

**984 COMMITTING A DOMESTIC ABUSE CRIME AS A DOMESTIC ABUSE REPEATER — § 939.621(1)(b) 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.

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:<sup>2</sup>

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

[intentional impairment of physical condition.]

[(first) (second) (third) degree sexual assault.]<sup>3</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).

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. This revision updated the Comment and was approved by the Committee in October 2015.

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(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."

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

3. 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.