate parts" in § 939.22(19) also expressly includes the buttock, anus, groin, scrotum, penis, vagina, and pubic mound. Courts apply these terms in accordance with their plain and commonly understood meanings, consistent with legislative definitions.

C. Contextual Proof and Circumstantial Evidence

- **Use of Other-Acts Evidence**: In State v. Friedrich, 135 Wis. 2d 1, 398 N.W.2d 763 (1987), the Wisconsin Supreme Court upheld the admissibility of prior sexual conduct to establish motive and plan. The court stressed that proving "sexual contact" requires showing that the touching was for the purpose of sexual gratification, and that evidence of similar prior acts can be highly probative in demonstrating that intent.[16] The "greater latitude" rule further supports admissibility in sex-crime cases, especially those involving children. See State v. Davidson, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606.

D. Jury Instruction Considerations and Plea Colloquy Issues

- **Purpose Element Must Be Conveyed**: Wisconsin courts have consistently emphasized that juries—and defendants entering pleas—must be informed that "sexual contact" requires a specific sexual purpose. In State v. Jipson, 2003 WI App 222, 267 Wis. 2d 467, 671 N.W.2d 18, the Court of Appeals permitted the defendant to withdraw his plea because the colloquy failed to advise him that second-degree sexual assault of a child requires proof that the contact was for sexual gratification, humiliation, arousal, or degradation.[17] Similarly, in State v. Nichelson, 220 Wis. 2d 214, 582 N.W.2d 460 (Ct. App. 1998), the court reversed the circuit court's order denying plea withdrawal after concluding that the trial court had not properly ensured the defendant understood this essential element during the plea colloquy.[18]

- **No Purpose Requirement for Child Enticement**: As clarified in State v. Hendricks, 2018 WI 15, "sexual contact" is not an element of the offense of child enticement under § 948.07. Rather, it is one of six "modes of commission." Accordingly, courts are not required to define "sexual contact" during plea proceedings for child enticement charges, but defining it at trial remains the Committee's recommended practice.[19]

V. Comparison of Statutory Definitions of "Sexual Contact"

Aspect	§ 939.22(34) General Definition (JI Criminal 934)	§ 940.225(5)(b) Adult Sexual Assault Definition (JI Criminal 1200A, 1219)	§ 948.01(5) Child Victim Definition (JI Criminal 2101A)
Applicable Offenses / Scope	Default definition for "sexual contact" in chs. 939 to 948 and 951, unless the context of a specific section manifestly requires a different construction OR the word is defined in § 948.01 for purposes of ch. 948. See § 939.22. **Examples:** human trafficking (§ 940.302), prostitution-related offenses (§ 944.30(1m)(e)), patronizing prostitutes (§ 944.31).	Applies exclusively to offenses charged under § 940.225 (Sexual assault — adult victim). See § 940.225(5)(b). **Examples:** first-/second-/third-/fourth-degree sexual assault (§ 940.225(1), (2), (3), (3m)); sexual assault by certain professionals/staff under § 940.225.	Applies to offenses in Chapter 948 (Crimes Against Children) whenever those offenses criminalize "sexual contact." See § 948.01. **Examples:** sexual assault of a child (§ 948.02); repeated sexual assault of the same child (§ 948.025); sexual assault of a child placed in substitute care (§ 948.085); sexual assault of a child by a school staff person (§ 948.095); underage sexual activity (§ 948.093).
Purpose / Intent Element	The act must be done "for the purpose of sexual humiliation, degradation, arousal, or gratification." § 939.22(34). A single, general-purpose clause applies to all four paragraphs (a)–(d).	Each subdivision recites its own purpose requirement. For § 940.225(5)(b)1. (intentional touching), the purposes are: (i) "sexually degrading or sexually humiliating the complainant," (ii) "sexually arousing or gratifying the defendant," or **(iii) UNIQUE:** the touching "*contains the elements of actual or attempted battery under s. 940.19 (1)*." This battery alternative is found only in § 940.225(5)(b)1. — not in § 939.22(34) or § 948.01(5).	Each subdivision recites the purpose: "for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." § 948.01(5)(a), (b), (c). Substantively identical to the general definition's purpose requirement, but more specific in naming "complainant" and "defendant."

Terminology Used	"The defendant"; "another person" (for the victim); "a third person" (for someone acting at the defendant's instruction). *Does not use the word "child" — because if the offense is in ch. 948, § 948.01(5) controls by virtue of § 939.22 (intro.).*	"The defendant"; "the complainant"; "another person" (for a third-party actor or additional intimate-parts target).	"The defendant"; "the complainant" (the child); "another person" (for a third-party actor or additional intimate-parts target). *Section 948.01(1) generally defines "child" as a person under 18. The exception for a person who has attained age 17 applies when that person is being prosecuted as the alleged offender; it does not exclude a 17-year-old complainant from the definition when another person is being prosecuted.*
Touching of Complainant's Intimate Parts by Defendant (or Directed Third Person)	**✓ § 939.22(34)(a)** Intentional touching by the defendant or, upon the defendant's instruction, by a **third person**, of the clothed or unclothed intimate parts of another person with any part of the body, clothed or unclothed, **or with any object or device**.	**✓ § 940.225(5)(b)1.a.** Intentional touching by the defendant or, upon the defendant's instruction, by **another person**, by the use of **any body part or object**, of the complainant's intimate parts. *Minor difference: "any body part or object" (no separate "device" term).*	**✓ § 948.01(5)(a)1.** Intentional touching by the defendant or, upon the defendant's instruction, by **another person**, by the use of **any body part or object**, of the complainant's intimate parts. *Minor difference: "any body part or object" (no separate "device" term).*
Touching of Complainant's Body With Defendant's Intimate Parts	**✓ § 939.22(34)(b)** Intentional touching by the defendant or, upon the defendant's instruction, by a third person, of **any part of the body** of another person **with the intimate parts of the body**, clothed or unclothed. *Example: defendant rubs their genitals on the victim's arm or leg.*	**◑ Covered indirectly** Section 940.225(5)(b)1.a. covers touching of the complainant's **intimate parts** "by the use of any body part" — which captures most such cases (the defendant's intimate parts touching the complainant's intimate parts). However, if the defendant's intimate parts touch a **non-intimate** part of the complainant's body (e.g., arm, leg), subdivision 1.a. would not reach that conduct unless it "contains the elements of actual or attempted battery" under subd. 1. (intro.).	**◑ Covered indirectly** Section 948.01(5)(a)1. covers touching of the complainant's **intimate parts** "by the use of any body part" — which captures most such cases. If the defendant's intimate parts touch a **non-intimate** part of the child's body (e.g., arm, leg), neither subdivision (a)1. nor (a)2. literally reaches the conduct. There is no statutory equivalent to § 939.22(34)(b) in ch. 948.

	✗ **Not included** Section 939.22(34) does not enumerate a scenario in which the complainant is the one doing the touching of the defendant's intimate parts. *For offenses prosecuted under § 940.225 or ch. 948, this scenario is captured by the more specific definitions; for other statutes using § 939.22(34), the conduct may still be chargeable as sexual assault (§ 940.225) or another offense.*	✓ **§ 940.225(5)(b)1.b.** Intentional touching **by the complainant**, **upon the defendant's instruction**, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person.	✓ **§ 948.01(5)(a)2.** Intentional touching by the complainant, by the use of any body part or object, of **the defendant's intimate parts** or, **if done upon the defendant's instructions**, the intimate parts of another person. *NOTE: The defendant's "instructions" requirement applies only to touching a third person's intimate parts. The child's touching of the defendant's own intimate parts falls within subd. (a)2. without any instruction requirement. See also State v. Traylor, 170 Wis. 2d 393, 489 N.W.2d 626 (Ct. App. 1992) (allowing child-initiated contact satisfies "intentional touching").*
	✓ **§ 939.22(34)(c)** Intentional penile ejaculation of ejaculate, or intentional emission of urine or feces, by the defendant or, upon the defendant's instruction, by a **third person**, upon any part of the body (clothed or unclothed) of another person.	✓ **§ 940.225(5)(b)2.** Intentional penile ejaculation of ejaculate, or intentional emission of urine or feces, by the defendant or, **upon the defendant's instruction**, by **another person**, upon any part of the body (clothed or unclothed) of the complainant. *The "upon the defendant's instruction, by another person" language was added by 2005 Wis. Act 435.*	✓ **§ 948.01(5)(b)** Intentional penile ejaculation of ejaculate, or intentional emission of urine or feces, by the defendant or, **upon the defendant's instruction**, by **another person**, upon any part of the body (clothed or unclothed) of the complainant. *The "upon the defendant's instruction, by another person" language was added by 2019 Wis. Act 16, creating parity with § 940.225(5)(b)2.*

	✓ **§ 939.22(34)(d)** Intentionally causing another person to ejaculate or emit urine or feces on any part of **the actor's body**, whether clothed or unclothed. *Uses "actor's body" (consistent with § 939.22 terminology) rather than "defendant's body."*	✓ **§ 940.225(5)(b)3.** For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of **the defendant's body**, whether clothed or unclothed.	✓ **§ 948.01(5)(c)** For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of **the defendant's body**, whether clothed or unclothed.
	✗ **Not included** Section 939.22(34) contains no parallel provision. The general definition does not reach this conduct. *For offenses not prosecuted under § 940.225 or ch. 948, this scenario is not covered.*	✓ **§ 940.225(5)(b)1.c.** Touching by the complainant of the ejaculate, urine, or feces of **any person** upon: (i) the intentional instructions of the defendant; (ii) the use or threat of force or violence by the defendant; or (iii) an intentional act of the defendant. *Added by 2023 Wis. Act 61 (effective Dec. 8, 2023).*	✓ **§ 948.01(5)(a)3.** Touching by the complainant of the ejaculate, urine, or feces of **any person** upon: (i) the intentional instructions of the defendant; (ii) the use or threat of force or violence by the defendant; or (iii) an intentional act of the defendant. *Added by 2023 Wis. Act 61 (effective Dec. 8, 2023).*
	✗ **Not included** The general definition requires a sexual-humiliation, degradation, arousal, or gratification purpose. There is no battery-based alternative.	✓ **UNIQUE: § 940.225(5)(b)1. (intro.)** The intentional touching under subd. 1. is sexual contact if it is either (i) for one of the sexual purposes, **OR** (ii) "contains the elements of actual or attempted battery under s. 940.19 (1)." *This alternative is unique to § 940.225(5)(b)1. It does NOT appear in § 939.22(34) or § 948.01(5).*	✗ **Not included** The child-victim definition requires a sexual-humiliation, degradation, arousal, or gratification purpose. There is no battery-based alternative.

	Supplied by § 939.22(19): "the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." *Applies to §§ 939.22(34), 940.225(5)(b), and 948.01(5) alike. See State v. Forster, 2003 WI App 29, 260 Wis. 2d 149 (includes male breasts); State v. Morse, 126 Wis. 2d 1 (instruction may refer to the "vaginal area" without error).*	Same definition — § 939.22(19) applies by virtue of § 939.22 (intro.).	Same definition — § 939.22(19) applies to ch. 948 because § 948.01 does not supply a separate definition of "intimate parts." See § 939.22 (intro.).
	Explicit. § 939.22(34)(a)–(c) repeatedly use the formulation "clothed or unclothed."	Explicit. § 940.225(5)(b)1. expressly covers intentional touching "whether direct or through clothing," and this language governs all three sub-subdivisions (a., b., and c.). In addition, § 940.225(5)(b)2. and 3. use the phrase "clothed or unclothed" in describing the body of the complainant or defendant.	Explicit. § 948.01(5)(a) expressly covers intentional touching "whether direct or through clothing," and this language governs all three sub-subdivisions (1., 2., and 3.). In addition, § 948.01(5)(b) uses the phrase "clothed or unclothed" in describing the body of the complainant. *Touching "through clothing" qualifies as intentional touching.*
	Each of paragraphs (a)–(d) requires **intentional** conduct by the defendant (or the third person acting on the defendant's instruction). *"Intentionally" has the meaning designated in § 939.23.*	Each subdivision requires **intentional** conduct. *"Allowing" a child-initiated touch can satisfy intentional touching. See State v. Traylor (though that case arose under § 948.01(5); the Committee has not extended Traylor to § 940.225 in the absence of clear authority).*	Each subdivision requires **intentional** conduct. *"Allowing" a child-initiated touch may satisfy intentional touching. State v. Traylor, 170 Wis. 2d 393 (Ct. App. 1992).*
	Wis JI–Criminal 934 (defining "sexual contact" under § 939.22(34) for offenses other than § 940.225 and ch. 948).	**Wis JI–Criminal 1200A** (definition used within the § 940.225 offense instructions, such as JI-Criminal 1208 and 1218B). **Wis JI–Criminal 1219** builds the definition alternatives directly into the fourth-degree sexual-assault instruction.	**Wis JI–Criminal 2101A** (definition used within the sexual-assault-of-a-child instructions, including JI-Criminal 2101, 2102, 2104, 2106, and 2134).

Key Statutory History	• Original structure traced to 1987 Wis. Act 332. • 1995 Wis. Act 69 added par. (c) (emission on another). • 2005 Wis. Act 273 added par. (d) (causing another to emit on the actor). • 2005 Wis. Act 435 added "by the defendant or, upon the defendant's instruction, by a third person" to (a), (b), and (c).	• Origin: 1975 sexual assault reform (ch. 184, Laws of 1975). • Ch. 309, Laws of 1981 (structural refinement after State v. Nye, 105 Wis. 2d 63). • 1995 Wis. Act 69 added subd. 2. (emission on complainant). • 2005 Wis. Act 273 added subd. 3. (causing complainant to emit). • 2005 Wis. Act 435 added "upon the defendant's instruction, by another person" language. • 2023 Wis. Act 61 added subd. 1.c. (complainant touching ejaculate/urine/feces).	• Created by 1987 Wis. Act 332 (creation of ch. 948). • 2005 Wis. Act 273 added (5)(c) (causing complainant to emit on defendant). • 2005 Wis. Act 435 added "upon the defendant's instruction" language to (5)(a). • 2019 Wis. Act 16 added "or, upon the defendant's instruction, by another person" to (5)(b). • 2023 Wis. Act 61 created (5)(a)3. (complainant touching ejaculate/urine/feces).

COMMENT

Wis JI–Criminal 935 was approved by the Committee in June 2026.

2023 Wisconsin Act 61 [effective date: December 8, 2023] created § 940.225(5)(b)1.c. and § 948.01(5)(a)3., thereby expanding the definition of "sexual contact" in both chapters. The new language captures situations in which the complainant intentionally touches another person's ejaculate, urine, or feces, and the defendant either: (1) intentionally instructed the complainant to do so, (2) used or threatened force or violence, or (3) otherwise caused the act by an intentional act of the defendant. For cases arising on or after December 8, 2023, courts must incorporate this new alternative definition when supported by the evidence. See Wis JI–Criminal 2101A for an example of how the child-victim instruction has been updated to reflect this change.

2019 Wisconsin Act 16. Act 16 amended § 948.01(5)(b) to add the language "or, upon the defendant's instruction, by another person," mirroring the 2005 Wis. Act 435 amendment to § 940.225(5)(b)2. Thus, under both the adult and child definitions, penile ejaculation or emission of urine or feces may be committed by the defendant or by a third person acting on the defendant's instruction.

Indirect digital contact (e.g., remote contact facilitated by electronic means). No reported Wisconsin cases address whether remote or digital touching (e.g., instructing a child via video to touch themselves or to touch intimate parts of a third person) constitutes "sexual contact" within § 948.01(5). Under § 948.01(5)(a)1., the statute requires "intentional touching by the defendant or, upon the defendant's instruction, by another person." Whether a child directed remotely to touch his or her own intimate parts is "another person" acting "upon the defendant's instruction" is an open question in Wisconsin. However, subdivision (5)(a)2. (touching by the complainant of the defendant's intimate parts) and subdivision (5)(a)3. (touching by the complainant of any person's ejaculate, urine, or feces upon the defendant's intentional instructions) provide alternative grounds where applicable. In any event, such conduct will typically also support charges under § 948.07 (child enticement) and § 948.075 (use of a computer to facilitate a child sex crime).

Overlap with emerging offenses. The legislature continues to update ch. 948. Practitioners should monitor statutory changes and adjust instructions accordingly.

Legislative History. The modern framework of "sexual contact" evolved through a series of targeted statutory amendments:

- **Pre-1988 framework**. The term "sexual contact" has been defined in § 940.225(5) since the 1975 sexual assault reform (ch. 184, Laws of 1975). The definition was refined by Chapter 309, Laws of 1981 (eliminating certain language held problematic in State v. Nye, 105 Wis. 2d 63, 312 N.W.2d 826 (1981)).

- **1987 Wisconsin Act 332.** Created Chapter 948 (Crimes Against Children) and the child-specific definition of "sexual contact" in § 948.01(5).

- **1995 Wisconsin Act 69**: Introduced § 939.22(34)(c), covering intentional penile ejaculation or emission on another person. The parallel § 948.01(5)(b) was likewise structured. This Act also created a new type of third-degree sexual assault based on the emission alternative. See Wis JI–Criminal 1218B.

- **2005 Wisconsin Act 273**: Added § 939.22(34)(d) (causing another to emit on the actor's body), § 940.225(5)(b)3., and § 948.01(5)(c), addressing scenarios in which the complainant is caused to emit on the defendant.

- **2005 Wisconsin Act 435**: Broadened liability in § 939.22(34) and § 940.225(5)(b) by adding language covering acts "by the defendant or, upon the defendant's instruction, by a third person" (or "by another person").

- **2019 Wisconsin Act 16**: Extended the "by another person upon the defendant's instruction" language to § 948.01(5)(b), creating parity with § 940.225(5)(b)2. for penile ejaculation and emission alternatives in child-victim cases.

- **2023 Wisconsin Act 61**: Created § 940.225(5)(b)1.c. and § 948.01(5)(a)3., adding scenarios in which the complainant intentionally touches ejaculate, urine, or feces of any person upon the defendant's intentional instructions, upon the use or threat of force or violence by the defendant, or upon an intentional act of the defendant.

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1. See § 939.22(34) (intro.).
2. See Wis JI–Criminal 1200A.
3. State v. Traylor, 170 Wis. 2d 393, 404, 489 N.W.2d 626 (Wis. Ct. App. 1992).
4. State v. Forster, 2003 WI App 29, 260 Wis. 2d 149, ¶13, 659 N.W.2d 144.
5. State v. Drusch, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Wis. Ct. App. 1987).
6. See § 939.22 (intro.)
7. State v. Hendricks, 2018 WI 15, 379 Wis. 2d 549, ¶22, 906 N.W.2d 666.
8. See also State v. Colton M., 2015 WI App 94, 366 Wis. 2d 119, 875 N.W.2d 642 (applying § 948.01(5) to a sub. (1)(e) prosecution).
9. See State v. Hendricks, 2018 WI 15, supra, at ¶ 33.
10. See State v. Drusch, supra.
11. See State v. Traylor, supra.
12. See State v. Hendricks, supra.
13. See State v. Forster, supra.
14. State v. Morse, 126 Wis. 2d 1, 4, 374 N.W.2d 388 (Wis. Ct. App. 1985).
15. State v. Morse, supra at 6.
16. State v. Friedrich, 135 Wis. 2d 1, 21, 398 N.W.2d 763 (1987).
17. State v. Jipson, 2003 WI App 222, 267 Wis. 2d 467, ¶ 1, 671 N.W.2d 18.
18. State v. Nichelson, 220 Wis. 2d 214, 582 N.W.2d 460 (Wis. Ct. App. 1998).
19. See State v. Hendricks, supra.

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984 COMMITTING A DOMESTIC ABUSE CRIME [AS A DOMESTIC ABUSE REPEATER — § 939.621(1)(b) and (2)][1]

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

The information[2] alleges not only that the defendant committed the crime of (identify crime) but also that the crime was an act of domestic abuse.

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

"Was the crime of (identify crime) an act of domestic abuse?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the crime of (identify crime) charged in this case was an act of domestic abuse.

For a crime to constitute an act of "domestic abuse" two things are required.

First, it must involve

SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE:[3]

[intentional infliction of physical pain, physical injury, or illness.]

[intentional impairment of physical condition.]

[(first) (second) (third) degree sexual assault.][4]

[a physical act that may cause the other person reasonably to fear imminent engagement in (identify conduct described under § 968.075(1)(a) 1., 2., or 3.)].[5]

Second, it must have been engaged in by an adult person (against his or her spouse or former spouse) (against an adult with whom the person resided or had

formerly resided) (against an adult with whom the person has a child in common).

If you are satisfied beyond a reasonable doubt that the crime of (identify crime) was an act of domestic abuse, you should answer the question "yes."

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

COMMENT

Wis JI–Criminal 984 was originally published in 2014 and updated in 2016 and 12/2024. The 12/2024 revision added brackets around the words "as a domestic abuse repeater" in the title to indicate that its inclusion is optional. See footnote 1 below. This revision was approved by the Committee in April 2026. It updated the comment to address crimes that do not involve physical conduct, as well as "multi-count cases."

Section 939.621 was created by 1987 Wisconsin Act 346. It provides for a penalty increase of up to two years if a person is a "domestic abuse repeater." The statute also provides that the penalty increase "changes the status of a misdemeanor to a felony."

Section 939.621 was amended by 2011 Wisconsin Act 277 [effective date: April 24, 2012]. Before being amended, the statute applied only to those who committed a second domestic abuse crime during the 72 hours immediately following an arrest for a domestic abuse incident. That provision is now found in § 939.621(1)(a). See Wis JI–Criminal 983. Act 277 added a second basis for the penalty increase, described as follows in § 939.621(1)(b):

> . . . convicted, on 2 separate occasions, of a felony or a misdemeanor for which a court imposed a domestic abuse surcharge under s. 973.055(1) or waived a domestic abuse surcharge pursuant to s. 973.055(4), during the 10-year period immediately prior to the commission of the crime for which the person presently is being sentenced, if the convictions remain of record and unreversed.

There are two parts to the finding required for enhancing the penalty under § 939.621(1)(b) and (2), one of which must go to the jury and one which does not. First, under § 939.621(2), the present conviction must be for a crime that is "an act of domestic abuse, as defined in s. 968.075(1)(a)." This is an issue for the jury because it provides for an increased penalty based on facts not covered by the offense definition of the crime to which the added penalty is being applied. Second, under § 939.621(1)(b), the defendant must have been convicted on two separate occasions of a crime for which a domestic abuse surcharge was imposed under § 973.055(1) or waived under § 973.055(4). The Committee concluded that this fact need not be submitted to the jury because it relates solely to prior convictions. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added.) The Committee concluded that the Apprendi exception applies even

though the prior convictions must be for violations subject to the domestic abuse surcharge, which could be characterized as a fact that goes beyond the mere fact of a conviction. This appears to be the same as the prior convictions, refusals, etc., that are the basis for increased penalties for operating under the influence or with a prohibited alcohol concentration: those must be priors that are counted under § 343.307, but their existence is determined by the court, not the jury.

In an unpublished opinion, the Wisconsin Court of Appeals reversed a conviction for disorderly conduct as both a repeater and a domestic abuse repeater. The decision concluded that the trial court erred in not instructing the jury to determine whether the underlying conduct qualified as an act of domestic abuse under § 939.621(1)(b) – the domestic abuse repeater statute. The court held that it is a jury issue because it increases the maximum penalty for the underlying crime. The decision cites Wis JI–Criminal 984 in footnote 3 of the decision. State v. Johnson, Wis. Ct. App No. 2014AP2888-CR [not published – cited for persuasive value]. Note: Wis JI–Criminal 984 was published in 2014; Johnson's trial took place in May 2013.

For the purposes of § 939.621(1)(b), "it is immaterial that the sentence [for the prior conviction] was stayed, withheld or suspended, or that the person was pardoned, unless the person was pardoned on the ground of innocence." Further, § 939.621(2) states: "The victim of the domestic abuse crime does not have to be the same as the victim of the domestic abuse incident that resulted in the prior arrest or conviction."

Selecting the bracketed alternatives based on the underlying offense. The definition of "domestic abuse" in § 968.075(1)(a) is framed exclusively in terms of physical conduct or the threat of imminent physical conduct. When the underlying offense includes "bodily harm" as an element — for example, battery under § 940.19(1) — the first or second bracketed alternative will ordinarily map directly onto the offense, because "bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." § 939.22(4); see State v. Higgs, 230 Wis. 2d 1, 11, 601 N.W.2d 653 (Ct. App. 1999).

The fit is less direct when the underlying offense is one that does not require physical contact or physical harm, such as disorderly conduct under § 947.01. Disorderly conduct may be committed by purely verbal or written means and does not require any physical force. See State v. Douglas D., 2001 WI 47, ¶3, 243 Wis. 2d 204, 626 N.W.2d 725 ("purely written speech . . . can constitute disorderly conduct"); State v. A.S., 2001 WI 48, ¶17, 243 Wis. 2d 173, 626 N.W.2d 712 ("application of the disorderly conduct statute to speech alone is permissible under appropriate circumstances"); State v. Schwebke, 2002 WI 55, 253 Wis. 2d 1, 644 N.W.2d 666; Doubek v. Kaul, 2022 WI 31, ¶20, 401 Wis. 2d 575, 973 N.W.2d 756 ("A person may be convicted of disorderly conduct for all kinds of conduct that does not involve the use or attempted physical force . . . for example, profane or unreasonably loud behavior.").

In such cases, the Committee suggests the following guidance. If the disorderly conduct, or other offense without a physical element, involved actual physical contact that caused physical pain, injury, or impairment of physical condition, the court may select the first or second alternative. If the evidence instead shows a physical act directed at the qualifying person that could reasonably cause that person to fear imminent physical harm described in subdivisions 1., 2., or 3. of § 968.075(1)(a), the fourth alternative is available. Examples include brandishing a weapon, raising a fist, throwing objects, or overturning furniture while making threats. Justice Karofsky's concurrence in Doubek v. Kaul illustrates application of the fourth alternative, identifying the defendant's act of raising a 2×4 above his head while threatening his wife as the qualifying "physical act." 2022 WI 31, ¶24 (Karofsky, J., concurring). The parenthetical "(identify conduct described under § 968.075(1)(a) 1., 2., or 3.)" should be completed with the specific feared harm supported by the evidence, most commonly "the intentional infliction of physical pain or physical injury."

The Committee notes, but does not resolve, whether purely verbal conduct, without any accompanying physical act, can satisfy any of the four subdivisions of § 968.075(1)(a). By their terms, each subdivision describes physical conduct or a "physical act," and no published Wisconsin appellate decision has held that verbal conduct alone is sufficient. Trial courts confronted with evidence of purely verbal conduct should therefore carefully consider whether the record supports submitting any of the four alternatives to the jury on the domestic abuse special verdict question.

Multi-count cases. When the domestic abuse repeater enhancer is alleged as to more than one count in the same information, the special verdict question should be submitted separately for each applicable count, following the guilt/not-guilty verdict on that count. The bracketed alternatives selected from § 968.075(1)(a) should be tailored to the evidence supporting the individual count, and need not be the same across counts. For example, in a case charging both battery and disorderly conduct as domestic abuse repeater counts, the first or second alternative may be appropriate for the battery count while the fourth alternative may be the only one supported as to the disorderly conduct count. This per-count approach is consistent with the treatment of other fact-based enhancers. See State v. Tomlinson, 2002 WI 91, 254 Wis. 2d 502, 648 N.W.2d 367; Wis JI–Criminal 484 (separate verdict on each count required); Wis JI–Criminal 990 (special verdict question submitted per count for dangerous weapon enhancer).

As with similar provisions, the Committee recommends that the penalty-increasing fact be submitted to the jury as a special question following the instruction for the charged crime. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> "Was the crime of _____ an act of domestic abuse?"

1. The bracketed language "AS A DOMESTIC ABUSE REPEATER — § 939.621(1)(b) and (2)" is included in the title to facilitate easy location of the instruction. The Committee recommends that this bracketed language not be included in the written instructions provided to the jury.

2. Section 939.621(2) provides that the penalty increase "changes the status of a misdemeanor to a felony." Thus, there will always have been an information, even if the underlying offense would have been a misdemeanor in the absence of the penalty increase.

3. The definition of "domestic abuse" is provided in § 968.075(1)(a). The Committee recommends selecting the parts of the definition that apply.

4. The statute uses the phrase "a violation of § 940.225(1), (2), or (3)" to describe this option. The Committee concluded that the titles of those offenses should be used rather than the statute numbers.

5. Each of the four subdivisions of § 968.075(1)(a) describes either physical conduct or, in subd. 4., a "physical act" that causes reasonable fear of imminent physical harm or sexual assault. When the

underlying crime is one that does not itself require physical conduct, such as disorderly conduct under § 947.01, the trial court should take care to select only those alternatives that are actually supported by the evidence. Where the only evidence consists of verbal conduct not accompanied by any physical act, the court should consider whether the record permits submission of the "act of domestic abuse" question at all. See the Comment above under "Selecting the bracketed alternatives based on the underlying offense."

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OFFICE OF JUDICIAL EDUCATION

7/2026

WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME II

Wisconsin Criminal Jury Instructions Committee

[Cite as Wis JI-Criminal]

- Includes 7/2026 Supplement (Release No. 71)

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1194 HIDING OR BURYING A CORPSE — § 940.11(2)

Statutory Definition of the Crime

Section 940.11(2)[1] of the Criminal Code of Wisconsin is violated by one who hides or buries a corpse with intent to (conceal a crime) (avoid apprehension, prosecution, or conviction for a crime) (collect benefits under section (49.141 to 49.161) (subch. IV of ch. 49) (49.79(1)(c))).[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 two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (hid)[3] (buried) a corpse.[4]
2. The defendant (hid) (buried) a corpse with intent[5] to (conceal a crime) (avoid apprehension, prosecution, or conviction[6] for a crime) (collect benefits under section (49.141 to 49.161) (subch. IV of ch. 49) (49.79(1)(c))).

   This requires that the defendant acted with the purpose to (conceal a crime) (avoid apprehension, prosecution, or conviction for a crime) (collect benefits under section (49.141 to 49.161) (subch. IV of ch. 49) (49.79(1)(c))).[7]

Deciding About Intent

You cannot look into a person's mind to find out 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 1194 was originally published in 1994 and revised in 1998, 2006, 2013, and 1/2024. The 2013 revision modified the instruction to reflect changes made by 2011 Wisconsin Act 268. This revision was approved by the Committee in April 2026. It added comment footnote 5 to address State v. Minck, 2025 WI App 35, 417 Wis. 2d 1, 24 N.W.3d 125, the first published opinion interpreting the intent element of § 940.11(2).

This instruction is for violations of sub. (2) of § 940.11. For violations of sub. (1) of the same statute, see Wis JI–Criminal 1193.

Section 940.11 was amended by 2011 Wisconsin Act 268 [effective date: April 24, 2012] to add an alternative intent element: intent to collect benefits under sections 49.141 Wisconsin works, 49.49 Medical assistance or 49.795 Food stamps. The "notwithstanding" provisions cross-referenced in the benefit-fraud alternative were subsequently re-codified from §§ 49.141(7), 49.49(1), and 49.795 into Chapter 946 (§§ 946.90–946.93), [effective date: February 6, 2016].

Subsection (3) of § 940.11 provides as follows: "A person may not be subject to prosecution under both this section and § 946.47 or under both this section and § 948.23 for his or her acts regarding the same corpse." Section 946.47 defines the offense of Harboring or Aiding Felons. Section 948.23 defines the offense of Concealing or Not Reporting the Death of a Child.

Per the provisions of Wis. Stat. § 939.66: "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both." Further, subsection (7) of the statute clarifies

that an included crime could be "the crime specified in s. 940.11(2) when the crime charged is specified in s. 940.11(1)." Therefore, a guilty verdict can be rendered for both a count of mutilating a corpse and a count of hiding or burying a corpse, but only one judgment of conviction can be entered for each corpse.

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1. This alternative intent element was added to § 940.11(2) by 2011 Wisconsin Act 268 [effective date: April 24, 2012]. Sections 49.141 to 49.161 refer to Wisconsin Works benefits; subch. IV of ch. 49 refers to the Medical Assistance program; and § 49.79(1)(c) defines the food stamp program. These citations reflect the current statutory text as amended effective February 6, 2016; the original Act 268 language referenced §§ 49.141(7), 49.49(1), and 49.795, which were the welfare-fraud penalty provisions later re-codified into Chapter 946.

2. The material added to the statute by Act 268 reads: ". . . or notwithstanding s. 946.90(2) or (3), 946.91(2), 946.92, or 946.93(2) or (3) with intent to collect benefits under one of those sections. . ." The statutes listed after "notwithstanding" are those that define criminal violations – what are typically referred to as "welfare fraud" or "food stamp fraud." These provisions were re-codified from Chapter 49 into Chapter 946 [effective February 6, 2016]; the current "notwithstanding" cross-references in the statute are §§ 946.90(2) or (3), 946.91(2), 946.92, and 946.93(2) or (3). The Committee interpreted this reference to mean that regardless of the other criminal penalties that may apply, an individual may be prosecuted under § 940.11 if the statute is violated with an intent to obtain benefits under those sections.

3. The evidence was found to be sufficient to establish that the defendant "hid" a corpse in State v. Badker, 2001 WI App 27, 240 Wis. 2d 460, 623 N.W.2d 142. The court referred with apparent approval to the dictionary definition of "hide" as "to put or keep out of sight." 2001 WI App 27, ¶25, citing Webster's II New College Dictionary (1999).

4. "Corpse" means the dead body of a human being. American Heritage Dictionary of the English Language, 3rd Edition, 1992.

5. In State v. Minck, 2025 WI App 35, ¶43, 417 Wis.2d 1, 24 N.W.3d 125, the Court of Appeals held, as a matter of first impression, that the "with intent to conceal a crime" element of § 940.11(2) does not require that the defendant intended to conceal the victim's homicide specifically. The statute refers to "a crime" without specifying its type; accordingly, intent to conceal any crime satisfies this element.

In Minck, the court found sufficient evidence that the defendant hid the corpse to conceal his illegal drug trafficking, which was a crime entirely separate from the victim's death. The court further confirmed that § 940.11(2) requires only "an intent, however ill-conceived or irrational, to conceal a crime" Id. at ¶ 52. A defendant need not have committed the homicide of the victim; the defendant need only have concealed the corpse with an intent, even an ill-founded one, to conceal some crime.

6. If the charging document specifies one of the alternatives (apprehension, prosecution, or conviction), or the evidence supports only one, only that alternative should be used in the instruction. If more than one alternative is supported by the evidence and included in the instruction, the Committee concluded that the jury need not be unanimous as to which applies because the alternatives do not state "conceptually distinct" categories. For a discussion of the same problem arising in connection with burglary with intent to commit a felony, see State v. Hammer, 216 Wis. 2d 213, 576 N.W.2d 285 (Ct. App. 1997).

7. "With intent to" is defined in § 939.23(4) as having the mental purpose to cause the result or being "aware that his or her conduct is practically certain to cause that result." The Committee believes that the mental purpose alternative is most likely to apply to this offense. Also see Wis JI–Criminal 923A and 923B.

1200A SEXUAL CONTACT — § 940.225(5)(b)

SELECT ONE OF THE FOLLOWING ALTERNATIVES RELATING TO THE TYPE OF SEXUAL CONTACT AND INSERT IT IN THE INSTRUCTION FOR THE SEXUAL ASSAULT OFFENSE.[1]

Meaning of "Sexual Contact"

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF THE INTIMATE PARTS OF THE VICTIM:

[Sexual contact is an intentional touching of the (name intimate part)[2] of (name of victim) (by the defendant) (by another person upon the defendant's instruction)[3]. The touching may be of the (name intimate part) directly, or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching.

Sexual contact also requires that the defendant acted with intent to (cause bodily harm to (name of victim).)[4] (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[5]]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING BY THE VICTIM OF THE INTIMATE PARTS OF THE DEFENDANT OR OF ANOTHER PERSON:

[Sexual contact is a touching by (name of victim) of the (name intimate part)[6] (of the defendant) (of another person upon the defendant's instruction)[7] if the defendant intentionally caused[8] (name of victim) to do that touching. The touching may be of the (name intimate part) directly or it may be through the clothing.

Sexual contact also requires that the defendant acted with intent to (cause bodily harm to (name of victim).)[9] (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[10]]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING BY THE VICTIM OF THE EJACULATE, URINE, OR FECES OF ANY PERSON:

[Sexual contact is a touching[11] by (name of victim) of the ejaculate, urine, or feces of any person upon (the intentional instructions of the defendant) (the use or threat of force or violence by the defendant) (an intentional act of the defendant).[12]

Sexual contact also requires that the defendant acted with intent to (cause bodily harm to (name of victim).)[13] (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[14]]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL EJACULATION OR INTENTIONAL EMISSION OF URINE OR FECES UPON THE COMPLAINANT:

[Sexual contact is intentional penile ejaculation of ejaculate or intentional emission of urine or feces (by the defendant) (by another person upon the defendant's instruction)[15] upon any part of the body clothed or unclothed of (name of victim).[16]

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[17]]

FOR SEXUAL CONTACT INVOLVING INTENTIONALLY CAUSING THE VICTIM TO EJACULATE OR EMIT URINE OR FECES ON ANY PART OF THE DEFENDANT'S BODY:

[Sexual contact is ejaculation or emission of urine or feces by (name of victim) on any part of the defendant's body, clothed or unclothed, which the defendant intentionally causes.[18]

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[19]]

GIVE THE FOLLOWING IN ALL CASES.

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 bearing upon intent.

CONTINUE WITH THE INSTRUCTION FOR THE SEXUAL ASSAULT OFFENSE.

COMMENT

Wis JI–Criminal 1200A was originally published in 1996 and revised in 1999, 2001, 2002, 2003, 2007, and 7/2024. The 2007 revision reflected changes made by 2005 Wisconsin Acts 273 and 435. The 7/2024 revision reflected changes made pursuant to 2023 Wisconsin Act 61 [effective date: December 8, 2023]. This revision was approved by the Committee in June 2026; it added to the comment.

[An instruction formerly numbered Wis JI–Criminal 1200A, FIRST DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE CAUSING PREGNANCY, has been renumbered Wis JI–Criminal 1201A.]

This instruction provides definitions of "sexual contact" that are to be integrated into the instruction for sexual assault offenses involving sexual contact as appropriate to the facts of the case. The material provided here was formerly included in the text of each offense instruction, dividing the sexual contact definition into two separate elements: one involving the type of touching and the other involving the purpose of the touching. 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 this separate instruction with all the alternatives for both the type of touching and the purpose of the touching. 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.

A similar instruction is provided at Wis JI–Criminal 2101A for offenses in violation of § 948.02. This instruction differs in several ways due to differences between the statutory definition of "sexual contact" provided in § 940.225(5)(b), addressed in this instruction, and the definition of the same term provided in § 948.01(5), addressed in Wis JI–Criminal 2101A. This instruction should be used only for violations of § 940.225.

The following definition of "sexual contact" is provided in § 940.225(5)(b), as amended by 2023 Wisconsin Act 61 [effective date: December 8, 2023]:

(b) "Sexual contact" means any of the following:

1. Any of the following types of intentional touching whether direct or through clothing if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19 (1):

a. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.

b. Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person.

c. Touching by the complainant of the ejaculate, urine, or feces of any person upon the intentional instructions of the defendant, upon the use or threat of force or violence by the defendant, or upon an intentional act of the defendant.

2. Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

3. For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

For a comprehensive comparison of this definition with § 939.22(34) (addressed in Wis JI–Criminal 934) and § 948.01(5) (addressed in Wis JI–Criminal 2101A), including guidance on which definition applies to specific charging statutes, see Wis JI–Criminal 935 (Law Note: The Definition of "Sexual Contact").

1. The definition of "sexual contact" in § 940.225(5)(b) identifies three types of intentional touchings and two alternatives involving intentional emission of bodily substances. The instruction provides a separate alternative for each type of sexual contact, one of which should be selected and added

to the instruction for the sexual assault offense.

Each alternative includes the second part of the statutory sexual contact definition: that the contact was for a prohibited purpose. See note 5, below.

2. Section 939.22(19) defines "intimate parts": "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved in the sexual contact.

In State v. Morse, 126 Wis. 2d 1, 374 N.W.2d 388 (Ct. App. 1985), the court of appeals held that a trial court did not improperly broaden the scope of the sexual contact definition in § 939.22(19) by defining "intimate part" to include "the vaginal area."

"[T]he plain language of Wis. Stat. § 939.22(19) is meant to include a female and a male breast because each is 'the breast . . . of a human being' and thereby the touching of a [15 year old] boy's breast constitutes 'sexual contact' within the meaning of Wis. Stat. §948.02(2)." State v. Forster, 2003 WI App 29, 260 Wis. 2d 149, 659 N.W.2d 144.

3. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

4. Note that this alternative – intent to cause bodily harm – is not to be used for cases based on sexual contact involving intentional ejaculation or intentional emission of urine or feces. The remaining two intent alternatives do apply to that type of case.

"Intent to cause bodily harm" is derived from that part of the statutory sexual contact definition, which prohibits touchings that "contain the elements of actual or attempted battery as defined in § 940.19(1)." The elements of battery are: (1) that the defendant caused bodily harm to another person; (2) that the defendant intended to cause bodily harm; (3) that the bodily harm was caused without the consent of the victim; and (4) that the defendant knew the victim did not consent. [See Wis JI–Criminal 1220.] Attempted battery requires proof of intent to commit all the elements of battery and an unequivocal act indicating that intent. (See Wis JI–Criminal 580.)

There is some difficulty in smoothly integrating the elements of battery, or attempted battery, into sexual contact offenses under § 940.225. The Committee determined that the essential element of battery or attempted battery that carries over to sexual contact offenses is that of intent to cause bodily harm.

The actual causing of bodily harm by the defendant (the first element of battery, supra) would be implicated only where offenses under § 940.225(1)(a) (see Wis JI–Criminal 1201) and 940.225(2)(b) (see Wis JI–Criminal 1211) are charged. In both offenses, the causing of bodily harm would be covered by other elements of the crime: with subsection (1)(a), the causing of great bodily harm would include it; with subsection (2)(b), the causing of injury, illness, etc., would include it.

For other sexual contact offenses, the causing of physical injury is not a required element. Therefore, these offenses would probably involve the elements of attempted battery. The Committee feels that the elements of a criminal attempt are established by including "intent to do bodily harm" as an element of the sexual contact offense. The "intentional touching" that is required for all sexual contact offenses would furnish the "unequivocal act" required for a criminal attempt. The requirement that intent to do bodily harm

be proved fulfills the other element of a criminal attempt, which is that the defendant intends to commit the completed crime.

The other two elements of battery and attempted battery require that the victim not consent to the touching and that the defendant know of this fact. However, not all sexual assaults have "without consent" as an element (see § 940.225(1)(d) and (2)(c) through (e)). In these instances, the legislature has apparently made the decision that the consent of the victim should be irrelevant because of the victim's young age, mental disability, or unconsciousness. In these cases, the Committee concluded that the reference to the "elements of battery or attempted battery" should not be read to overrule the sexual assault subsections that do not require that "without consent" be proved.

If the "without consent" element is interpreted in this way, the only essential element of battery and attempted battery that carries over to the sexual contact offenses is the element of "intent to cause bodily harm." The Committee determined that it was better to select this distinctive element and make it an element of sexual contact offenses than to incorporate all the elements of battery or attempted battery into the instructions.

5. Each alternative definition includes the requirement that the contact be for a prohibited purpose. Earlier versions of the instructions included the purpose as a separate element, but the Committee concluded that it was preferable to deal with purpose as a second part of the sexual contact definition. The Committee also concluded that including purpose as part of each alternative will reduce the possibility that it would be inadvertently overlooked. Failure to include the purpose of the contact as a part of the jury instruction is reversible error. State v. Krueger, 2001 WI App 14, 240 Wis. 2d 644, 623 N.W.2d 211. Likewise, failure to include reference to purpose when accepting a guilty plea may be grounds for withdrawal of the plea. State v. Bollig, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199; State v. Jipson, 2003 WI App 222, 267 Wis. 2d 467, 671 N.W.2d 18; and State v. Nichelson, 220 Wis. 2d 214, 582 N.W.2d 460 (1998).

The instruction phrases the alternatives as requiring that the defendant acted "with intent to" achieve one of the prohibited results. The statute refers to acting with "the purpose of . . ." No change in meaning is intended.

6. See note 2, supra.

7. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

8. The instruction refers to the touching of the defendant by the complainant as a touching which the defendant "causes" the complainant to do. The statute does not expressly provide for the "causing" alternative, but the Committee concluded that the requirement is implicit.

For sexual assault offenses against children, another alternative exists for this type of sexual contact: allowing a child to touch an intimate part of the defendant. This alternative was recognized in State v. Traylor, 170 Wis. 2d 393, 489 N.W.2d 626 (Ct. App. 1992). See the discussion in note 5, Wis JI–Criminal 2101A. Under § 940.225, certain adult victims are in a situation very similar to that of a child victim: persons suffering from mental illness or deficiency [sub. (2)(c)]; persons under the influence of an intoxicant [sub. (2)(cm)]; or, patients or residents [sub. (2)(g)]. However, the Committee decided not to incorporate the "or allowed" alternative in this instruction in the absence of clear authority extending the Traylor decision beyond offenses against children.

Applied literally to a case where the victim is caused to touch the defendant, § 940.225(5)(b)1.b. requires an "intentional touching by the complainant . . . of the . . . defendant's intimate parts. . . ." The Committee concluded that it is proper to interpret this definition in a manner that focuses on the defendant's, rather than the victim's, intent. Thus, the instruction refers simply to "a touching" by the victim that the defendant "intentionally caused." This is consistent with the Traylor decision's interpretation of almost identical language in the definition of "sexual contact" in § 948.01(5)(a).

The constitutionality of the sexual contact definition (prior to its amendment by Chapter 309, Laws of 1981) was considered by the Wisconsin courts in several cases. The constitutionality of the basic definition was upheld in State ex rel. Skinkis v. Treffert, 90 Wis. 2d 528, 280 N.W.2d 316 (Ct. App. 1979). In State v. Nye, 105 Wis. 2d 63, 312 N.W.2d 826 (1981), the Wisconsin Supreme Court summarily affirmed a Wisconsin Court of Appeals decision (101 Wis. 2d 398, 302 N.W.2d 83 (Ct. App. 1981)) which held that it was error to include in a jury instruction the former statutory language "if that touching can reasonably be construed to be for the purpose of sexual arousal or gratification." Chapter 309, Laws of 1981, eliminated the phrase from § 940.225(5)(b); the standard instructions had never included it in the definition of sexual contact.

9. Note that this alternative – intent to cause bodily harm – is not to be used for cases based on sexual contact involving intentional ejaculation or intentional emission of urine or feces. The remaining two alternatives do apply to that type of case. See note 4, supra.

10. See notes 4 and 5, supra.

11. See note 8, supra.

12. This is the type of "sexual contact" defined in sub. (5)(b)1.c. of § 940.225. It was created by 2023 Wisconsin Act 61, which first applies to offenses committed on December 8, 2023.

13. Note that this alternative – intent to cause bodily harm – is not to be used for cases based on sexual contact involving intentional ejaculation or intentional emission of urine or feces. The remaining two alternatives do apply to that type of case. See note 4, supra.

14. See notes 4 and 5, supra.

15. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

16. This is the type of "sexual contact" defined in sub. (5)(b)2. of § 940.225. It was created by 1995 Wisconsin Act 69, which first applies to offenses committed on December 2, 1995.

17. See notes 4 and 5, supra.

18. This is the type of "sexual contact" defined in sub. (5)(b)3. of § 940.225. It was created by 2005 Wisconsin Act 273, which first applies to offenses committed on April 20, 2006.

19. See notes 4 and 5, supra.

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1218A THIRD DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE WITHOUT CONSENT — § 940.225(3)(a)

Statutory Definition of the Crime

Third degree sexual assault, as defined in § 940.225(3)(a) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with another person without 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 two elements were present.

Elements of the Crime That the State Must Prove

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

   "Sexual intercourse" is defined as (insert the applicable definition set forth in Wis JI–Criminal 1200B).[1]

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

Meaning of "Did Not Consent"[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual intercourse with the defendant. In deciding whether (name of victim) did not consent, you should consider what (he) (she) 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 both elements of third-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 1218 and revised in 1983, 1990, 2001, and 2018. A revision renumbering it as Wis JI–Criminal 1218A was published in 1996. This revision was approved by the Committee in April 2026. It clarified all essential elements consistent with the Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for violations of § 940.225(3)(a): sexual intercourse without consent, as amended by 2017 Wisconsin Act 174. Act 174 amended former sub. (3) by splitting it into subdivs. (a) and (b). The text and the penalty were not changed.

See Wis JI–Criminal 1218B for violations under sub. (3)(b): sexual contact [as defined in § 940.225(5)(b)2. and 3.] without consent.

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1. The appropriate definition of "sexual intercourse" should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

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), (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.

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).

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1218B THIRD-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITHOUT CONSENT INVOLVING EJACULATION, ETC. — § 940.225(3)(b)

Statutory Definition of the Crime

Third-degree sexual assault, as defined in § 940.225(3)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with another person—meaning contact undertaken with intent to (become sexually aroused or gratified) (sexually degrade or humiliate that person)[1]—without 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 three elements were present.

Elements of the Crime That the State Must Prove

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

   "Sexual contact" is defined as [(intentional penile ejaculation of ejaculate or intentional emission of urine or feces (by the defendant) (by another person upon the defendant's instruction)[2] upon any part of the body clothed or unclothed of (name of victim).[3]] [ejaculation or emission of urine or feces by (name of victim) on any part of the defendant's body, clothed or unclothed, which the defendant intentionally causes.[4]][5]

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)).[6]

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

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 bearing upon intent.

Meaning of "Did Not Consent"[7]

"Did not consent" means that (name of victim) did not freely agree to have sexual contact with the defendant. In deciding whether (name of victim) did not consent, you should consider what (he) (she) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of third-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 1218B was originally published in 1996 and revised in 2002, 2004 and 2018. The 2018 revision reflected changes made by 2017 Wisconsin Act 174 [effective date: March 30, 2018]. This revision was approved by the Committee in April 2026. It added Element 2 to comply with the holding in State v. Jipson, 2003 WI App 222.

This instruction is for violations of § 940.225(3)(b), as amended by 2017 Wisconsin Act 174. For violations of sub. (3)(a), see Wis JI–Criminal 1218A. Act 174 amended former sub. (3) by splitting it into two subdivs. (a) and (b). The text and the penalty were not changed. This instruction applies only to sexual contact as defined in § 940.225(5)(b)2. and 3., which provide that sexual contact includes:

> Sub. (b)2. Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.
>
> Sub. (b)3. For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

2017 Wisconsin Act 174 amended former sub. (3) by splitting it into subs. (a) and (b). The text and the penalty were not changed. See Wis JI–Criminal 1218A for violations under sub. (3)(a): sexual intercourse without consent.

Unlike the other instructions for sexual contact offenses, this instruction builds in the applicable alternative specified in subs. (5)(b) 2. and 3. This is to emphasize that this instruction is only for those specific types of sexual contact. For sexual contact offenses generally, see Wis JI–Criminal 1200A.

