

**983 COMMITTING A DOMESTIC ABUSE CRIME WITHIN 72 HOURS OF ARREST — § 939.621(1)(a) and (2)**

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

The information<sup>1</sup> alleges not only that the defendant committed the crime of (identify crime) but also that the crime was an act of domestic abuse committed during the 72 hours immediately following the defendant's arrest for a domestic abuse incident.

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

"Was the crime of (identify crime) an act of domestic abuse and did the defendant commit it during the 72 hours immediately following an arrest for a domestic abuse incident?"

Before you may answer this question "yes," you must find the following beyond a reasonable doubt:

(1) that the defendant was previously arrested for a domestic abuse incident;

(2) that the crime of (identify crime) charged in this case was an act of domestic abuse;

and

(3) that the defendant committed the crime of (identify crime) charged in this case during the 72 hours immediately following the previous arrest.<sup>2</sup>

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:<sup>3</sup>

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

[intentional impairment of physical condition.]

[(first) (second) (third) degree sexual assault.]<sup>4</sup>

[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.)].

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).

#### ADD THE FOLLOWING IF RAISED BY THE EVIDENCE

[The victim of the domestic abuse crime charged in this case does not have to be the same as the victim of the domestic abuse incident that resulted in the previous arrest.]<sup>5</sup>

If you are satisfied beyond a reasonable doubt that the crime of (identify crime) was an act of domestic abuse and that the defendant committed it during the 72 hours immediately following an arrest for a domestic abuse incident, you should answer the question "yes."

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

#### COMMENT

Wis JI-Criminal 983 was originally published in 1997 and revised in 2003 and 2013. The 2013 revision reflected changes made by 2011 Wisconsin Act 277. This revision was approved by the Committee in February 2014; it reordered the two parts of the definition of "domestic abuse" and modified the caption and the Comment.

Section 939.621 was created by 1987 Wisconsin Act 346. It was amended by 1995 Wisconsin Act 304 to extend the time period from 24 to 72 hours. (Effective date: May 16, 1996.) The statute was not affected by 2001 Wisconsin Act 109, which repealed several penalty-enhancing statutes. Section 939.621 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). Act 277 added a second basis for the penalty increase, being a "domestic abuse repeater" – see § 939.621(1)(b) and Wis JI-Criminal 984.

. . . 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.

This instruction is drafted for a case where § 939.621(1)(a) applies – committing a second domestic abuse crime within 72 hours of release following an arrest for a domestic abuse incident. 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. 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 § 939.621(1)(a) requires two findings: that the crime charged was "an act of domestic abuse"; and that the crime charged was committed during the 72 hours immediately following the defendant's arrest for another act that constituted a domestic abuse incident. 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 and did the defendant commit it during the 72 hours immediately following an arrest for a domestic abuse incident?"

1. 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.

2. The definition of this penalty-increasing provision requires that the previous arrest and the commission of the new domestic abuse crime occurred within a 72-hour period. If there is a conflict in the evidence regarding when the previous arrest occurred, definition of "arrest" may be required. The Committee's advice is to use the definition that Wisconsin courts apply in the Fourth Amendment context. In State v. Swanson, 164 Wis.2d 437, 446, 475 N.W.2d 148 (1991) the court "abrogated" the subjective test for an arrest and adopted an objective test: "The standard generally used to determine the moment of arrest in a constitutional sense is whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances."

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. This is stated in § 939.621(2).