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1. The two identified alternatives defined in sub. (5)(b)2. and 3. apply to sexual contact involving intentional ejaculation or intentional emission of urine or feces. The "intent to cause bodily harm" alternative that applies to other types of sexual contact does not apply to the offense defined by this instruction. See Wis JI–Criminal 1200A.

2. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

3. This is the type of "sexual contact" defined in sub. (5)(b)2. of § 940.225. It was created by 1995 Wisconsin Act 69, which first applies to offenses committed on December 2, 1995.

4. This is the type of "sexual contact" defined in sub. (5)(b)3. of § 940.225. It was created by 2005 Wisconsin Act 273, which first applies to offenses committed on April 20, 2006.

5. This definition of "sexual contact" was created by 1995 Wisconsin Act 69 [effective date: December 2, 1995], which also created the offense addressed by this instruction. The appropriate definition of "sexual contact" should be selected based on the specific facts of the case.

6. Prior to the 2026 revision, the "Elements of the Crime That the State Must Prove" section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a "Meaning of 'Sexual Contact'" section and incorporated into the alternative definitions of sexual contact under Wis. Stat. § 940.225(5)(b)2. and 3.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court's earlier holding in State v. Jipson,

2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of "sexual contact," including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted "with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim."

7. 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.

8. 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).

1231A THREAT TO A PROBATION, EXTENDED SUPERVISION, OR PAROLE AGENT, COMMUNITY SUPERVISION AGENT, AN AFTERCARE AGENT, OR THEIR FAMILY MEMBER — § 947.016(2)

Statutory Definition of the Crime

Section 947.016(2) of the Criminal Code of Wisconsin is violated by one who threatens to cause bodily harm to the (person) (family member) of (a probation, extended supervision, or parole agent) (a community supervision agent) (an aftercare agent) where, at the time of the threat, the defendant knows or has reason to know that the victim is (a probation, extended supervision, or parole agent) (a community supervision agent) (an aftercare agent) (a family member of (a probation, extended supervision, or parole agent) (a community supervision agent) (an aftercare agent)), the threat is in response to an action by the agent acting in (his) (her) 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. (Name of victim) was ((a probation, extended supervision, or parole agent)[1] (a community supervision agent)[2] (an aftercare agent)[3]) (a family member of (a probation, extended supervision, or parole agent) (a community supervision agent)

(an aftercare agent)).

[For the purpose of this offense, a (e.g., child) is a family member.][4]

2. At the time of the threat, the defendant knew, or had reason to know, that (name of victim) was ((a probation, extended supervision, or parole agent) (a community supervision agent) (an aftercare agent) (a family member of (a probation, extended supervision, or parole agent) (a community supervision agent) (an aftercare agent)).

[This element may be satisfied by proving either that the defendant actually knew the victim's status, or that a reasonable person in the defendant's circumstances would have known the victim's status as (a probation, extended supervision, or parole agent) (a community supervision agent) (an aftercare agent) (a family member of (a probation, extended supervision, or parole agent) (a community supervision agent) (an aftercare agent)).]

3. The defendant threatened to cause bodily harm to (name of victim).

A threat requires a true threat. It may be communicated orally, in writing, or by conduct. "True threat" means that a reasonable person would interpret the threat as a serious expression that the speaker will inflict imminent or future bodily harm. It must convey a real possibility that bodily harm will follow.[5] 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]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[7]

4. The threat was in response to an action taken by the agent acting in an official capacity.

(Probation, extended supervision, or parole agents) (community supervision agents) (aftercare agents) act in an official capacity when they perform duties that they are employed[8] to perform.[9] [These duties include: _____.][10]

5. The defendant consciously disregarded[11] a substantial risk that others would view the statement as a true threat to cause bodily harm.

[This means the defendant is aware that others could regard the statement(s) as threatening violence and delivers (it) (them) anyway.][12]

6. The defendant threatened to cause bodily harm without the consent[13] of (name of victim).

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all 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 1231A was approved by the Committee in June 2026. It was drafted as part of the recodification and reorganization of the battery statutes enacted by 2025 Wisconsin Act 24 (effective date: August 10, 2025), which created a separate statutory section for threatening to cause bodily harm to agents or their family members.

Before the enactment of 2025 Wisconsin Act 24, threats directed at a probation, extended supervision, or parole agent, as well as a community supervision agent, aftercare agent, or their family member, were addressed under Wis JI–Criminal 1231.

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) was amended by 2021 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, and amended the definitions of "aftercare agent" and "community supervision agent" [Effective date: March 19, 2022]. 2025 Wisconsin Act 24 repealed § 940.20(2m)(b) and split its provisions: battery to agents or their family members is now codified at § 940.62(2)(b), and threatening to cause bodily harm to agents or their family members is now codified at § 947.016(2).

Battery causing bodily harm to these agents or their family members is addressed in § 940.62(2)(b)**.** See Wis JI–Criminal 1231.

Note: § 947.016(2) does not use the word "intentionally" in connection with the threat. Prior to the enactment of 2025 Wisconsin Act 24 many Wisconsin threat statutes required that the defendant "intentionally threatened." Under those statutes, the statutory mens rea (intentional purpose) exceeded the constitutional minimum (recklessness) established by Counterman v. Colorado, 600 U.S. 66. By contrast, because § 947.016(2) does not impose an intent requirement for the threat element, Element 5 of this instruction—the Counterman/Kindschy recklessness standard—functions both as the constitutional minimum and as the operative mens rea for true-threat prosecutions under the statute.

1. Section 940.51 (17) 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."

2. "Community supervision agent" is defined as follows in § 940.51 (4): ". . . 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."

3. "Aftercare agent" is defined as follows in § 940.51(2): ". . . 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."

4. Section 940.51 (10) provides:

"'Family member' means a spouse, child, stepchild, foster child, parent, legal guardian, sibling, grandparent, or grandchild."

5. See Counterman v. Colorado, 600 U.S. 66, 74, 143 S. Ct. 2106 (2023). Justice Bradley's concurrence in Kindschy v. Aish, 2024 WI 27, ¶44, 412 Wis. 2d 319, 8 N.W.3d 1, acknowledges Counterman's recklessness standard. Element 5 reflects the Counterman standard as the constitutionally required minimum mens rea for true-threat prosecutions.

6. This definition was originally 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.

In Counterman v. Colorado, 600 U.S. 66, ¶79, 143 S. Ct. 2106 (2023), the U.S. Supreme Court clarified that true threats must be evaluated based on their objective content—how a reasonable listener would perceive them—and that criminal liability requires a mens rea of at least recklessness, meaning the speaker must have "consciously disregarded a substantial risk that [the communications] would be viewed as threatening violence." The Wisconsin Supreme Court adopted the Counterman recklessness standard in Kindschy v. Aish, supra, at ¶¶14–15, abrogating the purely speaker-focused objective test previously employed under Perkins. Accordingly, the Committee revised the former Perkins–based definition to reflect the Counterman/Kindschy approach.

When deciding whether a statement is a true threat, the jury should consider the totality of circumstances. Relevant factors may include whether the threat was conditional; whether it was made directly to a specific person; how the recipient and others reacted; and whether the defendant had made similar statements or had the means to carry out the threat. The jury may also consider all other facts and context to determine if a statement was a true threat. See Perkins, supra, at ¶ 31, citing United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000).

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 U.S.C. § 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. Although Elonis was decided as a matter of federal statutory interpretation, it underscores that criminal "threat" liability should not rest solely on an objective reasonable-person standard. This instruction's definition of "true threat" includes both an objective reasonable-listener component and the mens rea floor required by the First Amendment under Counterman and Kindschy—that the defendant consciously disregarded a substantial risk that others would view the statement as threatening violence.

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

8. "Employed" is used here in the general sense of being engaged in the performance of a duty.

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

10. 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 § 947.016(2) must be "authorized by the department to exercise control" over specific categories of persons who are being supervised. See the definitions quoted in footnotes 1, 2, and 3 above. Thus, it appears that all would be subject to the standards and grants of authority in DOC 328.

11. Recklessness requires a subjective mental state: the defendant must actually (in his or her own mind) be aware of the risk created by the conduct. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. See Wis. Stat. § 939.24.

12. See Counterman v. Colorado, See 600 U.S. 66, supra, at 79.

13. 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.

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1232B THREAT TO A JUROR OR A FAMILY MEMBER OF A JUROR — § 947.016(1)

Statutory Definition of the Crime

Section 947.016(1) of the Criminal Code of Wisconsin is violated by one who threatens to cause bodily harm to (the person) (a family member) of a current or former juror[1], where at the time of the threat the defendant knows that the victim is a (current or former juror) (a family member of a current or former juror), the threat is because of or in response to any action taken in (an official capacity) (a legal proceeding), and the threat is made without the consent of the person threatened.

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

1. (Name of victim) was a (current or former juror) (family member of a current or former juror).
2. The defendant knew[2] that (name of victim) was a (current or former juror) (family member of a current or former juror).
3. The defendant threatened to cause bodily harm to (name of victim).

A threat requires a true threat. It may be communicated orally, in writing, or

by conduct. "True threat" means that a reasonable person would interpret the threat as a serious expression that the speaker will inflict imminent or future bodily harm. It must convey a real possibility that bodily harm will follow.[3] 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]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[5]

4. The defendant threatened to cause bodily harm to (name of victim) because of or in response to an action taken in (an official capacity) (a legal proceeding) by (name of juror) as a juror.[6]

5. The defendant consciously disregarded[7] a substantial risk that others would view the statement as a true threat to cause bodily harm.

[This means the defendant is aware that others could regard the statement(s) as threatening violence and delivers (it) (them) anyway.][8]

6. The defendant threatened to cause bodily harm without the consent[9] of (name of victim).

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all 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 1232B was approved by the Committee in June 2026.

§ 947.016(1), created by 2025 Wisconsin Act 24 [effective August 10, 2025], establishes a Class H felony for threatening to cause bodily harm to certain individuals involved in the court or legal system. While the statute applies broadly—including judges, prosecutors, law enforcement officers, guardians ad litem, corporation counsel, advocates, attorneys, and witnesses—this instruction is limited to juror-related prosecutions.

For an instruction on battery to a juror (or a juror's family member) under the recodified battery provisions, see Wis JI–Criminal 1232A.

Note: § 947.016(1) does not use the word "intentionally" in connection with the threat. Prior to the enactment of 2025 Wisconsin Act 24 many Wisconsin threat statutes required that the defendant "intentionally threatened." Under those statutes, the statutory mens rea (intentional purpose) exceeded the constitutional minimum (recklessness) established by Counterman v. Colorado, 600 U.S. 66. By contrast, because § 947.016(1) does not impose an intent requirement for the threat element, Element 5 of this instruction—the Counterman/Kindschy recklessness standard—functions both as the constitutional minimum and as the operative mens rea for true-threat prosecutions under the statute.

1. § 940.202 (1)(b) defines "Juror" as follows:

"Juror" means a person who is or was a grand or petit juror or is a prospective grand or petit juror who has received a summons to appear for jury service.

The Committee believes it is clearer for jurors to be instructed simply that, for example, the victim "was a juror." If the facts of a particular case require reference to a "grand" or "petit" juror, the Committee recommends including those terms in the instruction as needed. For additional context on grand juries, see Wis. Stat. § 968.40; for petit juries, see Wis. Stat. § 756.001.

2. The knowledge element reflects the standard in § 939.23(2): the actor must have knowledge of those facts which constitute the crime—here, knowledge that the victim is a current or former juror or a family member of a current or former juror. See Wis JI–Criminal 920.

3. See Counterman v. Colorado, 600 U.S. at 74, 143 S. Ct. 2106 (2023). Justice Bradley's concurrence in Kindschy v. Aish, 2024 WI 27, ¶44, 412 Wis.2d 319, 8 N.W.3d 1, acknowledges Counterman's recklessness standard. Element 5 reflects the Counterman standard as the constitutionally required minimum mens rea for true-threat prosecutions.

4. This definition was originally 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.

In Counterman v. Colorado, 600 U.S. 66, 79, 143 S. Ct. 2106 (2023), the U.S. Supreme Court clarified that true threats must be evaluated based on their objective content—how a reasonable listener would perceive them—and that criminal liability requires a mens rea of at least recklessness, meaning the speaker must have "consciously disregarded a substantial risk that [the communications] would be viewed as threatening violence." The Wisconsin Supreme Court adopted the Counterman recklessness standard in Kindschy v. Aish, supra, at ¶¶14–15, abrogating the purely speaker-focused objective test previously employed under Perkins. Accordingly, the Committee revised the former Perkins–based definition to reflect the Counterman/Kindschy approach.

When deciding whether a statement is a true threat, the jury should consider the totality of circumstances. Relevant factors may include whether the threat was conditional; whether it was made directly to a specific person; how the recipient and others reacted; and whether the defendant had made similar statements or had the means to carry out the threat. The jury may also consider all other facts and context to determine if a statement was a true threat. See Perkins, supra, at ¶ 31, citing United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000).

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. Although Elonis was decided as a matter of federal statutory interpretation, it underscores that criminal "threat" liability should not rest solely on an objective reasonable-person standard. This instruction's definition of "true threat" includes both an objective reasonable-listener component and the mens rea floor required by the First Amendment under Counterman and Kindschy—that the defendant consciously disregarded a substantial risk that others would view the statement as threatening violence.

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

6. Section 947.016(1) provides that the threat must be "because of or in response to any action taken by the person in an official capacity or in a legal proceeding." Although both alternatives are included in § 947.016(1) because the subsection applies to a broad list of protected persons, in juror cases the "legal proceeding" alternative will ordinarily describe the relevant conduct.

7. Recklessness requires a subjective mental state: the defendant must actually (in his or her own mind) be aware of the risk created by the conduct. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. See Wis. Stat. § 939.24.

8. See Counterman v. Colorado, See 600 U.S. 66, supra, at 79.

9. 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.

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1238B THREAT TO A WITNESS, A PERSON SHARING A COMMON DOMICILE WITH A WITNESS, OR THE FAMILY MEMBER OF A WITNESS — § 947.016(1)

Statutory Definition of the Crime

Section 947.016(1) of the Criminal Code of Wisconsin is violated by one who threatens to cause bodily harm to ((the person) (the family member) of a current or former (witness)) (a person sharing a common domicile with a witness) where at the time of the threat the defendant knows that the victim is a (current or former witness) (a family member of a current or former witness) (a person sharing a common domicile with a witness), the threat is because of or in response to any action taken in (an official capacity) (a legal proceeding), and the threat is made without the consent of the person threatened.

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

1. (Name of victim) was a (current or former witness) (family member of a current or former witness) (person sharing a common domicile with a witness).

   ["Witness" means any person who has attended or is expected to attend a proceeding to testify or who has testified.][1]

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

2. The defendant knew[2] that (name of victim) was a (current or former witness) (family member of a current or former witness) (person sharing a common domicile with a witness).

3. The defendant threatened to cause bodily harm to (name of victim).

A threat requires a true threat. It may be communicated orally, in writing, or by conduct. "True threat" means that a reasonable person would interpret the threat as a serious expression that the speaker will inflict imminent or future bodily harm. It must convey a real possibility that bodily harm will follow.[3] 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]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[5]

4. The defendant threatened to cause bodily harm to (name of victim) because of or in response to an action taken in (an official capacity) (a legal proceeding) by (name of witness) as a witness.[6]

5. The defendant consciously disregarded[4] a substantial risk that others would view the statement as a true threat to cause bodily harm.

[This means the defendant is aware that others could regard the statement(s) as threatening violence and delivers (it) (them) anyway.][5]

6. The defendant threatened to cause bodily harm without the consent[7] of (name of

victim).

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all 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 1238B was approved by the Committee in June 2026.

The offense of Threat to a Witness [Witness Has Attended or Testified] — § 940.201 was previously covered by Wis JI–Criminal 1238. That instruction was withdrawn in February 2026 following the enactment of 2025 Wisconsin Act 24, which repealed the operative provisions of § 940.201 — including the crime of causing or threatening to cause bodily harm to a witness — as part of a broader reorganization of Wisconsin's battery statutes. The threatening-conduct provisions formerly in § 940.201(2) were recreated in § 947.016(1).

§ 947.016(1), created by 2025 Wisconsin Act 24 [effective August 10, 2025], establishes a Class H felony for threatening to cause bodily harm to certain individuals involved in the court or legal system. While the statute applies broadly—including judges, prosecutors, law enforcement officers, guardians ad litem, corporation counsel, advocates, attorneys, and grand or petit jurors, this instruction is limited in scope and addresses only witnesses and individuals who share a common domicile with a witness.

For an instruction on Battery to a Witness or Person Sharing a Common Domicile with a Witness, see Wis JI–Criminal 1238A.

§ 947.016(1) was created by 2025 Wisconsin Act 24 [effective August 10, 2025]. Similar offenses against witnesses were formerly addressed by § 940.201. Related property-based threats to witnesses continue to be addressed by § 943.011.

Note: § 947.016(1) does not use the word "intentionally" in connection with the threat. Prior to the enactment of 2025 Wisconsin Act 24 many Wisconsin threat statutes required that the defendant "intentionally threatened." Under those statutes, the statutory mens rea (intentional purpose) exceeded the constitutional minimum (recklessness) established by Counterman v. Colorado, 600 U.S. 66. By contrast, because § 947.016(1) does not impose an intent requirement for the threat element, Element 5 of this instruction—the Counterman/Kindschy recklessness standard—functions both as the constitutional minimum and as the operative mens rea for true-threat prosecutions under the statute.

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1. 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 § 947.016(1). 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 § 940.201 — § 940.26, 1975 Wis. Stats. — 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."

2. The statute requires that the defendant "know" the victim's status. This is actual knowledge, not constructive knowledge. Contrast § 947.016(2)(a), which uses the lower "knows or has reason to know" standard for other protected persons. If the evidence raises a question whether the defendant had actual vs. constructive knowledge, the court should consider whether this distinction should be explained to the jury.

3. See Counterman v. Colorado, 600 U.S. 66, 74 (2023). Justice Bradley's concurrence in Kindschy v. Aish, 2024 WI 27, ¶44, 412 Wis.2d 319, 8 N.W.3d 1, acknowledges Counterman's recklessness standard. Element 5 reflects the Counterman standard as the constitutionally required minimum mens rea for true-threat prosecutions.

4. This definition was originally 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.

In Counterman v. Colorado, 600 U.S. 66, 79 (2023), the U.S. Supreme Court clarified that true threats must be evaluated based on their objective content—how a reasonable listener would perceive them—and that criminal liability requires a mens rea of at least recklessness, meaning the speaker must have "consciously disregarded a substantial risk that [the communications] would be viewed as threatening violence." The Wisconsin Supreme Court adopted the Counterman recklessness standard in Kindschy v. Aish, supra, at ¶¶14–15, abrogating the purely speaker-focused objective test previously employed under Perkins. Accordingly, the Committee revised the former Perkins–based definition to reflect the Counterman/Kindschy approach.

When deciding whether a statement is a true threat, the jury should consider the totality of circumstances. Relevant factors may include whether the threat was conditional; whether it was made directly to a specific person; how the recipient and others reacted; and whether the defendant had made similar statements or had the means to carry out the threat. The jury may also consider all other facts and context to determine if a statement was a true threat. See Perkins, supra, at ¶ 31, citing United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000).

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 U.S.C. § 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. Although Elonis was decided as a matter of federal statutory interpretation, it underscores that criminal "threat" liability should not rest solely on an objective reasonable-person standard. This instruction's definition of "true threat" includes both an objective reasonable-listener component and the mens rea floor required by the First Amendment under Counterman and Kindschy—that the defendant consciously disregarded a substantial risk that others would view the statement as threatening violence.

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

6. § 947.016(1) provides that the threat must be "in response to any action taken in an official capacity or in a legal proceeding." Although the statute uses both phrases because § 947.016(1) applies to a broad list of persons involved in the court or legal system, the Committee concluded that, as a practical matter, the "official capacity" alternative is not ordinarily applicable when the protected person is a witness. Witnesses do not act in an "official capacity" in the sense contemplated by the statute; their relevant conduct is participation in a "legal proceeding" (e.g., testifying, appearing under subpoena, etc.). The Committee views Act 24's use of both phrases as a drafting choice intended to consolidate the prior, role-specific formulations—former § 940.201 (witness-focused, proceeding-based)—into a single subsection. Accordingly, in prosecutions involving witnesses (and persons associated with witnesses), this instruction is drafted for use with the "legal proceeding" alternative, and "official capacity" should be selected only if the evidence and the theory of prosecution genuinely implicate that concept.

7. 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.

4. Recklessness requires a subjective mental state: the defendant must actually (in his or her own mind) be aware of the risk created by the conduct. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. See Wis. Stat. § 939.24.

5. See Counterman v. Colorado, See 600 U.S. 66, supra, at 79.

1240B THREAT TO A JUDGE OR THEIR FAMILY MEMBER — § 947.016(1)

Statutory Definition of the Crime

Section 947.016(1) of the Criminal Code of Wisconsin is violated by one who threatens to cause bodily harm to the (person) (family member) of any current or former judge where, at the time of the threat, the person knows the victim's status as an individual involved with a court or legal system, the threat is because of or in response to an action taken (in the judge's official capacity) (by the judge in a legal proceeding), 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 that satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a (current or former judge) (family member of a current or former judge).

   [For the purpose of this offense, a (e.g., circuit court judge) is a judge.][1]

   [For the purpose of this offense, a (e.g., child) is a family member.][2]

2. The defendant knew that (name of victim) was a (judge) (family member of a judge) involved with a court or legal system.

3. The defendant threatened to cause bodily harm to (name of victim).

A threat requires a true threat. It may be communicated orally, in writing, or by conduct. "True threat" means that a reasonable person would interpret the threat as a serious expression that the speaker will inflict imminent or future bodily harm. It must convey a real possibility that bodily harm will follow.[3] 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]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[5]

4. The threat was because of or in response to an action taken (in the judge's official capacity) (by the judge in a legal proceeding).

Judges act in an official capacity when they perform duties that they are employed[6] to perform.[7] [The duties of a judge include: _____].[8]

5. The defendant consciously disregarded[9] a substantial risk that others would view the statement as a true threat to cause bodily harm.

[This means the defendant is aware that others could regard the statement(s) as threatening violence and delivers (it) (them) anyway.][10]

6. The defendant threatened to cause bodily harm to (name of victim) without the consent[11] of (name of victim).

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all 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 1240B was originally published in 1994 and revised in 2002, 2016, 2018, 2019, 2020, 1/2024, and 12/2024. The 2002 revision divided the single instruction into two instructions, WI JI–Criminal 1240A and 1240B. Wis JI–Criminal 1240A was revised in 2008 to change the definition of "official capacity." The 2016 revision updated the Comment to reflect changes made by the 2015 Wisconsin Act 78. The 2018 revision reflected changes made by 2017 Wisconsin Act 272 and 2017 Wisconsin Act 352. The 2020 revision added the definition of "true threat." The 1/2024 revision amended the definition of a "true threat" according to Counterman v. Colorado, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard). This revision was approved by the Committee in June 2026. It amended the instruction to incorporate the recodification and reorganization of the threat statutes enacted by 2025 Wisconsin Act 24 [effective date: August 10, 2025.], which repealed § 940.203 in its entirety. It also clarified the language in footnote 3 regarding the amendments to the former Perkins-based "true threat" definition, incorporating the standard established in Counterman v. Colorado, 600 U.S. 66, and subsequently adopted by the Wisconsin Supreme Court in Kindschy v. Aish, 2024 WI 27.

§ 947.016(1), created by 2025 Wisconsin Act 24 [effective date: August 10, 2025], establishes a Class H felony for threatening to cause bodily harm to certain individuals involved in the court or legal system. The statute applies broadly — covering judges, prosecutors, law enforcement officers, guardians ad litem,

corporation counsel, advocates, attorneys, witnesses, and grand or petit jurors — but this instruction addresses only violations involving threats to a current or former judge or their family members.

For an instruction on battery to a judge or their family member, see Wis JI–Criminal 1240A.

Section 940.203 [now 947.016 (1)] was created by 1993 Wisconsin Act 50 [effective date: November 25, 1993] and originally applied only to 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] to include officers of the court. 2017 Wisconsin Act 352 [effective date: April 18, 2018] amended the definitions of "judge" and "law enforcement officer." 2025 Wisconsin Act 24 [effective date: August 10, 2025] repealed Wis. Stat. § 940.203 and relocated the offense of threat to a judge or their family member to Wis. Stat. § 947.016(1).

For violations based on battery to a judge, see Wis-JI Criminal 1240A. For battery and threats to prosecutors and law enforcement officers, see Wis JI–Criminal 1240C and 1240D. For battery and threats to a current or former guardian ad litem, corporation counsel, or attorney, see Wis JI–Criminal 1241A and 1241B.

Note: § 947.016(1) does not use the word "intentionally" in connection with the threat. Prior to the enactment of 2025 Wisconsin Act 24 many Wisconsin threat statutes required that the defendant "intentionally threatened." Under those statutes, the statutory mens rea (intentional purpose) exceeded the constitutional minimum (recklessness) established by Counterman v. Colorado, 600 U.S. 66. By contrast, because § 947.016(1) does not impose an intent requirement for the threat element, Element 5 of this instruction—the Counterman/Kindschy recklessness standard—functions both as the constitutional minimum and as the operative mens rea for true-threat prosecutions under the statute.

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1. Section 940.51(14) provides a definition of "judge" for the purpose of this offense. As amended by 2017 Wisconsin Act 352, that definition provides: "'Judge' means a person who currently is or who formerly was a supreme court justice, court of appeals judge, circuit court judge, municipal judge, tribal judge, temporary or permanent reserve judge or circuit, supplemental, or municipal court commissioner."

The applicable term should be inserted in the blank.

2. Section 940.51(10) provides a definition of "family member" for the purpose of this offense: "'Family member' means a spouse, child, stepchild, foster child, parent, legal guardian, sibling, grandparent, or grandchild."

The applicable term should be inserted in the blank.

3. See Counterman v. Colorado, 600 U.S. at 74, 143 S. Ct. 2106 (2023). Justice Bradley's concurrence in Kindschy v. Aish, 2024 WI 27, ¶44, 412 Wis. 2d 319, 8 N.W.3d 1, acknowledges Counterman's recklessness standard. Element 5 reflects the Counterman standard as the constitutionally required minimum mens rea for true-threat prosecutions.

4. This definition was originally 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.

In Counterman v. Colorado, 600 U.S. 66, ¶79, 143 S. Ct. 2106 (2023), the U.S. Supreme Court clarified that true threats must be evaluated based on their objective content—how a reasonable listener would perceive them—and that criminal liability requires a mens rea of at least recklessness, meaning the speaker must have "consciously disregarded a substantial risk that [the communications] would be viewed as threatening violence." The Wisconsin Supreme Court adopted the Counterman recklessness standard in Kindschy v. Aish, supra, at ¶¶14–15, abrogating the purely speaker-focused objective test previously employed under Perkins. Accordingly, the Committee revised the former Perkins–based definition to reflect the Counterman/Kindschy approach.

When deciding whether a statement is a true threat, the jury should consider the totality of circumstances. Relevant factors may include whether the threat was conditional; whether it was made directly to a specific person; how the recipient and others reacted; and whether the defendant had made similar statements or had the means to carry out the threat. The jury may also consider all other facts and context to determine if a statement was a true threat. See Perkins, supra, at ¶ 31, citing United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000).

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 U.S.C. § 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. Although Elonis was decided as a matter of federal statutory interpretation, it underscores that criminal "threat" liability should not rest solely on an objective reasonable-person standard. This instruction's definition of "true threat" includes both an objective reasonable-listener component and the mens rea floor required by the First Amendment under Counterman and Kindschy—that the defendant consciously disregarded a substantial risk that others would view the statement as threatening violence.

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

6. "Employed" is used here in the general sense of being engaged in the performance of a duty.

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

9. Recklessness requires a subjective mental state: the defendant must actually (in his or her own mind) be aware of the risk created by the conduct. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. See Wis. Stat. § 939.24.

10. See Counterman v. Colorado, See 600 U.S. 66, supra, at 79.

11. 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.

1240D THREAT TO A PROSECUTOR, LAW ENFORCEMENT OFFICER, OR THEIR FAMILY MEMBER — § 947.016(1)

Statutory Definition of the Crime

Section 947.016(1) of the Criminal Code of Wisconsin is violated by one who threatens to cause bodily harm to the (person) (family member) of any current or former (prosecutor) (law enforcement officer) where at the time of the threat the person knows the victim's status as an individual involved with a court or legal system, the threat is because of or in response to an action taken (in the (prosecutor's) (law enforcement officer's) official capacity) (by the (prosecutor) (law enforcement officer) in a legal proceeding), 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. (Name of victim) was a (current or former (prosecutor) (law enforcement officer)) (family member of a current or former (prosecutor) (law enforcement officer)).

   [A (e.g., district attorney) is a prosecutor.][1]

   [A (insert title, e.g., sheriff) is a law enforcement officer.][2]

   [For the purpose of this offense, a (e.g., child) is a family member.][3]

2. The defendant knew that (name of victim) was a (current or former (prosecutor) (law enforcement officer) involved with a court or legal system) (family member of a current or former (prosecutor) (law enforcement officer) involved with a court or legal system).

3. The defendant threatened to cause bodily harm to (name of victim).

A threat requires a true threat. It may be communicated orally, in writing, or by conduct. "True threat" means that a reasonable person would interpret the threat as a serious expression that the speaker will inflict imminent or future bodily harm. It must convey a real possibility that bodily harm will follow.[4] 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.[5]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[6]

4. The threat was because of or in response to an action taken (in the (prosecutor's) (law enforcement officer's) official capacity) (by the (prosecutor) (law enforcement officer) in a legal proceeding).

(Prosecutors) (law enforcement officers) act in an official capacity when they perform duties that they are employed[7] to perform.[8] [The duties of a (prosecutor) (law enforcement officer) include: _____].[9]

5. The defendant consciously disregarded[10] a substantial risk that others would view the statement as a true threat to cause bodily harm.

   [This means the defendant is aware that others could regard the statement(s) as threatening violence and delivers (it) (them) anyway.][11]

6. The defendant threatened to cause bodily harm to (name of victim) without the consent[12] of (name of victim).

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all 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 1240D was originally published in 2016 and revised in 2017, 2018, 2019, 1/2024, and 12/2024. The 2018 revision reflected changes made by 2017 Wisconsin Act 272 [effective date: April 13, 2018] and 2017 Wisconsin Act 352 [effective date: April 18, 2018]. The 1/2024 revision amended the definition of a "true threat" according to Counterman v. Colorado, 600 US 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard). This revision was approved by the Committee in June 2026. It amended the instruction to incorporate the recodification

and reorganization of the threat statutes enacted by 2025 Wisconsin Act 24 [effective date: August 10, 2025.] It also clarified the language in footnote 3 regarding the amendments to the former Perkins-based "true threat" definition, incorporating the standard established in Counterman v. Colorado, 600 U.S. 66, and subsequently adopted by the Wisconsin Supreme Court in Kindschy v. Aish, 2024 WI 27.

§ 947.016(1), created by 2025 Wisconsin Act 24 [effective August 9, 2025], establishes a Class H felony for threatening to cause bodily harm to certain individuals involved in the court or legal system. The statute applies broadly — covering judges, prosecutors, law enforcement officers, guardians ad litem, corporation counsel, advocates, attorneys, witnesses, and grand or petit jurors. However, this instruction addresses only the subset of violations involving threats to a current or former prosecutor or law enforcement officer, or their family members.

Wis JI–Criminal 1240D previously addressed § 940.203. That section 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 to include officers of the court. Wis. Stat. § 940.203(2)(b) and (c) were repealed by 2025 Wisconsin Act 24 [effective date: August 10, 2025.]

2025 Wisconsin Act 24 created Wis. Stat. § 947.016(1), Threatening to cause bodily harm to Certain Individuals Involved with a Court or Legal System. This statute applies to threats to commit bodily harm against prosecutors, law enforcement officers, and their family members, among others. This instruction addresses violations of § 947.016(1) specifically involving threats to a prosecutor or law enforcement officer.

For violations based on battery to a prosecutor or law enforcement officer, see Wis–JI Criminal 1240C. For battery and threats to a judge, see Wis JI–Criminal 1240A and 1240B. For battery and threats to a current or former guardian ad litem, corporation counsel, or attorney, see Wis JI–Criminal 1241A and 1241B.

Note: § 947.016(1) does not use the word "intentionally" in connection with the threat. Prior to the enactment of 2025 Wisconsin Act 24 many Wisconsin threat statutes required that the defendant "intentionally threatened." Under those statutes, the statutory mens rea (intentional purpose) exceeded the constitutional minimum (recklessness) established by Counterman v. Colorado, 600 U.S. 66. By contrast, because § 947.016(1) does not impose an intent requirement for the threat element, Element 5 of this instruction—the Counterman/Kindschy recklessness standard—functions both as the constitutional minimum and as the operative mens rea for true-threat prosecutions under the statute.

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1. Section 940.51(18) provides a definition of "prosecutor" for the purpose of this offense: "Prosecutor" means a person who currently is or formerly was any of the following:

(a) A district attorney, a deputy district attorney, an assistant district attorney, or a special prosecutor appointed under s. 978.045 or 978.05 (8) (b).
(b) The attorney general, a deputy attorney general, or an assistant attorney general.
(c) A tribal prosecutor.

The applicable term should be inserted in the blank.

2. Section 940.51(15) provides a definition of "law enforcement officer" for the purpose of this offense: "Law enforcement officer" has the meaning given in § 165.85 (2) (c) and includes a person who formerly was a law enforcement officer under that definition.

3. Section 940.51(10) provides a definition of "family member" for the purpose of this offense: "'Family member' means a spouse, child, stepchild, foster child, parent, legal guardian, sibling, grandparent, or grandchild."

The applicable term should be inserted in the blank.

4. See Counterman v. Colorado, 600 U.S. at 74, 143 S. Ct. 2106 (2023). Justice Bradley's concurrence in Kindschy v. Aish, 2024 WI 27, ¶44, 412 Wis.2d 319, 8 N.W.3d 1, acknowledges Counterman's recklessness standard. Element 5 reflects the Counterman standard as the constitutionally required minimum mens rea for true-threat prosecutions.

5. This definition was originally 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.

In Counterman v. Colorado, 600 U.S. 66, ¶79, 143 S. Ct. 2106 (2023), the U.S. Supreme Court clarified that true threats must be evaluated based on their objective content—how a reasonable listener would perceive them—and that criminal liability requires a mens rea of at least recklessness, meaning the speaker must have "consciously disregarded a substantial risk that [the communications] would be viewed as threatening violence." The Wisconsin Supreme Court adopted the Counterman recklessness standard in Kindschy v. Aish, supra, at ¶¶14–15, abrogating the purely speaker-focused objective test previously employed under Perkins. Accordingly, the Committee revised the former Perkins–based definition to reflect the Counterman/Kindschy approach.

When deciding whether a statement is a true threat, the jury should consider the totality of circumstances. Relevant factors may include whether the threat was conditional; whether it was made directly to a specific person; how the recipient and others reacted; and whether the defendant had made similar statements or had the means to carry out the threat. The jury may also consider all other facts and context to determine if a statement was a true threat. See Perkins, supra, at ¶ 31, citing United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000).

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. Although Elonis was decided as a matter of federal statutory interpretation, it underscores that criminal "threat" liability should not rest solely on an objective reasonable-person standard. This instruction's definition of "true threat" includes both an objective reasonable-listener component and the mens rea floor required by the First Amendment under Counterman and Kindschy—that the defendant consciously disregarded a substantial risk that others would view the statement as threatening violence.

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

7. "Employed" is used here in the general sense of being engaged in the performance of a duty.

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

9. 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.

10. Recklessness requires a subjective mental state: the defendant must actually (in his or her own mind) be aware of the risk created by the conduct. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. See Wis. Stat. § 939.24.

11. See Counterman v. Colorado, See 600 U.S. 66, supra, at 79.

12. 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.

1241B THREAT TO GUARDIAN AD LITEM, CORPORATION COUNSEL, ADVOCATE, OR ATTORNEY, OR THEIR FAMILY MEMBER — § 947.016(1)

Statutory Definition of the Crime

Section 947.016(1) of the Criminal Code of Wisconsin is violated by one who threatens to cause bodily harm to the (person) (family member) of any current or former (guardian ad litem) (corporation counsel) (advocate) (attorney) where at the time of the threat the person knows the victim's status as an individual involved with a court or legal system, the threat is because of or in response to an action taken (in the (guardian ad litem's) (corporation counsel's) (advocate's) (attorney's) official capacity) (by the (guardian ad litem) (corporation counsel) (advocate) (attorney) in a legal proceeding), 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. (Name of victim) was a (current or former (guardian ad litem[1]) (corporation counsel[2]) (advocate[3]) (attorney[4])) (family member of a current or former (guardian ad litem) (corporation counsel) (advocate) (attorney)).

   [For the purpose of this offense, a (e.g., child) is a family member.][5]

2. The defendant knew that (name of victim) was a (current or former (guardian ad litem) (corporation counsel) (advocate) (attorney)) (family member of a current or former (guardian ad litem) (corporation counsel) (advocate) (attorney)) and that the (guardian ad litem) (corporation counsel) (advocate) (attorney) was an individual involved with a court or legal system.

3. The defendant threatened to cause bodily harm to (name of victim).

A threat requires a true threat. It may be communicated orally, in writing, or by conduct. "True threat" means that a reasonable person would interpret the threat as a serious expression that the speaker will inflict imminent or future bodily harm. It must convey a real possibility that bodily harm will follow.[6] 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.[7]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[8]

4. The threat was because of or in response to an action taken (in the (guardian ad litem's) (corporation counsel's) (advocate's) (attorney's) official capacity) (by the (guardian ad litem) (corporation counsel) (advocate) (attorney) in a legal proceeding).

(Guardians ad litem) (Corporation counsel) (Tribal court advocates)

(Attorneys) act in an official capacity when they perform duties that they are employed[9] to perform.[10] [The duties of (a guardian ad litem) (a corporation counsel) (an advocate) (an attorney) include: _____].[11]

5. The defendant consciously disregarded[12] a substantial risk that others would view the statement as a true threat to cause bodily harm.

[This means the defendant is aware that others could regard the statement(s) as threatening violence and delivers (it) (them) anyway.][13]

6. The defendant threatened to cause bodily harm to (name of victim) without the consent[14] of (name of victim).

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all 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 and revised in 2022, 1/2024, and 12/2024. The 2022 revision amended the body of the instruction and the comment based on 2021 Wisconsin Act 191 [effective date: March 19, 2022]. The 1/2024 revision amended the definition of a "true threat" according to Counterman v. Colorado, 600 US 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard). This revision was approved by the Committee in June 2026. It amended the instruction to incorporate the recodification and reorganization of the threat statutes enacted by 2025 Wisconsin Act 24 [effective date: August 10, 2025.] It also clarified the language in footnote 3 regarding the amendments to the former Perkins-based "true threat" definition, incorporating the standard established in Counterman v. Colorado, 600 U.S. 66, and subsequently adopted by the Wisconsin Supreme Court in Kindschy v. Aish, 2024 WI 27.

Section 940.203 [now 947.016 (1)] originally applied only to 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]. 2025 Wisconsin Act 24 [effective date: August 9, 2025] repealed Wis. Stat. § 940.203 and relocated the offense of threat to a guardian ad litem; corporation counsel; advocate; attorney; or their family member to Wis. Stat. § 947.016(1).

This instruction is drafted for violations under § 947.016 (1) 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 violations based on battery and threats to a judge, see Wis–JI Criminal 1240A and 1240B. For battery and threats to prosecutors and law enforcement officers, see Wis JI–Criminal 1240C and 1240D.

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1. Section 54.40(2) provides the duties of "guardian ad litem."

2. Section 59.42 provides the duties of "corporation counsel."

3. Section 940.51(1) provides that "Advocate" means an individual who is representing the interests of a child, the tribe, or another party in a tribal court proceeding.

4. Section 940.51(3) provides that "attorney" means a legal professional practicing law as defined in SCR 23.01. The practice of law 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.

5. Section 940.51(10) provides a definition of "family member" for the purpose of this offense:

"'Family member' means a spouse, child, stepchild, foster child, parent, legal guardian, sibling, grandparent, or grandchild."

6. See Counterman v. Colorado, 600 U.S. 66, 74 (2023). Justice Bradley's concurrence in Kindschy v. Aish, 2024 WI 27, ¶44, 412 Wis.2d 319, 8 N.W.3d 1, acknowledges Counterman's recklessness standard. Element 5 reflects the Counterman standard as the constitutionally required minimum mens rea for true-threat prosecutions.

7. This definition was originally 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.

In Counterman v. Colorado, 600 U.S. 66, 79, 143 S. Ct. 2106 (2023), the U.S. Supreme Court clarified that true threats must be evaluated based on their objective content—how a reasonable listener would perceive them—and that criminal liability requires a mens rea of at least recklessness, meaning the speaker must have "consciously disregarded a substantial risk that [the communications] would be viewed as threatening violence." The Wisconsin Supreme Court adopted the Counterman recklessness standard in Kindschy v. Aish, supra, at ¶¶14–15, abrogating the purely speaker-focused objective test previously employed under Perkins. Accordingly, the Committee revised the former Perkins–based definition to reflect the Counterman/Kindschy approach.

When deciding whether a statement is a true threat, the jury should consider the totality of circumstances. Relevant factors may include whether the threat was conditional; whether it was made directly to a specific person; how the recipient and others reacted; and whether the defendant had made similar statements or had the means to carry out the threat. The jury may also consider all other facts and context to determine if a statement was a true threat. See Perkins, supra, at ¶ 31, citing United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000).

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. Although Elonis was decided as a matter of federal statutory interpretation, it underscores that criminal "threat" liability should not rest solely on an objective reasonable-person standard. This instruction's definition of "true threat" includes both an objective reasonable-listener component and the mens rea floor required by the First Amendment under Counterman and Kindschy—that the defendant consciously disregarded a substantial risk that others would view the statement as threatening violence.

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

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.

12. Recklessness requires a subjective mental state: the defendant must actually (in his or her own mind) be aware of the risk created by the conduct. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. See Wis. Stat. § 939.24.

13. See Counterman v. Colorado, See 600 U.S. 66, supra, at 79.

14. 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.

1242A THREAT TO A DEPARTMENT OF REVENUE EMPLOYEE OR THEIR FAMILY MEMBER — § 947.016(4)

Statutory Definition of the Crime

Section 947.016(4) of the Criminal Code of Wisconsin is violated by one who threatens to cause bodily harm to the (person) (family member) of any Department of Revenue (official) (employee) (agent) where at the time of the threat, the person knows, or should have known, that the victim is a (Department of Revenue (official) (employee) (agent)) (family member of a Department of Revenue (official) (employee) (agent)), and (the Department of Revenue (official) (employee) (agent) is acting in an official capacity at the time of the threat.) (the threat is in response to any action taken in the Department of Revenue (official's) (employee's) (agent's) official capacity).

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. (Name of victim) was a (Department of Revenue (official) (employee) (agent)) (family member of a Department of Revenue (official) (employee) (agent)).

   [For the purpose of this offense, a (e.g., child) is a family member.][1]

2. At the time of the threat, the defendant knew or should have known that (name of

victim) was a (Department of Revenue (official) (employee) (agent)) (family member of a Department of Revenue (official) (employee) (agent)).

[This element may be satisfied by proving either that the defendant actually knew the victim's status, or that a reasonable person in the defendant's circumstances would have known the victim's status as a (Department of Revenue (official) (employee) (agent)) (family member of a Department of Revenue (official) (employee) (agent)).]

3. The defendant threatened to cause bodily harm to (name of victim).

A threat requires a true threat. It may be communicated orally, in writing, or by conduct. "True threat" means that a reasonable person would interpret the threat as a serious expression that the speaker will inflict imminent or future bodily harm. It must convey a real possibility that bodily harm will follow.[2] 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]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

4. The threat was in response to (the Department of Revenue (official) (employee) (agent) acting in an official capacity at the time of the threat.) (any action taken in the Department of Revenue (official's) (employee's) (agent's) official capacity).

Department of Revenue (officials) (employees) (agents) act in an official

capacity when they perform duties that they are employed[5] to perform.[6] [The duties of a Department of Revenue (official) (employee) (agent) include: _____.]

5. The defendant consciously disregarded[7] a substantial risk that others would view the statement as a true threat to cause bodily harm.

   [This means the defendant is aware that others could regard the statement(s) as threatening violence and delivers (it) (them) anyway.][8]

6. The defendant threatened to cause bodily harm without the consent[9] of (name of victim).

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all 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 1242A was approved by the Committee in June 2026. It was drafted as part of the

recodification and reorganization of the battery statutes enacted by 2025 Wisconsin Act 24 [effective date: August 10, 2025], which created a separate statutory section for threatening to cause bodily harm to agents or their family members.

Prior to the enactment of 2025 Wisconsin Act 24, threats directed at Department of Revenue employees or their family members were addressed by Wis JI–Criminal 1242. Following the Act's enactment, however, Wis JI–Criminal 1242 now applies only to offenses involving battery against Department of Revenue employees or their family members.

This instruction is drafted for violations of § 947.016(4) involving threats to Department of Revenue officials, employees, or agents, or their family members. For violations involving threats to Department of Safety and Professional Services or Department of Workforce Development officials, employees, or agents, or their family members under the same statutory provision, see Wis JI–Criminal 1244A. For battery to Department of Revenue officials, employees, or agents, or their family members, see Wis JI–Criminal 1242.

Prior to the enactment of 2025 Wisconsin Act 24, threats directed at Department of Revenue employees were codified in former § 940.205, which combined battery and threat provisions in a single statute. Act 24 repealed § 940.205 and split its provisions: battery to Department of Revenue officials, employees, or agents is now codified at § 940.62(2)(c), and threatening to cause bodily harm to Department of Revenue officials, employees, or agents is now codified at § 947.016(4), together with threats against Department of Safety and Professional Services and Department of Workforce Development officials, employees, or agents.

Note: § 947.016(4) does not use the word "intentionally" in connection with the threat. Prior to the enactment of 2025 Wisconsin Act 24, many Wisconsin threat statutes required that the defendant "intentionally threatened." Under those statutes, the statutory mens rea (intentional purpose) exceeded the constitutional minimum (recklessness) established by Counterman v. Colorado, 600 U.S. 66. By contrast, because § 947.016(4) does not impose an intent requirement for the threat element, Element 5 of this instruction—the Counterman/Kindschy recklessness standard—functions both as the constitutional minimum and as the operative mens rea for true-threat prosecutions under the statute.

---

1. Section 940.51(10) provides:

"'Family member' means a spouse, child, stepchild, foster child, parent, legal guardian, sibling, grandparent, or grandchild."

The applicable term should be inserted in the blank.

2. See Counterman v. Colorado, 600 U.S. 66, 74 (2023). Justice Bradley's concurrence in Kindschy v. Aish, 2024 WI 27, ¶44, 412 Wis.2d 319, 8 N.W.3d 1, acknowledges Counterman's recklessness standard. Element 5 reflects the Counterman standard as the constitutionally required minimum mens rea for true-threat prosecutions.

3. This definition was originally 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.

In Counterman v. Colorado, 600 U.S. 66, ¶79, 143 S. Ct. 2106 (2023), the U.S. Supreme Court clarified that true threats must be evaluated based on their objective content—how a reasonable listener would perceive them—and that criminal liability requires a mens rea of at least recklessness, meaning the speaker must have "consciously disregarded a substantial risk that [the communications] would be viewed as threatening violence." The Wisconsin Supreme Court adopted the Counterman recklessness standard in Kindschy v. Aish, supra, at ¶¶14–15, abrogating the purely speaker-focused objective test previously employed under Perkins. Accordingly, the Committee revised the former Perkins–based definition to reflect the Counterman/Kindschy approach.

When deciding whether a statement is a true threat, the jury should consider the totality of circumstances. Relevant factors may include whether the threat was conditional; whether it was made directly to a specific person; how the recipient and others reacted; and whether the defendant had made similar statements or had the means to carry out the threat. The jury may also consider all other facts and context to determine if a statement was a true threat. See Perkins, supra, at ¶ 31, citing United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000).

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. Although Elonis was decided as a matter of federal statutory interpretation, it underscores that criminal "threat" liability should not rest solely on an objective reasonable-person standard. This instruction's definition of "true threat" includes both an objective reasonable-listener component and the mens rea floor required by the First Amendment under Counterman and Kindschy—that the defendant consciously disregarded a substantial risk that others would view the statement as threatening violence.

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

5. "Employed" is used here in the general sense of being engaged in the performance of a duty.

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

7. Recklessness requires a subjective mental state: the defendant must actually (in his or her own mind) be aware of the risk created by the conduct. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. See Wis. Stat. § 939.24.

8. See Counterman v. Colorado, 600 U.S. 66, supra, at 79.

9. 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.

1244A THREAT TO A DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES OFFICIAL, EMPLOYEE, OR AGENT; A DEPARTMENT OF WORKFORCE DEVELOPMENT OFFICIAL, EMPLOYEE, OR AGENT; OR THEIR FAMILY MEMBER — § 947.016(4)

Statutory Definition of the Crime

Section 947.016(4) of the Criminal Code of Wisconsin is violated by one who threatens to cause bodily harm to the (person) (family member) of any (Department of Safety and Professional Services) (Department of Workforce Development) official, employee, or agent where at the time of the threat, the person knows, or should have known, that the victim is a (Department of Safety and Professional Services official, employee, or agent) (Department of Workforce Development official, employee, or agent) (family member of a (Department of Safety and Professional Services official, employee, or agent) (Department of Workforce Development official, employee, or agent)), and the ((Department of Safety and Professional Services official, employee, or agent) (Department of Workforce Development official, employee, or agent) is acting in an official capacity at the time of the threat.) (threat is in response to any action taken by the official, employee, or agent in an official capacity.)

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. (Name of victim) was (an (official) (employee) (agent) of the (Department of Safety and Professional Services) (Department of Workforce Development)) (a family member of an (official) (employee) (agent) of the (Department of Safety and Professional Services) (Department of Workforce Development)).

   [For the purpose of this offense, a (e.g., child) is a family member.][1]

2. At the time of the threat, the defendant knew or should have known that (name of victim) was (an (official) (employee) (agent) of the (Department of Safety and Professional Services) (Department of Workforce Development)) (a family member of an (official) (employee) (agent) of the (Department of Safety and Professional Services) (Department of Workforce Development)).

   [This element may be satisfied by proving either that the defendant actually knew the victim's status, or that a reasonable person in the defendant's circumstances would have known that the victim was an ((official) (employee) (agent) of the (Department of Safety and Professional Services) (Department of Workforce Development)) (a family member of an (official) (employee) (agent) of the (Department of Safety and Professional Services) (Department of Workforce Development)).]

3. The defendant threatened to cause bodily harm to (name of victim).

A threat requires a true threat. It may be communicated orally, in writing, or by conduct. "True threat" means that a reasonable person would interpret the threat as a serious expression that the speaker will inflict imminent or future bodily harm. It must convey a real possibility that bodily harm will follow.[2] 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]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

4. (The (official) (employee) (agent) of the (Department of Safety and Professional Services) (Department of Workforce Development) was acting in an official capacity at the time of the threat.) (The threat was in response to an action taken by the (official) (employee) (agent) of the (Department of Safety and Professional Services) (Department of Workforce Development) in an official capacity.)

An (official) (employee) (agent) of the (Department of Safety and Professional Services) (Department of Workforce Development) acts in an official capacity when they perform duties that they are employed[5] to perform.[6] [The duties of an (official) (employee) (agent) of the (Department of Safety and Professional Services) (Department of Workforce Development) include:_____.]

5. The defendant consciously disregarded[7] a substantial risk that others would view

the statement as a true threat to cause bodily harm.

[This means the defendant is aware that others could regard the statement(s) as threatening violence and delivers (it) (them) anyway.][8]

6. The defendant threatened to cause bodily harm without the consent[9] of (name of victim).

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all 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 1244A was approved by the Committee in June 2026. It was drafted as part of the recodification and reorganization of the battery and threat statutes enacted by 2025 Wisconsin Act 24 [effective date: August 10, 2025], which created a separate statutory section for threatening to cause bodily harm to department officials, employees, or agents or their family members.

Prior to the enactment of 2025 Wisconsin Act 24, threats directed at Department of Safety and Professional Services officials, employees, or agents, Department of Workforce Development officials, employees, or agents, or their family members were addressed by Wis JI–Criminal 1244. Following the Act's enactment, however, Wis JI–Criminal 1244 now applies only to offenses involving battery against Department officials, employees, or agents or their family members.

Note: § 947.016(4) does not use the word "intentionally" in connection with the threat. Prior to the enactment of 2025 Wisconsin Act 24, many Wisconsin threat statutes required that the defendant "intentionally threatened." Under those statutes, the statutory mens rea (intentional purpose) exceeded the constitutional minimum (recklessness) established by Counterman v. Colorado, 600 U.S. 66. By contrast, because § 947.016(4) does not impose an intent requirement for the threat element, Element 5 of this instruction—the Counterman/Kindschy recklessness standard—functions both as the constitutional minimum and as the operative mens rea for true-threat prosecutions under the statute.

---

1. Section 940.51(10) provides:

"Family member" means a spouse, child, stepchild, foster child, parent, legal guardian, sibling, grandparent, or grandchild.

2. See Counterman v. Colorado, 600 U.S. 66, 74 (2023). Justice Bradley's concurrence in Kindschy v. Aish, 2024 WI 27, ¶44, 412 Wis. 2d 319, 8 N.W.3d 1, acknowledges Counterman's recklessness standard. Element 5 reflects the Counterman standard as the constitutionally required minimum mens rea for true-threat prosecutions.

3. This definition was originally 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.

In Counterman v. Colorado, 600 U.S. 66, 79, 143 S. Ct. 2106 (2023), the U.S. Supreme Court clarified that true threats must be evaluated based on their objective content—how a reasonable listener would perceive them—and that criminal liability requires a mens rea of at least recklessness, meaning the speaker must have "consciously disregarded a substantial risk that [the communications] would be viewed as threatening violence." The Wisconsin Supreme Court adopted the Counterman recklessness standard in Kindschy v. Aish, supra, at ¶¶14–15, abrogating the purely speaker-focused objective test previously employed under Perkins. Accordingly, the Committee revised the former Perkins–based definition to reflect the Counterman/Kindschy approach.

When deciding whether a statement is a true threat, the jury should consider the totality of circumstances. Relevant factors may include whether the threat was conditional; whether it was made directly to a specific person; how the recipient and others reacted; and whether the defendant had made similar statements or had the means to carry out the threat. The jury may also consider all other facts and context to determine if a statement was a true threat. See Perkins, supra, at ¶31, citing United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000).

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 U.S.C. § 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. Although Elonis was decided as a matter of federal statutory interpretation, it underscores that criminal "threat" liability should not rest solely on an objective reasonable-person standard. This instruction's definition of "true threat" includes both an objective reasonable-listener component and the mens rea floor required by the First Amendment under Counterman and Kindschy—that the defendant consciously disregarded a substantial risk that others would view the statement as threatening violence.

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

5. "Employed" is used here in the general sense of being engaged in the performance of a duty.

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

7. Recklessness requires a subjective mental state: the defendant must actually (in his or her own mind) be aware of the risk created by the conduct. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. See Wis. Stat. § 939.24.

8. See Counterman v. Colorado, 600 U.S. 66, supra, at 79.

9. 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.

1247C THREAT TO A HEALTH CARE PROVIDER, OR THEIR STAFF, OR THEIR FAMILY MEMBER — § 947.016(3)(bm)

Statutory Definition of the Crime

Section 947.016(3)(bm) of the Criminal Code of Wisconsin is violated by one who threatens to cause bodily harm to the (person) (family member) of a (current or former health care provider) (person who works or formerly worked in a health care facility) where at the time of the threat, the person knows or should have known 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 threat is in response to (an action occurring at a health care facility) (an action by a health care provider acting in the person's capacity as a health care provider) (an action by an official, employee, or agent of a health care facility acting in an 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. (Name of victim) was a (current or former health care provider[1]) (person who works or formerly worked in a health care facility[2]) (family member of a (current

or former health care provider) (person who works or formerly worked in a health care facility)).

[For the purpose of this offense, a (e.g., child) is a family member.][3]

2. At the time of the threat, the defendant knew or should have known that (name of victim) was a (current or former health care provider) (person who works or formerly worked in a health care facility) (family member of a (current or former health care provider) (person who works or formerly worked in a health care facility)).

[This element may be satisfied by proving either that the defendant actually knew the victim's status, or that a reasonable person in the defendant's circumstances would have known the victim's status as a (current or former health care provider) (person who works or formerly worked in a health care facility) (family member of such a person).]

3. The defendant threatened to cause bodily harm to (name of victim).

A threat requires a true threat. It may be communicated orally, in writing, or by conduct. "True threat" means that a reasonable person would interpret the threat as a serious expression that the speaker will inflict imminent or future bodily harm. It must convey a real possibility that bodily harm will follow.[4] 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.[5]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[6]

4. The threat was in response to (an action occurring at a health care facility) (an action by a health care provider acting in an official capacity) (an action by an official, employee, or agent of a health care facility acting in an official capacity).

(A threat is in response to an action "occurring at the health care facility" if it relates to an activity that took place at a health care facility.) (A threat is in response to an "action by a health care provider acting in an official capacity" when it relates to duties that the health care provider is licensed or otherwise authorized to perform as a health care provider.) (A threat is in response to an "action by an official, employee, or agent of the health care facility acting in his or her official capacity" when it relates to duties that an official, employee, or agent of the facility is employed[7] or authorized to perform.[8] [These duties include: _____.])

5. The defendant consciously disregarded[9] a substantial risk that others would view the statement as a true threat to cause bodily harm.

[This means the defendant is aware that others could regard the statement(s) as threatening violence and delivers (it) (them) anyway.][10]

6. The defendant threatened to cause bodily harm without the consent[11] of (name of victim).

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all 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 1247C was approved by the Committee in June 2026. It was drafted as part of the recodification and reorganization of the battery and threat statutes enacted by 2025 Wisconsin Act 24 [effective date: August 10, 2025], which consolidated several predecessor threat-to-certain-persons offenses, including threats to health care providers, staff, and their family members, into a single new statutory section at § 947.016.

Prior to the enactment of 2025 Wisconsin Act 24, threats directed at health care providers, their staff, and their family members were addressed by Wis JI–Criminal 1247B. Originally published in April 2022, that instruction was withdrawn in October 2025 following the repeal of the underlying statutory section by Act 24. The Act incorporated the language previously found in §§ 940.204(2)(b)–(c) and 940.204(3)(b) into the revised statutory framework, with battery provisions moved to § 940.62(2)(e) and threat provisions moved to § 947.016(3). The definitions of 'health care facility' and 'health care provider,' formerly in § 940.204(1)(b) and (c), were moved to § 940.51(12) and (13), respectively, as part of the consolidated definitions section for ch. 940, subchapter III. For matters concerning battery to health care providers, staff, and their family members, see Wis JI–Criminal 1247A.

Note: § 947.016(3) does not use the word "intentionally" in connection with the threat. Prior to the enactment of 2025 Wisconsin Act 24, many Wisconsin threat statutes required that the defendant "intentionally threatened." Under those statutes, the statutory mens rea (intentional purpose) exceeded the constitutional minimum (recklessness) established by Counterman v. Colorado, 600 U.S. 66 (2023). By contrast, because § 947.016(3) does not impose an intent requirement for the threat element, Element 5 of this instruction—the Counterman/Kindschy recklessness standard—functions both as the constitutional minimum and as the operative mens rea for true-threat prosecutions under the statute.

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1. Section 940.51(13) provides:

"Health care provider" means any of the following:
(a) A health care provider, as defined in s. 146.81 (1) (a) to (hp), (q), (r), or (s).
(b) A radiographer or limited X-ray machine operator licensed or permitted under ch. 462.
(c) A driver of an ambulance, as defined in s. 256.01 (1t).

2. Section 940.51(12) provides:

"Health care facility" means any of the following:
(a) A hospital, as defined in s. 50.33 (2).
(b) A clinic, which is a location with the primary purpose of providing outpatient diagnosis, treatment, or management of health conditions.
(c) A pharmacy that is licensed under s. 450.06.
(d) An adult day care center, as defined in s. 49.45(47).
(e) An adult family home, as defined in s. 50.01 (1).
(f) A community−based residential facility, as defined in s. 50.01 (1g).
(g) A residential care apartment complex, as defined in s. 50.01 (6d).
(h) A nursing home, as defined in s. 50.01 (3).
(i) 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.
(j) An ambulatory surgical center, as defined in 42 CFR 416.2.

3. Section 940.51(10) provides:

"'Family member' means a spouse, child, stepchild, foster child, parent, legal guardian, sibling, grandparent, or grandchild."

The applicable term should be inserted in the blank.

4. See Counterman v. Colorado, 600 U.S. 66, 74 (2023). Justice Bradley's concurrence in Kindschy v. Aish, 2024 WI 27, ¶44, 412 Wis. 2d 319, 8 N.W.3d 1, acknowledges Counterman's recklessness standard. Element 5 reflects the Counterman standard as the constitutionally required minimum mens rea for true-threat prosecutions.

5. This definition was originally 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.

In Counterman v. Colorado, 600 U.S. 66, 79 (2023), the U.S. Supreme Court clarified that true threats must be evaluated based on their objective content—how a reasonable listener would perceive them—and that criminal liability requires a mens rea of at least recklessness, meaning the speaker must have "consciously disregarded a substantial risk that [the communications] would be viewed as threatening violence." The Wisconsin Supreme Court adopted the Counterman recklessness standard in Kindschy v. Aish, supra, at ¶¶14–15, abrogating the purely speaker-focused objective test previously employed under Perkins. Accordingly, the Committee revised the former Perkins–based definition to reflect the Counterman/Kindschy approach.

When deciding whether a statement is a true threat, the jury should consider the totality of circumstances. Relevant factors may include whether the threat was conditional; whether it was made directly to a specific person; how the recipient and others reacted; and whether the defendant had made similar statements or had the means to carry out the threat. The jury may also consider all other facts and context to determine if a statement was a true threat. See Perkins, supra, at ¶31, citing United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000).

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 U.S.C. § 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. Although Elonis was decided as a matter of federal statutory interpretation, it underscores that criminal "threat" liability should not rest solely on an objective reasonable-person standard. This instruction's definition of "true threat" includes both an objective reasonable-listener component and the mens rea floor required by the First Amendment under Counterman and Kindschy—that the defendant consciously disregarded a substantial risk that others would view the statement as threatening violence.

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

7. "Employed" is used here in the general sense of being engaged in the performance of a duty.

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

9. Recklessness requires a subjective mental state: the defendant must actually (in his or her own mind) be aware of the risk created by the conduct. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. See Wis. Stat. § 939.24.

10. See Counterman v. Colorado, 600 U.S. 66, supra, at 79.

11. 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.

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OFFICE OF JUDICIAL EDUCATION

7/2026

WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME IIA

Wisconsin Criminal Jury Instructions Committee

[Cite as Wis JI-Criminal]

- Includes 7/2026 Supplement (Release No. 71)

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WIS JI-CRIMINAL

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1310 NEGLIGENT HANDLING OF BURNING MATERIAL — § 941.10

Statutory Definition of the Crime

Negligent handling of burning material, as defined in § 941.10 of the Criminal Code of Wisconsin, is committed by one who handles burning material in a highly negligent manner.

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 handled burning material.
2. The defendant did so in a manner constituting criminal negligence.[1]

The Meaning of "Criminal Negligence"

"Criminal negligence" means:

- the defendant's handling of burning material 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) handling of burning material 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.[2] IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED, ADD THE FOLLOWING:[3]

[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 criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

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 1310 was originally published in 1974 and revised in 1989, 1995, and 2007. This revision was approved by the Committee in June 2026. It updated the comment.

Section 941.10 was amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The offense was redefined to require either "criminal negligence" or the creation of a substantial and unreasonable risk of serious damage to property. "Criminal negligence" is defined in new § 939.25 in essentially the same way as "high degree of negligence" was defined under prior law. The only change was the substitution of "substantial" for "high probability of" in the phrase "substantial and unreasonable risk of death or great bodily harm."

1. The instruction defines the offense in terms of "criminal negligence" being the conduct alleged. The statute provides an alternative: "or under circumstances in which the person should realize that a substantial and unreasonable risk of serious damage to another's property is created." If that alternative is used, the second element should be rephrased as follows:

> The defendant did so under circumstances in which the defendant should have realized that a substantial and unreasonable risk of serious damage to another's property is created.

2. Wis JI–Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

3. 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.

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1316 GIVING A FALSE ALARM — § 941.13

Statutory Definition of the Crime

Giving a false alarm, as defined in § 941.13 of the Criminal Code of Wisconsin, is committed by one who intentionally gives a false alarm to any public officer or employee, whether by means of a fire alarm system or otherwise.

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 gave an alarm to a public (officer) (employee) by means of a fire alarm system or otherwise.[1]
2. The alarm was false.
3. The defendant intentionally gave the false alarm.

   "Intentionally" requires that the defendant acted with the mental purpose[2] to give a false alarm to a public (officer) (employee). It further requires that the defendant knew that the person was a public (officer) (employee) and knew the alarm was a false alarm.

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 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 1316 was originally published in 1974 and revised in 1977, 1995, and 2007. This revision was approved by the Committee in June 2026. It updated the comment.

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1. If a definition of "public officer" or "public employee" is needed, see § 939.22(30) which provides definitions of those terms.

2. When appropriate, add: "or was aware that his conduct was practically certain to cause that result." See § 939.23(3) and Wis JI–Criminal 923B.

1320 ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON: NEGLIGENT OPERATION OR HANDLING — § 941.20(1)(a)

Statutory Definition of the Crime

Endangering safety by use of a dangerous weapon, as defined in § 941.20(1)(a) of the Criminal Code of Wisconsin, is committed by one who endangers another's safety by the negligent operation or handling of a dangerous weapon.

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 or handled a dangerous weapon.
2. The defendant operated or handled a dangerous weapon in a manner constituting criminal negligence.
3. The defendant's operation or handling of a dangerous weapon in a criminally negligent manner endangered the safety of another.

Meaning of Dangerous Weapon

"Dangerous weapon" means[1]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.[2]]

[any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede, partially or completely, breathing or circulation of blood.]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm.[3] "Great bodily harm" means serious bodily injury.[4]]

[any electric weapon. An electric weapon is a device designed, redesigned, used, or intended to be used, offensively or defensively, to immobilize or incapacitate a person by the use of electric current.]

Meaning of "Criminal Negligence"

"Criminal negligence" means:[5]

- the defendant's operation or handling of a dangerous weapon 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 or handling of a dangerous weapon 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]

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 1321 in 1969 and revised in 1988, and 2005. It was republished as Wis JI–Criminal 1320 in 1995. The 2005 revision adoption of a new format and a change in the definition of "criminal negligence." This revision was approved by the Committee in June 2026. It updated the comment.

This instruction is for a violation of § 941.20(1)(a), as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The amended statute applies to offenses committed on or after January 1, 1989, and this instruction replaced Wis JI–Criminal 1321 for offenses committed on or after that date. For a discussion of the homicide revision generally, and of the offense covered by this instruction, see the Introductory Comment at Wis JI–Criminal 1000.

In addition to changing the title of § 941.20 from "reckless use of weapons" to "endangering safety by the use of a dangerous weapon," the homicide revision made two substantive changes in subsection (l)(a):

1) it changed the culpability requirement from reckless conduct to criminal negligence; and,
2) it amended the list of instrumentalities by striking "firearm, airgun, knife or bow and arrow" and replacing those terms with "dangerous weapon."

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1. Choose the alternative supported by the evidence. They are based in the definition of "dangerous weapon" provided in § 939.22(10). See Wis JI–Criminal 910 for footnotes discussing each alternative.

2. The Committee concluded that defining "great bodily harm" as "serious bodily injury" is sufficient in most cases. See Wis JI–Criminal 914 for a complete definition of "great bodily harm."

3. A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis. 2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first-degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer, the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, ¶62.

In light of Tomlinson, the Committee concluded that the definition of "dangerous weapon" in the instructions should be revised to include all the statutory alternatives in the text of the instruction. The alternative to be used in a case like Tomlinson would be the following:

> "Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

> The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

4. The Committee concluded that defining "great bodily harm" as "serious bodily injury" is sufficient in most cases. See Wis JI–Criminal 914 for a complete definition of "great bodily harm."

5. The definition of "criminal negligence" is based on the one provided in § 939.25. 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. It also includes material relating to violation of a safety statute.

1328 DISARMING A PEACE OFFICER — § 941.21(2)

Statutory Definition of the Crime

Disarming a peace officer, as defined in § 941.21(2) of the Criminal Code of Wisconsin, is committed by one who intentionally disarms a peace officer who is acting in an official capacity by taking a dangerous weapon[1] from the officer without 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. (Name of victim) was a peace officer.

   [A (insert title, e.g., "sheriff") is a peace officer.][2]

2. (Name of victim) was acting in an official capacity.

   (Insert title, e.g., "sheriffs")[3] act in an official capacity when they perform duties that they are employed to perform.[4] [The duties of a (insert title, e.g., "sheriff") include: _____.][5]

3. The defendant disarmed (name of victim) by taking (a dangerous weapon) (a device or container, specifically, (describe item under § 941.26(1g)(b) or (4)(a))) from (him) (her).

(This applies to any dangerous weapon that the officer was carrying or that was in an area within the officer's immediate presence.)[6]

4. (Name of victim) did not consent to the taking of the dangerous weapon.

5. The defendant committed the acts intentionally.

"Intentionally" requires that the defendant acted with the mental purpose of taking the dangerous weapon from a peace officer.[7] It further requires that the defendant knew that (name of victim) was a peace officer acting in an official capacity and knew that (name of victim) did not consent to the taking of the dangerous weapon.[8]

Meaning of "Dangerous Weapon"

"Dangerous weapon" means[9]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.[10]]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.[11]][12]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

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 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 1328 was originally published in 1988 and revised in 1994, 1996, 2007, and 2008. This revision was approved by the Committee in June 2026. It conformed the citations to 2025 Wisconsin Act 244, which renumbered § 941.21, redesignated the disarming a peace officer offense addressed in this instruction as § 941.21(2), and created a new offense under § 941.21(3) for disarming a correctional officer. See Wis JI–Criminal 1328A.

For an instruction addressing the offense under § 941.21(3), which prohibits intentionally disarming a "correctional officer" as defined in § 941.21(1), see Wis JI–Criminal 1328A.

1. Section 941.21 was amended by 1995 Wisconsin Act 339 (effective date: June 1, 1996) to refer not only to any dangerous weapon but also to "any device or container described under s. 941.26(1g)(b) or (4)(a)." The reference to § 941.26(1g)(b) is to containers of tear gas. The reference to § 941.26(4)(a) is to containers of oleoresin of capsicum, commonly referred to as "pepper spray." If either of these options is presented, the instruction must be modified. The Committee suggests simply substituting "tear gas container" or "container of oleoresin of capsicum" for "dangerous weapon" and not defining the term further. This is the approach used in the instructions for "pepper spray" offenses defined by § 941.26(4); see Wis JI–Criminal 1341, 1341A, and 1341B.

2. "Peace officer" is defined in § 939.22(22) as follows:

> "Peace officer" means any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes. "Peace officer" includes a commission warden and a university police officer, as defined in s. 175.42(1)(b).

In the Committee's judgment, the jury may be told, for example, that a sheriff is a peace officer. It is still for the jury to be satisfied that, in the particular case, the victim was a sheriff.

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

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

5. The duties, powers, or responsibilities of some peace officers are set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see State v. Jensen, 2007 WI App 256, 306 Wis. 2d 572, 743 N.W.2d 468 and, State v. Schultz, 2007 WI App 257, 306 Wis. 2d 598, 743 N.W.2d 823.

6. The statement "that the officer was carrying or that was in an area within the officer's immediate presence" is taken verbatim from § 941.21(2).

7. "Intentionally" is defined in § 939.23(3) as having the mental purpose to cause the result or being "aware that his or her conduct is practically certain to cause that result." The Committee believes that the mental purpose alternative is most likely to apply to this offense. Also see Wis JI–Criminal 923A and 923B.

8. When "intentionally" is used in a criminal statute, it requires knowledge of all facts necessary to make the conduct criminal and which follow the word "intentionally" in the statute. § 939.23(3).

9. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in § 939.22(10). See Wis JI–Criminal 910 for footnotes discussing each alternative.

10. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI–Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

11. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI–Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

12. A potential problem in instructing on this part of the definition of "dangerous weapon" is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis. 2d 502, 648 N.W.2d 367. The supreme court found that the trial court erred in instructing that "Dangerous weapon means a baseball bat." A baseball bat may

be a dangerous weapon if used in a manner likely to produce death or great bodily harm. See the discussion in note 5, Wis JI–Criminal 910.

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1328A DISARMING A CORRECTIONAL OFFICER — § 941.21(3)

Statutory Definition of the Crime

Disarming a correctional officer, as defined in § 941.21(3) of the Criminal Code of Wisconsin, is committed by one who intentionally disarms a correctional officer who is acting in an official capacity by taking a dangerous weapon[1], a device or container, or equipment from the correctional officer without 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. (Name of victim) was a correctional officer.

   A correctional officer is a person employed by the state or a political subdivision of the state as a guard or officer whose duties are the supervision and discipline of inmates[2]. [The term "correctional officer" also includes a juvenile correctional officer.][3]

2. (Name of victim) was acting in an official capacity.

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

3. The defendant disarmed (name of victim) by taking (a dangerous weapon) (a device or container, specifically, (describe item under § 941.26(1g)(b) or (4)(a))) (equipment) from (him) (her).

This applies to any (dangerous weapon) (device or container) (equipment) that the correctional officer was carrying or that was in an area within the correctional officer's immediate presence.[6]

["Equipment" means an item issued to or used by a correctional officer for the correctional officer's duties that is designed, or intended to be used, to cause bodily harm, restraint, or incapacitation, or that could be used by the correctional officer to communicate with other employees, seek assistance, or enter locked areas.][7]

4. (Name of victim) did not consent to the taking of the (dangerous weapon) (device or container) (equipment).

5. The defendant committed the acts intentionally.

"Intentionally" requires that the defendant acted with the mental purpose of taking the (dangerous weapon) (device or container) (equipment) from a correctional officer.[8] It further requires that the defendant knew that (name of victim) was a correctional officer acting in an official capacity and knew that (name of victim) did not consent to the taking of the (dangerous weapon) (device or container) (equipment).[9]

Meaning of "Dangerous Weapon"

"Dangerous weapon" means[10]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

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 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 1328A was approved by the Committee in June 2026.

This instruction was drafted in response to 2025 Wisconsin Act 244 [effective date: April 11, 2026], which created § 941.21(3) and added related definitions of "correctional officer" and "equipment" in § 941.21(1).

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1. Section 941.21 was amended by 1995 Wisconsin Act 339 [effective date: June 1, 1996] to refer not only to any dangerous weapon but also to "any device or container described under s. 941.26(1g)(b) or (4)(a)." The reference to § 941.26(1g)(b) is to containers of tear gas. The reference to § 941.26(4)(a) is to containers of oleoresin of capsicum, commonly referred to as "pepper spray." If either of these options is presented, the instruction must be modified. The Committee suggests simply substituting "tear gas container" or "container of oleoresin of capsicum" for "dangerous weapon" and not defining the term further. This is the approach used in the instructions for "pepper spray" offenses defined by § 941.26(4); see Wis JI–Criminal 1341, 1341A, and 1341B.

2. This is the definition of "correctional officer" provided in § 941.21(1)(a).

3. Section 941.21(1)(a)2. additionally defines "correctional officer" to include "a juvenile correctional officer, as defined under s. 48.981(1)(cu)." That definition provides the following:

> "Juvenile correctional officer" means a person employed by the state, a political subdivision of the state, a child welfare agency that is licensed under s. 48.66 (1) (b), or a private entity contracting under s. 938.222 whose principal duty is the supervision of juveniles held in a juvenile detention facility, a juvenile correctional facility, or a secured residential care center for children and youth.

4. The definition of "official capacity" is taken from Wis JI–Criminal 915 and Wis JI–Criminal 1328. See the Comment to those instructions for further discussion.

5. The duties, powers, or responsibilities of some correctional officers are set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. 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.

6. The "carrying or … immediate presence" language is taken verbatim from § 941.21(3), which applies "to any item that the correctional officer is carrying or that is in an area within the correctional officer's immediate presence."

7. This is the definition of "equipment" provided in § 941.21(1)(b).

8. "Intentionally" is defined in § 939.23(3) as having the mental purpose to cause the result or being "aware that his or her conduct is practically certain to cause that result." The Committee believes that the mental purpose alternative is most likely to apply to this offense. See Wis JI–Criminal 923A and 923B.

9. When "intentionally" is used in a criminal statute, it requires knowledge of all facts necessary to make the conduct criminal and which follow the word "intentionally" in the statute. § 939.23(3).

10. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in § 939.22(10). See Wis JI–Criminal 910 for footnotes discussing each alternative, and see Wis JI–Criminal 1328, note 12, regarding the caution in State v. Tomlinson, 2002 WI 91, 254 Wis. 2d 502, 648 N.W.2d 367, against instructing that a particular object is, as a matter of law, a dangerous weapon.

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1350 POSSESSION OF EXPLOSIVES FOR AN UNLAWFUL PURPOSE — § 941.31(1)

Statutory Definition of the Crime

Possession of explosives for unlawful purpose, as defined in § 941.31(1) of the Criminal Code of Wisconsin, is committed by one who possesses[1] any explosive compound with intent to use the explosive to commit a crime.[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 two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed any explosive compound.

"Possessed" means that the defendant knowingly[3] had actual physical control[4] of the explosive compound.[5]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.[6]

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

2. The defendant possessed an explosive compound with the intent[7] to use the explosive to commit a crime.[8]

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 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 1350 was originally published in 1966 and revised in 1980, 1987, 1988, 1995, 1996, and 2008. This revision was approved by the Committee in June 2026. It updated the comment.

This instruction is for violations of subsection (1) of § 941.31, which are punishable as Class F felonies. The statute was amended by 2001 Wisconsin Act 109 [effective date: February 1, 2003] which made it a Class H felony under subsection (2) if a person "makes, buys, sells, transports, possesses, uses or transfers any improvised explosive device, or possesses materials or components with intent to assemble

any improvised explosive device." Section 941.31(2)(b). Wis JI–Criminal 1351A and 1351B are drafted for violations of sub. (2).

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1. The instruction is drafted for a violation of the statute involving "possession." The statute also applies to one who "makes, buys, transports, or transfers, or offers to do the same." If one of the other alternatives is involved, the instruction must be modified (though most necessarily will involve possession).

Section 939.22(40) defines "transfer" as follows: "'Transfer' means any transaction involving a change in possession of any property or a change of right, title, or interest to or in any property."

2. The statute provides an alternative to possession with intent to commit a crime: "knowing that another intends to use it to commit a crime." If this alternative is used, the instruction must be modified. See note 7 below.

3. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

4. The definition of "possession" is based on the one provided in Wis JI–Criminal 920. That instruction also includes optional explanations for cases when an object is arguably under the defendant's control but not in his or her physical possession:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI–Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so called constructive possession.

5. In State v. Brulport, 202 Wis.2d 505, 551 N.W.2d 824 (Ct. App. 1996), the court approved the use of Wisconsin Administrative Code definitions of "explosive compound" and "explosion" in a case involving a violation of § 941.31(1):

> "Explosive" means any chemical compound, mixture or device, the primary or common purpose of which is to function by explosion. [§ ILHR 7.04(18), now § SPS 307.20(12)]
>
> "Explosion" means the substantially instantaneous release of both gas and heat. [§ ILHR 7.04(18)]

Brulport argued on appeal that a plastic soda bottle containing aluminum foil and drain cleaner did not qualify as an "explosive compound" under § 941.31. The evidence showed that the combination of the ingredients produces a hydrogen gas which gradually, heats, expands and ultimately explodes. The court of appeals noted that "explosive compound" and "explosion" were not defined in the statutes and adopted definitions from the Wis. Administrative Code, Chapter ILHR 7 (now SPS 307). Applying these definitions, the court found that the devices in question qualified as an "explosive compound." The fact that a detonating

or ignition mechanism is not required to trigger the explosion of these devices is not relevant; the definitions are satisfied if a "chemical compound, mixture or device" is present.

Note on administrative code: Chapter ILHR 7 was renumbered ch. Comm 7 in 1996, recreated effective March 1, 2008 (Register February 2008 No. 626), and subsequently renumbered ch. SPS 307 in December 2011. The definition of "Explosive" now appears at Wis. Admin. Code § SPS 307.20(12), and retains substantially the same language approved in Brulport. The administrative code no longer contains a separate stand-alone definition of "explosion." The Brulport standard — substantially instantaneous release of both gas and heat — remains controlling as a matter of case law. See also State v. Strong, 2011 WI App 43, 332 Wis. 2d 554, 796 N.W.2d 438 (applying related definitional principles under § 941.31(2)(a) and confirming that a device need not have a functioning detonator to qualify as an explosive, so long as the means of detonation can be readily inserted or attached).

6. The definition of "possess" is the one provided in Wis JI–Criminal 920. See the Comment to Wis JI–Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so called constructive possession.

7. See Wis JI–Criminal 923A for a discussion of various issues relating to definition of "with intent to." "Knowing that another intends to use it to commit a crime" is an alternative mental element for this offense. The following may be a helpful explanation:

> "With the knowledge that another intended to use the explosive to commit a crime" means that the defendant believed another intended to so use the explosives. With respect to the defendant's knowledge, you cannot look into a person's mind to determine knowledge or belief. Knowledge or belief must be found, if found at all, from acts, words, and statements, if any, and from all of the facts and circumstances in this case bearing upon knowledge or belief. To "know" that another intended to commit a crime requires merely that the defendant so believed.

8. A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime. Section 939.12.

1351A POSSESSION OF AN IMPROVISED EXPLOSIVE DEVICE — § 941.31(2)(b)

Statutory Definition of the Crime

Possession of an improvised explosive device, as defined in § 941.31(2)(b) of the Criminal Code of Wisconsin, is committed by one who possesses[1] any improvised explosive device.

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 possessed a device.

"Possessed" means that the defendant knowingly[2] had the device under (his) (her) actual physical control.

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.[3]

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

2. The device was an improvised explosive device.[4] This requires:

- that the device was explosive; that is, that it contained some type of explosive material[5] and a means of detonating that material; and
- that the device was destructive; that is, that it was capable of causing bodily harm or damage to property; and
- that the device was improvised; that is, that it was made by a person not engaged in the legitimate manufacture or use of explosives (or otherwise authorized by law to do so).[6]

["Improvised explosive device" does not include ammunition for any rifle, pistol, or shotgun.][7]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that 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

This instruction was originally published as Wis JI–Criminal 1351 in 1988. It was renumbered Wis JI–Criminal 1351A in 1996, and revised in 1996 and 2008. This revision was approved by the Committee in June 2026. It updated the comment.

This instruction is for one type of violation of subsection (2)(b) of § 941.31, which is punishable as a Class H felony. The statute was created by 1987 Wisconsin Act 234 (effective date: April 21, 1988). Possession of an explosive compound with intent to use it to commit a crime is prohibited by § 941.31(1). See Wis JI–Criminal 1350.

Subsection (2)(c) of § 941.31 provides exceptions to the coverage of the statute:

> This subsection does not apply to the transportation, possession, use or transfer of any improvised explosive device by any armed forces or national guard personnel or to any peace officer in the line of duty or as part of a duty related function or exercise. The restriction on transportation in this subsection does not apply to common carriers. Notwithstanding s. 939.22(22), this paragraph does not apply to a commission warden.

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1. The instruction is drafted for a violation of the statute involving "possession." The statute also applies to one who "makes, buys, sells, transports, uses or transfers . . . or possesses materials or components with intent to assemble any improvised explosive device." If one of the other alternatives is involved, the instruction must be modified (though most necessarily will involve possession).

Section 939.22(40) defines "transfer" as follows:

> "Transfer means any transaction involving a change in possession of any property or a change of right, title, or interest to or in any property."

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

3. The definition of "possess" is the one provided in Wis JI–Criminal 920. See the Comment to Wis JI–Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so called constructive possession.

4. The explanation of "improvised explosive device" is from the definition provided in § 941.31(2)(a). The statutory definition appears to require that the device have the three attributes emphasized

in the instruction: that it be explosive, destructive, and improvised. The full statutory definition reads as follows:

> "Improvised explosive device" means a destructive explosive device capable of causing bodily harm, great bodily harm, death or property damage; with some type of explosive material and a means of detonating the explosive material, directly, remotely, or with a timer either present or readily capable of being inserted or attached; which may include a pipe or similar casing, with the ends of the pipe or casing capped, plugged or crimped, and a fuse or similar object sticking out of the pipe or casing; and made by a person not engaged in the legitimate manufacture or legitimate use of explosives, or otherwise authorized by law to do so. "Improvised explosive device" does not include ammunition for any rifle, pistol or shotgun.

In State v. Strong, 2011 WI App 43, 332 Wis. 2d 554, 796 N.W.2d 438, the court of appeals construed this definition for purposes of Element 2. The court held that a device qualifies as an "improvised explosive device" even though it lacks a functioning detonator, so long as a means of detonation can be readily inserted or attached, and that "explosive material" may be given its ordinary dictionary meaning—applying that meaning, the court held that methyl ethyl ketone (acetone) qualifies as an explosive material under § 941.31(2)(a).

5. In State v. Brulport, 202 Wis. 2d 505, 551 N.W.2d 824 (Ct. App. 1996), the court approved the use of Wisconsin Administrative Code definitions of "explosive compound" and "explosion" in a case involving a violation of § 941.31(1):

> "Explosive compound" means any chemical compound, mixture or device, the primary or common purpose of which is to function by explosion. [§ ILHR 7.04(18) now § SPS 307.20(12)]
>
> "Explosion" means the substantially instantaneous release of both gas and heat. [§ ILHR 7.04(18)]

Brulport held that a plastic soda bottle containing aluminum foil and drain cleaner qualified as an "explosive compound" under § 941.31. See footnote 5, Wis JI–Criminal 1350.

Note on administrative code: Chapter ILHR 7 was renumbered ch. Comm 7 in 1996, recreated effective March 1, 2008 (Register February 2008 No. 626), and subsequently renumbered ch. SPS 307 in December 2011. The definition of "Explosive" now appears at Wis. Admin. Code § SPS 307.20(12), and retains substantially the same language approved in Brulport. The administrative code no longer contains a separate stand-alone definition of "explosion." The Brulport standard — substantially instantaneous release of both gas and heat — remains controlling as a matter of case law. See also State v. Strong, 2011 WI App 43, 332 Wis. 2d 554, 796 N.W.2d 438 (applying related definitional principles under § 941.31(2)(a) and confirming that a device need not have a functioning detonator to qualify as an explosive, so long as the means of detonation can be readily inserted or attached).

6. The phrase in parentheses is based on the definition found in § 941.31(2)(a). See note 4, supra.

7. See § 941.31(2)(a), and note 4, supra.

1351B POSSESSION OF MATERIALS OR COMPONENTS WITH INTENT TO ASSEMBLE AN IMPROVISED EXPLOSIVE DEVICE — § 941.31(2)(b)

Statutory Definition of the Crime

Section 941.31(2)(b) of the Criminal Code of Wisconsin is violated by a person who possesses materials or components with intent to assemble an improvised explosive device.

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 possessed materials or components.

"Possessed" means that the defendant knowingly[1] had actual physical control of materials or components.

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.[2]

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

2. The defendant possessed materials or components with intent to assemble an improvised explosive device.[3]

An "improvised explosive device" requires:

- that the device was explosive; that is, that it contained some type of explosive material[4] and a means of detonating that material; and
- that the device was destructive; that is, that it was capable of causing bodily harm or damage to property; and
- that the device was improvised; that is, that it was made by a person not engaged in the legitimate manufacture or use of explosives (or otherwise authorized by law to do so).[5]

["Improvised explosive device" does not include ammunition for any rifle, pistol, or shotgun.][6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

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 1351B was originally published in 1996, and revised in 2008. This revision was approved by the Committee in June 2026. It updated the comment.

This instruction is for one type of violation of subsection (2)(b) of § 941.31, which is punishable as a Class H felony. The statute was created by 1987 Wisconsin Act 234 (effective date: April 21, 1988). Possession of an improvised explosive device, also prohibited by § 941.31(2)(b), is addressed by Wis JI–Criminal 1351A. Possession of an explosive compound with intent to use it to commit a crime is prohibited by § 941.31(1). See Wis JI–Criminal 1350.

Subsection (2)(c) of § 941.31 provides exceptions to the coverage of the statute:

> This subsection does not apply to the transportation, possession, use or transfer of any improvised explosive device by any armed forces or national guard personnel or to any peace officer in the line of duty or as part of a duty related function or exercise. The restriction on transportation in this subsection does not apply to common carriers.

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1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

2. The definition of "possess" is the one provided in Wis JI–Criminal 920. See the Comment to Wis JI–Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so called constructive possession.

3. The explanation of "improvised explosive device" is from the definition provided in § 941.31(2)(a). The statutory definition appears to require that the device have the three attributes emphasized in the instruction: that it be explosive, destructive, and improvised. The full statutory definition reads as follows:

> "Improvised explosive device" means a destructive explosive device capable of causing bodily harm, great bodily harm, death or property damage; with some type of explosive material and a

> means of detonating the explosive material, directly, remotely, or with a timer either present or readily capable of being inserted or attached; which may include a pipe or similar casing, with the ends of the pipe or casing capped, plugged or crimped, and a fuse or similar object sticking out of the pipe or casing; and made by a person not engaged in the legitimate manufacture or legitimate use of explosives, or otherwise authorized by law to do so. "Improvised explosive device" does not include ammunition for any rifle, pistol or shotgun.

In State v. Strong, 2011 WI App 43, 332 Wis. 2d 554, 796 N.W.2d 438, the court of appeals construed this definition for purposes of Element 2. The court held that a device qualifies as an "improvised explosive device" even though it lacks a functioning detonator, so long as a means of detonation can be readily inserted or attached, and that "explosive material" may be given its ordinary dictionary meaning—applying that meaning, the court held that methyl ethyl ketone (acetone) qualifies as an explosive material under § 941.31(2)(a).

4. In State v. Brulport, 202 Wis. 2d 505, 551 N.W.2d 824 (Ct. App. 1996), the court approved the use of Wisconsin Administrative Code definitions of "explosive compound" and "explosion" in a case involving a violation of § 941.31(1):

> "Explosive compound" means any chemical compound, mixture or device, the primary or common purpose of which is to function by explosion. [§ ILHR 7.04(18) now § SPS 307.20(12)]
>
> "Explosion" means the substantially instantaneous release of both gas and heat. [§ ILHR 7.04(18)]

Brulport held that a plastic soda bottle containing aluminum foil and drain cleaner qualified as an "explosive compound" under § 941.31. See footnote 5, Wis JI–Criminal 1350.

Note on administrative code: Chapter ILHR 7 was renumbered ch. Comm 7 in 1996, recreated effective March 1, 2008 (Register February 2008 No. 626), and subsequently renumbered ch. SPS 307 in December 2011. The definition of "Explosive" now appears at Wis. Admin. Code § SPS 307.20(12), and retains substantially the same language approved in Brulport. The administrative code no longer contains a separate stand-alone definition of "explosion." The Brulport standard — substantially instantaneous release of both gas and heat — remains controlling as a matter of case law. See also State v. Strong, 2011 WI App 43, 332 Wis. 2d 554, 796 N.W.2d 438 (applying related definitional principles under § 941.31(2)(a) and confirming that a device need not have a functioning detonator to qualify as an explosive, so long as the means of detonation can be readily inserted or attached).

5. The phrase in parentheses is based on the definition found in § 941.31(2)(a). See note 3, supra.

6. See § 941.31(2)(a), and note 3, supra.

1353A POSSESSION OF A HAZARDOUS SUBSTANCE WITH INTENT TO ABUSE — § 941.316(2)(a)

Statutory Definition of the Crime

Possession of a hazardous substance with intent to abuse, as defined in § 941.316(2)(a) of the Criminal Code of Wisconsin, is committed by one who possesses[1] any hazardous substance[2] with the intent to abuse[3] the hazardous substance.

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 possessed a hazardous substance.

"Possessed" means that the defendant knowingly[4] had actual physical control of the hazardous substance.[5]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in (his) (her) possession, even though another person may also have similar control.]

The term "hazardous substance" means (insert the applicable statutory definition or characteristic under § 100.37(1)(c), if relied on). ["Hazardous substance" also includes any substance or mixture of substances that has the capacity to produce personal injury or illness to a person who abuses the substance and includes any household product[6], or any mixture of household products.]

2. The defendant possessed the hazardous substance with the intent[7] to abuse it.

"Abuse" means to ingest, inhale, or otherwise introduce into the human body a hazardous substance in a manner that does not comply with any cautionary labeling required for the hazardous substance under § 100.37 or under federal law, or in a manner not intended by the manufacturer of the hazardous substance, and that is intended to induce intoxication or elation, to stupefy the central nervous system, or to change the human audio, visual, or mental processes.[8]

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 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 1353A was approved by the Committee in June 2026.

This instruction is for violations of § 941.316(2)(a), which is punishable as a Class A misdemeanor. Wis JI–Criminal 1353B is drafted for the offense of intentional abuse under § 941.316(2)(b). Wis JI–Criminal 1353C is drafted for the felony distribution offense under § 941.316(3). Both subsections (2)(a) and (2)(b) may be charged in the alternative.

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1. The instruction is drafted for the "possession" alternative. The defense under § 941.316(4) provides that sub. (2) does not apply to a person who possesses or uses the hazardous substance if the substance is obtained from, or pursuant to a valid prescription or order of, a practitioner, as defined in § 961.01(19), while acting in the course of professional practice.

2. The term "hazardous substance" is defined in § 941.316(1)(c) by reference to § 100.37(1)(c) and by the extended definition in § 941.316(1)(c) itself. Under § 100.37(1)(c)1., "hazardous substance" means any substance or any mixture of substances — including a toy or other article intended for use by children — which is toxic, corrosive, an irritant, a strong sensitizer, flammable or combustible, or generates pressure through decomposition, heat, or other means, if such substance may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.

The term also includes any substance or any mixture of substances having the capacity to produce personal injury or illness to a person who abuses the substance, and includes any household product as defined in § 941.327(1)(e). Section 941.327(1)(e) defines "household product" as any food, drug, device, or cosmetic, or any article, product, or commodity of any kind or class which is customarily produced or distributed for sale through retail sales agencies for consumption by individuals or for use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of that use.

If neither the identity nor the qualifying character of the substance is disputed, no definition need be given. If the nature of the substance is contested, the court should instruct the jury on the applicable definition.

3. Section 941.316(1)(a) defines "abuse" as follows:

> "Abuse" means to ingest, inhale, or otherwise introduce into the human body a hazardous substance in a manner that does not comply with any cautionary labeling that is required for the hazardous substance under s. 100.37 or under federal law, or in a manner that is not intended by the manufacturer of the hazardous substance, and that is intended to induce intoxication or elation, to stupefy the central nervous system, or to change the human audio, visual, or mental processes.

4. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

5. The definition of "possession" is based on the one provided in Wis JI–Criminal 920. That instruction also includes optional explanations for cases where an object is arguably under the defendant's control but not in his or her physical possession. See the Comment to Wis JI–Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

6. Section 941.327(1)(e) defines "household product" as follows:

> "Household product" means any food, drug, device or cosmetic or any article, product or commodity of any kind or class which is customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of that consumption or use.

7. See Wis JI–Criminal 923A for a discussion of various issues relating to the definition of "with intent to."

8. The statutory definition of "abuse" provided in § 941.316(1)(a) contains two components: (1) conduct — introduction of the substance into the body in a manner that does not comply with cautionary labeling or with the manufacturer's intended use; and (2) purpose — the intent to induce intoxication or elation, stupefy the central nervous system, or alter audio, visual, or mental processes. Both components must be established.

1353B INTENTIONAL ABUSE OF A HAZARDOUS SUBSTANCE — § 941.316(2)(b)

Statutory Definition of the Crime

Intentional abuse of a hazardous substance, as defined in § 941.316(2)(b) of the Criminal Code of Wisconsin, is committed by one who intentionally[1] abuses[2] a hazardous substance.[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 two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant abused a hazardous substance.

   "Abuse" means to ingest, inhale, or otherwise introduce into the human body a hazardous substance in a manner that does not comply with any cautionary labeling required for the hazardous substance under § 100.37 or under federal law, or in a manner not intended by the manufacturer of the hazardous substance, and that is intended to induce intoxication or elation, to stupefy the central nervous system, or to change the human audio, visual, or mental processes.[4]

   The term "hazardous substance" means (insert the applicable statutory definition or characteristic under § 100.37(1)(c), if relied on). ["Hazardous

substance" also includes any substance or mixture of substances that has the capacity to produce personal injury or illness to a person who abuses the substance and includes any household product[5], or any mixture of household products.][6]

2. The defendant acted intentionally.

"Intentionally" means that the defendant had the mental purpose to ingest, inhale, or otherwise introduce the hazardous substance into the human body in the manner described above, with the further intent to induce intoxication or elation, stupefy the central nervous system, or change the human audio, visual, or mental processes.[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 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 1353B was approved by the Committee in June 2026.

This instruction is for violations of § 941.316(2)(b), which is punishable as a Class A misdemeanor. Wis JI–Criminal 1353A is drafted for the possession-with-intent offense under § 941.316(2)(a). Wis JI–Criminal 1353C is drafted for the felony distribution offense under § 941.316(3). The defense under § 941.316(4) — that the substance was obtained from, or pursuant to a valid prescription or order of, a practitioner acting in the course of professional practice — applies to both sub. (2) offenses and should be addressed in a separate instruction if supported by the evidence.

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1. The statute requires intentional conduct. "Intentionally" and "with intent to" are defined in § 939.23(3) and (4). See Wis JI–Criminal 923A and 923B.

2. The definition of "abuse" is provided by § 941.316(1)(a). Both the conduct and the purpose components must be proved. See note 4, below.

3. The term "hazardous substance" is defined in § 941.316(1)(c) by reference to § 100.37(1)(c) and by the extended statutory definition. See note 6, below.

4. This is the definition of "abuse" provided in § 941.316(1)(a). The definition has two components: (1) introduction of the substance into the human body in a manner that violates cautionary labeling or the manufacturer's intended use; and (2) an intent to induce intoxication or elation, stupefy the central nervous system, or alter audio, visual, or mental processes. Both must be established. The conduct element differs from the intent element: the conduct need only violate labeling or manufacturer intent, but the abuse must be aimed at one of the listed cognitive or sensory effects.

5. Section 941.327(1)(e) defines "household product" as follows:

> "Household product" means any food, drug, device or cosmetic or any article, product or commodity of any kind or class which is customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of that consumption or use.

6. The term "hazardous substance" is defined in § 941.316(1)(c) by reference to § 100.37(1)(c) and by the extended definition in § 941.316(1)(c) itself. Under § 100.37(1)(c)1., "hazardous substance" means any substance or mixture of substances — including a toy or other article intended for use by children — which is toxic, corrosive, an irritant, a strong sensitizer, flammable or combustible, or generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.

The term also includes any substance or mixture of substances having the capacity to produce personal injury or illness to a person who abuses the substance, and includes any household product or any mixture of household products, as defined in § 941.327(1)(e). Section 941.327(1)(e) defines "household product"

as any food, drug, device, or cosmetic, or any article, product, or commodity of any kind or class which is customarily produced or distributed for sale through retail sales agencies for consumption by individuals or for use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of that use.

If the identity or character of the substance is not in dispute, no definition need be given. If the nature of the substance is contested, the court should instruct the jury on the applicable definition.

7. See Wis JI–Criminal 923A for a discussion of various issues relating to the definition of "intentionally" and "with intent to."

1353C DISTRIBUTION OF A HAZARDOUS SUBSTANCE KNOWING IT WILL BE ABUSED — § 941.316(3)

Statutory Definition of the Crime

Distribution of a hazardous substance knowing it will be abused, as defined in § 941.316(3) of the Criminal Code of Wisconsin, is committed by one who distributes, or possesses with intent to distribute, a hazardous substance,[1] knowing or having reason to know that the hazardous substance will be abused.[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 two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (distributed) (possessed with intent to distribute) a hazardous substance.

"Distributed" means that the defendant transferred a hazardous substance from (himself) (herself) to another person.[3]

"Hazardous substance" means (insert the applicable statutory definition or characteristic under § 100.37(1)(c), if relied on). ["Hazardous substance" also includes any substance or mixture of substances that has the capacity to produce

personal injury or illness to a person who abuses the substance and includes any household product[4], or any mixture of household products.][5]

"Possessed" means that the defendant knowingly[6] had actual physical control of the hazardous substance.[7]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in (his) (her) possession, even though another person may also have similar control.]

ADD THE FOLLOWING IF THE POSSESSION-WITH-INTENT-TO-DISTRIBUTE ALTERNATIVE IS SUBMITTED:

"With intent to distribute" means that the defendant had the purpose to transfer the hazardous substance to another person.[8]

2. The defendant knew[9] or had reason to know that the hazardous substance would be abused.

"Abuse" means to ingest, inhale, or otherwise introduce into the human body a hazardous substance in a manner that does not comply with any cautionary labeling required for the hazardous substance under § 100.37 or under federal law, or in a manner not intended by the manufacturer of the hazardous substance, and

that is intended to induce intoxication or elation, to stupefy the central nervous system, or to change the human audio, visual, or mental processes.[10]

A person has reason to know that a hazardous substance will be abused if the facts and circumstances known to the person would cause a reasonable person in the defendant's position to believe that the hazardous substance will be abused.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. What a person knows or has reason to know must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that 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 1353C was approved by the Committee in June 2026.

This instruction is for violations of § 941.316(3), which is punishable as a Class I felony. Wis JI–Criminal 1353A and 1353B are drafted for the Class A misdemeanor offenses under § 941.316(2). Section 941.316(5) provides that sub. (3) does not apply to a person who distributes a hazardous substance in the ordinary course of business. This exception should be addressed in a separate instruction if supported by the evidence.

1. The term "hazardous substance" is defined in § 941.316(1)(c) by reference to § 100.37(1)(c) and by the extended statutory definition. See note 5, below.

2. The definition of "abuse" is provided by § 941.316(1)(a). See note 10, below. The prosecution must show that the defendant distributed or possessed with intent to distribute the hazardous substance, knowing or having reason to know that the substance would be used in the manner described by the abuse definition — that is, in a non-compliant or manufacturer-unintended manner aimed at inducing intoxication, elation, central-nervous-system stupefaction, or altered audio, visual, or mental processes.

3. Section 941.316(1)(b) defines "distribute" as follows:

"Distribute" means to transfer a hazardous substance from one person to another.

For the possession-with-intent-to-distribute alternative, see Wis JI–Criminal 920 and the Comment to that instruction for a discussion of constructive possession.

4. Section 941.327(1)(e) defines "household product" as follows:

> "Household product" means any food, drug, device or cosmetic or any article, product or commodity of any kind or class which is customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of that consumption or use.

5. The term "hazardous substance" is defined in § 941.316(1)(c) by reference to § 100.37(1)(c) and by the extended definition in § 941.316(1)(c) itself. Under § 100.37(1)(c)1., "hazardous substance" means any substance or mixture of substances — including a toy or other article intended for use by children — which is toxic, corrosive, an irritant, a strong sensitizer, flammable or combustible, or generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.

The term also includes any substance or mixture of substances having the capacity to produce personal injury or illness to a person who abuses the substance, and includes any household product as defined in § 941.327(1)(e). Section 941.327(1)(e) defines "household product" as any food, drug, device, or cosmetic, or any article, product, or commodity of any kind or class which is customarily produced or distributed for sale through retail sales agencies for consumption by individuals or for use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of that use.

If the identity or character of the substance is not in dispute, no definition need be given. If the nature of the substance is contested, the court should instruct the jury on the applicable definition.

6. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

7. The definition of "possession" is based on the one provided in Wis JI–Criminal 920. That instruction also includes optional explanations for cases where an object is arguably under the defendant's control but not in his or her physical possession. See the Comment to Wis JI–Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

8. See Wis JI–Criminal 923A for a discussion of various issues relating to the definition of "with intent to."

9. "Know" under § 939.23(2) requires only that the actor believes that the specified fact exists. The "having reason to know" standard is distinct and does not require subjective belief; it is satisfied when the circumstances known to the defendant would lead a reasonable person to conclude that the substance would be abused. See generally Wis JI–Criminal 923A.

The distinction between actual knowledge ("knowing") and constructive knowledge ("having reason to know") reflects the statutory language. The "having reason to know" standard is an objective inquiry — what a reasonable person would conclude from the circumstances — and does not require proof of actual subjective awareness. See § 939.23(2) ("Know" requires only that the actor believes that the specified fact exists); cf. Wis JI–Criminal 923A.

10. This is the definition of "abuse" provided in § 941.316(1)(a). The definition has two components: (1) introduction of the substance into the human body in a manner that violates cautionary labeling or the manufacturer's intended use; and (2) an intent to induce intoxication or elation, stupefy the central nervous system, or alter audio, visual, or mental processes. Both must be established. The conduct element differs from the intent element: the conduct need only violate labeling or manufacturer intent, but the abuse must be aimed at one of the listed cognitive or sensory effects.

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1375 VIOLATING A NO CONTACT ORDER — § 941.39

Statutory Definition of the Crime

Violating a no contact order, as defined in § 941.39 of the Wisconsin Statutes, is committed by one who intentionally violates a court order issued under § 973.049(2) of the Wisconsin Statutes.

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. A no contact order was issued under § 973.049(2) of the Wisconsin Statutes as a result of a conviction for a (felony) (misdemeanor).

   (A felony is a crime punishable by imprisonment in the Wisconsin state prisons.[1] _____ is a felony.)[2]

   (A misdemeanor is a crime punishable by imprisonment in the county jail.[3] _____ is a misdemeanor.)[4]

2. The defendant committed an act that violated the no contact order.

3. The defendant intentionally violated the no contact order.

   This requires that the defendant knew that the no contact order had been issued and knew that (his) (her) acts violated the order.[5]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all 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 1375 was originally published in 2007 and revised in 2013. This revision was approved by the Committee in June 2026. It amended the comment.

This instruction is for violations of § 941.39, titled "Victim, witness, juror, or co-actor contact." Section 941.39 was created by 2005 Wisconsin Act 32 and took effect on August 30, 2005.

2011 Wisconsin Act 267 amended § 941.39 to change the penalty [effective date: April 24, 2012]. The penalty is a Class A misdemeanor if the order resulted from a conviction for a misdemeanor; the penalty is a Class H felony if the order resulted from a conviction for a felony. The Committee concluded that because the nature of the conviction on which the order is based determines the penalty range, it is a fact that must be submitted to the jury. The penalty structure is like that for bail jumping under § 946.49; see Wis JI–Criminal 1975.

The offense is defined as violating a no contact order issued under § 973.049(2), which provides that a sentencing court "may" prohibit an individual who is being sentenced or placed on probation "from contacting victims of, witnesses to, jurors who served at any proceeding relating to, or co-actors in, a crime considered at sentencing during any part of the individual's sentence or period of probation if the court determines that the prohibition would be in the interest of public protection."

Subsection (3) of § 973.049, as amended by 2011 Wisconsin Act 267, provides: "If a court issues an order under sub. (2), the court shall inform the individual of the prohibition and include the prohibition in

the judgment of conviction for the crime." The Committee concluded that whether or not this requirement was met is not relevant in a prosecution for violating § 941.39.

2025 Wisconsin Act 26 amended § 973.049(2) by adding "witnesses to" and "jurors who served at any proceeding relating to" a crime considered at sentencing to the categories of persons whom a sentencing court may protect through a no contact order. The Act also amended the title of § 941.39 to read "Victim, witness, juror, or co-actor contact." Together, these changes expanded both the class of persons whom a court may protect under § 973.049(2) and the class of no contact orders whose violation may be prosecuted under § 941.39. The statute now covers witnesses and jurors who served in the proceeding, in addition to victims and co-actors.

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1. See § 939.60.

2. In the Committee's judgment, the jury may be told that a certain crime is in fact a felony or a misdemeanor. The jury must find that the defendant was actually convicted of that crime.

3. See §§ 939.60 and 939.12. "County jail" includes the Milwaukee County House of Correction.

4. See note 2, supra.

5. The basis for the knowledge requirement in the third element is the provision in § 939.23(3) which states that when the word "intentionally" is used in a criminal statute, it requires "knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'."

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1397 SEXUAL EXTORTION – § 942.095

Statutory Definition of the Crime

Section 942.095 of the Criminal Code of Wisconsin is violated by a person who threatens to [(injure the property or reputation of another person) (commit violence against another person) with the intent to coerce that person to (engage in sexual conduct) (produce an intimate representation of that person).] [distribute an intimate representation of another person with the intent to coerce that person to (engage in sexual conduct) (produce another intimate representation of that person) (provide the payment of money, property, services, or any other thing of value to the actor) (to do or refrain from doing any act against that person's will).]

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 threatened (to injure the property or reputation of (name of victim)) (to commit violence against (name of victim)) (to distribute an intimate representation of (name of victim)).

   A "threat" requires a true threat. It may be communicated orally, in writing, or by conduct. "True threat" means that a reasonable person would interpret the

threat as a serious expression that the speaker will imminently or in the future (insert the applicable threat alleged in Element 1). It must convey a real possibility that the threatened harm will follow.[1] 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]

2. The defendant made the threat for the purpose of causing (name of victim) to believe the defendant intended to carry out the threatened harm.

"For the purpose of" means that the defendant's conscious objective was to cause (name of victim) to understand the communication as a genuine expression of the defendant's intent to (injure the property or reputation of (name of victim).) (commit violence against (name of victim).) (distribute an intimate representation of (name of victim).)[3]

3. The defendant acted with intent to coerce (name of victim) to (engage in sexual conduct) (produce an intimate representation of (name of victim)) (produce another intimate representation of (name of victim)) (provide the payment of money, property, services, or any other thing of value to the defendant) (do an act against (name of victim)'s will) (refrain from doing an act that (name of victim) would otherwise have done).

["Sexual conduct" means the commission of any of the following: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus, or a lewd exhibition of human genitals.[4]]

["Intimate representation" means (a representation of a nude or partially nude person) (a representation of a clothed, covered, or partially clothed or covered genitalia or buttock that is not otherwise visible to the public) (a representation of a person urinating, defecating, or using a feminine hygiene product) (a representation of a person engaged in sexual intercourse or sexual contact)[5].][6]

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.

[ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS H FELONY AND THERE IS EVIDENCE THAT THE VICTIM ENGAGED IN SEXUAL CONDUCT AS A RESULT OF THE VIOLATION.[7]

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

Did (name of victim) engage in sexual conduct[8] as a result of the defendant's threat?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

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

[ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS H FELONY AND THERE IS EVIDENCE THAT THE VICTIM PRODUCED AN INTIMATE REPRESENTATION AS A RESULT OF THE VIOLATION.[9]

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

Did (name of victim) produce an intimate representation[10] as a result of the defendant's threat?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

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

[ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS H FELONY AND THERE IS EVIDENCE THAT THE VICTIM PROVIDED PAYMENT OF MONEY, PROPERTY, SERVICES, OR ANYTHING OF VALUE TO THE DEFENDANT AS A RESULT OF THE VIOLATION.[11]

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

Did (name of victim) provide the payment of money, property, services, or any other thing of value to the defendant as a result of the defendant's threat?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

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

[ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS H FELONY AND THERE IS EVIDENCE THAT THE VICTIM SUFFERED GREAT BODILY HARM AS A RESULT OF THE VIOLATION.[12]

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

Did (name of victim) suffer great bodily harm as a result of the defendant's threat?

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.[13]

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

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

[ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS H FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE, AND THE DEFENDANT IS NOT MORE THAN 48 MONTHS OLDER THAN THE VICTIM.[14]

If you find the defendant guilty, you must answer the following questions:

Question 1: Was (name of victim) under the age of 18 years at the time of the offense?

Knowledge of (name of victim)'s age is not required[15] and mistake regarding (name of victim)'s age is not a defense.[16]

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

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

If you answered "yes" to Question 1, answer Question 2. If you answered "no," do not answer Question 2.

Question 2: Was the defendant not more than 48 months older than (name of victim) at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

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

[ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS G FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE, AND THE DEFENDANT IS MORE THAN 48 MONTHS OLDER THAN THE VICTIM.[17]

If you find the defendant guilty, you must answer the following questions:

Question 1: Was (name of victim) under the age of 18 years at the time of the offense?

Knowledge of (name of victim)'s age is not required[18] and mistake regarding (name of victim)'s age is not a defense.[19]

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

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

If you answered "yes" to Question 1, answer Question 2. If you answered "no," do not answer Question 2.

Question 2: Was the defendant more than 48 months older than (name of victim) at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

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

[ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS G FELONY AND THERE IS EVIDENCE THAT THE VIOLATION WAS COMMITTED DURING THE COURSE OF A CHILD ABDUCTION IN VIOLATION OF § 948.30.[20]

IF THE CHILD ABDUCTION OFFENSE IS NOT CHARGED IN CONJUNCTION WITH THE SEXUAL EXTORTION OFFENSE, INCLUDE THE ELEMENTS OF THAT OFFENSE BEFORE ASKING THE FOLLOWING QUESTION.[21]

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

Was the violation committed during the course of a child abduction in violation of § 948.30?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

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

[ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS B FELONY AND THERE IS EVIDENCE THAT THE VICTIM DIED AS A DIRECT RESULT[22] OF THE VIOLATION.[23]

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

Did (name of victim) die as a direct result of the defendant's commission of this offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

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

COMMENT

Wis JI–Criminal 1397 was approved by the Committee in June 2026.

This instruction is drafted for violations of Wis. Stat. § 942.095 (Sexual Extortion), created by 2025 Wisconsin Act 48 (effective date: Dec. 10, 2025). Section 942.095 is a specialized extortion provision focusing on coercion of sexual acts, intimate representations, or other concessions through threats. It supplements the general extortion statute (Wis. Stat. § 943.30) by addressing threats of a sexual or reputational nature.

The offense in general is punishable as a Class I felony.

Intent Standard: Element 2 requires that the defendant acted "for the purpose of" causing the victim to perceive the communication as a serious expression of intent to carry out the threatened harm. This purposeful/intentional standard derives from and tracks the statute's own mens rea requirement: § 942.095(2) requires that each threat be made "with intent to coerce." Under Wis. Stat. § 939.23, "with intent to" means that the defendant had a conscious purpose to bring about that result. A defendant who purposefully employs a threat as an instrument of coercion necessarily understands that the communication will be received as threatening; the statutory intent-to-coerce requirement thus functionally subsumes and surpasses the constitutional recklessness floor established by Counterman v. Colorado, 600 U.S. 66, 143 S. Ct. 2106 (2023), and adopted by the Wisconsin Supreme Court in Kindschy v. Aish, 2024 WI 27, 412 Wis. 2d 319, 8 N.W.3d 1.

The Committee notes that the intent standard in Element 2 exceeds the constitutional minimum and is not subject to First Amendment challenge under Counterman or Kindschy. If a future court concludes that the constitutional floor requires no more than recklessness, the intentional standard in Element 2 remains valid as a matter of state statutory construction, since § 942.095(2)'s "with intent to coerce" language independently compels it.

Class H Felony (Sub. (3)): If the State proves that, as a result of the defendant's violation, the victim (a) engaged in sexual conduct, (b) produced an intimate representation, (c) provided money/property/services/anything of value to the actor, (d) suffered great bodily harm, or (e) (if the victim was under 18) the actor was not more than 48 months older than the victim, then the offense is punishable as a Class H felony.

Class G Felony (Sub. (4)) Age: If the victim is under 18 and the defendant is more than 4 years older, the offense escalates to Class G. The instruction provides two special verdict questions to address this: one to establish the victim's age (under 18) and, if so, a second to establish the age differential beyond 48 months. Absent a stipulation, these questions must be answered by the jury.

Class G Felony (Sub. (4)) Child Abduction: If the sexual extortion was committed in the course of a child abduction in violation of § 948.30, the offense is elevated to a Class G felony. The instruction includes a special verdict question to address these aggravating circumstances.

Class G Felony (Sub. (4)) Prior Conviction: If the defendant has a prior conviction for a "sexually violent offense," as defined in Wis. Stat. § 980.01(6), the offense is elevated to a Class G felony. Because that determination is a factual question for the trial court, it operates as a penalty enhancer rather than an element of the offense. Accordingly, this portion of sub. (4) is omitted from the instruction.

Class B Felony (Sub. (5)): If "the victim, as a direct result of the violation, dies", the offense is a Class B felony. The instruction provides a special verdict question to address this.

Alternative Modes of Commission (Sub. (2)(a)–(c)): Section 942.095(2) provides three alternative ways of committing sexual extortion: (a) threatening to injure someone's property or reputation, (b) threatening to commit violence against someone, or (c) threatening to distribute an intimate representation of someone. These alternatives are presented in the instruction as bracketed options for the first element. Only one mode should be selected for a given verdict question unless the evidence and charging document clearly indicate that multiple types of threat were used as part of a single cohesive extortion scheme. If more than one threat-type alternative is submitted to the jury in a single count, the jury should be instructed that it must unanimously agree on at least one particular threat (to avoid a non-unanimous verdict where some jurors base guilt on a different threat than others).

The Committee generally recommends selecting the single alternative that reflects the theory of the case or using separate counts for distinct threats, rather than a disjunctive submission. In this instruction, "threatens to injure the property or reputation of another person" is treated as one alternative (tracking the statutory language of sub. (2)(a)). If the case involves only injury to reputation (and not property) or vice versa, the instruction may be modified to specify the particular type of threat proven – though the statute does not require distinguishing between property and reputation as separate elements. The same principle applies to threats involving intimate representations: the statute speaks generally of "threatens to distribute an intimate representation of another person" (sub. (2)(c)), so the instruction uses that phrasing.

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1. See Counterman v. Colorado, 600 U.S. at 79, 143 S. Ct. 2106 (2023). Justice Bradley's concurrence in Kindschy v. Aish, 2024 WI 27, ¶44, 412 Wis. 2d 319, 8 N.W.3d 1, acknowledges Counterman's recklessness standard. Element 2 reflects the Counterman standard as the constitutionally required minimum mens rea for true-threat prosecutions.

2. This definition was originally 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.

In Counterman v. Colorado, 600 U.S. 66, ¶79, 143 S. Ct. 2106 (2023), the U.S. Supreme Court clarified that true threats must be evaluated based on their objective content—how a reasonable listener would perceive them—and that criminal liability requires a mens rea of at least recklessness, meaning the speaker must have "consciously disregarded a substantial risk that [the communications] would be viewed as threatening violence." The Wisconsin Supreme Court adopted the Counterman recklessness standard in Kindschy v. Aish, supra, at ¶¶14–15, abrogating the purely speaker-focused objective test previously employed under Perkins. Accordingly, the Committee revised the former Perkins–based definition to reflect the Counterman/Kindschy approach.

When deciding whether a statement is a true threat, the jury should consider the totality of circumstances. Relevant factors may include whether the threat was conditional; whether it was made directly to a specific person; how the recipient and others reacted; and whether the defendant had made similar statements or had the means to carry out the threat. The jury may also consider all other facts and context to determine if a statement was a true threat. See Perkins, supra, at ¶31, citing United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000).

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 U.S.C. § 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. Although Elonis was decided as a matter of federal statutory interpretation, it underscores that criminal "threat" liability should not rest solely on an objective reasonable-person standard. This instruction's definition of "true threat" includes both an objective reasonable-listener component and the mens rea floor required by the First Amendment under Counterman and Kindschy—that the defendant consciously disregarded a substantial risk that others would view the statement as threatening violence.

3. Element 2 requires proof that the defendant acted "for the purpose of" causing the victim to believe the defendant intended to carry out the threatened harm. This intentional standard derives from the statute's "with intent to coerce" language (§ 942.095(2)) and exceeds the constitutional recklessness floor established by Counterman v. Colorado, 600 U.S. 66, 143 S. Ct. 2106 (2023), and Kindschy v. Aish, 2024 WI 27, 412 Wis. 2d 319, 8 N.W.3d 1. Because intentional conduct necessarily encompasses recklessness, this instruction satisfies the First Amendment minimum while accurately reflecting the statute's heightened mens rea demand. A defendant cannot harbor the conscious purpose of coercing another person through a threat while simultaneously being unaware that the communication will be perceived as threatening. Accordingly, proof of Element 2 (purpose) will in every case satisfy the Counterman floor, and no separate recklessness finding is required. See Comment, "Intent Standard," supra.

4. This is the definition of "sexual conduct" provided in § 944.21(2)(e).

5. For the purposes of this option, sexual contact is defined in § 940.225 (5) (b) or (c).

6. This is the definition of "intimate representation" provided in §942.09(1)(ag).

7. This special question should be used where the Class H felony is charged. If the Class H felony is not charged, the instruction should be used without the special question.

8. See Note 4, supra.

9. This special question should be used when the Class H felony under § 942.095(3)(b) is charged. If the Class H felony is not charged, the instruction should be used without the special question. See Note 10, infra, regarding the definition of "intimate representation."

10. See Note 6, supra.

11. This special question should be used when the Class H felony under § 942.095(3)(c) is charged. If the Class H felony is not charged, the instruction should be used without the special question.

12. This special question should be used when the Class H felony under § 942.095(3)(d) is charged. If the Class H felony is not charged, the instruction should be used without the special question. See Note 13, infra, regarding the definition of "great bodily harm."

13. This is the definition of "great bodily harm" taken from Wis JI–Criminal 914. For additional guidance on the term, see that instruction.

14. This special question should be used when the Class H felony under § 942.095(3)(e) is charged. If the Class H felony is not charged, the instruction should be used without the special questions. See Notes 15 and 16, infra, regarding knowledge of and mistake as to the victim's age.

15. See § 939.23(6). "Criminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question."

16. See § 939.43(2). "A mistake as to the age of a minor or as to the existence or constitutionality of the section under which the actor is prosecuted or the scope or meaning of the terms used in that section is not a defense."

17. This special question should be used where the Class G felony is charged. If the Class G felony is not charged, the instruction should be used without the special question.

18. See note 15, supra.

19. See note 16, supra.

20. See Note 9, supra.

21. See Wis JI–Criminal 2160 through 2163 for model instructions concerning the offense of "Abduction of Another's Child."

22. In State v. Kizer, 2022 WI 58, ¶¶15, 20, 403 Wis. 2d 142, 976 N.W.2d 356, the Wisconsin Supreme Court interpreted the phrase "direct result" in the human-trafficking affirmative defense, Wis. Stat. § 939.46(1m), and explained how that phrase should be understood when it appears in a statute. Because "direct result" is not defined in § 939.46(1m), the Court applied its common and ordinary meaning. It construed "result" to mean a consequence or effect, and explained that the legislature narrowed that concept by adding "direct," meaning without interruption, diversion, or an intervening agency or influence. Id. at ¶13.

Using that ordinary-meaning framework, the Court concluded that an offense is committed "as a direct result" of trafficking when there is a logical, causal connection between the offense and the trafficking such that the offense is not, in significant part, the product of other events, circumstances, or considerations apart from the trafficking violation. Id. at ¶15. The Court also noted that a consequence may be the direct result of more than one prior act, but emphasized that "direct result" requires a tighter causal relationship than mere "but for" causation. Id. at ¶14. Finally, the Court clarified that "direct result" does not require foreseeability or temporal immediacy. Id. at ¶15.

The Committee believes Kizer's statutory-construction analysis may provide useful guidance if a question arises about the meaning of "direct result" in applying this instruction.

23. This special question should be used where the Class B felony is charged. If the Class B felony is not charged, the instruction should be used without the special question.

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 [and answer the following question(s) "yes" or "no"].

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.]

IF A REPEAT-OFFENDER PENALTY ENHANCEMENT UNDER § 943.20(3g) IS CHARGED, ADD THE FOLLOWING:

[Determining Prior Conviction Status Under § 943.20(3g)][10]

[If you find the defendant guilty, answer the following question:

Before the commission of this offense, had the defendant been convicted of one or more violations of (insert qualifying prior conviction(s) within those statutory ranges of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c))?

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant had one or more such prior convictions.]

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.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MULTIPLE ALLEGED THEFTS COMMITTED IN THE SAME PROSECUTORIAL UNIT DURING A COURSE OF CONDUCT AS PROVIDED IN § 943.20(5).[12]

[In determining the value of the property stolen, you may consider the value of property from multiple violations if you are satisfied beyond a reasonable doubt that those violations were committed in the same prosecutorial unit[13] by the defendant during a course of conduct. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.[14]][15]

["Prosecutorial unit" means a county.][16]

COMMENT

Wis JI–Criminal 1441 was originally published in 1966 and revised in 1977, 1987, 1991, 1999, 2000, 2002, 2003, 2006, 2009, 2018, and 2022. The 2022 revision updated the instruction to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020]. This revision was approved by the Committee in June 2026. It amended the instruction and comment to reflect 2025 Wisconsin Act 106 [effective date: March 22, 2026], which created § 943.20(3g) (increased penalty for repeat offenders) and § 943.20(5) (aggregation of values during a course of conduct).

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 H felony in the circumstances 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. Effective March 22, 2026, value aggregation may also be made under § 943.20(5), which permits aggregation of property values from multiple violations committed within the same prosecutorial unit as part of a course of conduct, as defined in § 947.013(1)(a). New § 971.36(5) further provides that aggregated acts under § 943.20(5) may be charged as a single crime. See footnote 12 below.

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. Effective March 22, 2026, 2025 Wisconsin Act 106 created § 943.20(3g), which provides an additional penalty-enhancement mechanism for repeat offenders. Under § 943.20(3g): (1) a defendant charged with a misdemeanor under sub. (3)(a) may be charged with and convicted of a Class I felony if the defendant has one or more prior convictions under sub. (3)(a)–(cm) or § 943.50(4)(a)–(c); and (2) a defendant charged with a felony under sub. (3)(bf)–(cm) may be charged with and convicted of a felony one classification higher than the standard classification if the defendant has one or more such prior convictions. Because a finding of prior conviction under § 943.20(3g) determines the grade of the offense, and therefore the range of permissible penalties, the existence of the qualifying prior conviction or convictions must be submitted to the jury and proved beyond a reasonable doubt unless the defendant, defense counsel, and the State stipulate to the prior conviction or convictions.

Stipulation to Prior Conviction(s)

If a stipulation to a prior conviction or convictions is made, the matter need not be submitted to the jury. See Wis JI–Criminal 1441B for general guidance on penalty-increasing facts. The initial applicability provision of 2025 Act 106 (Section 5m) provides that prior convictions may be counted even if they predate the Act's effective date.

The effect of a stipulation in a prosecution 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 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.

See also Wis JI–Criminal 1343, Possession of a Firearm, footnote 10, for an example of a complete waiver inquiry.

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." (71 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. 2d 466, 468, 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."

12. Alternatively, the jury can be instructed to determine the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct. As noted in the Comment, 2025 Wisconsin Act 106 [effective date: March 22, 2026] created two additional provisions directly bearing on aggregation in theft cases. First, § 943.20(5) provides:

> (5) AGGREGATION OF VALUES. For purposes of charging and penalty determinations under sub. (3)(a) to (cm), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in s. 947.013(1)(a), may be aggregated.

Second, new § 971.36(5) provides that in any case involving aggregated acts under § 943.20(5), "notwithstanding sub. (3), the acts may be prosecuted as a single crime." This is significant because § 943.20(5) operates independently of the conditions in § 971.36(3): it does not require that the property belong to the same owner, nor that the thefts occur pursuant to a single intent and design. It requires only that the multiple violations be committed (1) in the same prosecutorial unit, (2) by the same person, and (3) during a course of conduct as defined in § 947.013(1)(a).

The initial applicability provision of 2025 Act 106 (Section 5m) confirms that this aggregation authority applies to violations committed on or after March 22, 2026.

13. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1). Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial unit and elect one district attorney by their combined electorate.

14. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

15. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.20(5) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.20(3). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3) to charge multiple thefts as one crime and, at the same time, rely on § 943.20(5) to aggregate their value in support of a higher-level offense.

16. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they together constitute a single, two-county prosecutorial unit. See Note 13, supra.

1441B THEFT: PENALTY FACTORS — § 943.20(3)(d) and (3)(e), (3g), and (5)

ADD ONE OF THE FOLLOWING QUESTIONS IF FELONY THEFT IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN SUB. (3)(d), (3)(e), (3g), OR (5) IS ESTABLISHED.

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

FOR CHARGES UNDER SUB. (3)(d)1.

["Was the property taken a domestic animal?"][1]

FOR CHARGES UNDER SUB. (3)(d)3.

["Was the property taken from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing or the proximity of battle?"][2]

FOR CHARGES UNDER SUB. (3)(d)4.

["Was the property taken after physical disaster, riot, bombing or the proximity of battle has necessitated its removal from a building?"][3]

FOR CHARGES UNDER SUB. (3)(d)5.

["Was the property taken a firearm?"[4]

"Firearm" means a weapon that acts by the force of gunpowder.]

FOR CHARGES UNDER SUB. (3)(d)6.

["Was the property taken from (an individual at risk) (a patient or resident of a (name type of facility under § 940.295(2)))?"][5]

FOR CHARGES UNDER SUB. (3)(e).

["Was the property taken from (the person of another) (a corpse)?"][6]

[This requires that the property was taken from the body of the person in possession of the property, or that the person had immediate control over the property.][7]

FOR CHARGES UNDER SUB. (3g).

["Did the defendant have one or more prior convictions for a violation under § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c)?"]

FOR CHARGES UNDER SUB. (5).

["Were the multiple thefts committed by the same person, within the same prosecutorial unit[8], during a course of conduct?"][9]

["Prosecutorial unit" means a county.][10]

["Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.[11]]

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer to the question is "yes."

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

COMMENT

Wis JI–Criminal 1441B was originally published in 1999 and revised in 2002, 2003, 2008, 2018, and 2020. The 2018 revision made an editorial correction and added to footnote 6. The 2020 revision added language to the bracketed requirement for charges under sub. (3)(e), and added footnote 7. This revision

was approved by the Committee in June 2026. It added language pursuant to 2025 Wisconsin Act 106 [effective date: March 22, 2026], which added sub. (3g) (Increased Penalty for Repeated Violations) and sub. (5) (Aggregation of Values) to § 943.20.

This instruction addresses the eight penalty-increasing factors set forth in § 943.20(3)(d), (e), (3g), and (5). Theft from person – set forth in subdiv. (3)(e) – was formerly covered by a separate instruction, Wis JI–Criminal 1442, but that instruction has been withdrawn in favor of including all the factors together in this instruction. Each of the factors in sub. (3)(d) increases the penalty to a Class H felony; theft from person under sub. (3)(e) is a Class G felony. Section 943.20(3)(d), as amended by 2001 Wisconsin Act 109.

Section 943.20(3g), as created by 2025 Wisconsin Act 106, provides an increased penalty when the defendant has one or more prior convictions for a violation of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c). A person charged with a misdemeanor under sub. (3)(a) may be convicted of a Class I felony if prior convictions exist. A person charged with a felony under sub. (3)(bf) to (cm) may be convicted of a felony one classification higher if prior convictions exist. This provision first applies to violations committed on or after March 22, 2026, but prior convictions occurring before that date may be counted for purposes of the enhancement. Section 943.20(5), also created by 2025 Wisconsin Act 106, permits aggregation of the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in § 947.013(1)(a), for purposes of charging and penalty determinations under sub. (3)(a) to (cm). See also § 971.36(5), which provides that aggregated acts under § 943.20(5) may be prosecuted as a single crime.

As with the value question in theft cases, see Wis JI–Criminal 1441, the Committee recommends that these factors be presented to the jury in the form of a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of theft under Wis. Stat. § 943.20, at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> "Was the property taken (repeat the essential facts in the question)?"

---

1. This is the factor in subdiv. 1. of § 943.20(3)(d). "Domestic animal" is defined as follows for the purposes of Chapter 174: "'Domestic animal' includes livestock, dogs, and cats." § 174.001(2g).

2. This is the factor set forth in subdiv. 3. of § 943.20(3)(d).

3. This is the factor set forth in subdiv. 4. of § 943.20(3)(d).

4. This is the factor in subdiv. 5. of § 943.20(3)(d). The definition of "firearm" in the next sentence is the standard one used in the uniform instructions. It is based on Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

5. These are the factors set forth in subdiv. 6. of § 943.20(3)(d). The facilities "under s. 940.295(2)" include a variety of facilities, most of which involve providing health care or related services. See note 1, Wis JI–Criminal 1271. 2005 Wisconsin Act 388 changed the reference to "individual at risk" from "vulnerable adult." "Individual at risk" is defined as follows in § 943.20(2)(ae): "'Individual at risk' means an elder adult at risk or an adult at risk." Section 943.20(2)(ac) provides that "'Adult at risk' has the meaning given in s. 55.01(1e)." Section 943.20(2)(ad) provides that "'Elder adult at risk' has the meaning provided in s. 46.90(1)(br)." Definitions based on those cross references, which also apply to violations of § 940.285, are provided in Wis JI–Criminal 1268.

6. These are the factors in § 943.20(3)(e). The explication of "from the person" in the next sentence is what was formerly provided in Wis JI–Criminal 1442, Theft From Person. In State v. Hughes, 218 Wis. 2d 538, 548, 582 N.W.2d 49 (Ct. App. 1998), the court concluded that "theft 'from the person' encompasses the taking of property from the wheelchair of one sitting in the wheelchair at the time of the taking." Hughes did not state a generally applicable definition of "from the person" and expressly provided that the court "refrain[ed] from embracing either a narrow or broad standard that would necessarily apply to other factual situations." 218 Wis. 2d 538, 548, note 10. Also see, State v. Graham, 2000 WI App 138, 237 Wis. 2d 620, 614 N.W.2d 504, finding the evidence sufficient to prove "theft from person"; and State v. Tidwell, 2009 WI App 153, 321 Wis. 2d 596, 774 N.W.2d 650, finding the evidence sufficient to prove "attempted theft from person."

"'Corpse' means the dead body of a human being." American Heritage Dictionary of the English Language, 3rd Edition, 1992.

7. In State v. Tidwell, 2009 WI App 153, 321 Wis. 2d 596, 774 N.W.2d 650, the defendant argued that the evidence was insufficient to find him guilty on the charge of attempted theft from a person as the property he attempted to steal, a cash register on a counter, was not connected in any way to the victim's person. After reviewing the legislative history of § 943.20(3), the court of appeals disagreed and concluded that the intent of the "from the person" penalty enhancer was to "cove[r] circumstances which made stealing particularly dangerous and undesirable." It was the victim's constructive possession of the property which made the attempted theft particularly dangerous and undesirable. Id. at ¶¶8-12.

The Committee concluded that acts of theft in which the victim has immediate control over the property in question fall into the category of particularly dangerous and undesirable circumstances, and therefore constitutes theft from a person.

See JI 920 Possession.

8. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1). Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial unit and elect one district attorney by their combined electorate.

9. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.20(5) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.20(3). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts

from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3) to charge multiple thefts as one crime and, at the same time, rely on § 943.20(5) to aggregate their value in support of a higher-level offense.

10. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they together constitute a single, two-county prosecutorial unit. See Note 8, supra.

11. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

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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 [and answer the following question(s) "yes" or "no"].

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 money used was more than the amount stated in the question.]

IF A REPEAT-OFFENDER PENALTY ENHANCEMENT UNDER § 943.20(3g) IS CHARGED, ADD THE FOLLOWING:

[Determining Prior Conviction Status Under § 943.20(3g)][11]

[If you find the defendant guilty, answer the following question:

Before the commission of this offense, had the defendant been convicted of one or more violations of (insert qualifying prior conviction(s) within those statutory range of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c))?

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant had one or more such prior convictions.]

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).[12]

[In determining the value of the money used, 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.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MULTIPLE ALLEGED THEFTS COMMITTED IN THE SAME PROSECUTORIAL UNIT DURING A COURSE OF CONDUCT AS PROVIDED IN § 943.20(5).[13]

[In determining the value of the money used, you may consider the value of property from multiple violations if you are satisfied beyond a reasonable doubt that those violations were committed in the same prosecutorial unit[14] by the defendant during a course of conduct. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.[15]][16]

["Prosecutorial unit" means a county.][17]

COMMENT

Wis JI–Criminal 1443 was originally published in 1976 and revised in 1985, 1991, 1994, 2002, 2003, 2006, 2007, 2014, 2019, and 2022. 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. The 2022 revision updated footnote 11 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020]. This revision was approved by the Committee in June 2026. It amended the instruction and comment to reflect 2025 Wisconsin Act 106 [effective date: March 22, 2026], which created § 943.20(3g) (increased penalty for repeat offenders) and § 943.20(5) (aggregation of values during a course of conduct). Footnotes 11 and 13 were also updated.

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. 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 Wis 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, landscaping, repairing, or remodeling which is built, erected, made or done on or to land for its 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;
- 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.

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. Effective March 22, 2026, 2025 Wisconsin Act 106 created § 943.20(3g), which provides an additional penalty-enhancement mechanism for repeat offenders. Under § 943.20(3g): (1) a defendant charged with a misdemeanor under sub. (3)(a) may be charged with and convicted of a Class I felony if the defendant has one or more prior convictions under sub. (3)(a)–(cm) or § 943.50(4)(a)–(c); and (2) a defendant charged with a felony under sub. (3)(bf)–(cm) may be charged with and convicted of a felony one classification higher than the standard classification if the defendant has one or more such prior convictions. Because a finding of prior conviction under § 943.20(3g) determines the grade of the offense, and therefore the range of permissible penalties, the existence of the qualifying prior conviction or convictions must be submitted to the jury and proved beyond a reasonable doubt unless the defendant, defense counsel, and the State stipulate to the prior conviction or convictions.

Stipulation to Prior Conviction(s)

If a stipulation to a prior conviction or convictions is made, the matter need not be submitted to the jury. See Wis JI–Criminal 1441B for general guidance on penalty-increasing facts. The initial applicability provision of 2025 Act 106 (Section 5m) provides that prior convictions may be counted even if they predate the Act's effective date.

The effect of a stipulation in a prosecution 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 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.

See also Wis JI–Criminal 1343, Possession of a Firearm, footnote 10, for an example of a complete waiver inquiry.

12. 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."

13. Alternatively, the jury can be instructed to determine the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct. As noted in the Comment, 2025 Wisconsin Act 106 [effective date: March 22, 2026] created two additional provisions directly bearing on aggregation in theft cases. First, § 943.20(5) provides:

> (5) AGGREGATION OF VALUES. For purposes of charging and penalty determinations under sub. (3)(a) to (cm), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in s. 947.013(1)(a), may be aggregated.

Second, new § 971.36(5) provides that in any case involving aggregated acts under § 943.20(5), "notwithstanding sub. (3), the acts may be prosecuted as a single crime." This is significant because § 943.20(5) operates independently of the conditions in § 971.36(3): it does not require that the property belong to the same owner, nor that the thefts occur pursuant to a single intent and design. It requires only that the multiple violations be committed (1) in the same prosecutorial unit, (2) by the same person, and (3) during a course of conduct as defined in § 947.013(1)(a).

The initial applicability provision of 2025 Act 106 (Section 5m) confirms that this aggregation authority applies to violations committed on or after March 22, 2026.

14. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1). Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial unit and elect one district attorney by their combined electorate.

15. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

16. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.20(5) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.20(3). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3) to charge multiple thefts as one crime and, at the same time, rely on § 943.20(5) to aggregate their value in support of a higher-level offense.

17. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they together constitute a single, two-county prosecutorial unit. See Note 13, supra.

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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 [and answer the following question(s) "yes" or "no"].

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 money used was more than the amount stated in the question.]

IF A REPEAT-OFFENDER PENALTY ENHANCEMENT UNDER § 943.20(3g) IS CHARGED, ADD THE FOLLOWING:

[Determining Prior Conviction Status Under § 943.20(3g)][11]

[If you find the defendant guilty, answer the following question:

Before the commission of this offense, had the defendant been convicted of one or more violations of (insert qualifying prior conviction(s) within those statutory range of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c))?

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant had one or more such prior convictions.]

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).[12]

[In determining the value of the money used, 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.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MULTIPLE ALLEGED THEFTS COMMITTED IN THE SAME PROSECUTORIAL UNIT DURING A COURSE OF CONDUCT AS PROVIDED IN § 943.20(5).[13]

[In determining the value of the money used, you may consider the value of property from multiple violations if you are satisfied beyond a reasonable doubt that those violations were committed in the same prosecutorial unit[14] by the defendant during a course of

conduct. "Course of conduct" means a series of acts carried out in furtherance of the same purpose. § 947.013(1)(a).[15]][16]

["Prosecutorial unit" means a county.][17]

COMMENT

Wis JI-Criminal 1443A was originally published in 2008 and revised in 2019 and 2022. The 2022 revision updated footnote 11 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020]. This revision was approved by the Committee in June 2026. It amended the instruction and comment to reflect 2025 Wisconsin Act 106 [effective date: March 22, 2026], which created § 943.20(3g) (increased penalty for repeat offenders) and § 943.20(5) (aggregation of values during a course of conduct). Footnotes 11 and 13 were also updated.

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. Effective March 22, 2026, 2025 Wisconsin Act 106 created § 943.20(3g), which provides an additional penalty-enhancement mechanism for repeat offenders. Under § 943.20(3g): (1) a defendant charged with a misdemeanor under sub. (3)(a) may be charged with and convicted of a Class I felony if the defendant has one or more prior convictions under sub. (3)(a)–(cm) or § 943.50(4)(a)–(c); and (2) a defendant charged with a felony under sub. (3)(bf)–(cm) may be charged with and convicted of a felony one classification higher than the standard classification if the defendant has one or more such prior convictions. Because a finding of prior conviction under § 943.20(3g) determines the grade of the offense, and therefore the range of permissible penalties, the existence of the qualifying prior conviction or convictions must be submitted to the jury and proved beyond a reasonable doubt unless the defendant, defense counsel, and the State stipulate to the prior conviction or convictions.

Stipulation to Prior Conviction(s)

If a stipulation to a prior conviction or convictions is made, the matter need not be submitted to the jury. See Wis JI–Criminal 1441B for general guidance on penalty-increasing facts. The initial applicability provision of 2025 Act 106 (Section 5m) provides that prior convictions may be counted even if they predate the Act's effective date.

The effect of a stipulation in a prosecution 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 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.

See also Wis JI–Criminal 1343, Possession of a Firearm, footnote 10, for an example of a complete waiver inquiry.

12. 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."

13. Alternatively, the jury can be instructed to determine the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct. As noted in the Comment, 2025 Wisconsin Act 106 [effective date: March 22, 2026] created two additional provisions directly bearing on aggregation in theft cases. First, § 943.20(5) provides:

> (5) AGGREGATION OF VALUES. For purposes of charging and penalty determinations under sub. (3)(a) to (cm), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in s. 947.013(1)(a), may be aggregated.

Second, new § 971.36(5) provides that in any case involving aggregated acts under § 943.20(5), "notwithstanding sub. (3), the acts may be prosecuted as a single crime." This is significant because § 943.20(5) operates independently of the conditions in § 971.36(3): it does not require that the property belong to the same owner, nor that the thefts occur pursuant to a single intent and design. It requires only that the multiple violations be committed (1) in the same prosecutorial unit, (2) by the same person, and (3) during a course of conduct as defined in § 947.013(1)(a).

The initial applicability provision of 2025 Act 106 (Section 5m) confirms that this aggregation authority applies to violations committed on or after March 22, 2026.

14. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1). Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial unit and elect one district attorney by their combined electorate.

15. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

16. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.20(5) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.20(3). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3) to charge multiple thefts as one crime and, at the same time, rely on § 943.20(5) to aggregate their value in support of a higher-level offense.

17. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they together constitute a single, two-county prosecutorial unit. See Note 13, supra.

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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 [and answer the following question(s) "yes" or "no"].

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 money used was more than the amount stated in the question.]

IF A REPEAT-OFFENDER PENALTY ENHANCEMENT UNDER § 943.20(3g) IS CHARGED, ADD THE FOLLOWING:

[Determining Prior Conviction Status Under § 943.20(3g)][10]

[If you find the defendant guilty, answer the following question:

Before the commission of this offense, had the defendant been convicted of one or more violations of (insert qualifying prior conviction(s) within the statutory range of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c))?

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant had one or more such prior convictions.]

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 money used, 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.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MULTIPLE ALLEGED THEFTS COMMITTED IN THE SAME PROSECUTORIAL UNIT DURING A COURSE OF CONDUCT AS PROVIDED IN § 943.20(5).[12]

[In determining the value of the money used, you may consider the value of property from multiple violations if you are satisfied beyond a reasonable doubt that those violations were committed in the same prosecutorial unit[13] by the defendant during a course of conduct. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.[14]][15]

["Prosecutorial unit" means a county.][16]

COMMENT

Wis JI–Criminal 1444 was originally published in 1966 and revised in 1991, 1994, 2002, 2003, 2006, 2019, and 2022. The 2022 revision updated the text and footnote 11 to reflect a new sub category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020]. This revision was approved by the Committee in June 2026. It amended the instruction and comment to reflect 2025 Wisconsin Act 106 [effective date: March 22, 2026], which created § 943.20(3g) (increased penalty for repeat offenders) and § 943.20(5) (aggregation of values during a course of conduct). Footnotes 10 and 12 were also updated.

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 428, 504 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, but does not exceed $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.

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. Effective March 22, 2026, 2025 Wisconsin Act 106 created § 943.20(3g), which provides an additional penalty-enhancement mechanism for repeat offenders. Under § 943.20(3g): (1) a defendant charged with a misdemeanor under sub. (3)(a) may be charged with and convicted of a Class I felony if the defendant has one or more prior convictions under sub. (3)(a)–(cm) or § 943.50(4)(a)–(c); and (2) a defendant charged with a felony under sub. (3)(bf)–(cm) may be charged with and convicted of a felony one classification higher than the standard classification if the defendant has one or more such prior convictions. Because a finding of prior conviction under § 943.20(3g) determines the grade of the offense, and therefore the range of permissible penalties, the existence of the qualifying prior conviction or convictions must be submitted to the jury and proved beyond a reasonable doubt unless the defendant, defense counsel, and the State stipulate to the prior conviction or convictions.

Stipulation to Prior Conviction(s)

If a stipulation to a prior conviction or convictions is made, the matter need not be submitted to the jury. See Wis JI–Criminal 1441B for general guidance on penalty-increasing facts. The initial applicability provision of 2025 Act 106 (Section 5m) provides that prior convictions may be counted even if they predate the Act's effective date.

The effect of a stipulation in a prosecution 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 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.

See also Wis JI–Criminal 1343, Possession of a Firearm, footnote 10, for an example of a complete waiver inquiry.

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." (71 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."

12. Alternatively, the jury can be instructed to determine the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct. As noted in the Comment, 2025 Wisconsin Act 106 [effective date: March 22, 2026] created two additional provisions directly bearing on aggregation in theft cases. First, § 943.20(5) provides:

> (5) AGGREGATION OF VALUES. For purposes of charging and penalty determinations under sub. (3)(a) to (cm), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in s. 947.013(1)(a), may be aggregated.

Second, new § 971.36(5) provides that in any case involving aggregated acts under § 943.20(5), "notwithstanding sub. (3), the acts may be prosecuted as a single crime." This is significant because § 943.20(5) operates independently of the conditions in § 971.36(3): it does not require that the property belong to the same owner, nor that the thefts occur pursuant to a single intent and design. It requires only that the multiple violations be committed (1) in the same prosecutorial unit, (2) by the same person, and (3) during a course of conduct as defined in § 947.013(1)(a).

The initial applicability provision of 2025 Act 106 (Section 5m) confirms that this aggregation authority applies to violations committed on or after March 22, 2026.

13. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1). Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial unit and elect one district attorney by their combined electorate.

14. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

15. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.20(5) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.20(3). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3) to charge multiple thefts as one crime and, at the same time, rely on § 943.20(5) to aggregate their value in support of a higher-level offense.

16. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they

together constitute a single, two-county prosecutorial unit. See Note 13, supra.

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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 [and answer the following question(s) "yes" or "no"].

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.]

IF A REPEAT-OFFENDER PENALTY ENHANCEMENT UNDER § 943.20(3g) IS CHARGED, ADD THE FOLLOWING:

[Determining Prior Conviction Status Under § 943.20(3g)][9]

[If you find the defendant guilty, answer the following question:

Before the commission of this offense, had the defendant been convicted of one or more violations of (insert qualifying prior conviction(s) within the statutory range of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c))?

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant had one or more such prior convictions.]

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.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MULTIPLE ALLEGED THEFTS COMMITTED IN THE SAME PROSECUTORIAL UNIT DURING A COURSE OF CONDUCT AS PROVIDED IN § 943.20(5).[11]

[In determining the value of the property stolen, you may consider the value of property from multiple violations if you are satisfied beyond a reasonable doubt that those violations were committed in the same prosecutorial unit[12] by the defendant during a course of conduct. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.[13]][14]

["Prosecutorial unit" means a county.][15]

COMMENT

Wis JI–Criminal 1450 was originally published in 1966 and revised in 1992, 2002, 2006, 2019, and 2022. The 2022 revision updated the text and footnote 9 to reflect a new sub-category pursuant to 2019

Wisconsin Act 144 [effective date: March 5, 2020]. This revision was approved by the Committee in June 2026. It amended the instruction and comment to reflect 2025 Wisconsin Act 106 [effective date: March 22, 2026], which created § 943.20(3g) (increased penalty for repeat offenders) and § 943.20(5) (aggregation of values during a course of conduct). Footnotes 9 and 11 were also updated.

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 H felony in the circumstances 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. Effective March 22, 2026, value aggregation may also be made under § 943.20(5), which permits aggregation of property values from multiple violations committed within the same prosecutorial unit as part of a course of conduct, as defined in § 947.013(1)(a). New § 971.36(5) further provides that aggregated acts under § 943.20(5) may be charged as a single crime. See footnote 11 below.

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)(ag) 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)(b) 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 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.

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 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, 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. Effective March 22, 2026, 2025 Wisconsin Act 106 created § 943.20(3g), which provides an additional penalty-enhancement mechanism for repeat offenders. Under § 943.20(3g): (1) a defendant charged with a misdemeanor under sub. (3)(a) may be charged with and convicted of a Class I felony if the defendant has one or more prior convictions under sub. (3)(a)–(cm) or § 943.50(4)(a)–(c); and (2) a defendant charged with a felony under sub. (3)(bf)–(cm) may be charged with and convicted of a felony one classification higher than the standard classification if the defendant has one or more such prior convictions. Because a finding of prior conviction under § 943.20(3g) determines the grade of the offense, and therefore the range of permissible penalties, the existence of the qualifying prior conviction or convictions must be submitted to the jury and proved beyond a reasonable doubt unless the defendant, defense counsel, and the State stipulate to the prior conviction or convictions.

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If a stipulation to a prior conviction or convictions is made, the matter need not be submitted to the jury. See Wis JI–Criminal 1441B for general guidance on penalty-increasing facts. The initial applicability provision of 2025 Act 106 (Section 5m) provides that prior convictions may be counted even if they predate the Act's effective date.

The effect of a stipulation in a prosecution 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.

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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.

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(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.

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> 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.

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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."

11. Alternatively, the jury can be instructed to determine the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct. As noted in the Comment, 2025 Wisconsin Act 106 [effective date: March 22, 2026] created two additional provisions directly bearing on aggregation in theft cases. First, § 943.20(5) provides:

> (5) AGGREGATION OF VALUES. For purposes of charging and penalty determinations under sub. (3)(a) to (cm), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in s. 947.013(1)(a), may be aggregated.

Second, new § 971.36(5) provides that in any case involving aggregated acts under § 943.20(5), "notwithstanding sub. (3), the acts may be prosecuted as a single crime." This is significant because § 943.20(5) operates independently of the conditions in § 971.36(3): it does not require that the property belong to the same owner, nor that the thefts occur pursuant to a single intent and design. It requires only that the multiple violations be committed (1) in the same prosecutorial unit, (2) by the same person, and (3) during a course of conduct as defined in § 947.013(1)(a).

The initial applicability provision of 2025 Act 106 (Section 5m) confirms that this aggregation authority applies to violations committed on or after March 22, 2026.

12. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1). Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial unit and elect one district attorney by their combined electorate.

13. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

14. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.20(5) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.20(3). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3) to charge multiple thefts as one crime and, at the same time, rely on § 943.20(5) to aggregate their value in support of a higher-level offense.

15. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they together constitute a single, two-county prosecutorial unit. See Note 13, supra.

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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 [and answer the following question(s) "yes" or "no"].

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.]

IF A REPEAT-OFFENDER PENALTY ENHANCEMENT UNDER § 943.20(3g) IS CHARGED, ADD THE FOLLOWING:

[Determining Prior Conviction Status Under § 943.20(3g)][11]

[If you find the defendant guilty, answer the following question:

Before the commission of this offense, had the defendant been convicted of one or more violations of (insert qualifying prior conviction(s) within the statutory range of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c))?

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant had one or more such prior convictions.]

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).[12]

[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.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MULTIPLE ALLEGED THEFTS COMMITTED IN THE SAME PROSECUTORIAL UNIT DURING A COURSE OF CONDUCT AS PROVIDED IN § 943.20(5).[13]

[In determining the value of the property obtained, you may consider the value of property from multiple violations if you are satisfied beyond a reasonable doubt that those violations were committed in the same prosecutorial unit[14] by the defendant during a course of conduct. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.[15]][16]

["Prosecutorial unit" means a county.][17]

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, and 2022. The 2022 revision updated footnote 11 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020]. This revision was approved by the Committee in June 2026. It amended the instruction and comment to reflect 2025 Wisconsin Act 106 [effective date: March 22, 2026], which created § 943.20(3g) (increased penalty for repeat offenders) and § 943.20(5) (aggregation of values during a course of conduct). Footnotes 11 and 13 were also updated.

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 the circumstances 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. Effective March 22, 2026, value aggregation may also be made under § 943.20(5), which permits aggregation of property values from multiple violations committed within the same prosecutorial unit as part of a course of conduct, as defined in § 947.013(1)(a). New § 971.36(5) further provides that aggregated acts under § 943.20(5) may be charged as a single crime. See footnote 13 below.

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, 299 Wis. 2d 251, 729 N.W.2d 784.

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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, 299 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 by § 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)(c).

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 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.

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. Effective March 22, 2026, 2025 Wisconsin Act 106 created § 943.20(3g), which provides an additional penalty-enhancement mechanism for repeat offenders. Under § 943.20(3g): (1) a defendant charged with a misdemeanor under sub. (3)(a) may be charged with and convicted of a Class I felony if the defendant has one or more prior convictions under sub. (3)(a)–(cm) or § 943.50(4)(a)–(c); and (2) a defendant charged with a felony under sub. (3)(bf)–(cm) may be charged with and convicted of a felony one classification higher than the standard classification if the defendant has one or more such prior convictions. Because a finding of prior conviction under § 943.20(3g) determines the grade of the offense, and therefore the range of permissible penalties, the existence of the qualifying prior conviction or convictions must be submitted to the jury and proved beyond a reasonable doubt unless the defendant, defense counsel, and the State stipulate to the prior conviction or convictions.

Stipulation to Prior Conviction(s)

If a stipulation to a prior conviction or convictions is made, the matter need not be submitted to the jury. See Wis JI–Criminal 1441B for general guidance on penalty-increasing facts. The initial applicability provision of 2025 Act 106 (Section 5m) provides that prior convictions may be counted even if they predate the Act's effective date.

The effect of a stipulation in a prosecution 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 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.

See also Wis JI–Criminal 1343, Possession of a Firearm, footnote 10, for an example of a complete waiver inquiry.

12. 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." (71 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."

13. Alternatively, the jury can be instructed to determine the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct. As noted in the Comment, 2025 Wisconsin Act 106 [effective date: March 22, 2026] created two additional provisions directly bearing on aggregation in theft cases. First, § 943.20(5) provides:

(5) AGGREGATION OF VALUES. For purposes of charging and penalty determinations under sub. (3)(a) to (cm), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in s. 947.013(1)(a), may be aggregated.

Second, new § 971.36(5) provides that in any case involving aggregated acts under § 943.20(5), "notwithstanding sub. (3), the acts may be prosecuted as a single crime." This is significant because § 943.20(5) operates independently of the conditions in § 971.36(3): it does not require that the property belong to the same owner, nor that the thefts occur pursuant to a single intent and design. It requires only that the multiple violations be committed (1) in the same prosecutorial unit, (2) by the same person, and (3) during a course of conduct as defined in § 947.013(1)(a).

The initial applicability provision of 2025 Act 106 (Section 5m) confirms that this aggregation authority applies to violations committed on or after March 22, 2026.

14. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1). Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial unit and elect one district attorney by their combined electorate.

15. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

16. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.20(5) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.20(3). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3) to charge multiple thefts as one crime and, at the same time, rely on § 943.20(5) to aggregate their value in support of a higher-level offense.

17. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they together constitute a single, two-county prosecutorial unit. See Note 14, supra.

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.[7]

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.

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 [and answer the following question(s) "yes" or "no"].

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.]

IF A REPEAT-OFFENDER PENALTY ENHANCEMENT UNDER § 943.20(3g) IS CHARGED, ADD THE FOLLOWING:

[Determining Prior Conviction Status Under § 943.20(3g)][11]

[If you find the defendant guilty, answer the following question:

Before the commission of this offense, had the defendant been convicted of one or more violations of (insert qualifying prior conviction(s) within the statutory range of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c))?

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant had one or more such prior convictions.]

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).[12]

[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.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MULTIPLE ALLEGED THEFTS COMMITTED IN THE SAME PROSECUTORIAL UNIT DURING A COURSE OF CONDUCT AS PROVIDED IN § 943.20(5).[13]

[In determining the value of the property obtained, you may consider the value of property from multiple violations if you are satisfied beyond a reasonable doubt that those violations were committed in the same prosecutorial unit[14] by the defendant during a course of conduct. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.[15]][16]

["Prosecutorial unit" means a county.][17]

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, and 2022. The 2022 revision updated footnote 11 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020]. This revision was approved by the Committee in June 2026. It amended the instruction and comment to reflect 2025 Wisconsin Act 106 [effective date: March 22, 2026], which created § 943.20(3g) (increased penalty for repeat offenders) and § 943.20(5) (aggregation of values during a course of conduct). Footnotes 11 and 13 were also updated.

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 the circumstances 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. Effective March 22, 2026, value aggregation may also be made under § 943.20(5), which permits aggregation of property values from multiple violations committed within the same prosecutorial unit as part of a course of conduct, as defined in § 947.013(1)(a). New § 971.36(5) further provides that aggregated acts under § 943.20(5) may be charged as a single crime. See footnote 13 below.

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.

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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)(c).

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 7 and 8 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 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.

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. Effective March 22, 2026, 2025 Wisconsin Act 106 created § 943.20(3g), which provides an additional penalty-enhancement mechanism for repeat offenders. Under § 943.20(3g): (1) a defendant charged with a misdemeanor under sub. (3)(a) may be charged with and convicted of a Class I felony if the defendant has one or more prior convictions under sub. (3)(a)–(cm) or § 943.50(4)(a)–(c); and (2) a defendant charged with a felony under sub. (3)(bf)–(cm) may be charged with and convicted of a felony one classification higher than the standard classification if the defendant has one or more such prior convictions. Because a finding of prior conviction under § 943.20(3g) determines the grade of the offense, and therefore the range of permissible penalties, the existence of the qualifying prior conviction or convictions must be submitted to the jury and proved beyond a reasonable doubt unless the defendant, defense counsel, and the State stipulate to the prior conviction or convictions.

Stipulation to Prior Conviction(s)

If a stipulation to a prior conviction or convictions is made, the matter need not be submitted to the jury. See Wis JI–Criminal 1441B for general guidance on penalty-increasing facts. The initial applicability provision of 2025 Act 106 (Section 5m) provides that prior convictions may be counted even if they predate the Act's effective date.

The effect of a stipulation in a prosecution 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 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.

See also Wis JI–Criminal 1343, Possession of a Firearm, footnote 10, for an example of a complete waiver inquiry.

12. 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." (71 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."

13. Alternatively, the jury can be instructed to determine the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct. As noted in the Comment, 2025 Wisconsin Act 106 [effective date: March 22, 2026] created two additional provisions directly bearing on aggregation in theft cases. First, § 943.20(5) provides:

> (5) AGGREGATION OF VALUES. For purposes of charging and penalty determinations under sub. (3)(a) to (cm), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in s. 947.013(1)(a), may be aggregated.

Second, new § 971.36(5) provides that in any case involving aggregated acts under § 943.20(5), "notwithstanding sub. (3), the acts may be prosecuted as a single crime." This is significant because § 943.20(5) operates independently of the conditions in § 971.36(3): it does not require that the property belong to the same owner, nor that the thefts occur pursuant to a single intent and design. It requires only that the multiple violations be committed (1) in the same prosecutorial unit, (2) by the same person, and (3) during a course of conduct as defined in § 947.013(1)(a).

The initial applicability provision of 2025 Act 106 (Section 5m) confirms that this aggregation authority applies to violations committed on or after March 22, 2026.

14. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1). Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial unit and elect one district attorney by their combined electorate.

15. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

16. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.20(5) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.20(3). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3)

to charge multiple thefts as one crime and, at the same time, rely on § 943.20(5) to aggregate their value in support of a higher-level offense.

17. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they together constitute a single two-county prosecutorial unit. See Note 14, supra.

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 [and answer the following question(s) "yes" or "no"].

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 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.[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.]

IF A REPEAT-OFFENDER PENALTY ENHANCEMENT UNDER § 943.20(3g) IS CHARGED, ADD THE FOLLOWING:

[Determining Prior Conviction Status Under § 943.20(3g)][8]

[If you find the defendant guilty, answer the following question:

Before the commission of this offense, had the defendant been convicted of one or more violations of (insert qualifying prior conviction(s) within the statutory range of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c))?

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant had one or more such prior convictions.]

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 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.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MULTIPLE ALLEGED THEFTS COMMITTED IN THE SAME PROSECUTORIAL UNIT DURING A COURSE OF CONDUCT AS PROVIDED IN § 943.20(5).[10]

[In determining the value of the property obtained, you may consider the value of property from multiple violations if you are satisfied beyond a reasonable doubt that those violations were committed in the same prosecutorial unit[11] by the defendant during a course of conduct. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.[12]][13]

["Prosecutorial unit" means a county.][14]

COMMENT

Wis JI–Criminal 1453C was originally published in 2008 and revised in 2019 and 2022. The 2022 revision updated footnote 8 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020]. This revision was approved by the Committee in June 2026. It amended the instruction and comment to reflect 2025 Wisconsin Act 106 [effective date: March 22, 2026], which created § 943.20(3g) (increased penalty for repeat offenders) and § 943.20(5) (aggregation of values during a course of conduct). Footnotes 8 and 10 were also updated.

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 the circumstances 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. Effective March 22, 2026, value aggregation may also be made under § 943.20(5), which permits aggregation of property values from multiple violations committed within the same prosecutorial unit as part of a course of conduct, as defined in § 947.013(1)(a). New § 971.36(5) further provides that aggregated acts under § 943.20(5) may be charged as a single crime. See footnote 13 below.

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.

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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)(c).

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 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.

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. Effective March 22, 2026, 2025 Wisconsin Act 106 created § 943.20(3g), which provides an additional penalty-enhancement mechanism for repeat offenders. Under § 943.20(3g): (1) a defendant charged with a misdemeanor under sub. (3)(a) may be charged with and convicted of a Class I felony if the defendant has one or more prior convictions under sub. (3)(a)–(cm) or § 943.50(4)(a)–(c); and (2) a defendant charged with a felony under sub. (3)(bf)–(cm) may be charged with and convicted of a felony one classification higher than the standard classification if the defendant has one or more such prior convictions. Because a finding of prior conviction under § 943.20(3g) determines the grade of the offense, and therefore the range of permissible penalties, the existence of the qualifying prior conviction or convictions must be submitted to the jury and proved beyond a reasonable doubt unless the defendant, defense counsel, and the State stipulate to the prior conviction or convictions.

Stipulation to Prior Conviction(s)

If a stipulation to a prior conviction or convictions is made, the matter need not be submitted to the jury. See Wis JI–Criminal 1441B for general guidance on penalty-increasing facts. The initial applicability provision of 2025 Act 106 (Section 5m) provides that prior convictions may be counted even if they predate the Act's effective date.

The effect of a stipulation in a prosecution 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 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.

See also Wis JI–Criminal 1343, Possession of a Firearm, footnote 10, for an example of a complete waiver inquiry.

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." (71 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."

10. Alternatively, the jury can be instructed to determine the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct. As noted in the Comment, 2025 Wisconsin Act 106 [effective date: March 22, 2026] created two additional provisions directly bearing on aggregation in theft cases. First, § 943.20(5) provides:

> (5) AGGREGATION OF VALUES. For purposes of charging and penalty determinations under sub. (3)(a) to (cm), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in s. 947.013(1)(a), may be aggregated.

Second, new § 971.36(5) provides that in any case involving aggregated acts under § 943.20(5), "notwithstanding sub. (3), the acts may be prosecuted as a single crime." This is significant because § 943.20(5) operates independently of the conditions in § 971.36(3): it does not require that the property belong to the same owner, nor that the thefts occur pursuant to a single intent and design. It requires only that the multiple violations be committed (1) in the same prosecutorial unit, (2) by the same person, and (3) during a course of conduct as defined in § 947.013(1)(a).

The initial applicability provision of 2025 Act 106 (Section 5m) confirms that this aggregation authority applies to violations committed on or after March 22, 2026.

11. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1). Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial unit and elect one district attorney by their combined electorate.

12. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

13. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.20(5) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.20(3). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3) to charge multiple thefts as one crime and, at the same time, rely on § 943.20(5) to aggregate their value in support of a higher-level offense.

14. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they together constitute a single, two-county prosecutorial unit. See Note 13, supra.

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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 [and answer the following question(s) "yes" or "no"].

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.]

IF A REPEAT-OFFENDER PENALTY ENHANCEMENT UNDER § 943.20(3g) IS CHARGED, ADD THE FOLLOWING:

[Determining Prior Conviction Status Under § 943.20(3g)][5]

[If you find the defendant guilty, answer the following question:

Before the commission of this offense, had the defendant been convicted of one or more violations of (insert qualifying prior conviction(s) within the statutory range of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c))?

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant had one or more such prior convictions.]

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).[6]

[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.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MULTIPLE ALLEGED THEFTS COMMITTED IN THE SAME PROSECUTORIAL UNIT DURING A COURSE OF CONDUCT AS PROVIDED IN § 943.20(5).[7]

[In determining the value of the property stolen, you may consider the value of property from multiple violations if you are satisfied beyond a reasonable doubt that those violations were committed in the same prosecutorial unit[8] by the defendant during a course of conduct. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.[9]][10]

["Prosecutorial unit" means a county.][11]

COMMENT

Wis JI–Criminal 1455 was originally published in 1976 and revised in 1992, 2002, 2003, 2006, 2019, and 2022. The 2022 revision updated footnote 6 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020]. This revision was approved by the Committee in June 2026. It amended the instruction and comment to reflect 2025 Wisconsin Act 106 [effective date: March 22, 2026], which created § 943.20(3g) (increased penalty for repeat offenders) and § 943.20(5) (aggregation of values during a course of conduct). Footnotes 11 and 13 were also updated.

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 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.

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.

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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;
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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 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, 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. Effective March 22, 2026, 2025 Wisconsin Act 106 created § 943.20(3g), which provides an additional penalty-enhancement mechanism for repeat offenders. Under § 943.20(3g): (1) a defendant charged with a misdemeanor under sub. (3)(a) may be charged with and convicted of a Class I felony if the defendant has one or more prior convictions under sub. (3)(a)–(cm) or § 943.50(4)(a)–(c); and (2) a defendant charged with a felony under sub. (3)(bf)–(cm) may be charged with and convicted of a felony one classification higher than the standard classification if the defendant has one or more such prior convictions. Because a finding of prior conviction under § 943.20(3g) determines the grade of the offense, and therefore the range of permissible penalties, the existence of the qualifying prior conviction or convictions must be submitted to the jury and proved beyond a reasonable doubt unless the defendant, defense counsel, and the State stipulate to the prior conviction or convictions.

Stipulation to Prior Conviction(s)

If a stipulation to a prior conviction or convictions is made, the matter need not be submitted to the jury. See Wis JI–Criminal 1441B for general guidance on penalty-increasing facts. The initial applicability provision of 2025 Act 106 (Section 5m) provides that prior convictions may be counted even if they predate the Act's effective date.

The effect of a stipulation in a prosecution 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.

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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.

See also Wis JI–Criminal 1343, Possession of a Firearm, footnote 10, for an example of a complete waiver inquiry.

6. 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.

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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, 239 Wis. 466, 1 N.W.2d 875(1942); 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."

7. Alternatively, the jury can be instructed to determine the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct. As noted in the Comment, 2025 Wisconsin Act 106 [effective date: March 22, 2026] created two additional provisions directly bearing on aggregation in theft cases. First, § 943.20(5) provides:

> (5) AGGREGATION OF VALUES. For purposes of charging and penalty determinations under sub. (3)(a) to (cm), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in s. 947.013(1)(a), may be aggregated.

Second, new § 971.36(5) provides that in any case involving aggregated acts under § 943.20(5), "notwithstanding sub. (3), the acts may be prosecuted as a single crime." This is significant because § 943.20(5) operates independently of the conditions in § 971.36(3): it does not require that the property belong to the same owner, nor that the thefts occur pursuant to a single intent and design. It requires only that the multiple violations be committed (1) in the same prosecutorial unit, (2) by the same person, and (3) during a course of conduct as defined in § 947.013(1)(a).

The initial applicability provision of 2025 Act 106 (Section 5m) confirms that this aggregation authority applies to violations committed on or after March 22, 2026.

8. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1). Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial

unit and elect one district attorney by their combined electorate.

9. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

10. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.20(5) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.20(3). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3) to charge multiple thefts as one crime and, at the same time, rely on § 943.20(5) to aggregate their value in support of a higher-level offense.

11. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they together constitute a single, two-county prosecutorial unit. See Note 8, supra.

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1498 RETAIL THEFT[1] — § 943.50(1m)(a)-(e)

Statutory Definition of the Crime

Retail theft, as defined in § 943.50(1m) of the Criminal Code of Wisconsin, is committed by one who intentionally [(alters the indicia of price or value of) (takes and carries away) (transfers) (conceals) (retains possession of)[2]] (merchandise held for resale[3] by a merchant) (property of a merchant) without consent and with the intent to deprive the merchant permanently of possession or the full purchase price of such (merchandise) (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 six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (altered the indicia of price or value of) (took and carried away) (transferred) (concealed) (retained possession of) (property involved).[4]
2. The (property involved) was (merchandise held for resale[5] by a merchant[6]) (property of a merchant).
3. The defendant knew that (property involved) was (merchandise held for resale[7] by a merchant) (property of a merchant).

4. The merchant did not consent[8] to the defendant's (altering the indicia of price or value of) (taking and carrying away) (transferring) (concealing) (retaining possession of) (property involved).

5. The defendant knew that the merchant did not consent.[9]

6. The defendant intended to deprive the merchant permanently of (possession) (the full purchase price) of the (merchandise) (property).[10]

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.

IF FELONY RETAIL THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE MERCHANDISE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[11]

Determining Value

If you find the defendant guilty, answer the following question:

("Was the value of the (merchandise) (property involved) more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the (merchandise) (property involved) more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the (merchandise) (property involved) more than $500?"

Answer: "yes" or "no.")

["Value" means the (value of the property, if the property involved was property of a merchant) (merchant's stated price of the merchandise, if the property involved was merchandise held for resale) (difference between the merchant's stated price of the merchandise and the altered price, if the case involves altering indicia of price or value).[12]

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.]

IF A REPEAT-OFFENDER PENALTY ENHANCEMENT UNDER § 943.50(4g) IS CHARGED, ADD THE FOLLOWING:

[Determining Prior Conviction Status Under § 943.50(4g)][13]

[If you find the defendant guilty, answer the following question:

Before the commission of this offense, had the defendant been convicted of one or more violations of (insert qualifying prior conviction(s) within the statutory range of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c))?

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant had one or more such prior convictions.]

ADD THE FOLLOWING FOR CASES INVOLVING MULTIPLE ALLEGED THEFTS COMMITTED IN THE SAME PROSECUTORIAL UNIT DURING A COURSE OF CONDUCT AS PROVIDED IN § 943.50(6).[14]

[In determining the value of the (merchandise) (property) involved, you may consider the value of property from multiple violations if you are satisfied beyond a reasonable doubt that those violations were committed in the same prosecutorial unit[15] by the defendant during a course of conduct. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.[16]][17]

["Prosecutorial unit" means a county.][18]

COMMENT

Wis JI–Criminal 1498 was originally published in 1974 and revised in 1977, 1980, 1983, 1991, 1999, 2002, 2003, 2012, 2019, and 2020. This revision was approved by the Committee in June 2026. It amended the instruction and comment to reflect 2025 Wisconsin Act 106 [effective date: March 22, 2026], which created § 943.50(4g) (increased penalty for repeat offenders) and § 943.50(6) (aggregation of values during a course of conduct). Footnotes 13 and 14 were also added.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. The amount distinguishing misdemeanors from felonies was decreased from $2,500 to $500 by 2011 Wisconsin Act 174. [Effective date: April 17, 2012.]

Act 174 also created ss. 943.50(4m), which provides that "[W]hoever violates sub. (1m) (a), (b), (c), (d), (e), or (f) is guilty of a Class I felony if all of the following apply:

The value of the merchandise does not exceed $500.
The person agrees or combines with another to commit the violation.
The person intends to sell the merchandise by means of the Internet."

2011 Wisconsin Act 110 amended § 943.50 to cover theft of services. See Wis JI–Criminal 1498C.

2025 Wisconsin Act 106 [effective date: March 22, 2026] created § 943.50(4g), which provides an increased penalty for repeat offenders. A person charged with a misdemeanor under sub. (4)(a) may be charged with and convicted of a Class I felony if the person has one or more prior convictions for a violation under sub. (4)(a) to (c) or § 943.20(3)(a) to (cm). A person charged with a felony under sub. (4)(bf) to (c) may be charged with and convicted of a felony one classification higher than the felony classification

provided in sub. (4) if the person has one or more prior convictions for a violation under sub. (4)(a) to (c) or § 943.20(3)(a) to (cm).

Act 106 also created § 943.50(6), which provides that for purposes of charging and penalty determinations under sub. (4)(a) to (c), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in § 947.013(1)(a), may be aggregated. Additionally, Act 106 created § 971.36(5), which provides that in any case involving aggregated acts under § 943.50(6), the acts may be prosecuted as a single crime notwithstanding sub. (3) of that statute. When aggregation is charged, the jury must determine the aggregate value beyond a reasonable doubt.

The 1999 revision reflected changes made in § 943.50 by 1997 Wisconsin Act 262, effective date: June 23, 1998. This instruction covers the alternative ways of committing retail theft that were prohibited by § 943.50 before the changes made by Act 262. These alternatives are defined in sub. (1m) (a) through (e) of the amended statute. New alternatives relating to "theft detection devices," "theft detection shielding devices" and "theft detection device removers" are defined in new subs. (1m)(f), (g), and (h). See Wis JI–Criminal 1498A, 1498B, and 1498D.

Act 262 also repealed former sub. (2), which had provided that intentional concealment of merchandise "beyond the last station for receiving payments," for example, was "evidence of intent. . . ." Paragraphs addressing those provisions [and treating them in the same way as "prima facie evidence" provisions] have been deleted from the instruction.

In State v. Lopez, 2019 WI 101, 389 Wis.2d 156, 936 N.W.2d 125**,** the Wisconsin Supreme Court affirmed the court of appeals decision in State v. Lopez, 2019 WI App 2, 385 Wis.2d 482, 922 N.W.2d 855, which held that the State may charge multiple acts of retail theft as one continuous offense pursuant to § 971.36(3)(a). Nothing in § 971.36(3)(a) indicates that the legislature intended to limit the provision to a specific type or types of theft; therefore the statute is applicable to various types of theft, including retail theft under § 943.50(1m)(a)-(e). 2025 Wisconsin Act 106 now supplies an additional statutory aggregation mechanism independent of § 971.36(3)(a).

1. The title of § 943.50 was changed from "shoplifting" to "retail theft" by Chapter 270, Laws of 1981. The change was effective April 27, 1981. Additional changes made by Chapter 270 were: extending the statute's coverage "to include" property of the merchant; cross referencing the definition of "merchant" in the Uniform Commercial Code; providing a new definition of value; expanding the immunity of one who detains a suspected violator of the statute; and providing for the admission of photographs of the merchandise in lieu of producing the merchandise itself.

2011 Wisconsin Act 110 changed the title of § 943.50 to "Retail Theft; Theft of Services."

2. The Committee recommends using only the verb or verbs which appropriately describe the form of retail theft alleged or indicated by the evidence. There is no authority specific to this statute requiring election of one alternative. However, cases interpreting the theft statute, § 943.20, address a closely comparable situation and hold that the statute identifies different ways of committing the offense: by taking and carrying away, or by using, by transferring, by concealing, or by retaining possession of property of another. The alternatives may not be charged in the disjunctive, Jackson v. State, 92 Wis.2d 1, 284 N.W.2d 685 (Ct. App. 1979); the jury must unanimously agree on the manner in which the statute was violated, State v. Seymour, 183 Wis.2d 682, 515 N.W.2d 874 (1994). See Wis JI–Criminal 517 for an instruction on jury agreement.

3. The amendment of § 943.50 by Chapter 270, Laws of 1981, extended the coverage of the statute to include "property of the merchant." In a case where the merchant's personal property was taken, substitute "property of the merchant" for "merchandise held for resale."

4. "Intentionally" requires that the defendant acted with the purpose to do the thing or cause the result specified "or is aware that his or her act is practically certain to cause that result." § 939.23(3). See Wis JI–Criminal 923A and 923B. "Intentionally" also requires knowledge of those facts necessary to make the conduct criminal that follow the word in the statute. See § 939.23(3).

5. See note 3, supra.

6. Section 943.50(1), as created by Chapter 270, Laws of 1981, provides that "merchant" includes those identified in § 402.104(3) as well as any innkeeper, motelkeeper, or hotelkeeper.

Section 402.104(3) defines "merchant" as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.

7. See note 4, supra.

8. The phrase "without consent" is defined in § 939.22(48)(a)-(c). That definition should be read to the jury at this point if consent is at issue. See Wis JI–Criminal 948.

9. See note 4, supra.

10. When appropriate add: "or is aware that his or her conduct is practically certain to cause that result." See § 939.23(4) and Wis JI–Criminal 923B.

When appropriate add: "or creates a serious risk of permanent loss by acts which manifest a gross indifference to the permanent loss of the property," Sartin v. State, 44 Wis.2d 138, 147, 170 N.W.2d 727 (1969), citing Baldwin, "Criminal Misappropriations in Wisconsin—Part I," 44 Marq. L. Rev. 253, 267 (1960).

11. 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 are set forth in § 943.50(4):

- if the value of the property does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $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.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for Class I and Class H 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.

12. Section 943.50(1)(b), as created by Chapter 270, Laws of 1981, provides a definition of "value" for the purposes of "retail theft" cases:

(b) "Value of merchandise" means:

1. For property of the merchant, the value of the property; or
2. For merchandise held for resale, the merchant's stated price of the merchandise or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the merchant's stated price, the difference between the merchant's stated price of the merchandise and the altered price.

13. Effective March 22, 2026, 2025 Wisconsin Act 106 created § 943.50(4g), which provides an additional penalty-enhancement mechanism for repeat offenders. Under § 943.50(4g): (1) a defendant charged with a misdemeanor under sub. (4)(a) may be charged with and convicted of a Class I felony if the defendant has one or more prior convictions under sub. (4)(a)–(c) or § 943.20(3)(a)–(cm); and (2) a defendant charged with a felony under sub. (4)(bf)–(c) may be charged with and convicted of a felony one classification higher than the standard classification if the defendant has one or more such prior convictions. Because a finding of prior conviction under § 943.50(4g) determines the grade of the offense, and therefore the range of permissible penalties, the existence of the qualifying prior conviction or convictions must be submitted to the jury and proved beyond a reasonable doubt unless the defendant, defense counsel, and the State stipulate to the prior conviction or convictions.

Stipulation to Prior Conviction(s)

If a stipulation to a prior conviction or convictions is made, the matter need not be submitted to the jury. See Wis JI–Criminal 1441B for general guidance on penalty-increasing facts. The initial applicability provision of 2025 Act 106 (Section 5m) provides that prior convictions may be counted even if they predate the Act's effective date.

The effect of a stipulation in a prosecution 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 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.

See also Wis JI–Criminal 1343, Possession of a Firearm, footnote 10, for an example of a complete waiver inquiry.

14. Alternatively, the jury can be instructed to determine the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct. As noted in the Comment, 2025 Wisconsin Act 106 [effective date: March 22, 2026] created two additional provisions directly bearing on aggregation in theft cases. First, § 943.50(6) provides:

> (6) AGGREGATION OF VALUES. For purposes of charging and penalty determinations under sub. (4)(a) to (c), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in s. 947.013(1)(a), may be aggregated.

Second, new § 971.36(5) provides that in any case involving aggregated acts under § 943.50(6), "notwithstanding sub. (3), the acts may be prosecuted as a single crime." This is significant because § 943.50(6) operates independently of the conditions in § 971.36(3): it does not require that the property belong to the same owner, nor that the thefts occur pursuant to a single intent and design. It requires only that the multiple violations be committed (1) in the same prosecutorial unit, (2) by the same person, and (3) during a course of conduct as defined in § 947.013(1)(a).

The initial applicability provision of 2025 Act 106 (Section 5m) confirms that this aggregation authority applies to violations committed on or after March 22, 2026.

15. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1). Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial unit and elect one district attorney by their combined electorate.

16. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

17. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.50(6) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.50(4). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3) to charge multiple thefts as one crime and, at the same time, rely on § 943.50(6) to aggregate their value in support of a higher-level offense.

18. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they together constitute a single, two-county prosecutorial unit. See Note 15, supra.

1498A RETAIL THEFT: REMOVING A THEFT DETECTION DEVICE — § 943.50(1m)(f)

Statutory Definition of the Crime

Section 943.50(1m)(f) of the Criminal Code of Wisconsin is violated by one who, while anywhere in a merchant's store, intentionally removes a theft detection device from (merchandise held for resale[1]) (property of a merchant) without the merchant's consent and with intent to deprive the merchant permanently of possession or the full purchase price of such (merchandise held for resale by a merchant) (property of a merchant).

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, while in the merchant's store, intentionally removed a theft detection device from (property involved).

   "Theft detection device" means any tag or other device that is used to prevent or detect theft and that is attached to merchandise held for resale by a merchant or to property of a merchant.[2]

2. (Property involved) was (merchandise held for resale by a merchant) (property of a merchant).[3]

3. The defendant knew that (property involved) was (merchandise held for resale[4] by a merchant) (property of a merchant).

4. The merchant did not consent[5] to removal of a theft detection device.

5. The defendant knew that the merchant did not consent.

6. The defendant intended to deprive the merchant permanently of (possession) (the full purchase price) of the (merchandise held for resale by a merchant) (property of a merchant).[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.[7]

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 RETAIL THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE MERCHANDISE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[8]

Determining Value

If you find the defendant guilty, answer the following question:

("Was the value of the (merchandise) (property involved) more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the (merchandise) (property involved) more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the (merchandise) (property involved) more than $500?"

Answer: "yes" or "no.")

["Value" means the (value of the property, if the property involved was property of a merchant) (merchant's stated price of the merchandise, if the property involved was merchandise held for resale).[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.]

IF A REPEAT-OFFENDER PENALTY ENHANCEMENT UNDER § 943.50(4g) IS CHARGED, ADD THE FOLLOWING:

[Determining Prior Conviction Status Under § 943.50(4g)][10]

[If you find the defendant guilty, answer the following question:

Before the commission of this offense, had the defendant been convicted of one or more violations of (insert qualifying prior conviction(s) within the statutory range of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c))?

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant had one or more such prior convictions.]

ADD THE FOLLOWING FOR CASES INVOLVING MULTIPLE ALLEGED THEFTS COMMITTED IN THE SAME PROSECUTORIAL UNIT DURING A COURSE OF CONDUCT AS PROVIDED IN § 943.50(6).[11]

[In determining the value of the (merchandise) (property) involved, you may consider the value of property from multiple violations if you are satisfied beyond a reasonable doubt that those violations were committed in the same prosecutorial unit[12] by the defendant during a course of conduct. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.[13]][14]

["Prosecutorial unit" means a county.][15]

COMMENT

Wis JI–Criminal 1498A was originally published in November 1998 and revised in 2003, 2012, 2019, 2020, and 12/2024. This revision was approved by the Committee in June 2026. It amended the instruction and comment to reflect 2025 Wisconsin Act 106 [effective date: March 22, 2026], which created § 943.50(4g) (increased penalty for repeat offenders) and § 943.50(6) (aggregation of values during a course of conduct). Footnotes 13 and 14 were also added.

This instruction is for the offense defined in sub. (1m)(f) of § 943.50, which was created by 1997 Wisconsin Act 262 [effective date: June 23, 1998]. For violations of sub. (1m)(g) of § 943.50, see Wis JI–Criminal 1498B. For violations of sub. (1m)(h) of § 943.50, see Wis JI–Criminal 1498D.

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 distinguishing misdemeanors from felonies was

decreased from $2,500 to $500 by 2011 Wisconsin Act 174. [Effective date: April 17, 2012.]

Act 174 also created § 943.50(4m), which provides that "[W]hoever violates sub. (1m) (a), (b), (c), (d), (e), or (f) is guilty of a Class I felony if all of the following apply:

(a) The value of the merchandise does not exceed $500.
(b) The person agrees or combines with another to commit the violation.
(c) The person intends to sell the merchandise by means of the Internet."

2025 Wisconsin Act 106 [effective date: March 22, 2026] created § 943.50(4g), which provides an increased penalty for repeat offenders. A person charged with a misdemeanor under sub. (4)(a) may be charged with and convicted of a Class I felony if the person has one or more prior convictions for a violation under sub. (4)(a) to (c) or § 943.20(3)(a) to (cm). A person charged with a felony under sub. (4)(bf) to (c) may be charged with and convicted of a felony one classification higher than the felony classification provided in sub. (4) if the person has one or more prior convictions for a violation under sub. (4)(a) to (c) or § 943.20(3)(a) to (cm).

Act 106 also created § 943.50(6), which provides that for purposes of charging and penalty determinations under sub. (4)(a) to (c), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in § 947.013(1)(a), may be aggregated. Additionally, Act 106 created § 971.36(5), which provides that in any case involving aggregated acts under § 943.50(6), the acts may be prosecuted as a single crime notwithstanding sub. (3) of that statute. When aggregation is charged, the jury must determine the aggregate value beyond a reasonable doubt.

In State v. Lopez, 2019 WI 101, 389 Wis. 2d 156, 936 N.W.2d 125, the Wisconsin Supreme Court affirmed the court of appeals decision in State v. Lopez, 2019 WI App 2, 385 Wis. 2d 482, 922 N.W.2d 855, which held that the State may charge multiple acts of retail theft as one continuous offense pursuant to § 971.36(3)(a). Nothing in § 971.36(3)(a) indicates that the legislature intended to limit the provision to a specific type or types of theft, therefore the statute is applicable to various types of theft, including retail theft under § 943.50(1m)(a)-(e). 2025 Wisconsin Act 106 now supplies an additional statutory aggregation mechanism independent of § 971.36(3)(a).

1. Section 943.50(1m)(f) prohibits removing a theft detection device "from merchandise held for resale by a merchant or property of a merchant." The instruction is drafted for an offense involving "merchandise held for resale by a merchant" and must be modified if "property of a merchant" was involved.

2. This is the definition provided in § 943.50(1)(ar).

3. Section 943.50(1), as created by Chapter 270, Laws of 1981, provides that "merchant" includes those identified in § 402.104(3) as well as any innkeeper, motelkeeper, or hotelkeeper.

Section 402.104(3) defines "merchant" as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods

involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.

4. See note 1, supra.

5. The phrase "without consent" is defined in § 939.22(48)(a)-(c). That definition should be read to the jury at this point if consent is at issue. See Wis JI–Criminal 948.

6. When appropriate add: "or is aware that his or her conduct is practically certain to cause that result." See § 939.23(4) and Wis JI–Criminal 923B.

7. 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.

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 are set forth in § 943.50(4):

- if the value of the property does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $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.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for Class I and Class H 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.

9. Section 943.50(1)(b), as created by Chapter 270, Laws of 1981, provides a definition of "value" for the purposes of "retail theft" cases:

(b) "Value of merchandise" means:

1. For property of the merchant, the value of the property; or
2. For merchandise held for resale, the merchant's stated price of the merchandise or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the merchant's stated price, the difference between the merchant's stated price of the merchandise and the altered price.

10. Effective March 22, 2026, 2025 Wisconsin Act 106 created § 943.50(4g), which provides an additional penalty-enhancement mechanism for repeat offenders. Under § 943.50(4g): (1) a defendant charged with a misdemeanor under sub. (4)(a) may be charged with and convicted of a Class I felony if the defendant has one or more prior convictions under sub. (4)(a)–(c) or § 943.20(3)(a)–(cm); and (2) a defendant charged with a felony under sub. (4)(bf)–(c) may be charged with and convicted of a felony one classification higher than the standard classification if the defendant has one or more such prior convictions. Because a finding of prior conviction under § 943.50(4g) determines the grade of the offense, and therefore the range of permissible penalties, the existence of the qualifying prior conviction or convictions must be submitted to the jury and proved beyond a reasonable doubt unless the defendant, defense counsel, and the State stipulate to the prior conviction or convictions.

Stipulation to Prior Conviction(s)

If a stipulation to a prior conviction or convictions is made, the matter need not be submitted to the jury. See Wis JI–Criminal 1441B for general guidance on penalty-increasing facts. The initial applicability provision of 2025 Act 106 (Section 5m) provides that prior convictions may be counted even if they predate the Act's effective date.

The effect of a stipulation in a prosecution 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 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.

See also Wis JI–Criminal 1343, Possession of a Firearm, footnote 10, for an example of a complete waiver inquiry.

11. Alternatively, the jury can be instructed to determine the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct. As noted in the Comment, 2025 Wisconsin Act 106 [effective date: March 22, 2026] created two additional provisions directly bearing on aggregation in theft cases. First, § 943.50(6) provides:

> (6) AGGREGATION OF VALUES. For purposes of charging and penalty determinations under sub. (4)(a) to (c), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in s. 947.013(1)(a), may be aggregated.

Second, new § 971.36(5) provides that in any case involving aggregated acts under § 943.50(6), "notwithstanding sub. (3), the acts may be prosecuted as a single crime." This is significant because § 943.50(6) operates independently of the conditions in § 971.36(3): it does not require that the property belong to the same owner, nor that the thefts occur pursuant to a single intent and design. It requires only that the multiple violations be committed (1) in the same prosecutorial unit, (2) by the same person, and (3) during a course of conduct as defined in § 947.013(1)(a).

The initial applicability provision of 2025 Act 106 (Section 5m) confirms that this aggregation authority applies to violations committed on or after March 22, 2026.

12. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1). Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial unit and elect one district attorney by their combined electorate.

13. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

14. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.50(6) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.50(4). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3) to charge multiple thefts as one crime and, at the same time, rely on § 943.50(6) to aggregate their value in support of a higher-level offense.

15. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they together constitute a single, two-county prosecutorial unit. See Note 12, supra.

1498B RETAIL THEFT: USING A THEFT DETECTION SHIELDING DEVICE — § 943.50(1m)(g)

Statutory Definition of the Crime

Section 943.50(1m)(g) of the Criminal Code of Wisconsin is violated by one who uses [or possesses with intent to use] a theft detection shielding device to shield (merchandise held for resale) (property of a merchant) from being detected by an electronic or magnetic theft alarm sensor and does so without the merchant's consent and with intent to deprive the merchant permanently of possession[1] of the merchandise.

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 used [or possessed with intent to use] a theft detection shielding device to shield (merchandise held for resale) (property of a merchant) from being detected by an electronic or magnetic theft alarm sensor.

   "Theft detection shielding device" means any laminated or coated bag or device designed to shield merchandise held for resale by a merchant or property of a merchant from being detected by an electronic or magnetic theft alarm sensor.[2]

2. (Property involved) was (merchandise held for resale by a merchant) (property of

a merchant).[3]

3. The defendant knew that (property involved) was (merchandise held for resale[4] by a merchant) (property of a merchant).

4. The merchant did not consent[5] to use of [or possession with intent to use] a theft detection shielding device to shield the (merchandise held for resale by a merchant) (property of a merchant) from being detected by a theft alarm sensor.

5. The defendant knew that the merchant did not consent.

6. The defendant intended to deprive the merchant permanently of possession of the (merchandise held for resale by a merchant) (property of a merchant).[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.[7]

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 RETAIL THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE

MERCHANDISE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[8]

Determining Value

If you find the defendant guilty, answer the following question:

("Was the value of the (merchandise) (property involved) more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the (merchandise) (property involved) more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the (merchandise) (property involved) more than $500?"

Answer: "yes" or "no.")

["Value" means the (value of the property, if the property involved was property of a merchant) (merchant's stated price of the merchandise, if the property involved was merchandise held for resale) (difference between the merchant's stated price of the merchandise and the altered price, if the case involves altering indicia of price or value).[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.]

IF A REPEAT-OFFENDER PENALTY ENHANCEMENT UNDER § 943.50(4g) IS CHARGED, ADD THE FOLLOWING:

[Determining Prior Conviction Status Under § 943.50(4g)][10]

[If you find the defendant guilty, answer the following question:

Before the commission of this offense, had the defendant been convicted of one or more violations of (insert qualifying prior conviction(s) within the statutory range of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c))?

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant had one or more such prior convictions.]

ADD THE FOLLOWING FOR CASES INVOLVING MULTIPLE ALLEGED THEFTS COMMITTED IN THE SAME PROSECUTORIAL UNIT DURING A COURSE OF CONDUCT AS PROVIDED IN § 943.50(6).[11]

[In determining the value of the (merchandise) (property) involved, you may consider the value of property from multiple violations if you are satisfied beyond a reasonable doubt that those violations were committed in the same prosecutorial unit[12] by the defendant during a course of conduct. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.[13]][14]

["Prosecutorial unit" means a county.][15]

COMMENT

Wis JI–Criminal 1498B was originally published in 1998 and revised in 2003, 2012, 2019, 2020, and 12/2024. This revision was approved by the Committee in June 2026. It amended the instruction and comment to reflect 2025 Wisconsin Act 106 [effective date: March 22, 2026], which created § 943.50(4g) (increased penalty for repeat offenders) and § 943.50(6) (aggregation of values during a course of conduct). Footnotes 11 and 12 were also added.

This instruction is for the offense defined in sub. (1m)(g) of § 943.50, which was created by 1997 Wisconsin Act 262 [effective date: June 23, 1998]. For violations of sub. (1m)(f) of § 943.50, see Wis JI–Criminal 1498A. For violations of sub. (1m)(h) of § 943.50, see Wis JI–Criminal 1498D.

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 distinguishing misdemeanors from felonies was decreased from $2,500 to $500 by 2011 Wisconsin Act 174. [Effective date: April 17, 2012.]

2025 Wisconsin Act 106 [effective date: March 22, 2026] created § 943.50(4g), which provides an increased penalty for repeat offenders. A person charged with a misdemeanor under sub. (4)(a) may be charged with and convicted of a Class I felony if the person has one or more prior convictions for a violation under sub. (4)(a) to (c) or § 943.20(3)(a) to (cm). A person charged with a felony under sub. (4)(bf) to (c) may be charged with and convicted of a felony one classification higher than the felony classification provided in sub. (4) if the person has one or more prior convictions for a violation under sub. (4)(a) to (c) or § 943.20(3)(a) to (cm).

Act 106 also created § 943.50(6), which provides that for purposes of charging and penalty determinations under sub. (4)(a) to (c), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in § 947.013(1)(a), may be aggregated. Additionally, Act 106 created § 971.36(5), which provides that in any case involving aggregated acts under § 943.50(6), the acts may be prosecuted as a single crime notwithstanding sub. (3) of that statute. When aggregation is charged, the jury must determine the aggregate value beyond a reasonable doubt.

In State v. Lopez, 2019 WI 101, 389 Wis. 2d 156, 936 N.W.2d 125**,** the Wisconsin Supreme Court affirmed the court of appeals decision in State v. Lopez, 2019 WI App 2, 385 Wis. 2d 482, 922 N.W.2d 855, which held that the State may charge multiple acts of retail theft as one continuous offense pursuant to § 971.36(3)(a). Nothing in § 971.36(3)(a) indicates that the legislature intended to limit the provision to a specific type or types of theft, therefore the statute is applicable to various types of theft, including retail theft under § 943.50(1m)(a)-(e). 2025 Wisconsin Act 106 now supplies an additional statutory aggregation mechanism independent of § 971.36(3)(a).

1. The instruction does not include the following alternative from the statute: intent to deprive the merchant permanently of "the full purchase price" of the merchandise. The Committee concluded that a shielding device would be used only to steal the merchandise, not to reduce its stated price.

2. This is the definition provided in § 943.50(1)(at).

3. Section 943.50(1), as created by Chapter 270, Laws of 1981, provides that "merchant" includes those identified in § 402.104(3) as well as any innkeeper, motelkeeper, or hotelkeeper.

Section 402.104(3) defines "merchant" as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.

4. See note 1, supra.

5. The phrase "without consent" is defined in § 939.22(48)(a)-(c). That definition should be read to the jury at this point if consent is at issue. See Wis JI–Criminal 948.

6. When appropriate add: "or is aware that his or her conduct is practically certain to cause that result." See § 939.23(4) and Wis JI–Criminal 923B.

7. 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.

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 are set forth in § 943.50(4):

- if the value of the property does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $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.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for Class I and Class H 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.

9. Section 943.50(1)(b), as created by Chapter 270, Laws of 1981, provides a definition of "value" for the purposes of "retail theft" cases:

(b) "Value of merchandise" means:

1. For property of the merchant, the value of the property; or
2. For merchandise held for resale, the merchant's stated price of the merchandise or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the merchant's stated price, the difference between the merchant's stated price of the merchandise and the altered price.

10. Effective March 22, 2026, 2025 Wisconsin Act 106 created § 943.50(4g), which provides an additional penalty-enhancement mechanism for repeat offenders. Under § 943.50(4g): (1) a defendant charged with a misdemeanor under sub. (4)(a) may be charged with and convicted of a Class I felony if the defendant has one or more prior convictions under sub. (4)(a)–(c) or § 943.20(3)(a)–(cm); and (2) a defendant charged with a felony under sub. (4)(bf)–(c) may be charged with and convicted of a felony one

classification higher than the standard classification if the defendant has one or more such prior convictions. Because a finding of prior conviction under § 943.50(4g) determines the grade of the offense, and therefore the range of permissible penalties, the existence of the qualifying prior conviction or convictions must be submitted to the jury and proved beyond a reasonable doubt unless the defendant, defense counsel, and the State stipulate to the prior conviction or convictions.

Stipulation to Prior Conviction(s)

If a stipulation to a prior conviction or convictions is made, the matter need not be submitted to the jury. See Wis JI–Criminal 1441B for general guidance on penalty-increasing facts. The initial applicability provision of 2025 Act 106 (Section 5m) provides that prior convictions may be counted even if they predate the Act's effective date.

The effect of a stipulation in a prosecution 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 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.

See also Wis JI–Criminal 1343, Possession of a Firearm, footnote 10, for an example of a complete waiver inquiry.

11. Alternatively, the jury can be instructed to determine the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct. As noted in the Comment, 2025 Wisconsin Act 106 [effective date: March 22, 2026] created two additional provisions directly bearing on aggregation in theft cases. First, § 943.50(6) provides:

> (6) AGGREGATION OF VALUES. For purposes of charging and penalty determinations under sub. (4)(a) to (c), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in s. 947.013(1)(a), may be aggregated.

Second, new § 971.36(5) provides that in any case involving aggregated acts under § 943.50(6), "notwithstanding sub. (3), the acts may be prosecuted as a single crime." This is significant because § 943.50(6) operates independently of the conditions in § 971.36(3): it does not require that the property belong to the same owner, nor that the thefts occur pursuant to a single intent and design. It requires only that the multiple violations be committed (1) in the same prosecutorial unit, (2) by the same person, and (3) during a course of conduct as defined in § 947.013(1)(a).

The initial applicability provision of 2025 Act 106 (Section 5m) confirms that this aggregation authority applies to violations committed on or after March 22, 2026.

12. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1). Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial unit and elect one district attorney by their combined electorate.

13. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

14. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.50(6) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.50(4). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3) to charge multiple thefts as one crime and, at the same time, rely on § 943.50(6) to aggregate their value in support of a higher-level offense.

15. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they together constitute a single, two-county prosecutorial unit. See Note 12, supra.

1498C THEFT OF SERVICES — § 943.50(1r)

Statutory Definition of the Crime

Theft of services, as defined in § 943.50(1r) of the Criminal Code of Wisconsin, is committed by one who, having obtained a service from a service provider, absconds and intentionally fails or refuses to pay for the service and does so without the service provider's consent and with intent to deprive the service provider permanently of the full price of the service.[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 four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained a service from a service provider.

   "Service provider" means a merchant who provides a service to retail customers without a written contract with the expectation that the service will be paid for by the customer upon completion of the service.[2]

2. The defendant intentionally absconded without paying for the service.

   "Intentionally absconded" means that the defendant left with the mental purpose to avoid paying for the service.[3]

3. The service provider did not consent to the defendant leaving without paying for

the service.

4. The defendant intended to deprive the service provider permanently of the full price of the service.

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 OF SERVICES IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE SERVICE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[4]

Determining Value

If you find the defendant guilty, answer the following question:

("Was the value of the service more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the service more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the service more than $500?"

Answer: "yes" or "no.")

["Value" means the price that the service provider stated for the service before the service was provided.][5]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that

the value of the service was more than the amount stated in the question.]

IF A REPEAT-OFFENDER PENALTY ENHANCEMENT UNDER § 943.50(4g) IS CHARGED, ADD THE FOLLOWING:

[Determining Prior Conviction Status Under § 943.50(4g)][6]

[If you find the defendant guilty, answer the following question:

Before the commission of this offense, had the defendant been convicted of one or more violations of (insert qualifying prior conviction(s) within the statutory range of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c))?

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant had one or more such prior convictions.]

ADD THE FOLLOWING FOR CASES INVOLVING MULTIPLE ALLEGED THEFTS COMMITTED IN THE SAME PROSECUTORIAL UNIT DURING A COURSE OF CONDUCT AS PROVIDED IN § 943.50(6).[7]

[In determining the value of the service involved, you may consider the value of property from multiple violations if you are satisfied beyond a reasonable doubt that those violations were committed in the same prosecutorial unit[8] by the defendant during a course of conduct. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.[9]][10]

["Prosecutorial unit" means a county.][11]

COMMENT

Wis JI–Criminal 1498C was originally published by the Committee in 2012 and revised in 2019 and 2020. This revision was approved by the Committee in June 2026. It amended the instruction and comment to reflect 2025 Wisconsin Act 106 [effective date: March 22, 2026], which created § 943.50(4g) (increased penalty for repeat offenders) and § 943.50(6) (aggregation of values during a course of conduct). Footnotes 6 and 7 were also added.

The crime of "theft of services" was created by 2011 Wisconsin Act 110 [effective date: December 21, 2011]. Act 110 added subsection (1r) to § 943.50, which is now titled: "Retail theft; theft of services."

As with other retail theft violations, the basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. The instruction provides for a jury finding of the amount for felony cases. See footnote 4 and the accompanying text. The amount distinguishing misdemeanors from felonies was reduced from $1,500 to $500 by 2011 Wisconsin Act 174.

Act 174 also created § 943.50(4m) which provides that "[W]hoever violates sub. (1m) (a), (b), (c), (d), (e), or (f) is guilty of a Class I felony if all of the following apply:

(a) The value of the merchandise does not exceed $500.
(b) The person agrees or combines with another to commit the violation.
(c) The person intends to sell the merchandise by means of the Internet."

2025 Wisconsin Act 106 [effective date: March 22, 2026] created § 943.50(4g), which provides an increased penalty for repeat offenders. A person charged with a misdemeanor under sub. (4)(a) may be charged with and convicted of a Class I felony if the person has one or more prior convictions for a violation under sub. (4)(a) to (c) or § 943.20(3)(a) to (cm). A person charged with a felony under sub. (4)(bf) to (c) may be charged with and convicted of a felony one classification higher than the felony classification provided in sub. (4) if the person has one or more prior convictions for a violation under sub. (4)(a) to (c) or § 943.20(3)(a) to (cm).

Act 106 also created § 943.50(6), which provides that for purposes of charging and penalty determinations under sub. (4)(a) to (c), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in § 947.013(1)(a), may be aggregated. Additionally, Act 106 created § 971.36(5), which provides that in any case involving aggregated acts under § 943.50(6), the acts may be prosecuted as a single crime notwithstanding sub. (3) of that statute. When aggregation is charged, the jury must determine the aggregate value beyond a reasonable doubt.

In State v. Lopez, 2019 WI 101, 389 Wis.2d 156, 936 N.W.2d 125**,** the Wisconsin Supreme Court affirmed the court of appeals decision in State v. Lopez, 2019 WI App 2, 385 Wis.2d 482, 922 N.W.2d 855, which held that the State may charge multiple acts of retail theft as one continuous offense pursuant to § 971.36(3)(a). Nothing in § 971.36(3)(a) indicates that the legislature intended to limit the provision to a specific type or types of theft, therefore the statute is applicable to various types of theft, including retail theft under § 943.50(1m)(a)-(e). 2025 Wisconsin Act 106 now supplies an additional statutory aggregation mechanism independent of § 971.36(3)(a).

1. This statement reorders the statutory language to make it more understandable for the jury; no change in meaning is intended.

2. This is the definition provided in § 943.50(1)(am).

3. The definition of "abscond" is adapted from the one used in Wis JI–Criminal 1461, Fraud on Hotel or Restaurant Keeper. See footnote 5, Wis JI–Criminal 1461. For definition of "intentionally," see Wis JI–Criminal 923A and 923B.

4. The jury must make a finding of the value of the stolen property [or services] 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 are set forth in § 943.50(4):

- if the value of the service does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the service exceeds $500 but not $5,000, the offense is a Class I felony;
- if the value of the service exceeds $5,000 but not $10,000, the offense is a Class H felony; and
- if the value of the service exceeds $10,000, the offense is a Class G felony.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for the felony penalties; 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.

5. This is the definition provided in § 943.50(1)(b)3.

6. Effective March 22, 2026, 2025 Wisconsin Act 106 created § 943.50(4g), which provides an additional penalty-enhancement mechanism for repeat offenders. Under § 943.50(4g): (1) a defendant charged with a misdemeanor under sub. (4)(a) may be charged with and convicted of a Class I felony if the defendant has one or more prior convictions under sub. (4)(a)–(c) or § 943.20(3)(a)–(cm); and (2) a defendant charged with a felony under sub. (4)(bf)–(c) may be charged with and convicted of a felony one classification higher than the standard classification if the defendant has one or more such prior convictions. Because a finding of prior conviction under § 943.50(4g) determines the grade of the offense, and therefore the range of permissible penalties, the existence of the qualifying prior conviction or convictions must be submitted to the jury and proved beyond a reasonable doubt unless the defendant, defense counsel, and the State stipulate to the prior conviction or convictions.

Stipulation to Prior Conviction(s)

If a stipulation to a prior conviction or convictions is made, the matter need not be submitted to the jury. See Wis JI–Criminal 1441B for general guidance on penalty-increasing facts. The initial applicability provision of 2025 Act 106 (Section 5m) provides that prior convictions may be counted even if they predate the Act's effective date.

The effect of a stipulation in a prosecution 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 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.

See also Wis JI–Criminal 1343, Possession of a Firearm, footnote 10, for an example of a complete waiver inquiry.

7. Alternatively, the jury can be instructed to determine the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct. As noted in the Comment, 2025 Wisconsin Act 106 [effective date: March 22, 2026] created two additional provisions directly bearing on aggregation in theft cases. First, § 943.50(6) provides:

> (6) AGGREGATION OF VALUES. For purposes of charging and penalty determinations under sub. (4)(a) to (c), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in s. 947.013(1)(a), may be aggregated.

Second, new § 971.36(5) provides that in any case involving aggregated acts under § 943.50(6), "notwithstanding sub. (3), the acts may be prosecuted as a single crime." This is significant because § 943.50(6) operates independently of the conditions in § 971.36(3): it does not require that the property belong to the same owner, nor that the thefts occur pursuant to a single intent and design. It requires only that the multiple violations be committed (1) in the same prosecutorial unit, (2) by the same person, and (3) during a course of conduct as defined in § 947.013(1)(a).

The initial applicability provision of 2025 Act 106 (Section 5m) confirms that this aggregation authority applies to violations committed on or after March 22, 2026.

8. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1). Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial unit and elect one district attorney by their combined electorate.

9. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

10. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.50(6) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same

prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.50(4). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3) to charge multiple thefts as one crime and, at the same time, rely on § 943.50(6) to aggregate their value in support of a higher-level offense.

11. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they together constitute a single, two-county prosecutorial unit. See Note 8, supra.

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1498D RETAIL THEFT: [USING] [POSSESSING] A THEFT DETECTION DEVICE REMOVER — § 943.50(1m)(h)

Statutory Definition of the Crime

Section 943.50(1m)(h) of the Criminal Code of Wisconsin is violated by one who (uses) (possesses with intent to use) a theft detection device remover to remove a theft detection device from (merchandise held for resale by a merchant) (property of a merchant) and does so without the merchant's consent and with intent to deprive the merchant permanently of the possession or the full purchase price of the (merchandise held for resale) (property of a merchant).

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 (used) (possessed with the intent to use) a theft detection device remover to remove a theft detection device.

   "Theft detection device" means any tag or other device that is used to prevent or detect theft and that is attached to merchandise held for resale by a merchant or to property of a merchant.[1]

2. (Property involved) was (merchandise held for resale by the merchant) (property

of a merchant).[2]

3. The defendant knew that (property involved) was (merchandise held for resale[3] by the merchant) (property of a merchant).

4. The merchant did not consent[4] to the (use of) (possession with intent to use) the theft detection device remover to remove the theft detection device from (property involved).

5. The defendant knew that the merchant did not consent.

6. The defendant intended to deprive the merchant permanently of (possession of the (merchandise held for resale) (property of the merchant)) (the full purchase price of the (merchandise held for resale) (property of the merchant)).[5]

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.[6]

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 RETAIL THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE

WOULD SUPPORT A FINDING THAT THE VALUE OF THE MERCHANDISE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[7]

Determining Value

If you find the defendant guilty, answer the following question:

("Was the value of the (merchandise) (property involved) more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the (merchandise) (property involved) more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the (merchandise) (property involved) more than $500?"

Answer: "yes" or "no.")

["Value" means the (value of the property, if the property involved was property of a merchant) (merchant's stated price of the merchandise, if the property involved was merchandise held for resale).[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.]

IF A REPEAT-OFFENDER PENALTY ENHANCEMENT UNDER § 943.50(4g) IS CHARGED, ADD THE FOLLOWING:

[Determining Prior Conviction Status Under § 943.50(4g)][9]

[If you find the defendant guilty, answer the following question:

Before the commission of this offense, had the defendant been convicted of one or more violations of (insert qualifying prior conviction(s) within the statutory range of § 943.20(3)(a) to (cm) or § 943.50(4)(a) to (c))?

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant had one or more such prior convictions.]

ADD THE FOLLOWING FOR CASES INVOLVING MULTIPLE ALLEGED THEFTS COMMITTED IN THE SAME PROSECUTORIAL UNIT DURING A COURSE OF CONDUCT AS PROVIDED IN § 943.50(6).[10]

[In determining the value of the (merchandise) (property) involved, you may consider the value of property from multiple violations if you are satisfied beyond a reasonable doubt that those violations were committed in the same prosecutorial unit[11] by the defendant during a course of conduct. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.[12]][13]

["Prosecutorial unit" means a county.][14]

COMMENT

Wis JI–Criminal 1498D was approved by the Committee in October 2024 and revised in 12/2024. This revision was approved by the Committee in June 2026. It amended the instruction and comment to reflect 2025 Wisconsin Act 106 [effective date: March 22, 2026], which created § 943.50(4g) (increased

penalty for repeat offenders) and § 943.50(6) (aggregation of values during a course of conduct). Footnotes 10 and 11 were also added.

This instruction is for the offense defined in sub. (1m)(h) of § 943.50, which was created by 1997 Wisconsin Act 262 [effective date: June 23, 1998]. For violations of sub. (1m)(f) of § 943.50, see Wis JI–Criminal 1498A. For violations of sub. (1m)(g) of § 943.50, see Wis JI-Criminal 1498B.

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, which distinguishes misdemeanors from felonies, decreased from $2,500 to $500 by 2011 Wisconsin Act 174. [Effective date: April 17, 2012.]

2025 Wisconsin Act 106 [effective date: March 22, 2026] created § 943.50(4g), which provides an increased penalty for repeat offenders. A person charged with a misdemeanor under sub. (4)(a) may be charged with and convicted of a Class I felony if the person has one or more prior convictions for a violation under sub. (4)(a) to (c) or § 943.20(3)(a) to (cm). A person charged with a felony under sub. (4)(bf) to (c) may be charged with and convicted of a felony one classification higher than the felony classification provided in sub. (4) if the person has one or more prior convictions for a violation under sub. (4)(a) to (c) or § 943.20(3)(a) to (cm).

Act 106 also created § 943.50(6), which provides that for purposes of charging and penalty determinations under sub. (4)(a) to (c), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in § 947.013(1)(a), may be aggregated. Additionally, Act 106 created § 971.36(5), which provides that in any case involving aggregated acts under § 943.50(6), the acts may be prosecuted as a single crime notwithstanding sub. (3) of that statute. When aggregation is charged, the jury must determine the aggregate value beyond a reasonable doubt.

1. This is the definition provided in § 943.50(1)(ar).

2. Section 943.50(1), as created by Chapter 270, Laws of 1981, provides that "merchant" includes those identified in § 402.104(3) as well as any innkeeper, motelkeeper, or hotelkeeper.

Section 402.104(3) defines "merchant" as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.

3. See note 1, supra.

4. The phrase "without consent" is defined in § 939.22(48)(a)-(c). That definition should be read to the jury at this point if consent is at issue. See Wis JI–Criminal 948.

5. When appropriate, add: "or is aware that his conduct is practically certain to cause that result." See § 939.23(4) and Wis JI–Criminal 923B.

6. 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.

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 are set forth in § 943.50(4):

- if the value of the property does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $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.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for Class I and Class H 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.

8. Section 943.50(1)(b), as created by Chapter 270, Laws of 1981, provides a definition of "value" for the purposes of "retail theft" cases:

> (b) "Value of merchandise" means:
>
> 1. For property of the merchant, the value of the property; or
> 2. For merchandise held for resale, the merchant's stated price of the merchandise or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the merchant's stated price, the difference between the merchant's stated price of the merchandise and the altered price.

9. Effective March 22, 2026, 2025 Wisconsin Act 106 created § 943.50(4g), which provides an additional penalty-enhancement mechanism for repeat offenders. Under § 943.50(4g): (1) a defendant charged with a misdemeanor under sub. (4)(a) may be charged with and convicted of a Class I felony if the defendant has one or more prior convictions under sub. (4)(a)–(c) or § 943.20(3)(a)–(cm); and (2) a defendant charged with a felony under sub. (4)(bf)–(c) may be charged with and convicted of a felony one classification higher than the standard classification if the defendant has one or more such prior convictions. Because a finding of prior conviction under § 943.50(4g) determines the grade of the offense, and therefore the range of permissible penalties, the existence of the qualifying prior conviction or convictions must be submitted to the jury and proved beyond a reasonable doubt unless the defendant, defense counsel, and the State stipulate to the prior conviction or convictions.

Stipulation to Prior Conviction(s)

If a stipulation to a prior conviction or convictions is made, the matter need not be submitted to the jury. See Wis JI–Criminal 1441B for general guidance on penalty-increasing facts. The initial applicability provision of 2025 Act 106 (Section 5m) provides that prior convictions may be counted even if they predate the Act's effective date.

The effect of a stipulation in a prosecution 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 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.

See also Wis JI–Criminal 1343, Possession of a Firearm, footnote 10, for an example of a complete waiver inquiry.

10. Alternatively, the jury can be instructed to determine the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct. As noted in the Comment, 2025 Wisconsin Act 106 [effective date: March 22, 2026] created two additional provisions directly bearing on aggregation in theft cases. First, § 943.50(6) provides:

> (6) AGGREGATION OF VALUES. For purposes of charging and penalty determinations under sub. (4)(a) to (c), the value of property from multiple violations committed in the same prosecutorial unit by the same person during a course of conduct, as defined in s. 947.013(1)(a), may be aggregated.

Second, new § 971.36(5) provides that in any case involving aggregated acts under § 943.50(6), "notwithstanding sub. (3), the acts may be prosecuted as a single crime." This is significant because § 943.50(6) operates independently of the conditions in § 971.36(3): it does not require that the property belong to the same owner, nor that the thefts occur pursuant to a single intent and design. It requires only that the multiple violations be committed (1) in the same prosecutorial unit, (2) by the same person, and (3) during a course of conduct as defined in § 947.013(1)(a).

The initial applicability provision of 2025 Act 106 (Section 5m) confirms that this aggregation authority applies to violations committed on or after March 22, 2026.

11. Wis. Stat. § 978.001(2) defines "prosecutorial unit" by reference to Wis. Stat. § 978.01(1).

Section 978.01(1) provides that each county constitutes a prosecutorial unit and elects its own district attorney, except that Shawano and Menominee Counties together form a single two-county prosecutorial unit and elect one district attorney by their combined electorate.

12. This is the definition of "course of conduct" set forth in Wis. Stat. § 947.013(1)(a).

13. Wisconsin's theft aggregation framework operates through two distinct but complementary statutory mechanisms. Section 943.50(6) serves as a valuation tool, allowing the State to combine the dollar amounts of multiple thefts committed by the same person during a course of conduct within the same prosecutorial unit for the limited purpose of reaching a higher penalty tier under § 943.50(4). Section 971.36(3), in contrast, serves as a procedural tool, allowing the State to charge multiple theft incidents in a single count when specified conditions are met, such as a shared victim, a single intent and design, or thefts from the same location. The two statutes are not mutually exclusive. A prosecutor may rely on § 971.36(3) to charge multiple thefts as one crime and, at the same time, rely on § 943.50(6) to aggregate their value in support of a higher-level offense.

14. This is an abbreviated definition of "prosecutorial unit" as defined in Wis. Stat. § 978.001(2), by reference to Wis. Stat. § 978.01(1). Shawano and Menominee Counties are an exception because they together constitute a single, two-county prosecutorial unit. See Note 11, supra.

1523 WIRE FRAUD AGAINST A FINANCIAL INSTITUTION[1] — Wis. Stat. § 943.90

Statutory Definition of the Crime

Wire fraud against a financial institution, as defined in § 943.90 of the Criminal Code of Wisconsin, is committed by one who (transmits) (causes to be transmitted) electrically, electromagnetically, or by light any signal, writing, image, sound, or data for the purpose of committing a financial crime.

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 (transmitted) (caused to be transmitted) electrically, electromagnetically, or by light a signal, writing, image, sound, or data.
2. The defendant did so for the purpose of (committing) (attempting to commit)[2] (conspiring to commit)[3] a financial crime[4], namely: (specify the intended financial crime[5]).

ADD THE FOLLOWING CONCERNING THE ELEMENTS OF THE ALLEGED FINANCIAL CRIME UNDERLYING THE WIRE-FRAUD CHARGE AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY

The State alleges that the defendant committed the crime of (specify the financial crime). The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant committed the crime of (specify the financial crime).

The crime of (specify the financial crime) is committed by one who:

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 1523 was approved by the Committee in June 2026.

Section 943.90 was created by 2005 Wisconsin Act 212 [effective date: April 11, 2006]. The penalty for committing a violation of § 943.90 is a Class H felony.

Wis JI–Criminal 1523 is drafted for the offense defined in § 943.90. For violations of other crimes against financial institutions, see the following Wisconsin Jury Instructions:

- For a violation of § 943.82 "fraud against a financial institution," see Wis JI–Criminal 1512.
- For a violation of § 943.82(2) "false representation as a financial institution," see Wis JI–Criminal 1514.
- For a violation of § 943.87 "robbery of a financial institution," see Wis JI–Criminal 1522.
- For a violation of § 943.895(2)(a)1-2 "money laundering," see Wis JI–Criminal 1524.
- For a violation of § 943.895(2)(a)3 "money laundering," see Wis JI–Criminal 1525.
- For a violation of § 943.895(2)(a)4 "money laundering," see Wis JI–Criminal 1526.

1. Wis. Stat. § 943.80(2) provides that "Financial institution" means a bank, as defined in s. 214.01(1)(c), a savings bank, as defined in s. 214.01(1)(t), a savings and loan association, a trust company, a credit union, as defined in s. 186.01(2), a mortgage banker, as defined in s. 224.71(3), or a mortgage broker, as defined in s. 224.71(4), whether chartered under the laws of this state, another state or territory, or under the laws of the United States; a company that controls, is controlled by, or is under common control with a bank, a savings bank, a savings and loan association, a trust company, a credit union, a mortgage banker, or a mortgage broker; or a person licensed under s. 138.09, other than a person who agrees for a fee to hold a check for a period of time before negotiating or presenting the check for payment and other than a pawnbroker, as defined in s. 138.10(1)(a).

2. If the case is charged as an attempt, it may be advisable to define "attempt" for the jury. A full explanation appears in Wis JI–Criminal 580, which should be consulted for a more complete discussion of the concept.

3. Wis. Stat. § 943.80(1) provides that "'financial crime' means a crime under §§ 943.81 to 943.90, or any other felony committed against a financial institution, including an attempt or conspiracy to commit one of those crimes." If the State's theory is based on an attempted or conspiratorial predicate offense, the corresponding attempt language—drafted in parentheses throughout the instruction—should be included when supported by the facts of the case.

If the case is charged as a conspiracy, it may be advisable to define "conspiracy" for the jury. A full explanation appears in Wis JI–Criminal 570, which should be consulted for a more complete discussion of the concept.

4. If the alleged "financial crime" is not separately charged, the court should also instruct the jury on what the State must prove for the specified intended financial crime.

5. Wis. Stat. § 943.80(1) provides "financial crime" has the following meaning:

> "'Financial crime' means a crime under ss. 943.81 to 943.90 or any other felony committed against a financial institution or an attempt or conspiracy to commit one of these crimes."

The crimes included under ss. 943.81 to 943.90 include the following:

- 943.81 Theft from a financial institution
- 943.82 Fraud against a financial institution.
- 943.825 Interference with automated teller machine.
- 943.83 Loan fraud.
- 943.84 Transfer of encumbered property.
- 943.85 Bribery involving a financial institution.
- 943.86 Extortion against a financial institution.
- 943.87 Robbery of a financial institution.
- 943.88 Organizer of financial crimes.
- 943.89 Mail fraud.
- 943.895 Money laundering.

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OFFICE OF JUDICIAL EDUCATION
7/2026

WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME III

Wisconsin Criminal Jury Instructions Committee

[Cite as Wis JI-Criminal]

- Includes 7/2026 Supplement (Release No. 71)

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1830 IMPERSONATING A PEACE OFFICER, FIRE FIGHTER, OR OTHER EMERGENCY PERSONNEL — § 946.70(1)

Statutory Definition of the Crime

Impersonating a (peace officer) (fire fighter) (emergency medical services practitioner) (emergency medical responder), as defined in § 946.70(1) of the Criminal Code of Wisconsin, is committed by one who impersonates a (peace officer) (fire fighter) (emergency medical services practitioner) (emergency medical responder) with intent to mislead others into believing that the person is actually a (peace officer) (fire fighter) (emergency medical services practitioner) (emergency medical responder).

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 impersonated a (peace officer) (fire fighter) (emergency medical services practitioner) (emergency medical responder).

   To "impersonate" means to (assume the identity or characteristics of) (represent oneself to be) (pretend to be) another person without authority to do so. (One may impersonate another by verbal declarations as well as by obvious physical impersonations as in wearing a badge or a uniform.)

[A "peace officer" is a person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.]

[An "emergency medical services practitioner" means a person who holds a license issued under ch. 256 to provide emergency medical care, as defined in § 256.01(5).]

[An "emergency medical responder" means a person who holds a certificate issued under ch. 256 to provide emergency medical care, as defined in § 256.01(4p).]

2. The defendant impersonated a (peace officer) (fire fighter) (emergency medical services practitioner) (emergency medical responder) with intent to mislead (another person) (other persons) into believing the defendant was actually a (peace officer) (fire fighter) (emergency medical services practitioner) (emergency medical responder).

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 1830 was originally published in 1980 and revised in 1986, 1995, 2009, and 2013. The 2013 revision reflects changes made in § 946.70 by 2011 Wisconsin Act 276. This revision was approved by the Committee in April 2026; it reflects changes made in § 946.70 by 2025 Wisconsin Act 55 [effective date: December 11, 2025].

This instruction is drafted for a violation of subsec. (1) of § 946.70. The maximum penalty for the basic offense under sub. (1) is a Class I felony. A separate and more serious offense is created under sub. (2): a person who violates sub. (1) "with the intent to commit or aid or abet the commission of a crime other than a crime" is guilty of a Class H felony.

1985 Wisconsin Act 97 amended § 946.70 by substituting the word "impersonate" for "personate." Since the two words have essentially the same meaning, it is assumed that no change in meaning was intended.

2011 Wisconsin Act 276 amended § 946.70 by creating subs. (1)(b), (c), and (d), extending the coverage to include impersonating a fire fighter, an emergency medical services practitioner, and an emergency medical responder [effective date: April 24, 2012].

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1908 UNLAWFUL USE OF A COMPUTERIZED COMMUNICATION SYSTEM — § 947.0125(2)(a)

[NOTE: This instruction is subject to modification in order to address the other modes of commission set out in Wis. Stat. § 947.0125(2)(b)–(f). See footnote 7.]

Statutory Definition of the Crime

Unlawful use of (an electronic mail) (a computerized communication) system, as defined in § 947.0125(2)(a) of the Criminal Code of Wisconsin, is committed by one who with intent to frighten, intimidate, threaten, abuse or harass another person, sends a message to the person on (an electronic mail) (a computerized communication) system, and threatens to inflict injury or physical harm to any person or the property of any 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 sent a message to (name of victim) on (an electronic mail) (a computerized communication) system.

   "Message" means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature, or any transfer of a computer program.[1] "Computer program" means an ordered set of instructions or statements that, when executed

by a computer, causes the computer to process data.[2]

2. The defendant sent the message to (name of victim) with intent to[3] ((frighten) (intimidate) (threaten) (abuse) (harass)[4]) (name of victim).

"With intent to (frighten) (intimidate) (threaten) (abuse) (harass)" means that the defendant acted with the mental purpose to (frighten) (intimidate) (threaten) (abuse) (harass) another person or was aware that the conduct was practically certain to cause that result.[5]

3. In the message, the defendant threatened[6] to inflict (physical harm to) (damage to the property of) any person.[7]

It is not necessary that the person making the threat have the ability to carry out the threat.

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 1908 was originally published in 1996 and revised in 2008 and 1/2024. The 1/2024 revision modified the former Perkins–based "true threat" language in footnote 6 to reflect the objective standard established in Counterman v. Colorado, 600 U.S. 66 and subsequently adopted by the Wisconsin Supreme Court in Kindschy v. Aish, 2024 WI 27. This revision was approved by the Committee in June

2026. It added footnote 7 to explain how the instruction may be modified to address the multiple modes of commission set out in Wis. Stat. § 947.0125(2).

Section 947.0125, Unlawful Use of Computerized Communication Systems, was created by 1995 Wisconsin Act 353. Effective date: June 7, 1996. Violations of subsec. (2) are Class B misdemeanors.

1. This is the definition of "message" provided in § 947.0125(1).

2. The definition of "message" in Wis. Stat. § 947.0125(1) incorporates the definition of "computer program" from Wis. Stat. § 943.70. Under § 943.70, "computer program" means an ordered set of instructions or statements that, when executed by a computer, causes the computer to process data.

3. The Committee recommends that one of the alternatives in parentheses should be elected if possible because it clarifies the issue for the jury. The Committee does not conclude that an instruction joining one or more alternatives in the disjunctive would be error. See Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979); and United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

4. "Harassment" is referred to in § 947.013(1m)(b), which identifies one type of harassment penalized by that statute:

> (b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

The § 947.013(1m)(b) reference is the same as the one used in the harassment restraining order statute, § 813.125(1)(b). The restraining order statute and its definition of harassment were found to be constitutional by the Wisconsin Supreme Court in Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), where the court found the meaning of harassment readily ascertainable by reference to a dictionary: "'Harass' means to worry or impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil, or badger." 139 Wis.2d 397, 407, citing Webster's Third New International Dictionary 1031 (1961).

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary.

5. See § 939.23(4) and Wis JI–Criminal 923A and 923B.

6. Wisconsin appellate courts have held that some criminal statutes prohibiting threats must be read to apply only to "true threats." For example, in State v. Robert T., 2008 WI App 22, 307 Wis.2d 488, 746 N.W.2d 564, the court of appeals held that "§ 947.015 must be read with the limitation that only a false bomb scare that constitutes a 'true threat' can be charged." ¶12. State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762, reached the same conclusion for violations of § 940.203, Threat to a judge. Also see State v. A.S., 2001 WI 48, 243 Wis.2d 173, 626 N.W.2d 712, holding that a "true threat" is required for disorderly conduct charges based on threats.

In Counterman v. Colorado, 600 U.S. 66, 79, 143 S. Ct. 2106 (2023), the U.S. Supreme Court clarified that true threats must be evaluated based on their objective content—how a reasonable listener would perceive them—and that criminal liability requires a mens rea of at least recklessness, meaning the speaker must have "consciously disregarded a substantial risk that [the communications] would be viewed as

threatening violence." The Wisconsin Supreme Court adopted the Counterman recklessness standard in Kindschy v. Aish, supra, at ¶¶14–15, abrogating the purely speaker-focused objective test previously employed under Perkins. Accordingly, the Committee revised the former Perkins–based definition to reflect the Counterman/Kindschy approach.

When deciding whether a statement is a true threat, the jury should consider the totality of circumstances. Relevant factors may include whether the threat was conditional; whether it was made directly to a specific person; how the recipient and others reacted; and whether the defendant had made similar statements or had the means to carry out the threat. The jury may also consider all other facts and context to determine if a statement was a true threat. See Perkins, supra, at ¶ 31, citing United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000).

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 U.S.C. § 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. Although Elonis was decided as a matter of federal statutory interpretation, it underscores that criminal "threat" liability should not rest solely on an objective reasonable-person standard. This instruction's definition of "true threat" includes both an objective reasonable-listener component and the mens rea floor required by the First Amendment under Counterman and Kindschy—that the defendant consciously disregarded a substantial risk that others would view the statement as threatening violence.

It is important to note, however, that certain Wisconsin threat statutes continue to require that the defendant acted "intentionally." Under Wisconsin law, "intentionally" means the defendant acted with the conscious purpose to make a threat—not merely with reckless disregard. See Wis JI–Criminal 923A; Wis. Stat. § 939.23(3). This purpose-based mens rea standard exceeds the constitutional minimum established in Counterman. Because the First Amendment permits states to impose a more stringent mental-state requirement than recklessness, Wisconsin's existing "intentionally threatens" language not only meets but surpasses the constitutional threshold articulated in Counterman.

The Committee concluded that a separate definition of "true threat" is not necessary in this instruction because its substance is covered by the second element, which requires that the defendant "intended to frighten, intimidate, threaten, abuse, or harass" the victim.

The following definition of "true threat" is based on Perkins and Counterman:

> A "threat" is an expression of intention to cause harm. It may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression that the speaker will (insert the applicable threat to cause harm). It must convey a real possibility that the threatened harm will follow. 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.

A threat requires a true threat. It may be communicated orally, in writing, or by conduct. "True threat" means that a reasonable person would interpret the threat as a serious expression that the speaker will inflict imminent or future harm as threatened. It must convey a real possibility that the harm will follow. 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.

7. Wis. Stat. § 947.0125(2)(a) through (f) sets out six separate modes of commission, each punishable as a Class B misdemeanor. This instruction is drafted to address violations under § 947.0125(2)(a), which prohibits sending a message directly to a person that threatens physical injury or property damage, with intent to frighten, intimidate, threaten, abuse, or harass. The remaining five modes of commission are as follows:

(b) Sending a threatening message through a computerized system with a reasonable expectation that the person will receive it (even if it is not sent directly to that person), with intent to frighten, intimidate, threaten, abuse, or harass.

(c) Sending a message directly to a person that contains obscene, lewd, or profane language, or suggests a lewd or lascivious act, with intent to frighten, intimidate, threaten, or abuse. Wis JI–Criminal 1909 is drafted to address this offense.

(d) Sending a message containing obscene, lewd, or profane language, or suggesting a lewd or lascivious act, through a computerized system with a reasonable expectation that the person will receive it, rather than by direct transmission only.

(e) Sending a message directly to a person while concealing or attempting to conceal the sender's identity, with intent to frighten, intimidate, threaten, or abuse.

(f) Sending a message through a computerized system with a reasonable expectation that the person will receive it while concealing or attempting to conceal the sender's identity, with intent to frighten, intimidate, threaten, or abuse.

The Committee has chosen to include only Wis JI–Criminal 1908 and Wis JI–Criminal 1909 in the official jury instructions set, as the modes of commission set out in Wis. Stat. § 947.0125(2)(a) and (c) are the ones most likely to be prosecuted. However, this instruction may be modified to accommodate the other computer communication offenses provided in Wis. Stat. § 947.0125(2).

For offenses under Wis. Stat. § 947.0125(2)(b), (d) the first two elements of this instruction remain the same. For offenses under subsecs. (2)(e) and (2)(f), Element 2 must be modified to delete "(harass)" from the list of intents, as "harass" is not an enumerated intent under those subsections. The third element, however, must be replaced as set forth below and, depending on the subsection charged, may need to be followed by a fourth element.

Wis. Stat. § 947.0125(2)(b)

3. In the message, the defendant threatened to inflict injury or physical harm to any person or to the property of any person.

4. The defendant sent the message with the reasonable expectation that (name of victim) would receive it.

Wis. Stat. § 947.0125(2)(d)

3. The message (contained obscene, lewd or profane language) (suggested a lewd or lascivious act).

4. The defendant sent the message with the reasonable expectation that (name of victim) would receive it.

Wis. Stat. § 947.0125(2)(e)

Note: Element 2 must be modified as follows to omit "harass."

3. In sending the message, the defendant intentionally prevented or attempted to prevent the disclosure of (his) (her) identity.

Wis. Stat. § 947.0125(2)(f)

Note: Element 2 must be modified as follows to omit "harass."

3. The defendant sent the message with the reasonable expectation that (name of victim) would receive it.

4. In sending the message, the defendant intentionally prevented or attempted to prevent the disclosure of (his) (her) identity.

1922 INTENTIONALLY SENDING A FALSE COMMUNICATION TO 911 — § 256.35(10)(a)

Statutory Definition of the Crime

Section 256.35(10)(a) of the Wisconsin Statutes is violated by a person who intentionally (dials) (sends a text message to) the telephone number "911" to report an emergency, knowing that the fact situation which he or she reports does not exist.

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 Charged Crime That the State Must Prove

1. The defendant intentionally (dialed) (sent a text message to) the telephone number "911" to report an emergency.

   The term "intentionally," as used here, means that the defendant either acted with the purpose of (dialing) (sending a text message to) the number 911 to report an emergency, or was aware that (his) (her) conduct was practically certain to cause that result.[1]

2. At the time the defendant (dialed) (sent the text message to) 911, the defendant knew that the emergency fact situation reported did not exist.[2]

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.[3]

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 1922 was approved by the Committee in June 2026.

This instruction is drafted for violations of § 256.35(10)(a), as amended by 2025 Wisconsin Act 245.

Section 256.35(10)(a) establishes two offense levels. Any person shall be fined not less than $100 nor more than $600 or imprisoned not more than 90 days or both for the first offense and is guilty of a Class H felony for any other offense committed within 4 years after the first offense.

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1. The knowledge requirement is based on § 939.23(3) which provides that the use of "intentionally" in a criminal statute requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally.'"

2. The phrase "does not exist" tracks the statutory language of § 256.35(10)(a): "knowing that the fact situation which he or she reports does not exist." The element as drafted requires the jury to find that the defendant had actual knowledge of the falsity of the reported emergency, distinguishing this offense from a negligent or mistaken call.

3. 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.

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1980 MISTREATING AN ANIMAL — §§ 951.02 and 951.18(1)

Statutory Definition of the Crime

Mistreating an animal, as defined in §§ 951.02 and 951.18 of the Criminal Code of Wisconsin, is committed by one who (intentionally) (negligently)[1] treats any animal in a cruel manner.

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 treated an animal[2] in a cruel manner.

   "Cruel" means causing (unnecessary and excessive pain or suffering) (unjustifiable injury or death).[3]

2. The defendant (intentionally) (negligently) treated an animal in a cruel manner.

   ["Intentionally" requires that the defendant acted with the mental purpose to treat the animal in a cruel manner or was aware that the conduct was practically certain to cause that result.][4]

   ["Negligently" requires that the defendant's conduct amounted to "criminal negligence."[5] "Criminal negligence" means:

   - the conduct 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) conduct created the unreasonable and substantial risk of death or great bodily harm.]

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 ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED[6]

If you find the defendant intentionally treated an animal in a cruel manner, you must answer the following question:

["Did treating the animal in a cruel manner result in the (mutilation) (disfigurement) (death) of the animal?"][7]

["Did the defendant cause injury to the animal and know that the animal was used by a law enforcement agency to perform agency functions or duties?"][8]

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the answer to the question is "yes."

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

COMMENT

Wis JI–Criminal 1980 was originally published in 1984 and revised in 1986, 1989, 1995, 2005, and 2013. The 2005 revision adopted a new format and changed the definition of "negligently." The 2013 revision updated the comment and footnote 2. The 2013 revision added to footnote 4. This revision was approved by the Committee in April 2026; it added to the comment.

1987 Wisconsin Act 332 renumbered the chapter containing crimes against animals from Chapter 948 to Chapter 951. The effective date of the change was July 1, 1989.

2011 Wisconsin Act 32 made changes in Chapter 951 relating to its application to scientific research. § 951.02 Mistreating Animals was amended to read as follows:

No person may treat any animal, whether belonging to the person or another, in a cruel manner.

This section does not prohibit normal and accepted veterinary practices.

And, § 951.015(3) was created to provide that the chapter does not apply to research pursuant to a procedure approved by an educational or research institution.

Simple violations of the statutes relating to cruelty to animals are Class C forfeitures; a person who violates any of those provisions within 3 years after a humane officer issues an abatement order under § 173.11 is subject to a Class A forfeiture. When a person "intentionally or negligently violates" the statutes, the offense is a Class A misdemeanor. See § 951.18(1). Section 951.18(1) further provides for a felony penalty in two circumstances: "Any person who intentionally violates s. 951.02, resulting in the mutilation, disfigurement, or death of an animal, is guilty of a Class I felony"; and, "Any person who intentionally violates § 951.02 or 951.06, knowing that the animal that is the victim is used by a law enforcement agency to perform agency functions or duties and causing injury to the animal, is guilty of a Class I felony."

If the felony offense is charged, the Committee suggests adding a special question to address the penalty-increasing fact.

Chapter 951 applies to individuals who used snowmobiles to run down and kill deer. Criminal charges are not superceded by regulations relating to hunting in Chapter 29, Wisconsin Statutes. State v. Kuenzi, 2011 WI App 30, ¶3, 332 Wis. 2d 299, 796 N.W.2d 222.

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1. "Intentionally" or "negligently" violating the statutes relating to cruelty to animals makes the conduct criminal (see comment, supra). The instruction is drafted on the premise that one of the alternatives will be selected.

2. The following definition is provided in § 951.01(1):

(1) "Animal" includes every living:
(a) Warm-blooded creature, except a human being;
(b) Reptile; or
(c) Amphibian.

"The definition of 'animal' is based on § 346.20, Minn. Stats. Anno. (1971). The term includes not only animals strictly so called but birds and other living warm-blooded creatures except people." Legislative Council Note to 1973 Senate Bill 16.

The definition of "animal" includes non-captive wild animals, such as deer. State v. Kuenzi, 2011 WI App 30, ¶17, 332 Wis. 2d 299, 796 N.W.2d 222.

3. This definition is provided in § 951.01(2).

4. See § 939.23(3) and Wis JI–Criminal 923A and 923B. A charge of intentionally mistreating an animal, resulting in death, under §§ 951.02 and 951.18(1) requires proof of intent to treat the animal in a cruel manner; the state does not have to prove the defendant intended to cause the animal's death. State v. Klingelhoets, 2012 WI App 55, 341 Wis. 2d 432, 814 N.W.2d 885.

5. The Committee concluded that "criminal negligence" applies to this offense because § 939.25(2) states: "If criminal negligence is an element of a crime in chs. 939 to 951 . . . the negligence is indicated by the term 'negligent' or 'negligently.'" This offense is defined in §§ 951.02 and 951.18 and the latter uses the term "negligently."

If reference to ordinary negligence is believed to be helpful in defining "criminal negligence," see Wis JI–Criminal 925.

6. Intentionally treating an animal in a cruel manner becomes a Class I felony in two situations. See footnotes 7 and 8, below. The Committee recommends that the penalty increasing fact be submitted to the jury in the form of a special question. The following form is suggested for the verdict; one of the bracketed questions should be included:

> We, the jury, find the defendant guilty of mistreating an animal, under Wis. Stat. § 951.02, at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> ["Did treating the animal in a cruel manner result in the (mutilation) (disfigurement) (death) of the animal?"]
>
> ["Did the defendant cause injury to the animal and know that the animal was used by a law enforcement agency to perform agency functions or duties?"]

7. Section 951.18(1) provides: "Any person who intentionally violates s. 951.02, resulting in the mutilation, disfigurement or death of an animal, is guilty of a Class I felony."

8. Section 951.18(1) provides: "Any person who intentionally violates s. 951.02 or 951.06, knowing that the animal that is the victim is used by a law enforcement agency to perform agency functions or duties and causing injury to the animal, is guilty of a Class I felony."

1984 FAILING TO PROVIDE AN ANIMAL WITH PROPER SHELTER — §§ 951.14 and 951.18(1)

Statutory Definition of the Crime

Failing to provide an animal with proper shelter, as defined in §§ 951.14 and 951.18 of the Criminal Code of Wisconsin, is committed by one who owns or is responsible for confining or impounding an animal and (intentionally) (negligently)[1] fails to supply the animal with proper shelter.

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 (owned) (was responsible for confining or impounding) an animal.[2]
2. The defendant failed to provide proper shelter for the animal.

   Shelter is proper when it is sufficient to maintain the animal[3] in good health.[4]
3. The defendant (intentionally) (negligently) failed to supply the animal with proper shelter.

   ["Intentionally" requires that the defendant acted with the mental purpose to fail to supply the animal with proper shelter or was aware that the conduct was practically certain to cause that result.][5]

["Negligently" requires that the defendant's conduct amounted to "criminal negligence."[6] "Criminal negligence" means:

- the conduct 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) conduct created the unreasonable and substantial risk of death or great bodily harm.]

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 1984 was originally published in 1984 and revised in 1989, 1995, and 2005. This revision was approved by the Committee in April 2026; it added to the comment.

1987 Wisconsin Act 332 renumbered the chapter containing crimes against animals from Chapter 948 to Chapter 951. The effective date of the change was July 1, 1989.

Simple violations of the statutes relating to cruelty to animals are punished as Class C forfeitures; a person who violates any of those provisions within 3 years after a humane officer issues an abatement order under § 173.11 is subject to a Class A forfeiture. When a person "intentionally or negligently violates" the statutes, the punishment is that of a Class A misdemeanor. See § 951.18(1). Section 951.18(1) further provides for a felony penalty in certain circumstances that do not apply to § 951.14, the statute addressed by this instruction.

The terms "indoor" and "outdoor" as used in § 951.14 are not defined by statute or by Wisconsin case law. Additionally, courts may encounter hybrid situations, such as an animal inside a motor vehicle, which does not fall squarely within either category as those terms are ordinarily understood. In such a situation,

the Committee suggests that the court apply the standards of § 951.14 according to their plain meaning and in light of the specific conditions in which the animal was confined.

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1. "Intentionally" or "negligently" violating the statutes relating to cruelty to animals makes the conduct criminal (see Comment, supra). The instruction is drafted on the premise that one of the alternatives will be selected.

2. The following definition is provided in § 951.01(1):

(1) "Animal" includes every living:
(a) Warm-blooded creature, except a human being;
(b) Reptile; or
(c) Amphibian.

"The definition of 'animal' is based on § 346.20, Minn. Stats. Anno. (1971). The term includes not only animals strictly so-called but birds and other living warm-blooded creatures except people." Legislative Council Note to 1973 Senate Bill 16.

3. If the animal involved is a farm animal, § 951.14 does not impose shelter requirements or standards more stringent than normally accepted husbandry practices in the particular county where the animal or shelter is located.

§ 951.01(3) defines "Farm animal" as any warm-blooded animal normally raised on farms in the United States and used or intended for use as food or fiber.

4. If more detailed explanation of "proper shelter" is required, see subsecs. (1) through (4) of sec. 951.14, which address indoor standards, outdoor standards, space standards, and sanitation standards, respectively.

5. See § 939.23(3) and Wis JI–Criminal 923A and 923B.

6. The Committee concluded that "criminal negligence" applies to this offense because § 939.25(2) states: "If criminal negligence is an element of a crime in chs. 939 to 951 . . . the negligence is indicated by the term 'negligent' or 'negligently.'" This offense is defined in §§ 951.14 and 951.18 and the latter uses the term "negligently."

If reference to ordinary negligence is believed to be helpful in defining "criminal negligence," see Wis JI–Criminal 925.

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2101A SEXUAL CONTACT — § 948.01(5)

INSERT THE ALTERNATIVE(S) SUPPORTED BY THE EVIDENCE INTO THE INSTRUCTION ON THE SEXUAL ASSAULT OFFENSE.[1]

Meaning of "Sexual Contact"

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF THE INTIMATE PARTS OF THE VICTIM:

[Sexual contact is an intentional touching of the (name intimate part)[2] of (name of victim) (by the defendant) (by another person upon the defendant's instruction)[3]. The touching may be of the (name intimate part) directly, or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching.

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)][4]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING BY THE VICTIM OF THE INTIMATE PARTS OF THE DEFENDANT OR OF ANOTHER PERSON:

[Sexual contact is a touching by (name of victim) of the (name intimate part)[5] (of the defendant) (of another person upon the defendant's instruction),[6] if the defendant intentionally caused or allowed[7] (name of victim) to do that touching. The touching may be of the (name intimate part) directly, or it may be through the clothing.

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)][8]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING BY THE VICTIM OF THE EJACULATE, URINE, OR FECES OF ANY PERSON:

[Sexual contact is a touching[9] by (name of victim) of the ejaculate, urine, or feces of any person upon (the intentional instructions of the defendant) (the use or threat of force or violence by the defendant) (an intentional act of the defendant).[10]

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[11]]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL EJACULATION OR INTENTIONAL EMISSION OF URINE OR FECES UPON THE COMPLAINANT:

[Sexual contact is intentional penile ejaculation of ejaculate or intentional emission of urine or feces (by the defendant) (by another person upon the defendant's instruction)[12] upon any part of the body clothed or unclothed of (name of victim).[13]

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[14]]

FOR SEXUAL CONTACT INVOLVING INTENTIONALLY CAUSING THE VICTIM TO EJACULATE OR EMIT URINE OR FECES ON ANY PART OF THE DEFENDANT'S BODY:

[Sexual contact is ejaculation or emission of urine or feces by (name of victim) on any part of the defendant's body, clothed or unclothed, which the defendant intentionally causes.[15]

Sexual contact also requires that the defendant acted with intent to (become sexually

aroused or gratified.) (sexually degrade or humiliate (name of victim).)[16]]

GIVE THE FOLLOWING IN ALL CASES.

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 bearing upon intent.

CONTINUE WITH THE INSTRUCTION FOR THE SEXUAL ASSAULT OF A CHILD OFFENSE.

COMMENT

Wis JI–Criminal 2101A was originally published in 1996 and revised in 1999, 2001, 2002, 2003, 2007, and 7/2024. The 2007 revision reflected changes made by 2005 Wisconsin Acts 273 and 435. The 7/2024 revision reflected changes made pursuant to 2023 Wisconsin Act 61 [effective date: December 8, 2023]. This revision was approved by the Committee in June 2026. It amended the direction concerning the alternative definitions of sexual contact and added to the comment.

Unanimity

The instruction was amended in June 2026 to direct the court to "insert the alternative(s) supported by the evidence" rather than to "select one" of the alternative definitions of sexual contact. The former direction rested on the assumption that only one form of sexual contact would be at issue in a given case. That assumption does not hold in all cases, particularly those involving repeated sexual assault of a child under § 948.025, where the evidence may support multiple forms of sexual contact, such as both intentional touching of the complainant by the defendant and intentional touching of the defendant by the complainant.

In those cases, limiting the instruction to a single alternative may not accurately describe the conduct the jury is permitted to consider. The revised language allows the court to tailor the instruction to the proof actually presented, whether that includes one alternative or several. This approach is consistent with State v. Coughlin, 2022 WI 43, ¶¶18 to 19, 28 to 33, 402 Wis. 2d 107, 975 N.W.2d 179, where the supreme court evaluated the sufficiency of the evidence against jury instructions that defined sexual contact to include both the defendant's intentional touching of the victims and the victims' intentional touching of the defendant if the defendant intentionally caused or allowed that touching. The court noted that both forms of sexual contact were supported by the evidence and reflected in the State's theory at trial. Id., ¶¶31 to 32.

Submitting more than one statutory alternative of "sexual contact" raises a potential jury unanimity question. The general rule is that unanimity is required as to the ultimate issue of guilt and as to each essential element of the offense, but not necessarily as to the alternative means or modes by which a single element may be satisfied. See State v. Lomagro, 113 Wis. 2d 582, 591 to 95, 335 N.W.2d 583 (1983); State v. Derango, 2000 WI 89, ¶¶13 to 25, 236 Wis. 2d 721, 613 N.W.2d 833. When a statute creates one offense with alternative modes of commission, unanimity on the particular alternative is not required unless the alternatives are conceptually distinct or treating them as alternative means would be irrational or fundamentally unfair. See Derango, 2000 WI 89, ¶¶22 to 25.

In Lomagro, the court held that multiple forms of sexual intercourse were conceptually similar where they occurred during one continuous criminal episode and were grouped together under the statutory definition of "sexual intercourse." 113 Wis. 2d at 593 to 95, 598. Because § 948.01(5) similarly groups multiple forms of intentional touching under the single definition of "sexual contact," Lomagro and Derango support submitting more than one statutory alternative of sexual contact with the standard unanimity instruction when each alternative is supported by the evidence and reflects the State's theory at trial. In that circumstance, the jury need not unanimously agree on the particular statutory form of sexual contact, so long as it unanimously agrees that the State proved sexual contact as defined by § 948.01(5).

This instruction provides definitions of "sexual contact" that are to be integrated into the instruction for sexual assault of a child offenses involving sexual contact as appropriate to the facts of the case. The material provided here was formerly included in the text of each offense instruction, dividing the sexual contact definition into two separate elements: one involving the type of touching and the other involving the purpose of the touching. 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 this separate instruction with all the alternatives for both the type of touching and the purpose of the touching. The Committee believes that this will be more convenient for the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

A similar instruction is provided at Wis JI-Criminal 1200A for offenses in violation of § 940.225. This instruction differs in several ways due to differences between the statutory definition of "sexual contact" provided in § 948.01(5), addressed in this instruction, and the definition of the same term provided in § 940.225(5)(b), addressed in Wis JI-Criminal 1200A. This instruction should be used only for violations of § 948.02.

The following definition of "sexual contact" is provided in § 948.01(5), as amended by 2023 Wisconsin Act 61 [effective date: December 8, 2023]:

(5) "Sexual contact" means any of the following:

(a) Any of the following types of intentional touching whether direct or through clothing if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant:

1. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.

2. Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts

of another person.

3. Touching by the complainant of the ejaculate, urine, or feces of any person upon the intentional instructions of the defendant, upon the use or threat of force or violence by the defendant, or upon an intentional act of the defendant.

(b) Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

(c) For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

For a comprehensive comparison of this definition with § 939.22(34) (addressed in Wis JI–Criminal 934) and § 940.225(5)(b) (addressed in Wis JI–Criminal 1200A), including guidance on which definition applies to specific charging statutes, see Wis JI–Criminal 935 (Law Note: The Definition of "Sexual Contact").

1. The definition of "sexual contact" in § 948.01(5) identifies three types of intentional touchings and two alternatives involving intentional emission of bodily substances. The instruction provides separate alternatives for each alternative, and the court should include the alternative or alternatives supported by the evidence in the instruction for the sexual assault of a child offense.

Each alternative includes the second part of the statutory sexual contact definition: that the contact was for a sexual purpose. See note 4, below.

2. Section 939.22(19) defines "intimate parts": "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved in the sexual contact.

In State v. Morse, 126 Wis. 2d 1, 374 N.W.2d 388 (Ct. App. 1985), the court of appeals held that a trial court did not improperly broaden the scope of the sexual contact definition in § 939.22(19) by defining "intimate part" to include "the vaginal area."

A child's testimony referring to her "private," her "potty place," and "between her legs" was sufficient to support a jury finding that the defendant touched her "groin, vagina, or pubic mound." State v. Brunette, 220 Wis. 2d 431, 453-54, 583 N.W.2d 174 (Ct. App. 1998).

"[T]he plain language of Wis. Stat. § 939.22(19) is meant to include a female and a male breast because each is 'the breast . . . of a human being' and thereby the touching of a [15 year old] boy's breast constitutes 'sexual contact' within the meaning of Wis. Stat. § 948.02(2)." State v. Forster, 2003 WI App 29, 260 Wis. 2d 149, 659 N.W.2d 144.

3. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

4. Each alternative definition includes the requirement that the contact be for one of two prohibited purposes. Earlier versions of the instructions included the purpose as a separate element, but the Committee concluded that it was preferable to deal with it as a second part of the sexual contact definition. The Committee also concluded that including purpose as part of each alternative will reduce the possibility that it would be inadvertently overlooked. Failure to include the purpose of the contact as a part of the jury instruction is reversible error. State v. Krueger, 2001 WI App 14, 240 Wis. 2d 644, 623 N.W.2d 211. Likewise, failure to include reference to purpose when accepting a guilty plea may be grounds for withdrawal of the plea. State v. Bollig, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199; State v. Jipson, 2003 WI App 222, 267 Wis. 2d 467, 671 N.W.2d 18; and, State v. Nichelson, 220 Wis. 2d 214, 582 N.W.2d 460 (1998).

The two purposes set forth as alternatives are the only two contained in the definition of "sexual contact" provided in § 948.01(5). The definition of "sexual contact" in § 940.225(5)(b) includes touching which "contains the elements of actual or attempted battery . . ." The Committee has interpreted this as a "purpose to cause bodily harm" but notes that this purpose does not apply to offenses under § 948.02.

The instruction phrases the two alternatives as requiring that the defendant acted "with intent to" achieve one of the prohibited results. The statute refers to acting with "the purpose of . . ." No change in meaning is intended.

5. See note 2, supra.

6. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

7. The instruction refers to the touching of the defendant by the complainant as a touching that the defendant "caused or allowed" the complainant to do. The statute does not expressly provide for the "causing" alternative, but the Committee concluded that the requirement is implicit. The "or allowed" alternative was added after the Wisconsin Court of Appeals approved an instruction to which it had been added. State v. Traylor, 170 Wis. 2d 393, 489 N.W.2d 626 (Ct. App. 1992). In Traylor, the court rejected the defendant's argument that sexual contact requires an affirmative act and that mere passivity is not "intentional touching" as contemplated by the statute:

> . . . the defendant does not have to initiate sexual contact with a child. If the defendant allows the contact, that is sufficient to constitute intentional touching because it indicates that the defendant had the requisite purpose of causing sexual arousal or gratification. 170 Wis. 2d 393, 404.

In a footnote, the court emphasized that there must be evidence that a defendant allowed the touching:

> The mere fact of a child's touching an adult does not raise the inference [that the defendant sanctioned the touching for the purpose of sexual arousal or gratification]. There might indeed be evidence in a specific case that the adult called an immediate halt to this activity. Absent other evidence that the event was sanctioned by the adult, the mere fact that a touching took place is not the same as "allowing" it. 170 Wis. 2d 393, 404, note 2.

Applied literally to a case where the victim is caused to touch the defendant, § 948.01(5)(a) requires an "intentional touching by the complainant . . . of the . . . defendants' intimate parts . . ." The Committee

concluded that the Traylor decision interpreted this definition in a manner that focused on the defendant's, rather than the victim's, intent. Thus, the instruction refers simply to "a touching" by the victim that the defendant "intentionally caused or allowed."

8. See note 4, supra.

9. See note 7, supra.

10. This is the type of "sexual contact" defined in sub. (5)(a)3. of § 948.01. It was created by 2023 Wisconsin Act 61, which first applies to offenses committed on December 8, 2023.

11. See note 4, supra.

12. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

13. This is the type of "sexual contact" defined in sub. (5)(b) of § 948.01. It was created by 1995 Wisconsin Act 69, which first applies to offenses committed on December 2, 1995.

14. See note 4, supra.

15. This is the type of "sexual contact" defined in sub. (5)(c) of § 948.01. It was created by 2005 Wisconsin Act 273, which first applies to offenses committed on April 20, 2006.

16. See notes 4 and 5, supra.

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2107 REPEATED ACTS OF SEXUAL ASSAULT OF A CHILD — § 948.025

Statutory Definition of the Crime

Section 948.025 of the Criminal Code of Wisconsin is violated by one who, within a specified period of time,[1] commits three or more sexual assaults of the same child.

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 committed at least three sexual assaults of (name of victim).

   In this case, the defendant is alleged to have committed sexual assault of a child by violating (identify the subsection(s) of § 948.02 that defines the sexual assault(s) alleged).[2]

   Section _____ requires the State to prove that:[3]

   LIST THE ELEMENTS OF THE INTENDED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[4]

2. At least three sexual assaults took place within a specified period of time. The specified period of time is from (beginning date of specified period) through (ending date of specified period).[5]

GIVE THE FOLLOWING ONLY IF MORE THAN THREE ACTS HAVE BEEN ALLEGED.

[More Than Three Acts Alleged]

[Before you may find the defendant guilty, you must unanimously agree that at least three sexual assaults occurred between (beginning date of specified period) and (ending date of specified period), but you need not agree on which acts constitute the required three.][6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant committed three violations of (specify statute) within the specified period of time, you should find the defendant guilty.

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

COMMENT

Wis JI–Criminal 2107 was originally published in 1994 and revised in 1996, 2002, 2003, 2008, 2018, and 2019. This revision was approved by the Committee in June 2026; it updated the comment.

This instruction is for a violation of § 948.025(1), which was created by 1993 Wisconsin Act 227 [effective date: April 23, 1994]. Act 227 provided that "[t]his act first applies to offenses committed on the effective date of this SECTION." 1993 Wisconsin Act 227, Section 44, Initial Applicability. Thus it appears that all of the acts must have occurred after April 23, 1994. The statute was amended by 2007 Wisconsin Act 80 [effective date: March 27, 2008].

NOTE: This instruction is drafted for a case where the predicate acts alleged are all violations of the same subsection of § 948.02. [See Wis JI–Criminal 2107 EXAMPLE for a case where all predicates are violations of § 948.02(1)(b).] If the charge alleges violations of different subsections of § 948.02, considerable complexity could result and great care should be taken in drafting the instruction. Issues of concern include:

- slight variations in the elements of the predicate crimes, as with, for example, the age limits;
- determining whether less serious violations of § 948.025 are lesser included offenses – there is no special rule for § 948.025 in § 939.66, so the strict compare-the-statutory elements test would apply;
- submitting individual predicate offenses as lesser included offenses;
- making a proper statement regarding jury agreement – see § 948.025(2); and,
- potential confusion if evidence of other similar acts are submitted under § 904.04(2).

The 2008 revision of Wis JI-Criminal 2107 reflected the penalty changes made by 2007 Wisconsin Act 80. There are five possible penalties for convictions under § 948.025:

- § 948.025(1)(a) requires at least three violations of § 948.02(1)(am) and is a Class A felony with a mandatory minimum of 25 years confinement before extended supervision eligibility – see § 939.616(1g).

- § 948.025(1)(b) requires at least three violations of § 948.02(1)(am), (b), or (c) and is a Class B felony with a mandatory minimum term of confinement of 25 years – see § 939.616(1r).

- § 948.025(1)(c) requires at least three violations of § 948.02(1)(am), (b), (c), or (d) and is a Class B felony with a mandatory minimum term of confinement of 5 years – see § 939.616(2).

- § 948.025(1)(d) requires at least three violations of § 948.02(1) and is a Class B felony with no mandatory minimum term of confinement.

- § 948.025(1)(e) requires at least three violations of § 948.02(1) or (2) and is a Class C felony with no mandatory minimum term of confinement.

Penalties and elements for offenses defined in § 948.02 are outlined in Wis JI–Criminal 2102 INTRODUCTORY COMMENT: § 948.02 SEXUAL ASSAULT OF A CHILD: AS AMENDED BY 2007 WISCONSIN ACT 80 AND 2013 WISCONSIN ACT 167.

Section 939.635 provides that the maximum penalty for violations of § 948.025 "may be increased by not more than 5 years" if the offense was "against a child for whom the person was providing child care for compensation." See Wis JI-Criminal 2115 for a special question that should be added to the instruction when that penalty-increasing fact is charged.

State v. Colton M., 2015 WI App 94, 366 Wis. 2d 119, 875 N.W.2d 642, concerned a claim by the 15-year-old defendant that applying § 948.025(1)(e) to him violated his due process and equal protection rights because statutes defined him as both a victim and an offender. The court concluded that "§ 948.025(1)(e), as applied to Colton, is not unconstitutionally vague beyond a reasonable doubt and, therefore, his delinquency adjudication under that statute does not violate his due process rights. We also conclude the prosecutor's decision to charge Colton and not D. [the underage victim] was not made on a discriminatory basis and, therefore, did not violate Colton's right to equal protection." 2015 WI App 94, ¶6.

Section 948.025(3) prohibits separate charges for sexual assaults that are predicates for the repeated sexual assault charge. See State v. Cooper, 2003 WI App 227, 267 Wis. 2d 886, 672 N.W.2d 118. Separate

charges for offenses that are not predicates for the repeated sexual assault charge are permissible. State v. Nommensen, 2007 WI App 224, 305 Wis. 2d 695, 741 N.W.2d 481.

Where a charge under § 948.025 is based on predicate acts involving sexual contact, the evidence may support more than one statutory alternative within the definition of "sexual contact" under § 948.01(5). For example, the evidence may show both intentional touching of the complainant by the defendant and intentional touching of the defendant by the complainant. In that circumstance, the court should include each alternative form of sexual contact supported by the evidence in the instruction. See Wis JI–Criminal 2101A.

This approach is consistent with State v. Coughlin, 2022 WI 43, 402 Wis. 2d 107, 975 N.W.2d 179, although Coughlin addressed sufficiency of the evidence rather than jury unanimity. In Coughlin, the jury instructions defined "sexual contact" to include both the defendant's intentional touching of the victims and the victims' intentional touching of the defendant if the defendant intentionally caused or allowed that touching. Id., ¶¶18 to 19. The supreme court evaluated the sufficiency of the evidence against the jury instructions, explaining that the instructions conformed to the statutory definition and reflected the theory of the crime presented at trial. Id., ¶¶28 to 33. The court specifically noted that the victims testified to both forms of sexual contact and that the State explicitly relied on both forms in closing argument. Id., ¶¶31 to 32.

Unanimity

Submitting more than one statutory alternative of "sexual contact" on a single predicate count raises a question of jury unanimity. The general rule is that unanimity is required only as to the ultimate issue of guilt, not as to which of several alternative means the defendant used to satisfy an element of the offense, provided the alternatives are "conceptually similar." See State v. Lomagro, 113 Wis. 2d 582, 591–93, 335 N.W.2d 583 (1983); State v. Derango, 2000 WI 89, ¶¶13–15, 236 Wis. 2d 721, 613 N.W.2d 833. In Lomagro, the court held that where the legislature has grouped multiple forms of conduct together under a single statutory definition, the legislature has effectively determined that those forms are conceptually similar, and the standard unanimity instruction is sufficient — the jury need not agree on which specific act occurred so long as it unanimously agrees that the defendant committed an act falling within the definition. 113 Wis. 2d at 593–95. Because § 948.01(5) similarly groups together multiple forms of "sexual contact" under a single statutory definition, Lomagro and Derango support submitting more than one statutory alternative of sexual contact with the standard unanimity instruction when each alternative is supported by the evidence and reflects the State's theory at trial.

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1. The statute refers to 3 or more violations "within a specified period of time." The Committee concluded that the intent of the statute must be that the prosecutor will specify the applicable period in the charge. That "specified period" should be carried over to the jury instruction. See note 5, below.

2. This instruction is drafted for a case where the predicate acts alleged are all violations of the same subsection of § 948.02. Refer to the standard instruction for that subsection and insert it here, using the bullet points in place of numbers for each element. For an illustration, see Wis JI–Criminal 2107 EXAMPLE.

3. To avoid a second reference to "elements" in defining the predicate crimes, the Committee decided that a bulleted list should be used instead of a numerical one. The instruction introduces the list

with ". . . requires the State to prove that:. ." to allow simply plugging in the regular statement of the element without change, using a bullet point instead of a number. See Wis JI–Criminal 2107 EXAMPLE.

4. The Committee recommends that a complete listing of the elements of the "predicate crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis. 2d 664, 660 N.W.2d 698], and the intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis. 2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

5. Here identify the beginning and ending dates of the period specified by the prosecution. For example: "The specified period of time is from January 1, 2008 through June 16, 2008."

In State v. Schultz, 2019 WI App 3, 385 Wis. 2d 494, 922 N.W.2d 866, the defendant was tried and acquitted on a charge of repeated sexual assault of child. The specified time period was identified as "late summer or early fall" of 2012. After the acquittal, he was charged with a single act of child sexual assault against the same victim alleged to have occurred on or about Oct. 19, 2012. This was based on a paternity test showing he was the father of a child conceived at that time, and Schultz argued that principles of double jeopardy should bar the charge for child sexual assault. The issue for the court of appeals was whether Oct. 19 was included in the specified time period of "late summer or early fall."

The court concluded that "early fall" was ambiguous and that it was "appropriate to look at the entire record to clarify the meaning of the phrase ..." ¶25. The proper test "is to consider how a reasonable person familiar with the facts and circumstances of a particular case would understand that charging language." ¶30. The court concluded that the reasonable person "would not consider the phrase 'early fall of 2012' to include October 19." ¶34.

The court added:

> We thus emphasize an important point, lest our decision be read to encourage the use of ambiguous charging language to manipulate double jeopardy protections in future prosecutions: well-established law in Wisconsin already provides a remedy for a defendant facing an ambiguous charge. Specifically, a defendant may move for the dismissal – or, in the alternative, move to make more definite and certain the allegations against him or her – of charges based on allegedly overbroad or ambiguous timeframes in a charging document.
> ¶35.

6. This statement is based on § 948.025(2). It is sufficient for cases where all the alleged predicate violations are of the same subsection of § 948.02. If the alleged predicate violations are of different subsections of § 948.02, a more detailed statement is required. See subs. (b) and (c) of § 948.025.

The rules in subsec. (2) of § 948.025 do "not violate due process or the right to a unanimous verdict." State v. Johnson, 2001 WI 52, ¶28, 243 Wis. 2d 365, 627 N.W.2d 455.

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2128 GROOMING A CHILD FOR SEXUAL ACTIVITY — § 948.072

Statutory Definition of the Crime

Section 948.072 is violated by a person who engages in a course of conduct, pattern of behavior, or series of acts with the intention to condition, seduce, solicit, lure, or entice a child (for the purpose of engaging in sexual intercourse or sexual contact) (for the purpose of producing, distributing, or possessing depictions of the child engaged in sexually explicit conduct).

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 engaged in a course of conduct[1], pattern of behavior, or series of acts.[2]

   A "course of conduct, pattern of behavior, or series of acts" may include, but is not limited to, (insert any of the appropriate forms of conduct included in § 948.072(2)(a)–(f) that are supported by the evidence).[3]

2. The defendant committed the course of conduct, pattern of behavior, or series of acts with the intention to condition, seduce, solicit, lure, or entice a child.

   "Child" means a person who has not attained the age of 18 years.[4]

3. The defendant engaged in the course of conduct, pattern of behavior, or series of acts for the purpose of (engaging in sexual intercourse or sexual contact with a child) (producing, distributing, or possessing depictions of the child engaged in sexually explicit conduct).

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

"Sexually explicit conduct" means actual or simulated sexual intercourse, bestiality, masturbation, sexual sadism or sexual masochistic abuse, or lewd exhibition of intimate parts.[5]

Consent

Consent is not an issue or a defense in an alleged violation. You should not consider whether the child consented to any of the defendant's conduct.[6]

Knowledge of or Mistake as to Child's Age

Knowledge of (name of victim)'s age is not required,[7] and mistake regarding (name of victim)'s age is not a defense.[8]

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 on 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 [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 AN AGGRAVATED FELONY OFFENSE UNDER § 948.072(3)(b), (c), OR (d) IS CHARGED[10]

If you find the defendant guilty, you must answer the following question[11]:

[FOR CHARGES UNDER SUB. (3)(b)]

[Was the defendant in a position of trust or authority over (name of victim)?

A "position of trust or authority over the child" means a relationship between a person and a child in which the person has regular and direct contact with the child and power or control over the child's welfare, education, or other factors important to the child.[12]

If you are satisfied beyond a reasonable doubt that the defendant was in a position of trust or authority over the child, you should answer this question Yes.

If you are not so satisfied, you must answer this question No.]

[FOR CHARGES UNDER SUB. (3)(c)]

[Did (name of victim) have a developmental, cognitive, or physical disability that was known, or should have been known, by the defendant?

If you are satisfied beyond a reasonable doubt that the child had a developmental, cognitive, or physical disability that was known, or should have been known, by the defendant, you should answer this question Yes.

If you are not so satisfied, you must answer this question No.]

[FOR CHARGES UNDER SUB. (3)(d)]

[Did the violation involve two or more children?

If you are satisfied beyond a reasonable doubt that the violation involved two or more children, you should answer this question Yes.

If you are not so satisfied, you must answer this question No.]

COMMENT

Wis JI–Criminal 2128 was approved by the Committee in June 2026.

The instruction was drafted to address the crime of grooming a child for sexual activity under § 948.072, Stats., as created by 2025 Wisconsin Act 88 [effective date: March 8, 2026].

Exception to the criminal penalty. Per sub. (4), the felony penalties in sub. (3) do not apply if the following three conditions are met: (1) the defendant has not attained the age of 19; (2) the child is not more than 4 years younger than the defendant (unless the violation involves force); and (3) the conduct did not involve coercion, or abuse of a position of trust or authority over the child.

Because this exception encompasses every felony classification under the statute, a defendant who qualifies under sub. (4) is not subject to criminal liability under § 948.072. In effect, this "Romeo and Juliet" provision completely bars prosecution of close-in-age defendants, so long as the conduct was not coercive and did not involve an abuse of trust.

The jury instructions typically treat these exceptions like an affirmative defense: the State need not anticipate them in the charging document and they are not issues in the case until supported by "some evidence." If so supported, the state must prove the inapplicability of the exception beyond a reasonable

doubt. See Wis JI-Criminal 700. As to the general rules in Wisconsin relating to "affirmative defenses," see Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979) and State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983).

Prior to 2025 Wisconsin Act 88, conduct now covered by § 948.072 could result in only limited criminal exposure if it fell short of the overt acts required for child enticement under § 948.07 or use of a computer to facilitate a child sex crime under § 948.075.

The act of grooming is not confined to schools or any single setting. Therefore, courts may need to instruct juries accordingly that the statutory examples are illustrative of the types of conduct that may constitute grooming across any setting.

Violations of § 948.072 are treated similarly to other child sex offenses in numerous contexts, including: classifying it as a "sex offense" triggering sex offender registration under § 301.45; allowing the extended statute of limitations under § 939.74(2)(c) (prosecution must begin before the victim turns 45); classifying it as a "sexually violent offense" for purposes of a civil commitment petition under ch. 980; and requiring mandatory reporting of suspected violations by specified professionals under ch. 48. Conduct that violates § 948.072 may also constitute child enticement under § 948.07, use of a computer to facilitate a child sex crime under § 948.075 (Wis JI–Criminal 2135), or sexual misconduct by a school staff member or volunteer under § 948.098 (Wis JI–Criminal 2139B).

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1. A course of conduct, pattern of behavior, or series of acts may include, among other activities: verbal comments, suggestions, or conversations of a sexual nature directed toward a child; inappropriate or sexualized physical contact or attempts to initiate such contact; written, electronic, or digital communications to seduce, solicit, lure, or entice a child; provision or promise of gifts, favors, privileges, attention, or other items of value to lower a child's inhibitions, gain trust, or create emotional dependence; acts intending to isolate a child from family, peers, or guardians; or use of a computer or electronic device to contact a child or a child's guardian.

The list of examples in § 948.072(2)(a)–(f) is non-exhaustive. The statute specifies that a course of conduct "may include, among other activities," the listed behaviors. Courts should instruct juries accordingly that the examples are illustrative, not exhaustive.

2. The statute requires a "course of conduct, pattern of behavior, or series of acts," implying repeated or connected conduct rather than an isolated incident. No appellate court has yet interpreted the scope of this requirement under § 948.072. The legislative record reflects that the statute was designed to reach conduct that unfolds over an extended period — weeks, months, or even years — through incremental trust-building, digital communications, gift-giving, and similar preparatory behaviors.

Section 948.072 does not define "course of conduct." Two other statutes that use related terminology may, however, be helpful in understanding the term. Wis JI–Criminal 1284, which addresses the offense of stalking under § 940.32(2), defines "course of conduct" as "a series of two or more acts carried out over time, however short or long, that show a continuity of purpose." Wis JI–Criminal 1912, which addresses the offense of engaging in a course of conduct that harasses or intimidates another under § 947.013, incorporates the definition of "course of conduct" set out in § 947.013(1)(a): "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." Neither definition applies of its own force to § 948.072, but both reflect the Legislature's general

understanding that a course of conduct requires more than a single act and involves a continuity of purpose, and both may be helpful in guiding the court and jury as to the meaning of the term in the grooming context.

3 . § 948.072(2) provides that "For purposes of this section, a course of conduct, pattern of behavior, or series of acts may include, among other activities, any of the following:

(a) Verbal comments, suggestions, or conversations of a sexual nature directed toward a child.
(b) Inappropriate or sexualized physical contact or attempts to initiate such contact.
(c) Written, electronic, or digital communications, including using text messages, emails, social media, or online platforms, to seduce, solicit, lure, or entice a child.
(d) Provision or promise of gifts, favors, privileges, attention, or other items of value with the intent to lower a child's inhibitions, gain trust, or create emotional dependence.
(e) An act intending to isolate a child, or to encourage a child to separate from family, peers, or guardians.
(f) Use of a computer, online service, Internet service, local bulletin board service, or any device capable of electronic data storage or transmission to contact a child, a child's guardian, or any person believed by the actor to be a child or a child's guardian."

4. Wis. Stat. § 948.01(1) defines "child" as "a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, "child" does not include a person who has attained the age of 17 years."

5. This is the definition of "sexually explicit conduct" provided in § 948.01(7).

6. Section 948.072(5) expressly states: "Consent is not an issue or a defense in alleged violations of sub. (3)."

7. See Wis. Stat. § 939.23(6).

8. See Wis. Stat. § 939.43(2).

9. Continue with the bracketed material if a Class F, Class E, or Class D felony offense is charged, and add the appropriate questions. For Class G felony offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

10. Wis. Stat. § 948.072(3) identifies three circumstances that increase the penalty for the underlying Class G felony to a Class F, Class E, or Class D felony. A bracketed question is included for each of those statutory alternatives.

11. The aggravating circumstances in § 948.072(3)(b), (c), and (d) increase the class of the felony and therefore the maximum penalty to which the defendant is exposed. Under Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), and its progeny, any fact other than a prior conviction that increases the maximum penalty must be submitted to the jury and proved beyond a reasonable doubt. Accordingly, the State bears the burden of proving each charged aggravating circumstance beyond a reasonable doubt.

12. "Position of trust or authority over the child" is defined in § 948.072(1).

The legislative record identifies teachers, coaches, childcare providers, healthcare professionals, and clergy as examples of adults who may occupy such positions. The list is not exhaustive; the key statutory inquiry is whether the person had regular and direct contact with the child and power or control over the child's welfare, education, or other important factors.

A conviction for the aggravated Class F felony requires the State to prove both the basic grooming elements and that the defendant was in such a position at the time of the conduct.

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2139B SEXUAL MISCONDUCT AGAINST A PUPIL BY A SCHOOL STAFF MEMBER OR VOLUNTEER – § 948.098

Statutory Definition of the Crime

Section 948.098 of the Criminal Code of Wisconsin is violated by a person who, as a school staff member or volunteer commits an act of sexual misconduct against a pupil enrolled in a school in 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 four elements were present.

Elements of the Crime That the State Must Prove

1. On (insert date of offense), the defendant was a (school staff member)[1] (volunteer)[2] at (insert name of school[3]).
2. On (insert date of offense), (name of victim) was enrolled in a school in this state as a pupil.
3. The defendant committed an act of sexual misconduct against (name of victim).

   "Sexual misconduct" means verbal conduct of a sexual nature or physical contact of a sexual nature. Sexual misconduct includes conduct directed by a person at another person of the same or opposite gender.[4]

   ["Physical contact of a sexual nature"[5] means any of the following types of

intentional touching, whether direct or through clothing:

- Intentional touching by the actor[6] or, upon the actor's instruction, by another person, by the use of any body part or object, if the purpose of the intentional touching is (insert the applicable statutory purpose).[7]
- Intentional touching by the pupil, by the use of any body part or object, of the actor or, if done upon the actor's instructions, another person, if the purpose of the intentional touching is (insert the applicable statutory purpose).[8]]

["Verbal conduct of a sexual nature" means communications made intentionally for the purpose of (insert the applicable statutory purpose).[9]]

4. The defendant acted intentionally.

"Intentionally" means that the defendant acted with the mental purpose to [sexually degrade or sexually humiliate (name of victim)] [sexually degrade or sexually humiliate the defendant] [sexually arouse or sexually gratify (name of victim)] [sexually arouse or sexually gratify the defendant] or was aware that (his) (her) conduct was practically certain to cause that result.[10]

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 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 2139B was approved by the Committee in August 2024. This revision was approved by the Committee in April 2026. It amended the instruction to reflect amendments to § 948.098 pursuant to 2025 Wisconsin Act 88 [effective date: March 8, 2026].

This instruction is for a violation of sub. (2) of § 948.098, which was created by 2023 Wisconsin Act 200 [effective date: March 24, 2024]. The offense is a Class I felony.

Section 948.098(2) was amended by 2025 Wisconsin Act 88 [effective date: March 8, 2026] to change "enrolled in the school" to "enrolled in a school in this state." This amendment broadens the offense beyond pupils enrolled at the defendant's own school to any pupil enrolled in any school in Wisconsin.

1. "School staff member" is defined as follows in § 948.098(1)(c):

> "School staff member" means any person who provides services to a school or a school board, including an employee of a school or a school board and a person who provides services to a school or a school board under a contract. "School staff member" includes a bus driver.

2. "Volunteer" is defined as follows in § 948.098(1)(f):

> "Volunteer" means a person, other than a school staff member, who provides services to a school without compensation.

3. "School" is defined as follows in § 948.098(1)(b):

> "School" means a public or private elementary or secondary school, or a tribal school, as defined in s. 115.001 (15m).

4. This is the definition of "sexual misconduct" provided in § 948.098(1)(d).

5. This is the definition of "physical contact of a sexual nature" provided in § 948.098(1)(a).

6. The term "actor" is used in Wis. Stat. §§ 948.098(1)(a)1 and 2. The Committee concluded that "actor" exclusively refers to the defendant. To align with the statutory language, the Committee decided to retain the term "actor" in the instruction rather than substituting it with "defendant." In the context of this statutory subsection, the two terms are synonymous.

7. The purposes listed under § 948.098(1)(a)1.a through d. are as follows:

a. To sexually degrade or sexually humiliate the pupil.
b. To sexually degrade or sexually humiliate the actor.
c. To sexually arouse or sexually gratify the pupil.
d. To sexually arouse or sexually gratify the actor.

8. The purposes listed under § 948.098(1)(a)2.a through d. are as follows:

a. To sexually degrade or sexually humiliate the pupil.
b. To sexually degrade or sexually humiliate the actor.
c. To sexually arouse or sexually gratify the pupil.
d. To sexually arouse or sexually gratify the actor.

9. The purposes listed under § 948.098(1)(e)1 through 4 are as follows:

1. Sexually degrading or sexually humiliating the pupil.
2. Sexually degrading or sexually humiliating the actor.
3. Sexually arousing or sexually gratifying the pupil.
4. Sexually arousing or sexually gratifying the actor.

10. 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.

The requirement that the defendant knows 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."

2198 FAILURE TO COMPLY WITH [SEX OFFENDER][1] REGISTRATION REQUIREMENTS — § 301.45

Statutory Definition of the Crime

Section 301.45 of the Wisconsin Statutes is violated by one who knowingly fails to comply with a requirement to provide information under that statute.[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. The defendant was a person who was required to provide information under section 301.45.

   A person who (describe the applicable criterion set forth in subs. (1g) of § 301.45)[3] is required to provide information under section 301.45.

2. The defendant failed to provide information as required.

   Section 301.45____ provides that persons required to provide information under section 301.45 must (describe the requirement set forth in subs. (2)-(4) of § 301.45)[4].[5]

3. The defendant knowingly failed to provide the required information.

This requires that the defendant knew that (he) (she) was required to provide the information.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all 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 2198 was approved by the Committee in December 2004 and revised in 2012 and 2021. This revision was approved by the Committee in April 2026. It reflects changes to § 301.45(4)(b) made by 2025 Wisconsin Act 98 [effective date: March 15, 2026].

This instruction provides a very general model for violations of § 301.45, sex offender registration. The statute imposes a very detailed and complex set of requirements for persons who have been adjudicated for a sex offense. The key provisions are as follows:

- Those who are covered by the registration requirement are identified in sub. (1g) of § 301.45.
- The requirements for registration and providing information are set forth in subs. (2) to (4) of § 301.45.
- Subsection (6)(a) specifies criminal penalties for "whoever knowingly fails to comply with any requirement to provide information under subs. (2) to (4) . . ."
- Subsection (6)(ag) specifies criminal penalties for "whoever intentionally violates sub. (4r) . . ."
- Subsection (4r) restricts establishing or changing residence without complying with applicable requirements.

The instruction provides a model for violations based on sub. (6)(a): knowingly failing to comply with requirements in subs. (2) to (4). The basis for the defendant's being required to register should be described in element 1; the information that was not provided as required should be described in element 2.

2009 Wisconsin Act 131 [effective date: March 4, 2010] created § 301.45(2)(a)6m. to add email accounts, internet addresses for web sites, etc., to the information that must be provided by those required to register.

The sex offender registration law is not unconstitutional as applied to a defendant convicted of the non-sexual false imprisonment of a minor. False imprisonment in violation of § 940.30 is considered a "sex offense" under § 301.45(1d)(b) if the victim was a minor and the defendant was not the victim's parent. Requiring registration in this type of case "is rationally related to a legitimate governmental interest." State v. Smith, 2010 WI 16, ¶40, 323 Wis. 2d 377, 780 N.W.2d 90.

In State v. Dinkins, 2012 WI 24, 339 Wis. 2d 78, 810 N.W.2d 787, the conviction of a homeless sex offender for failing to provide the address at which he will be residing as required by § 301.45(6) was reversed. The court held:

> . . . we conclude that a registrant cannot be convicted of violating Wis. Stat. § 301.45(6) for failing to report the address at which he will be residing when he is unable to provide this information. We determine that a registrant is unable to provide the required information when that information does not exist, despite the registrant's reasonable attempt to provide it. ¶5.

In reaching this conclusion, the court relied on the "unable to provide" language found in Wis. Stat. § 301.45(2)(d) which provides in relevant part:

A person subject to [the registration requirements] who is not under the supervision of the [DOC] or the [DHS] shall provide the information specified in par. (a) to the [DOC] in accordance with the rules under sub. (8). If the person is unable to provide an item of information specified in par. (a), the [DOC] may request assistance from a circuit court or the [DHS] in obtaining that item of information.

In State v. Savage, 2020 WI 93, 395 Wis. 2d 1, 951 N.W.2d 838, the Wisconsin Supreme Court reexamined Dinkins and its application to homeless registrants under the supervision of the Department of Corrections. The court held that "Dinkins does not conclude that homeless sex offenders are exempt from registration requirements." See id., ¶46. Instead, Dinkins merely answered the narrow question of whether a registrant, who is not under supervision, can be convicted under § 301.45(6) for failing to notify the Department of Corrections of the address at which they will be residing upon release from prison.

In contrast, registrants under the supervision of the Department of Corrections are subject to a different paragraph than the defendant in Dinkins. Specifically, the information requirements of such registrants are controlled by § 301.45(2)(b), which does not contain a provision for a person unable to provide information as provided in § 301.45(2)(d). Therefore, as the court in Savage provided, "Any hypothetical defenses formulated based upon the 'unable to provide' holding in Dinkins cannot be imputed to a case dealing with a defendant who is under DOC supervision pursuant to §301.45(2)(b)." See Savage, supra, 935 Wis. 2d 1, ¶46.

Note: Effective March 15, 2026, Wis. Stat. subsection 301.45 (4)(b) was amended by 2025 Wisconsin Act 98 to create a new affirmative obligation to notify DOC within 24 hours of becoming unable to provide

an address. This is distinct from the question addressed in Dinkins — a registrant cannot be convicted for failing to provide an address they do not have, but may now be convicted for failing to timely notify DOC of that inability.

In State v. Triebold, 2021 WI App 13, 396 Wis. 2d 176, ¶13, 955 N.W.2d 415, the court held that the registrant's failure to update the Wisconsin Department of Corrections of a change of address that occurred exclusively within the jurisdiction of Minnesota had "the consequence of depriving Wisconsin authorities of information concerning the location of his residence." The court concluded that Wis. Stat expressly prohibits such a consequence. § 301.45.

The Triebold court also determined that double jeopardy principles did not preclude the registrant's dual convictions in Minnesota and Wisconsin under Wis. Stat. § 939.71 or Blockburger v. United States, 284 U.S. 299, 304 (1932) because the two offenses required proof of different facts. Triebold, supra, at ¶24-25.

In State v. Freland, 2011 WI App 80, 344 Wis. 2d 722, 800 N.W.2d 18, the court of appeals ruled that the defendant was entitled to withdraw his plea of guilty to a felony charge of failing to provide sex offender information as required by § 301.45(2)(e). The plea was not knowing, voluntary, or intelligent because he was not aware that the out-of-state conviction on which the registration requirement was based was eligible to be treated as a misdemeanor under § 301.45(6).

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1. The bracketed language "SEX OFFENDER" is included in the title to facilitate easy location of the instruction. The Committee recommends that this bracketed language not be included in the written instructions provided to the jury.

2. This includes the requirement, created by 2025 Wisconsin Act 98, that a registrant on parole or extended supervision who becomes unable to provide an address must notify the Department of Corrections of that inability within 24 hours.

3. Subsection (1g) lists the categories of persons who are subject to the requirements of § 301.45. The applicable category should be used in the blank in element 1. For example, "A person who was convicted for a sex offense after December 25, 1993, is required to provide information under section 301.45." Offenses that are "sex offenses" are listed in § 301.45(1d)(b).

4. Specify the subsection of § 301.45 that is involved in the case and describe the requirement that was allegedly violated.

5. If the charge is based on the failure to notify the Department of Corrections of an inability to provide an address under § 301.45(4)(b) (as amended by 2025 Wisconsin Act 98), element 2 should describe that obligation specifically.

OFFICE OF JUDICIAL EDUCATION
7/2026

WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME IV

Wisconsin Criminal Jury Instructions Committee

[Cite as Wis JI-Criminal]

- Includes 7/2026 Supplement (Release No. 71)

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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 of 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) [and were the violations committed as part of a single intent and design] [4]?

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the amount was more than (state amount) [and that the violations were committed as part of a single intent and design][5].

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 of controlled substance), including the weight of any other substance or material mixed or combined with it, more than (state amount which determines the penalty)?[6]

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, 2018, 2022 and 11/2025. The 2018 revision added a model for submitting more than one question regarding the amount involved. The 11/2025 revision incorporated the opinion State v. West, 2024 WI App 35, 412 Wis.2d 758, 8 N.W.3d 460 by adding bracketed language that requires the jury to find the drug amounts were obtained under a single intent and design, as contemplated by Wis. Stat. § 971.365. This revision was approved by the Committee in April 2026. It updated the comment to reflect the enactment of 2025 Wisconsin Act 100.

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; (dn) carfentanil; (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 of 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. Include the bracketed language if the State seeks to prosecute multiple violations as a single crime under Wis. Stat. § 971.365(1).

In State v. West, 2024 WI App 35, ¶¶30-34, 412 Wis.2d 758, 8 N.W.3d 460, the court confirmed that § 971.365(1)(b) permits the State to prosecute "all violations" of § 961.41(1) or (1m) "as a single crime" — and to aggregate the quantities involved — when the jury finds that the violations were "pursuant to a single intent and design."

The separate violations need not be committed on the same date. See West, supra, at ¶35.

5. See footnote 4, supra.

6. If the case involves possession with intent to manufacture or deliver, the Committee recommends restating this sentence as follows: "Was the amount of (name of 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.

6004 DELIVERING OR DISTRIBUTING A CONTROLLED SUBSTANCE ON OR NEAR CERTAIN PREMISES — § 961.49(1m)

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

The information alleges not only that the defendant delivered[1] (insert name of qualifying controlled substance)[2] but also that the defendant delivered[3] (insert same name of qualifying controlled substance) while (on) (within 1,000 feet of) a (insert the type of applicable premises).[4]

If you find the defendant guilty, you must answer the following question[5]:

"Did the defendant deliver (insert name of qualifying controlled substance) while (on) (within 1,000 feet of) a (insert the type of applicable premises)?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the defendant delivered (insert name of qualifying controlled substance) while (on) (within 1,000 feet of) a (insert the type of applicable premises) .

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

COMMENT

Wis JI–Criminal 6004 was originally published in December 1990 and revised in 1995, 1996, 1999, and 2003. This revision was approved by the Committee in June 2026. It reflects amendments pursuant to 2005 Wisconsin Act 14, and 2021 Wisconsin Act 179.

Section 961.49 was amended by 2001 Wisconsin Act 109, but its basic penalty-enhancing provision was retained. It was subsequently amended by 2005 Wisconsin Act 14, 2009 Wisconsin Act 302, and 2021 Wisconsin Act 179.

Section 961.49(1m) does not apply to all controlled substance offenses. The enhancement is limited to deliveries, distributions, or possession with intent to deliver or distribute the following specific substances:

- cocaine,
- cocaine base,
- fentanyl,
- a fentanyl analog,
- carfentanil,
- heroin,
- phencyclidine,
- lysergic acid diethylamide,
- psilocin,
- psilocybin,
- amphetamine,
- methamphetamine,
- methcathinone,
- any form of tetrahydrocannabinols, or
- a controlled substance analog of any of these substances.

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 is for cases involving § 961.49(1m), which provides for an increase of up to five years in the term of imprisonment for certain controlled substance offenses. It applies to violations of § 961.41(1) (cm), (d), (dm), (dn), (e), (f), (g) or (h) and § 961.41(1m)(cm), (d), (dm), (dn), (e), (f), (g) or (h) committed "on or otherwise within 1,000 feet" of certain premises. Schools are the premises most commonly involved, but see note 4, below.

Note: As of 2021 Wisconsin Act 179 [effective date: March 18, 2022], § 961.49(1m)(b)6. expressly includes "any premises of a tribal school, as defined in s. 115.001(15m)" in addition to private and public school premises.

Because the statute provides an enhanced penalty upon the finding of an additional fact, the Committee concluded that the additional fact is to be submitted to the jury. This is the same approach used for other penalty enhancers, see Wis JI–Criminal 990, Using a Dangerous Weapon, and Wis JI–Criminal 994, Concealing Identity.

Subsections (2) and (3) of § 961.49, which provided for sentences for "presumptive minimum" sentences were repealed by 2001 Wisconsin Act 109 [effective date: February 1, 2003]. A new subsection (2m) was added by 2005 Wisconsin Act 14 [effective date: June 22, 2005]. It extends the 5-year enhancer to persons who violate § 961.65 (obtaining a controlled substance by fraud) while intending to deliver or distribute methamphetamine or a methamphetamine analog under any of the circumstances listed in § 961.49(1m)(a)–(d).

If the offense is charged under § 961.49(2m), the following optional instruction language may be utilized:

> "The information alleges that the defendant, while violating § 961.65 [obtaining or attempting to obtain methamphetamine by fraud], intended to deliver or distribute (methamphetamine) (a controlled substance analog of methamphetamine) while (on) (within 1,000 feet of) [identify applicable premises from note 4 below].
>
> If you find the defendant guilty of that offense, you must answer the following question:
>
> "Did the defendant, while violating § 961.65, intend to deliver or distribute methamphetamine (or a controlled substance analog of methamphetamine) while (on) (within 1,000 feet of) a (insert the type of applicable premises)?
>
> Before you may answer 'yes,' you must be satisfied beyond a reasonable doubt of each of those facts. If you are not so satisfied, you must answer 'no.'"

Section 961.495 applies to simple possession offenses committed within 1,000 feet of the same types of premises covered by § 961.49. It requires the sentencing court to impose 100 hours of community service work in addition to any other penalties imposed. This does not affect the penalty range and therefore does not present a factual issue for the jury. § 961.495 was amended by 2009 Wisconsin Act 302 [effective date: May 27, 2010], to include tribal school premises, consistent with the amendment to § 961.49(1m)(b)6.

In State v. Hermann, 164 Wis.2d 269, 474 N.W.2d 906 (Ct. App. 1991), the court refused to interpret the statute to include a mental element. That is, there is no requirement, express or implied, that the defendant know that the delivery is taking place within 1,000 feet of a school. The Hermann court also rejected a variety of constitutionally-based challenges to the statute.

The application of § 161.49 (now §§ 961.49) was discussed in State v. Rasmussen, 195 Wis.2d 109, 536 N.W.2d 106 (Ct. App. 1995). Rasmussen's vehicle was stopped for a traffic violation beyond the 1,000-foot zone, and a search disclosed 59 grams of cocaine in the defendant's purse. The trial court dismissed the enhancement provision, finding that the defendant was simply traveling between a tavern and her house when she passed within 1,000 feet of a school. The court of appeals reversed, holding that the evidence was sufficient to show that the defendant possessed cocaine with the intent to deliver and did so within the 1,000 foot zone; that is all that is required to support the application of § 161.49 (now § 961.49).

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1. The underlying offense can be a violation of either § 961.41(1) – (cm), (d), (dm), (dn), (e), (f), (g) or (h) — delivery or distribution of a specified controlled substance — or § 961.41(1m)(cm), (d), (dm), (dn), (e), (f), (g) or (h) — possession of a specified controlled substance with intent to deliver or distribute. This instruction uses "delivery"; it would need to be changed if one of the other alternatives was the basis for the underlying charge.

2. The Committee suggests naming the controlled substance throughout the instruction. The jury will only be considering this special question if they have found the defendant guilty of an offense involving

the named substance. It is the nature of the substance that determines the applicable penalty, and it is that penalty which is increased by the facts addressed by this instruction.

3. This instruction is drafted for a case where there was an actual delivery of a controlled substance within 1,000 feet of the designated premises. The statute also applies, however, to possession of a controlled substance with intent to deliver. See the comment preceding note 1, supra.

4. The list of premises in § 961.49(1m) was amended by 1997 Wisconsin Act 327 [effective date: July 15, 1998], and further amended by 2021 Wisconsin Act 179 [effective date: March 18, 2022], to read as follows:

(a) While the person is in or on the premises of a scattered-site public housing project.
(b) While the person is in or on or otherwise within 1,000 feet of any of the following:

1. A state, county, city, village or town park.
2. A jail or correctional facility.
3. A multiunit public housing project.
4. A swimming pool open to members of the public.
5. A youth center or a community center.
6. Any private or public school premises and any premises of a tribal school, as defined in s. 115.001(15m).
7. A school bus, as defined in s. 340.01(56).

(c) While the person is in or on the premises of an approved treatment facility, as defined in s. 51.01(2), that provides alcohol and other drug abuse treatment.
(d) While the person is within 1,000 feet of the premises of an approved treatment facility, as defined in s. 51.01(2), that provides alcohol and other drug abuse treatment, if the person knows or should have known that he or she is within 1,000 feet of the premises of the facility or if the facility is readily recognizable as a facility that provides alcohol and other drug abuse treatment.

"School" is not specially defined for purposes of § 961.49. In State v. Andrews, 171 Wis.2d 217, 491 N.W.2d 504 (Ct. App. 1992), the court referred to § 115.01 for a definition of "public school" and to § 118.165(1) for a definition of "private school." The court held that "a University of Wisconsin campus, such as at Oshkosh, does not fit either definition." 171 Wis.2d 217, 223. The court noted that 21 U.S.C. § 860 apparently served as a model for § 961.49. While the federal statute explicitly refers to colleges and universities, the Wisconsin counterpart does not. The court "presume[d] the difference in language reflects a deliberate choice. . . ." 171 Wis.2d 217, 224. The addition of tribal schools by 2021 Wis. Act 179 does not affect the exclusion of colleges and universities. A "tribal school" is defined by reference to § 115.001(15m) and is distinct from a university.

In State v. Hall, 196 Wis.2d 850, 540 N.W.2d 219 (Ct. App. 1995), the court held that the use of the word "premises" in § 961.49 does not make the statute unconstitutionally vague. The court concluded "that the statute provides fair warning that the region contemplated by the statute begins at the property line." 196 Wis.2d 850, 872 73.

A "daycare center" is a type of "youth center" to which § 961.49 applies. State v. Van Riper, 222 Wis.2d 197, 198, 586 N.W.2d 198 (Ct. App. 1998).

5. The Committee recommends that facts which increase the range of penalties be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).

We, the jury, find the defendant not guilty.

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

"Did the defendant deliver (insert name of qualifying controlled substance) while (on) (within 1,000 feet of) a (insert the type of applicable premises)?"

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SM-50 COMPETENCY TO PROCEED

The following Special Material outlines the procedures relating to a criminal defendant's competency to proceed as those procedures are set forth in sections 971.13 and 971.14, Wisconsin Statutes. The material takes into account the changes in those statutes made by legislation through the end of the 2025-26 legislative session.

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I. The Legal Standard for Incompetency

Section 971.13(1) provides: "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." (Emphasis added.)

A. "Lacks substantial mental capacity"

The phrase "lacks substantial mental capacity" replaced the former statute's "as a result of mental disease or defect is unable. . ." Thus, there is no need to identify a particular mental disease as the source of the alleged difficulty. The co-reporters for the Judicial Council committee that drafted the current competency statutes state:

> Not every defendant with a clinically recognized mental disorder is incompetent to stand trial. The legal standard is whether the defendant has the present mental capacity to understand the proceedings and assist in his or her own defense. The new legislation does not change this standard. It does clarify, however, that a defendant should not be considered incompetent to proceed merely because he or she requires medication to maintain legal competency.

Fosdal and Fullin, "Wisconsin's New Competency to Stand Trial Statute," Wisconsin Bar Bulletin (Oct. 1982) p. 11.

The term "lacks substantial mental capacity" can include intellectual disability as the basis for an incompetency finding. In State v. Garfoot, 207 Wis.2d 214, 227-28, the Wisconsin Supreme Court made the following comments in connection with a suggestion noted in the state's argument that intellectual disability alone may not warrant a finding that the defendant is not competent to stand trial:

> The State is correct in that mental retardation in and of itself is generally insufficient to give rise to a finding of incompetence to stand trial. However a defendant may be incompetent based on retardation alone if the condition is so severe as to render him incapable of functioning in critical areas.

B. "To understand the proceedings or to assist in his or her own defense"

This part of the standard has been part of Wisconsin law since 1965. The constitutional standard was stated as follows in Dusky v. United States, 362 U.S. 402 (per curiam, 1960):

". . . the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as a factual understanding of the proceedings against him." The Wisconsin Supreme Court has held that § 971.13(1) codifies the Dusky standard. State v. Garfoot, supra, 207 Wis.2d 214, 226.[1]

The same standard for competency applies at any stage of the proceedings. A higher or more demanding standard is not required for the decision to withdraw a plea of not guilty by reason of mental disease or defect. State v. Byrge, 225 Wis.2d 702, 712, 594 N.W.2d 388 (Ct. App. 1999).

C. Rationale for the competency rule

The rule against trying a person who is not competent is grounded in due process: it violates fundamental fairness to prosecute a defendant who is not able to fully exercise his or her constitutional procedural rights. Further, "a defendant's full assistance and cooperation has been traditionally thought essential to developing the 'true facts' of the case." State ex rel. Matalik v. Schubert, 57 Wis.2d 315, 322, 204 N.W.2d 13 (1973).

D. Competency and related issues

It is often the defendant's courtroom behavior, inability to understand procedures, or difficulty in getting along with counsel that first gives reason to doubt competency to proceed. These problems may indicate other issues as well. These related issues are discussed briefly below.

1. Competency and criminal responsibility

Competency to stand trial is concerned with the defendant's mental condition at the time of the trial. Only the mental conditions that affect the ability to understand the proceedings and assist in the defense are at issue.

Criminal responsibility (or the "insanity defense") differs in two important respects. First, it is concerned with the defendant's mental condition at the time of the offense. Second, it is concerned with the effect of that mental condition on the defendant's ability to tell right from wrong or to conform his or her conduct to what the law requires.

A person with serious mental problems may present both competency to proceed and insanity defense issues, only one of them, or neither one. Trial courts should be alert for indications that either issue needs to be pursued and keep in mind the different time frames

and abilities that each issue involves.

Courts sometimes order that competency and criminal responsibility evaluations be conducted at the same time or order an inpatient criminal responsibility examination. There is no statutory authority for an inpatient examination of a defendant's criminal responsibility. Trying to combine that examination with a competency evaluation causes problems for the examiners because there usually is not enough time to conduct both of them.

2. Competency and self-representation

This Special Material is concerned with competency to proceed in cases where the defendant is represented by counsel.[2] Occasionally, the competency of defendants who seek to represent themselves is questioned. Competency to stand trial is not the same as competency to proceed pro se. Pickens v. State, 96 Wis.2d 549, 567, 292 N.W.2d 601 (1980). In State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), the Wisconsin Supreme Court reaffirmed the Pickens rule and reversed a decision of the court of appeals that had held that separate inquiry into "competence for self-representation" was no longer required.

Extensive discussion of waiver of counsel, self-representation, and related issues is beyond the scope of this Special Material. But because these issues often arise in conjunction with competency to stand trial questions, a few considerations relating to the competency inquiry should be emphasized.

First, whether or not the defendant is represented by counsel, the court must determine if there is "reason to doubt" the defendant's competency to proceed. If there is "reason to doubt," the examination procedures set forth in subsecs. (1)-(3) of § 971.14 and outlined in this Special Material should be followed. If the court determines that the defendant is not competent to proceed, a commitment under § 971.14(5) should follow.

Second, if the defendant is found to be competent to proceed and wishes to proceed pro se, the court must determine if the defendant is making a knowing and voluntary waiver of the right to counsel. If the waiver is valid, a further inquiry must be made to determine whether the defendant "possesses the minimal competency necessary to conduct his own defense." Pickens, 96 Wis.2d 549 at 569, reaffirmed in Klessig, 211 Wis.2d 194, 212. For a complete discussion, see SM 30 WAIVER AND FORFEITURE OF COUNSEL; SELF-REPRESENTATION; STANDBY COUNSEL; "HYBRID REPRESENTATION"; COURT APPOINTMENT OF COUNSEL.

3. Competency and amnesia

Amnesia by itself does not mean that a defendant is not competent to stand trial. Questions relating to amnesia may be raised by a request for a competency evaluation and, as to the competency issue, the regular standard applies. A defendant may suffer from amnesia and be competent under this standard. In those cases, Wisconsin courts have adopted a six-part test to determine whether the defendant – competent but claiming amnesia – can receive a fair trial. See State v. McIntosh, 137 Wis.2d 339, 404 N.W.2d 557 (Ct. App. 1987), and State v. King, 187 Wis.2d 548, 523 N.W.2d 159 (Ct. App. 1994).

4. Chapter 980 sexually violent person commitments

Section 971.14 once applied to chapter 980 commitments pursuant to Wis. Stat. § 980.05(1m) (2003-04). The previous version of § 980.05(1m) provided: "At the trial to determine whether the person who is the subject of a petition under § 980.02 is a sexually violent person, all rules of evidence in criminal actions apply. All constitutional rights available to a defendant in a criminal proceeding are available to the person." However, § 980.05(1m) was repealed by 2005 Wis. Act 434, §§ 101, 131(1) [effective August 1, 2006]. Therefore, because competency evaluations under § 971.14 are limited to criminal case defendants, they no longer apply to prisoners against whom a ch. 980 petition has been filed.

The Wisconsin Court of Appeals affirmed this in In Re Commitment of Luttrell, 2008 WI App 93, 312 Wis.2d 695, 754 N.W.2d 249 when it held that a prisoner eligible for commitment under § 980.05(5) did not have a due process right to a competency evaluation under § 971.14. The court concluded that a ch. 980 action is a civil commitment, not a criminal prosecution, thus a prisoner against whom a ch. 980 petition has been filed is not a criminal case defendant. Luttrell, supra, at ¶7. Although a successful ch. 980 petition results in continued confinement, prisoners determined to be sexually violent persons are confined for treatment purposes, not for punishment. Id. at ¶9.

II. When and How Is Competency Raised?

A. May be raised at any time

1. In the trial court

Competency may be raised at any time between the filing of charges and the pronouncement of judgment. While questions about competency are usually raised before trial, it can become an issue after trial but before sentencing. State v. McKnight, 65 Wis.2d 582, 223 N.W.2d 550 (1974).

2. During postconviction proceedings

In State v. Debra A.E., 188 Wis.2d 111, 523 N.W.2d 727 (1994), the Wisconsin Supreme Court addressed the standards and procedures to be used when competency is raised during postconviction proceedings. First, the court noted that the procedures set forth in §§ 971.13 and 971.14 govern competency determinations only through the sentencing stage of a criminal trial and that they do not require circuit courts to rule on competency during postconviction relief proceedings. 188 Wis.2d 111, 128 & n.14. However, when the question of competency is raised in the circuit court at the postconviction stage, the court has the power to consider the question and should use the same "reason to doubt standard" employed under § 971.14. 188 Wis.2d 111, 131 & n.17. The court may use its discretion to determine how the competency evaluation should be made; if a hearing is held, the court should be guided by § 971.14 to the extent feasible. 188 Wis.2d 111, 131-32. The standard for the competency decision is as follows: ". . . a defendant is incompetent to pursue postconviction relief . . . when he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding." 188 Wis.2d 111, 126.

Because § 971.14(4) governs competency determinations only through the sentencing stage of a criminal trial and no other statutory section governs the standard of proof and the allocation of the burden of persuasion on the competency/incompetency issue during a postconviction proceeding, the burden of proof applicable during such proceedings has been established by case law. In State v. Daniel, 2015 WI 44, 362 Wis.2d 74, 862 N.W.2d 867, the supreme court held that when the issue of a defendant's competency is raised, and the state contends the defendant is competent, it has the burden of proving competency by a preponderance of the evidence.

If the court finds that a defendant is not competent at the postconviction stage, "the court's goal is to fashion a process through which circuit courts and counsel can manage the postconviction relief . . . while protecting defendants' fair opportunity for postconviction relief and promoting the effective administration of the judicial system. . . [O]rdinarily this process need not include a court order for treatment to restore competency. Meaningful postconviction relief can be provided even though a defendant is incompetent." 188 Wis.2d 111, 129-30. The court identified the following alternatives for the court to apply as appropriate:

(1) continuation of postconviction relief proceedings – defense counsel should initiate or continue postconviction relief on a defendant's behalf when any issues rest on the record, do not necessitate the defendant's assistance or decision making, and involve no risk to the defendant;

(2) continuances or enlargement of time limits for postconviction relief [if issues do necessitate the defendant's assistance or decision making];

(3) appointment of temporary guardians – upon defense counsel's request, to make the decisions the law requires the defendant to make; and

(4) permitting defendants who regain competency to raise issues at a later proceeding that could not have been raised earlier because of incompetency.

188 Wis.2d 111, 133-36.

In State v. Scott, 2018 WI 74, 382 Wis.2d 476, 488, 914 N.W.2d 141, the supreme court reinforced Debra A.E.'s observation that postconviction competency proceedings will "ordinarily … not include a court order for treatment to restore competency," 188 Wis. 2d at 130. The court held that the circuit court acted prematurely when it ordered the defendant to be medicated to competency "without first determining whether and to what extent postconviction proceedings could continue despite the defendant's incompetency." Scott, 382 Wis.2d 476, ¶26. Scott requires a circuit court to follow the mandatory procedures established in Debra A.E. before it may order a non-dangerous but incompetent defendant involuntarily medicated for the purpose of conducting a postconviction proceeding. Scott, 382 Wis.2d 476, ¶21-26. See also Debra A.E., 188 Wis.2d 111, 131- 36.

If an involuntary medication order is entered during postconviction proceedings, the defendant may appeal the order as a matter of right under § 808.03(1) and is entitled to an automatic stay of the medication order pending appeal. Scott, 382 Wis.2d 476, ¶42-44; State v. Green, 2022 WI 30, ¶¶18-36, 401 Wis.2d 542, 973 N.W.2d 770 (holding that Scott's automatic stay rule does not apply to pretrial involuntary treatment orders). The State may seek to lift an automatic stay pending appeal under the standard set forth in State v. Gudenschwager, 191 Wis. 2d 431, 529 N.W.2d 225 (1995), as modified by the court in Scott. 382 Wis.2d 476, ¶¶45-48.

3. During probation revocation proceedings

In State ex rel. Vanderbeke v. Endicott, 210 Wis.2d 503, 563 N.W.2d 883 (1997), the Wisconsin Supreme Court set forth the procedure to be employed when competency is raised during a probation revocation proceeding.

If an administrative law judge has reason to doubt the probationer's competency, the revocation proceeding is to be stayed until a competency determination can be made. An administrative law judge having reason to doubt a probationer's competency shall promptly forward a written request for a competency determination to the circuit court in the county

in which the probationer was sentenced. The request shall be accompanied by a copy of the papers on file in the revocation proceeding and the administrative law judge's written statement explaining the grounds for finding reason to doubt the probationer's competency.

Upon receipt of the written request from an administrative law judge, the circuit court shall determine the probationer's competency. The procedures for determining competency to proceed at trial, set forth in § 971.14, shall be followed to the extent practicable.

4. Retrospective evaluation of a defendant's competency to stand trial

The ability to conduct a retrospective determination of a defendant's competency to stand trial is inherently difficult. However, in State v. Johnson, 133 Wis.2d 207, 225, 395 N.W.2d 176 (1986), the court of appeals determined that "the mere passage of time may not make the effort meaningless" if there is sufficient evidence in the record derived from the trial. By analyzing the applicable legal and medical records, along with a current medical evaluation, the court determined that it was possible to produce "a hindsight picture of Johnson's competency at the time of trial." Id. at 225.

If the circuit court concludes that a meaningful inquiry can be held, it must then hold a competency hearing. If the circuit court finds that a meaningful hearing cannot be held, or if it finds that the accused was incompetent during the trial, then it must vacate the judgment of conviction and order a new trial. Because "retrospective determinations of competency are factual determinations," they will be upheld "unless totally unsupported by facts in the record and, therefore, clearly erroneous." See State v. Smith, 2016 WI 23, ¶30, 367 Wis.2d 483, 878 N.W.2d 135; See also, State v. Byrge, 2000 WI 101, ¶33, 237 Wis.2d 197, 614 N.W.2d 477; State v. Garfoot, 207 Wis.2d 214, 224-25, 558 N.W.2d 626 (1997); Wis. Stat. § 805.17(2).

B. "Reason to doubt" the defendant's competency

Section 971.14(1r)(a) requires that a competency inquiry be made "whenever there is reason to doubt a defendant's competency to proceed." Defendants who may be incompetent cannot waive the right to have the court determine their capacity to stand trial. Pate v. Robinson, 383 U.S. 375, 384 (1966).

C. Who may raise the issue?

1. Defense counsel

Defense counsel usually raises the competency issue and may do so either by written motion or orally, on the record, in court. If defense counsel has reason to doubt the

defendant's competency, counsel must bring the issue to the trial court's attention. Failure to do so constitutes ineffective assistance of counsel. State v. Johnson, 133 Wis.2d 207, 395 N.W.2d 176 (1986). In Johnson, defense counsel had letters from a psychiatrist and a psychologist expressing serious doubts about the defendant's competency but made the "strategic decision" to withhold the letters from the court. The defendant was convicted, but the conviction was reversed on the ground that counsel's failure to raise the competency issue constituted ineffective assistance of counsel as a matter of law. ". . . [W]here defense counsel has a reason to doubt the competency of his client to stand trial, he must raise the issue with the trial court. The failure to raise the issue of competency makes the counsel's representation fall below an objective standard of reasonableness. . . . We believe that considerations of strategy are inappropriate in mental competency situations. Thus, we hold that strategic considerations do not eliminate defense counsel's duty to request a competency hearing." 133 Wis.2d 207, 220-21.

In State v. Meeks, 2003 WI 104, 263 Wis.2d 794, 666 N.W.2d 859, the Wisconsin Supreme Court held that a lawyer who formerly represented the defendant could not testify about his or her perceptions of the former client's competency when competency was raised in a new prosecution. [See discussion at Sec. IV. A.1., below.] The court adopted what is characterized as the minority view on this issue and admitted that it creates a tension with the Johnson decision. The court did not overrule Johnson, pointing out that:

> The attorney is merely obligated to "raise the issue [of competency] with the trial court." Johnson, 133 Wis.2d at 220. There is no requirement that the attorney testify about his or her reasons for raising the issue or the opinions, perceptions, or impressions that form the basis for his or her reason to doubt the client's competence. Meeks, 263 Wis.2d 794, ¶46.

2. Defendant

Defendants may occasionally try to raise the competency issue themselves, even if defense counsel has not. In these situations, courts may wish to conduct an inquiry to establish whether the defendant's competency is the problem as opposed to difficulty in getting along with defense counsel or simply dissatisfaction with defense counsel.

3. Prosecutor

The prosecutor may also choose to raise the competency issue. In these cases, courts should be aware that in some instances, criminal charges followed by a prosecutor's raising the defendant's competency to proceed have been used as a substitute for initiating civil commitment proceedings under Chapter 51.

4. Court – sua sponte

Even if competency is not raised by the parties, a court has a duty to make an inquiry into competency whenever the defendant's conduct gives rise to "reason to doubt." Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966).

D. Basis for "reason to doubt" competency

A statement by the defendant or defense counsel to the effect that the defendant cannot understand the proceedings may not be enough to trigger a full competency inquiry and is not sufficient if negated by the defendant's actions, such as preparing motions that show an understanding of the proceedings. State v. McKnight, 65 Wis.2d 582, 223 N.W.2d 550 (1974). The claim should be supported by facts, such as the defendant's demeanor, medical history, the presence of irrational behavior, any prior medical opinions on competency to stand trial, etc. While defense counsel's representations need not be accepted without question, the United States Supreme Court has recognized that doubt expressed by the one with the closest contact with the defendant "is unquestionably a factor which should be considered." Drope v. Missouri, 420 U.S. 162, 177 n.13 (1975). If competency is not raised in open court, the presentation of a written motion (often captioned "Motion for Competency Evaluation") is an effective method for calling the issue to the court's attention.

In some cases, the "reason to doubt" competency will be obvious. In more difficult cases, it may be necessary to conduct an evidentiary hearing to help the court decide whether the full competency inquiry should be ordered.

In State v. Weber, 146 Wis.2d 817, 433 N.W.2d 583 (Ct. App. 1988), the court reviewed the "reason to doubt" standard in light of four factors: a statement by the defendant's first lawyer that he had "some question" regarding competency; the defendant's demeanor in the courtroom, specifically his silence and responses to certain questions; a civil mental commitment several years earlier; and statements by the defendant's second lawyer at sentencing to the effect that the defendant was under psychiatric care. The court concluded that these factors did not, individually or in combination, establish a "reason to doubt" competency.

E. Probable cause determination

When the court is satisfied that there is reason to doubt the defendant's competency, an examination of the defendant is to be ordered but only after a finding that it is probable that the defendant committed the offense charged.

1. Unnecessary, if after preliminary examination

If the question about competency arises after the preliminary examination, a further probable cause determination is not required. § 971.14(1r)(b).

2. From the complaint, unless the defendant avers the complaint is false

If competency is raised before the preliminary examination in a felony case (or at any time before the verdict is returned in a misdemeanor), the court may not order a competency evaluation until satisfied that it is probable that the defendant committed the offense charged.

The probable cause finding may be based solely upon the criminal complaint unless the defendant "submits an affidavit alleging with particularity that the averments of the complaint are materially false," in which case a hearing must be ordered. § 971.14(1r)(c).

3. Hearing on probable cause

The hearing is limited to the issues and witnesses required for determining probable cause. The defendant may call and cross examine witnesses. The rules of evidence do not apply. § 911.01(4)(c).

Section 971.14(1r)(c) allows the receipt of testimony over the telephone at the probable cause hearing: "Upon a showing by the proponent of good cause under § 807.13(2)(c), testimony may be received into the record of the hearing by telephone or live audiovisual means."

If the court finds that probable cause is not established, the charge shall be dismissed without prejudice, and the defendant shall be released (subject to being held in custody or continued on bail for not more than 72 hours pending the issuance of a new complaint – see § 971.31(6)). If the court finds that probable cause exists, an examination is ordered. § 971.14(1r)(c).

III. The Competency Examination

A. Ordering the examination

1. Appointing examiners

"One or more" examiners are to be appointed; they need not be psychiatrists but must have "the specialized knowledge determined by the court to be appropriate." §

971.14(2)(a). This is a change from prior law, which required that examiners be "physicians."

2. Outpatient examinations preferred

A defendant released on bail may not be ordered to have an inpatient examination unless the defendant fails to cooperate in the examination or the examiner informs the court that inpatient observation is necessary to an adequate examination. § 971.14(2)(b).

If the defendant is not released on bail, outpatient examinations are required unless "an inpatient examination is determined by the court to be necessary." § 971.14(2)(a).

3. Inpatient examinations

If an inpatient examination is found to be necessary, the defendant may be committed to "a suitable mental health facility" for up to 15 days. § 971.14(2)(a) and (c). The facility may request one 15 day extension if it can show good cause why the examination cannot be completed within the original period. § 971.14(2)(c).

The Department of Health Services determines where the evaluations take place. § 971.14(2)(am):

> Notwithstanding par. (a), if the court orders the defendant to be examined by the department or a department facility, the department shall determine where the examination will be conducted, who will conduct the examination and whether the examination will be conducted on an inpatient or outpatient basis. Any such outpatient examination shall be conducted in a jail or a locked unit of a facility. In any case, under this paragraph in which the department determines that an inpatient examination is necessary, the 15 day period under par. (c) begins upon the arrival of the defendant at the inpatient facility. If an outpatient examination is begun by or through the department, and the department later determines that an inpatient examination is necessary, the sheriff shall transport the defendant to the inpatient facility designated by the department, unless the defendant has been released on bail.

The court must arrange for the transportation of in-custody defendants to the examining facility and back to the jail. § 971.14(2)(d).

Time spent at an inpatient facility for a competency examination is time for which sentence credit is due under § 973.155 if the defendant is eventually convicted and sentenced. § 971.14(2)(a).

4. The commitment order for an examination

The commitment order should be executed completely and clearly. Use of the officially adopted circuit court form is required. § 971.025(1). The form is CR205 (revised February 2017), available on the state court website: http://www.wicourts.gov/. It should indicate the name of the defense counsel[3] and the prosecutor since examiners often wish to consult with the lawyers in conducting the examination. The examiners also find it helpful if the commitment order is accompanied by documents that provide more information about the defendant and the offense. The criminal complaint should be attached to the commitment order in all cases. When available, the following materials are also helpful:

- police reports
- record of previous convictions or arrests
- a presentence report from other recent cases
- any other clinical records the prosecutor may have.

This additional material is especially important for inpatient examinations since they must be completed within 15 days.

5. Examiner's duties

The examiner shall personally observe and examine the defendant and shall have access to treatment records. § 971.14(2)(e). "Treatment records" are defined in § 51.30(1)(b).

6. Medication and treatment during the examination period

Section 971.14(2)(f) provides that a defendant may receive voluntary treatment during the examination period. This "clarifies that a defendant on examination status may receive voluntary treatment but, until committed under sub. (5) may not be involuntarily treated or medicated unless necessary for the safety of the defendant or others. See s. 51.61(1)(f), (g), (h), and (i)." Judicial Council Committee's Note, 1981. Also, see State ex rel. Jones v. Gerhardstein, 141 Wis.2d 710, 416 N.W.2d 883 (1987), discussed in Sec. V.B., below.

7. Examination by other experts

Section 971.14(2)(g) provides that the defendant may be examined at any time by other experts chosen by the defendant or by the prosecution. These experts must be allowed reasonable access to the defendant. The examinations are limited to competency purposes.

B. The examiner's report

The requirements for the report and its contents are specified in § 971.14(3).

1. Time limits for filing

Section 971.14(2)(c) establishes the following time limits:

a. Outpatient examinations: within 30 days of the ordering of the examination.

b. Inpatient examinations: within 15 days of the ordering of the examination (unless the single permissible 15-day extension has been ordered, in which case within 30 days).[4]

2. Contents

Section 971.14(3) requires that the report contain the following:

a. Description of the examination.

b. Identification of the persons interviewed, the specific records reviewed, and any tests administered.

c. The clinical findings of the examiner.

d. The examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and assist in his or her defense, including the facts and reasoning, in reasonable detail, upon which that opinion is based.

e. If the report indicates the defendant lacks competency, the examiner's opinion regarding the likelihood that the defendant, if provided treatment, may be restored to competency within 12 months (or the maximum sentence for the most serious offense with which the defendant is charged, whichever is less).

f. If sufficient information is available, the examiner's opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment. [Sub. (3)(dm).]

Section 971.14(3)(e) further requires that the report contain "the facts and reasoning, in

reasonable detail" for the findings and opinions set forth in c. through f., above.

3. Filing and distribution

The report is to be filed with the court (§ 971.14(3)), and the "court shall cause copies of the report to be delivered forthwith to the district attorney and defense counsel, or the defendant personally if not represented by counsel." § 971.14(4)(a).

"Upon the request of the sheriff or jailer charged with care and control of the jail in which the defendant is being held . . . , the court shall cause a copy of the report to be delivered to the sheriff or jailer." § 971.14(4)(a).

The report shall not be otherwise disclosed prior to the hearing on competency. § 971.14(4)(a).

IV. The Judicial Determination Regarding Competency

Competency to stand trial is a legal issue to be decided by the court. A finding is not to be made on the basis of rubber stamping the expert's report. State ex rel. Haskins v. Dodge County Court, 62 Wis.2d 250, 264, 214 N.W.2d 575 (1974). Stated another way, the ultimate legal conclusion of competency to stand trial is a judicial rather than medical determination. State v. Smith, 2016 WI 23, ¶52, 367 Wis.2d 483, 878 N.W.2d 135.

A. The hearing on competency

1. The need for an evidentiary hearing

A full evidentiary hearing is not always required since the statutes allow the district attorney, the defendant, and the defense counsel to "waive their respective opportunities to present other evidence on the issue." § 971.14(4)(b). In State v. Guck, 176 Wis.2d 845, 500 N.W.2d 910 (1993), the court held that § 971.14(4)(b) does not require a personal statement by a defendant waiving the evidentiary hearing. In Guck, defense counsel stated in the trial court that he had discussed the report and the right to a hearing with the defendant and that the defendant wished to waive the hearing. The court concluded that "the Legislature did not intend to require a personal statement by a criminal defendant waiving the opportunity to present evidence on the issue of competency under sec. 971.14(4)(b)." 176 Wis.2d 845, 855.

Though Guck makes it clear that the statute does not require a personal statement by the defendant, the Committee continues to recommend as good practice that the court personally inquire of the defendant whether he or she concurs in the waiver. A simple

question at this stage may help to forestall a later, more cumbersome inquiry into the effectiveness of defense counsel.

Section 971.14(4)(b) allows the receipt of testimony over the telephone at the competency hearing: "Upon a showing by the proponent of good cause under § 807.13(2)(c), testimony may be received into the record of the hearing by telephone or live audiovisual means."

As to whether a defense lawyer may (or must) testify, State v. Meeks, 2003 WI 104, 263 Wis.2d 794, 666 N.W.2d 859, the Wisconsin Supreme Court held that a lawyer who formerly represented the defendant could not testify about his or her perceptions of the former client's competency when competency was raised in a new prosecution. Meeks was charged with felony murder, and his competency to stand trial was raised shortly after initial appearance. The state introduced testimony of an attorney who had represented Meeks on charges in earlier cases but did not represent him on the current charges. The attorney did not testify as to any specific communications with Meeks, but the implication of her testimony was that Meeks was competent to proceed during those earlier cases.

The court of appeals held that the testimony was appropriate because it did not divulge the contents of any specific conversations and therefore did not violate the attorney-client privilege. The Wisconsin Supreme Court reversed, holding that:

> . . . an attorney's opinions, perceptions, and impressions relating to a former client's mental competency fall within the definition of a confidential communication pursuant to Wis. Stat. § 905.03(2) and SCR 20:1.6. As a result, such communications may not be revealed without the consent of the client. 2003 WI 104, ¶2.

The court adopted what is characterized as the minority view on this issue and admitted that it creates a tension with the Johnson decision. [discussed in Sec. II.A.4., above]. The court did not overrule Johnson, pointing out that:

> The attorney is merely obligated to "raise the issue [of competency] with the trial court." Johnson, 133 Wis.2d at 220. There is no requirement that the attorney testify about his or her reasons for raising the issue or the opinions, perceptions, or impressions that form the basis for his or her reason to doubt the client's competence. Meeks, 263 Wis.2d 794, ¶46.

In a final summary, the court restated its conclusion:

In summary, we hold that the testimony of [former defense counsel] violated the

> attorney-client privilege. While the contents of confidential conversations with Meeks were not revealed in her testimony, [former defense counsel]'s expressed opinions, perceptions, and impressions of Meeks' competency were premised upon and inextricably linked to confidential communications. Confidential communications must be interpreted to include both verbal and non-verbal communications in order to preserve inviolate the integrity of the attorney-client relationship. Meeks, 263 Wis.2d 794, ¶58.

2. The burden of persuasion

Section 971.14(4)(b) provides as follows with respect to the standard of proof and the allocation of the burden of persuasion on the competency/incompetency issue:

> . . . . At the commencement of the hearing, the judge shall ask the defendant whether he or she claims to be competent or incompetent. If the defendant stands mute or claims to be incompetent the defendant shall be found to be incompetent unless the state proves by the greater weight of the credible evidence that the defendant is competent. If the defendant claims to be competent, the defendant shall be found competent unless the state proves by evidence which is clear and convincing that the defendant is incompetent.

The statute appears to comply with due process requirements for the competency determination and commitment for treatment.[5] However, a possible problem remains if the statute is read literally: if a defendant "claims to be competent," the burden is on the state to prove incompetence "by evidence which is clear and convincing"; if the state fails to meet its burden, the statute provides that "the defendant shall be found competent."

A problem may arise in at least two ways. One is that if the defendant "claims to be competent," the state may well claim the defendant is competent as well, leaving neither party with an interest in presenting the case for either competency or incompetency. A second variation would be presented if the state does attempt to prove incompetency but fails. In either situation, the possible problem is this: failure to prove incompetency by clear and convincing evidence (either because no one pursues that issue or because the standard of proof is not satisfied) does not necessarily mean that competency is established by the greater weight of the evidence.

If it is a basic due process requirement that a person not be tried unless competency is established by at least the greater weight of the evidence, an affirmative finding must be made in every case where there is "reason to doubt" competency. The statute's assertion that "the defendant shall be found competent" in the absence of proof (to a higher degree of certainty) that the defendant is incompetent is no substitute for a finding based on the

evidence.

As a practical matter, this should not be a serious problem, but the Committee recommends the cautious approach of making a finding of competency, based on the record, whenever there is "reason to doubt" competency rather than relying on the automatic direction of the statute. In virtually every case, a record failing to show incompetence (by clear and convincing evidence) should support an affirmative finding that the defendant is competent (by the greater weight of the evidence). A recommended finding is included in Sec. IV.B., below.

The approach recommended here is essentially the same as the one called for by the ABA Criminal Justice Mental Health Standards. They call for a finding by the greater weight of the evidence that the defendant is competent. The burden of persuasion is not assigned to either party. If that finding is not made, the court is to consider issues of treatment to effect competence. Involuntary commitment for treatment is to be ordered if the basis therefor is established by clear and convincing evidence. See ABA Criminal Justice Mental Health Standards 7 4.8(c) and 7 4.9(a) (1989).

B. If the court finds the defendant competent to proceed, the criminal proceeding shall resume.

If the court finds the defendant competent to proceed, a specific finding should be made. A finding like the following is recommended:

> The court has considered the reports of the examiners, the conduct and demeanor of the defendant, and all the facts and circumstances relating to the defendant's understanding of these proceedings. The court is satisfied by the greater weight of the credible evidence that the defendant does not lack substantial capacity to understand the proceeding or assist.

C. If the court finds the defendant incompetent to proceed, the court must determine if the defendant is likely to regain competency.

If the court finds that the defendant is not competent to proceed, the court must further determine whether the defendant is likely to become competent within the shorter of the two time periods specified by § 971.14(5)(a):

- within 12 months, or
- within a period equal to the maximum sentence for the most serious offense with which the defendant is charged (if that period is less than 12 months).

In practice, these limits amount to a 12 month limit for Criminal Code felonies because the lowest felony penalty class — Class I — provides for a maximum of 1.5 years imprisonment and 2 years of extended supervision. Most Criminal Code misdemeanors are "Class A" and have a 9-month maximum sentence. There are some Class B and C misdemeanors in the Criminal Code, which have 90 day and 30 day maximum penalties, respectively.

1. Recovery of competency not likely: release of defendant

If the court determines that regaining competency within the designated time period is not likely, § 971.14(6)(a) provides that the defendant is to be released, subject to the civil commitment transition provision described in § 971.14(6)(b) and in Sec. VIII. B., below.

2. Recovery of competency likely: commitment of defendant

If the court determines that the defendant is likely to become competent within the specified period, the court is to order that the proceedings be suspended and shall commit the defendant to the custody of the department for placement in an appropriate institution. § 971.14(5)(a). The commitment process is addressed in the next section. The reexamination process is described in Sec. VI.

V. Commitment as not competent to proceed – § 971.14(5)(a)

A. Basis for and terms of a commitment order.

1. Basis for commitment

Both of the following bases must exist to support a commitment:

a. The defendant lacks substantial mental capacity to understand the proceedings or assist in his or her own defense; and

b. The defendant is likely to become competent within the commitment period.

2. Length of commitment[6]

The commitment may continue until competency is regained or until the lesser of the following limits is reached:

a. 12 months

The 12-month limit will apply to almost all cases where Criminal Code felonies are charged because the felony class with the shortest penalty, Class I, carries a maximum sentence of 1.5 years confinement and 2 years extended supervision.

b. The maximum sentence for the most serious offense charged

The "maximum sentence" limit will apply only to misdemeanors. Class A misdemeanors carry a 9-month maximum sentence; Class B and C misdemeanors carry 90 day and 30-day maximums, respectively.

3. The commitment order

The commitment order should be executed completely and clearly. Use of the officially adopted circuit court form is required. § 971.025(1). The form is CR 206 (revised September 2022), available on the state court website: http://www.wicourts.gov/.

B. The right to refuse medication; involuntary medication orders.

The Wisconsin Supreme Court has held that all involuntarily committed persons have the right to refuse psychotropic medication. State ex rel. Jones v. Gerhardstein, 141 Wis.2d 710, 416 N.W.2d 883 (1987). This includes persons committed under § 971.14 as not competent to stand trial.

A finding on competence to refuse medication is to be made as part of the initial competency evaluation if sufficient information is available to the examiner. See § 971.14(3)(dm). A similar finding is also to be made at the time the person is committed as not competent to stand trial. See § 971.14(4)(b). If no court order regarding competence to refuse medication was entered at the time of commitment, a procedure for returning to court to obtain such an order is set forth in § 971.14(5)(am).

The standard for determining competence to refuse medication is set forth in § 971.14(3)(dm):

> …The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, and, after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the defendant, one of the following is true:

1. The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.

2. The defendant is substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness, developmental disability, alcoholism, or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

The necessity and extent of advice on the "advantages, disadvantages and alternatives" in a civil commitment case is discussed in Outagamie County v. Melanie L., 2013 WI 67, 349 Wis.2d 148, 833 N.W.2d 607.

It is important that hearings be held as quickly as possible so that needed treatment is not delayed. It may help to receive testimony pursuant to the rules on conducting proceedings by telephone or audiovisual means. (Section 971.14(5)(am) refers to the "procedures and standards specified in [§ 971.14] sub. (4)(b)." Subsection (4)(b) includes a provision for taking testimony by telephone.) The hearing may be conducted by a court commissioner. State ex rel. Jones v. Gerhardstein, supra, 141 Wis.2d 710, 746.

Note that at any stage where a person is found not competent to refuse medication, the effect of a court order is to authorize medication or treatment under appropriate medical standards. (See § 971.14(4)(d).) The statute does not give the court authority to order that specific kinds of treatment be offered.

The provisions in § 971.14 authorizing involuntary medication orders must be implemented only after consideration of the decisions of the United States Supreme Court in Riggins v. Nevada, 504 U.S. 127 (1992) and Sell v. United States, 539 U.S. 166 (2003), and the Wisconsin Supreme Court in State v. Fitzgerald, 2019 WI 69, 387 Wis.2d 384, 929 N.W.2d 165.

In Riggins, the Court reversed a conviction because the state trial court failed to make sufficient findings to support the forced administration of antipsychotic drugs during trial. Riggins was charged with murder and robbery. He complained about hearing voices and having trouble sleeping. The drug Mellaril was prescribed, beginning at a level of 100 milligrams per day. It was eventually increased to 800 milligrams per day. Prior to trial, Riggins requested that the trial court order the administration of the drug suspended until after trial. The trial court refused without an extensive statement of reasons.

The United States Supreme Court held that the involuntary administration of Mellaril

denied Riggins "a full and fair trial." The side effects of the drugs could affect Riggins' outward appearance, which is observed by the jury in evaluating the defendant's demeanor. And ". . . it is clearly possible that such side effects impacted . . . the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." 504 U.S. 127, 137. Further, a defendant has a liberty interest in freedom from unwanted antipsychotic drugs. The Court found the record insufficient to support a finding that these interests were outweighed by the need to accomplish an essential state policy, so the conviction was reversed.

The Court elaborated on Riggins in Sell. The Court held:

> . . . the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests. 539 U.S. 166, 179.

The Court emphasized that the instances where involuntary medication is permitted may be rare. That is because the standard says or implies the following:

> First, a court must find that **important** governmental interests[7] are at stake. . .
>
> Second, the court must conclude that involuntary medication will **significantly further** those concomitant state interests. . .[8]
>
> Third, the court must conclude that involuntary medication is **necessary** to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results.
>
> Fourth, . . . the court must conclude that administration of the drugs is **medically appropriate**, i.e., in the patient's best medical interest in light of his medical condition. 539 U.S. 166, 180-181 [emphasis in original].[9]

The question regarding medication for competency purposes was restated as follows:

> Has the government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it? Id., at 183.

In Fitzgerald, the Wisconsin Supreme Court examined the constitutionality of § 971.14 as it related to the issue of ordering involuntary medication to restore a criminal defendant's competency to stand trial. In a unanimous decision, the Court vacated the circuit court's order for involuntary medication, holding that § 971.14 was unconstitutional as applied to Fitzgerald. Therefore, regardless of the language of § 971.14(3)(dm) and (4)(b), the four Sell factors **must** be satisfied before a court can issue an involuntary medication order to restore competency to stand trial.[10]

Wisconsin Circuit Court form CR-206 Order for Commitment for Treatment (Incompetency) was revised in light of Fitzgerald to accurately reflect the factors set forth in Sell.

In State v. Scott, 2018 WI 74, 382 Wis.2d 476, 914 N.W.2d 141, the Wisconsin Supreme Court held that a defendant committed for treatment to competency may appeal an involuntary medication order as a matter of right under § 808.03(1) and that the order is subject to an automatic stay pending appeal. However, the court amended that rule in State v. Green, 2022 WI 30, 401 Wis.2d 542, 973 N.W.2d 770, and held that Scott's automatic stay rule does not apply to involuntary treatment orders for a person being treated to competency before trial. Instead, the defendant may seek a discretionary stay pending appeal under the standard in State v. Gudenschwager, 191 Wis.2d 431, 529 N.W.2d 225 (1995). 401 Wis. 2d 542, ¶¶18-36 & n.13.[11]

In State v. D.E.C., 2025 WI App 9, 415 Wis. 2d 161, 17 N.W.3d 67, the court clarified that a Sell-compliant plan may list multiple first-and second-generation antipsychotics, dosage ranges that include manufacturer maximums, and contingent injectable formulations when the plan's flexibility is supported by the treating psychiatrist's testimony; however, State v. J.D.B., 2026 WI 5, 419 Wis.2d 383, 31 N.W.3d 314, later clarified that Sell does not impose a rigid evidentiary checklist and that, while individualized findings are required, the constitution permits flexibility in the evidence used to support them. [12]

C. Suspension of the criminal proceedings

The criminal proceedings are "suspended" during the competency commitment. Pretrial motions under § 971.31 may be decided notwithstanding the defendant's lack of competency if they are "susceptible of fair determination prior to trial and without the personal participation of the defendant." § 971.13(3).

VI. Reexamination and Reports

A. Timing of the reports

The treatment facility is required to reexamine the defendant and report to the court at specified intervals. Written reports are to be furnished to court three months after commitment, six months after commitment, nine months after commitment, and within 30 days of the expiration of the commitment. § 971.14(5)(b).

B. Contents of the reports – § 971.14(5)(b)

Each report shall indicate one of the following:

1. The defendant has become competent; or

2. The defendant remains incompetent but is likely to attain competency within the remaining commitment period; or

3. The defendant has not made such progress that attainment of competency is likely within the remaining commitment period. A report making this indication must include the examiner's opinion regarding whether the defendant is mentally ill, alcoholic, drug dependent, developmentally disabled, or infirm because of aging or other like incapacities.[13]

C. Reexamination hearing; when required and how conducted

A reexamination hearing is required if the report indicates the defendant either has regained competency or is unlikely to attain competency within the remaining commitment period. A hearing is not required if the report indicates the defendant remains incompetent but is likely to attain competency within the remaining commitment period. § 971.14(5)(c).

The hearing shall be held within 14 days of the receipt of the report and is subject to the same requirements as the original commitment hearing – see § 971.14(4) and Sec. IV., above. The parties may waive the hearing, in which case the finding is to be based on the report.

If the court determines the defendant is competent, the criminal proceeding shall be resumed. If the court determines the defendant is making sufficient progress toward becoming competent, the commitment shall continue. § 971.14(5)(c)).

VII. The Defendant Who Regains Competency

A. Competency regained

If the court determines that the defendant has become competent, the defendant is to be discharged from the commitment, and the criminal proceedings are resumed. § 971.14(5)(c).

B. Competency dependent on medication

If medication has assisted the defendant in regaining competency, the court "may make appropriate orders for the continued administration of the medication in order to maintain the competence of the defendant for the duration of the proceedings." § 971.14(5)(d). The Committee recommends that § 971.14(5)(d) be interpreted in light of Riggins, Sell, and Fitzgerald to require a specific finding that the need for the ordered medication outweighs the interests of the defendant that the cases identify. See the discussion in Sec. V.B., above, regarding orders for involuntary medication to restore competency.

C. Recommitment

If a defendant who has been restored to competency thereafter again becomes incompetent, there may be a recommitment. § 971.14(5)(d). The court must make the same determinations as those required for an original commitment: not competent but likely to become competent within the commitment period.

The maximum period for a recommitment is 18 months, minus the days spent under previous commitments, or 12 months, whichever is less. § 971.14(5)(d).

D. Sentence credit

Sentence credit under § 973.155 is due for all days spent in commitment as not competent to proceed, whether the commitment is inpatient or outpatient. § 971.14(5)(a).3 Sentence credit is also required for all days spent during a commitment to an inpatient facility for examination relating to competency to proceed. § 971.14(2)(a).

VIII. Competency Not Regained: Discharge from the Commitment

A. Releasing the defendant

If the court determines that it is unlikely that an incompetent defendant will become competent within the remaining commitment period, it shall discharge the defendant from

the commitment and release him, subject to the provisions relating to transition and civil commitment. § 971.14(6)(a). (Transition to civil commitment is discussed at Sec. B., below.)

1. Periodic return to court

If a defendant is released, the court may order the defendant to appear in court at specified intervals for redetermination of competency to proceed. § 971.14(6)(a).

2. Reexamination of competency

"Counsel who have received notice under par. (c) [from custodian of incompetent defendant who was civilly committed] or who otherwise obtain information that a defendant discharged under par. (a) [discharge and release] may have become competent may move the court to order that the defendant undergo a competency examination. . . ." § 971.14(6)(d).

This competency examination is to be conducted under § 971.14(2), the same statute that applies to an original examination. The court may order a report under § 971.14(3) and a hearing under § 971.14(4).

If the court determines that the defendant is competent, the criminal proceeding is resumed.

If the court determines that the defendant is not competent, it shall release the defendant. However, the court "may impose such reasonable nonmonetary conditions as will protect the public and enable the court and district attorney to discover whether the person subsequently becomes competent." § 971.14(6)(d).

3. Status of the criminal charges

The above procedures clearly imply that the criminal charges will remain pending. There is no authority for a trial judge to order dismissal sua sponte. State ex rel. Haskins v. Dodge County Court, 62 Wis.2d 250, 268, 214 N.W.2d 575 (1974). Dismissal of charges is apparently within the prosecutor's discretion, subject to the general rules relating to speedy trial. 62 Wis.2d 250, 267-71

B. Transition to civil commitment

One of the purposes of the changes made by § 917.14(6), was to facilitate the transition to civil commitment for persons who had been discharged from a competency

commitment.[14]

1. Detention – § 971.14(6)(b)

When a defendant is discharged from a competency commitment, the court may order that he be taken into custody and delivered to one of the following facilities:

a. A facility specified in § 51.15(2) (facilities for the emergency detention of persons undergoing civil mental commitment).

b. An approved public treatment facility under § 51.45(2)(c) (an alcohol treatment facility).

c. An appropriate medical or protective placement facility.

The length of the detention is governed by the statutes relating to the parallel civil commitments: § 51.20 for civil mental commitment; § 51.45(11) for commitments for alcohol treatment; and § 55.06(11) for protective placements.

2. Commitment "statement"

Either the district attorney or the corporation counsel may prepare the "statement" for commitment. § 971.14(6)(b). It is to be based on the allegations of the criminal complaint and the evidence in the case. The statement must meet the requirements for the related civil petitions: § 51.20(1) for civil mental commitments; § 51.45(13)(a) for alcohol treatment; and § 55.06(11) for protective placements. It need not be corroborated by others and will be treated as the petition for commitment. All conduct "during or subsequent to the time of the offense" may be considered in deciding whether the "recent overt acts" requirement for civil commitment has been satisfied. See § 51.20(1)(am).

3. Filing the statement

The statement for commitment shall be given to the director of the facility to which the defendant was delivered. It shall be "filed with the branch of circuit court assigned to exercise criminal jurisdiction in the county in which the criminal charges are pending." § 971.14(6)(b). However, the court may transfer the matter to the branch assigned jurisdiction under Chapter 51.

4. If a person is committed

A person committed under this procedure is treated as though committed under § 51.20,

§ 51.45, or § 55.06, as applicable. Days spent subject to this commitment do not require sentence credit under § 973.155. § 971.14(6)(b).

5. Notice of transfer or discharge

At least 14 days prior to transfer, discharge, or expiration of the commitment order, the § 51.42 or § 51.437 board must notify the court which originally discharged the person from the competency commitment, the district attorney for the county in which that court is located, and the person's attorney of record. § 971.14(6)(c).

6. Subsequent competency examinations

Upon receiving the above notice or upon receiving other information that the defendant is competent to proceed, either the district attorney or defense counsel may move the court to order another competency examination under § 971.14(2). The procedures relating to the original evaluation of competency apply. § 971.14(6)(d).

If the court determines that the defendant is competent, the criminal proceedings shall be resumed. If the court determines that the defendant is not competent, it shall order release but may impose such reasonable nonmonetary conditions as will protect the public and enable the court and district attorney to discover whether the person subsequently becomes competent. § 971.14(6)(d).

COMMENT

SM 50 was originally published in 1974 and revised in 1986, 1988, 1989, 1991, 1997, 2004, 2021, 2023, and 7/2025. This revision was approved by the Committee in April 2026. It updated the Comment.

This Special Material is intended to outline the statutory procedures and case law requirements relating to determining a defendant's competency to stand trial.

The 2004 revision withdrew three appendices. Appendix A was a letter describing the "local sites" project of the Department of Health and Family Services, which is intended to provide faster and less expensive competency evaluations. Trial courts generally receive periodic updates on the local sites assigned to their courts. Appendix B illustrated a completed order for competency evaluation. Appendix C illustrated a completed order for commitment for treatment. The forms for these orders are available on the state court website. See CR 205 and CR 206 at http://www.wicourts.gov/.

1. This basic standard for competency is sometimes elaborated upon by reference to more specific abilities and characteristics. In State v. Garfoot, the court noted that "[t]o elicit information about a

defendant's competence, many courts and experts rely on a 13 point checklist known as the 'McGarry Scale' or 'Competency to Stand Trial Instrument,'" and made reference to State v. Shields, 593 A.2d 986 (Del. Super. 1990), which in turn refers to a detailed list of factors. 207 Wis.2d 214, 228, n.7.

2. It is assumed that a person committed for a competency examination will always be represented by counsel or will have waived counsel. A person must at least be afforded the opportunity to be represented, not only because it is constitutionally required (the criminal prosecution has begun) but also because medical ethics preclude conducting a competency examination of any person charged with crime "prior to access to or availability of legal counsel." American Psychiatric Association Ethical Guidelines, Section 4, Number 13.

3. Examiners are ethically prohibited from examining a person charged with a crime who has not had access to counsel. See note 2, supra.

4. The 15 day limit under § 971.14(2)(am) does not begin to run until the defendant arrives at the examination facility; the limit did not apply where the court's order was not reduced to writing, and the defendant was never transported to the examination facility. State ex rel. Hager v. Marten, 226 Wis.2d 687, 594 N.W.2d 791 (1999).

5. Subsection (4) of § 971.14 contains two different burdens of persuasion, depending on what the defendant claims with regard to competency. This possibly awkward approach was adopted in an attempt to serve two different interests. The statute requires the state to prove competency by the greater weight of the evidence to serve the basic due process requirement that an incompetent defendant may not be tried. The statute requires the state to prove incompetency by clear and convincing evidence to justify the involuntary commitment for treatment of the defendant who is found to lack competency. This approach was developed in an attempt to meet requirements that were believed to follow from the analogy made between involuntary civil mental commitments and commitments of those found not competent to stand trial. The United States Supreme Court has addressed some aspects of this issue since § 971.14 was adopted in its present form.

In Medina v. California, 505 U.S. 437, 439 (1992), the Court held that "the Due Process Clause permits a State to require a defendant who alleges incompetence to stand trial to bear the burden of proving so by a preponderance of the evidence." In Cooper v. Oklahoma, 517 U.S. 348 (1996), the Court held that an Oklahoma statute requiring the defendant to prove lack of competency by clear and convincing evidence violated the Due Process Clause. And, in Addington v. Texas, 441 U.S. 418 (1979), the Court held that the "clear and convincing evidence" burden satisfies the requirements of due process for the purposes of civil mental commitment. The Wisconsin two-step approach clearly complies with these due process-based requirements.

The constitutionality of the Wisconsin statutory scheme regarding the burden of persuasion was upheld in State v. Wanta, 224 Wis.2d 679, 592 N.W.2d 645 (Ct. App. 1999).

6. Under pre–Truth In Sentencing law, good time credit is to be accorded persons committed as incompetent to stand trial. State v. Moore, 167 Wis.2d 491, 481 N.W.2d 633 (1992).

7. Sell requires courts to assess the government's interest in prosecution under the specific facts of the individual case, and it recognizes that "special circumstances may lessen the importance" of that interest. Sell v. United States, 539 U.S. 166, 180, 123 S. Ct. 2174 (2003). In State v. J.D.B., 2026 WI 5, 419 Wis.2d 383, 31 N.W.3d 314, the Wisconsin Supreme Court emphasized that Sell factor 1 is a single,

unified inquiry—not a two-part or "checkbox" test—and that mitigating circumstances are typically not "ordinary." J.D.B., supra, at ¶¶12–14. Courts may also consider whether the charged offense is non-violent when evaluating the government's interest. See United States v. White, 620 F.3d 401, 419 (4th Cir. 2010).

Examples of circumstances that may bear on the analysis include the defendant's pretrial confinement credit and the likelihood/length of future confinement through civil commitment, but the ultimate question remains whether the State's interest in prosecution is sufficiently important, on these facts, to override the defendant's liberty interest against unwanted medication. J.D.B., supra, at ¶¶13–14; Jackson v. Indiana, 406 U.S. 715, 738, 92 S.Ct. 1845 (1972).

As persuasive guidance, several courts link the "seriousness" of a charge to the maximum penalty and the nature or effect of the conduct. Offenses carrying maximum penalties greater than six months are routinely deemed "serious." See United States v. Tucker, 60 F.4th 879, 886–87 (4th Cir. 2023); United States v. Valenzuela-Puentes, 479 F.3d 1220, 1226 (10th Cir. 2007); United States v. Palmer, 507 F.3d 300, 304 (5th Cir. 2007).

Once the State establishes that a charge is serious, some courts require the defendant to present evidence of special circumstances. However, the State retains the ultimate burden under Sell to prove the relevant factual predicates by clear and convincing evidence. See United States v. Fiesta, 84 F.4th 713, 721–22 (7th Cir. 2023); State v. Green, 396 Wis. 2d 658, ¶16 (Ct. App. 2021).

8. The State must show a "substantial likelihood" of restoring competency based on evidence specific to the defendant, but need not produce an exhaustive, flow-chart-style plan; live expert testimony can supply the required context.

9. With regard to persons who have never previously been treated with antipsychotic medications, broader dosage ranges may be constitutionally permissible where the expert explains that a "robust trial" may be needed before abandoning a drug. See State v. D.E.C., 2025 WI App 9, 415 Wis. 2d 161, ¶45, 17 N.W.3d 67.

10. Subsections (3)(dm) and (4)(b) are less comprehensive than the standard articulated in Sell in four ways:

First, sub. (3)(dm) "does not require the circuit court to find that an important government 'interest in bringing to trial an individual accused of a serious crime' is at stake," as required by the first Sell factor. Fitzgerald, supra at ¶26. Instead, § 971.14 "merely requires the circuit court to find probable cause that the defendant committed a crime—not necessarily a serious one." Id. at ¶26. See also, § 971.14(1r).

Second, sub. (3)(dm) fails to consider the second Sell factor, as "it does not require the circuit court to conclude that medication is substantially likely to restore a defendant's competency or to consider whether side effects 'will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense.'" Fitzgerald, at ¶27 (quoting Sell, 539 U.S. at 181, 123 S.Ct. 2174 (2003)).

Third, in contrast to the third Sell standard, "§ 971.14(4)(b) mandates involuntary medication if the State establishes pursuant to paragraph (3)(dm) the defendant's inability to either express an understanding of the advantages and disadvantages of medication or to make an informed choice about it, regardless of the existence of less intrusive but nonetheless effective options." ¶28.

Fourth, in contrast to the fourth Sell factor, which requires the circuit court to conclude that the

administration of medication is medically appropriate, § 971.14(4)(b) can be read to authorize "whoever administers the medication or treatment to the defendant" to "observe appropriate medical standards." § 971.14(4)(b). See State v. Fitzgerald, 2019 WI 69, ¶¶14-17, 387 Wis.2d 384, 929 N.W.2d 165.

11. In State v. D.E.C., 415 Wis. 2d 161, 2025 WI App 9, ¶¶ 61–66, 17 N.W.3d 67, the court re-affirmed that objections to specific medications, dosage ranges, or formulation sequences must be presented in the circuit court; undeveloped or first-time appellate arguments are deemed forfeited. However, D.E.C. did not disturb the automatic-stay framework articulated in State v. Scott, 2018 WI 74, 382 Wis. 2d 476, and refined for pre-trial orders in State v. Green, 2022 WI 30, 401 Wis. 2d 542.

12. Preserving objections after D.E.C. – Arguments about specific medications, dosing maxima, or injectable use must be raised in the circuit court; otherwise they are forfeited absent extraordinary circumstances.

Wisconsin cases have discussed certain plan details that are commonly addressed in Sell litigation (e.g., identification of proposed medication(s), dosing parameters, and reporting/monitoring intervals). See State v. Green, 2021 WI App 18, ¶¶37–38, 396 Wis.2d 658, 957 N.W.2d 583; State v. D.E.C., 2025 WI App 9, ¶34, 415 Wis.2d 161, 17 N.W.3d 67. However, the Wisconsin Supreme Court has since clarified that Sell does not require a mandatory checklist of evidentiary items and overruled Green to the extent it is understood to impose one; the constitutional focus is on individualized findings supported by evidence, with flexibility in how that showing is made. State v. J.D.B., 2026 WI 5, ¶33, 419 Wis.2d 383, 31 N.W.3d 314.

13. As a drafting best practice, treatment plans and hearing testimony should provide defendant-specific information sufficient to support the circuit court's Sell findings, but the plan need not read as an exhaustive "flow-chart-style" protocol so long as the evidentiary record supports the required individualized determinations. J.D.B., supra, at ¶¶32–33.

14. For a case illustrating the transition from a competency commitment to a civil mental commitment, see In Re the Mental Condition of Billy Jo W., 182 Wis.2d 616, 514 N.W.2d 707 (1994). In that case, the court held that in certain circumstances, a court may order the release of civil commitment records where there is a "significant interrelationship between criminal proceedings involving a violent felony and the civil commitment." 182 Wis.2d 616, 649. Upon making a threshold determination that the interrelationship exists, the court must balance the public interest in access against the individual's privacy interest.

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