

**996 SELECTING THE PERSON AGAINST WHOM A CRIME IS
COMMITTED BECAUSE OF RACE, RELIGION, ETC. — § 939.645**

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

The (information) (complaint) alleges not only that the defendant committed the crime of _____¹ but also that he intentionally selected the person against whom the crime was committed in whole or in part because of the defendant's belief or perception regarding the race² of that person.

If you find the defendant guilty, you must answer the following question:³

"Did the defendant intentionally select the person against whom the crime of _____ was committed because of the race of that person?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant intentionally⁴ selected (name of victim) as the victim of the crime of _____ in whole or in part because of the defendant's belief or perception regarding (name of victim)'s race, whether or not that belief or perception was correct.⁵

If you are satisfied beyond a reasonable doubt that the defendant intentionally selected (name of victim) as the person against whom the crime of _____ was committed because of his belief or perception regarding the race of (name of victim), you should answer the question "yes."

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

COMMENT

Wis JI-Criminal 996 was originally published in September 1988 and revised in 1990. It was withdrawn in June 1992 and republished in 1993. This revision was approved by the Committee in February 2003 and involved adding reference to 2001 Wisconsin Act 109 to the comment.

Section 939.645 was retained as a "penalty enhancer" by 2001 Wisconsin Act 109.

This instruction is drafted for the enhancement of penalty provided by § 939.645, Penalty; Crimes Committed Against Certain People or Property. The statute was created by 1987 Wisconsin Act 348, effective date: May 3, 1988. Wis JI-Criminal 996 is drafted for cases involving a crime against the person; Wis JI-Criminal 996A is drafted for cases where the crime is against property. The penalty increase depends on the ordinary penalty for the underlying crime:

- If the penalty for the underlying crime is less than that of a Class A misdemeanor, the revised maximum fine is \$10,000 and the maximum term of imprisonment is one year in the county jail.
- If the penalty is ordinarily a Class A misdemeanor, the revised maximum fine is \$10,000 and the revised maximum term of imprisonment is 2 years. NOTE: This changes the status of the crime to a felony.
- If the crime is ordinarily a felony (of any class) the maximum fine may be increased by not more than \$5,000 and the maximum term of imprisonment may be increased by not more than 5 years.

Section 939.645(2).

The penalty enhancement does not apply to a crime which already requires proof of the victim's race, etc. § 939.645(4). See, for example, § 943.012, Criminal Damage to Religious and Other Property, also created by 1987 Wisconsin Act 348, and addressed by Wis JI-Criminal 1401A, 1401B, and 1401C.

A brief history of the "hate crimes" statute and its review in the courts follows note 5.

The penalty enhancement under § 939.645 should be alleged in the complaint and information along with the underlying crime. Section 939.645(3) expressly provides that "the court shall direct that the trier of fact find a special verdict as to . . . [the penalty enhancement issue]." This comports with the Committee's usual recommendation 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 intentionally select the person against whom the crime of _____ was committed because of the race of that person?"

1. Section 939.645 applies only to crimes "under chs. 939 to 948." § 939.645(1)(a).
2. The penalty enhancement provided by § 939.645 applies not only to victims selected because of race but also to victims selected because of "religion, color, disability, sexual orientation, national origin, or ancestry." § 939.645(1)(b). The references to "race" in the instruction must be changed to refer to the appropriate term if one of the other bases for selection is involved.
3. Section 939.645(3) requires the use of a special verdict. See the Comment preceding note 1, supra.
4. Although § 939.645(1)(b) uses the word "intentionally," it apparently does not have its usual meaning. See § 939.23(3). First, the statute's provision that the actor select the victim "in whole or in part" because of status seems to be a lesser standard than the typical "mental purpose" requirement. Second, the context of this offense makes it unlikely that the "aware that his or her conduct is practically certain to cause that result" alternative is likely to apply. Third, the general rule that "intentionally" carries with it a knowledge requirement appears to be superseded by the 1992 amendment of the statute which made "belief or perception" of the victim's status sufficient.
5. The phrase "in whole or in part because of the actor's belief or perception regarding the race . . . whether or not the actor's belief or perception was correct," was added to the statute by 1991 Wisconsin Act 291, effective date: May 14, 1992.

History of the Wisconsin "Hate Crimes" Statute

Section 939.645 was created by 1987 Wisconsin Act 348, effective date: May 3, 1988. It was amended by 1991 Wisconsin Act 291. (See note 5, above.)

The instructions for this offense were originally published in 1988 but were withdrawn in 1992 when the Wisconsin Supreme Court found that the statute was unconstitutional. The instructions were restored in 1993 after the United States Supreme Court reversed the Wisconsin decision.

In State v. Mitchell, 169 Wis.2d 153, 485 N.W.2d 807 (1992), the Wisconsin Supreme Court concluded that § 939.645 unconstitutionally infringed upon free speech by punishing thought rather than conduct. The court focused on the statute's phrasing: "intentionally selects the [victim] . . . because of . . . race. . . .":

Without doubt the hate crimes statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of the defendant's selection, the reason the defendant selected the victim, the motive behind the selection. . . .

While the statute does not specifically phrase the "because of . . . race, religion, color, [etc.]" element in terms of bias or prejudice, it is clear from the history of anti-bias statutes, detailed above, that sec. 939.645, Stats., is expressly aimed at the bigoted bias of the actor. Merely because the statute refers in a literal sense to the intentional "conduct" of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law – punishment of offensive motive or thought.

. . . . A statute specifically designed to punish personal prejudice impermissibly infringes upon an individual's First Amendment rights, no matter how carefully or cleverly one words the statute. The hate crimes statute enhances the punishment of bigoted criminals because they are bigoted. The statute is directed solely at the subjective motivation of the actor – his or her prejudice. Punishment of one's thought, however repugnant the thought, is unconstitutional.

169 Wis.2d 153, 167, 170

The court indicated that its decision was supported by the decision of the United States Supreme Court in R.A.V. v. City of St. Paul, 112 S.Ct. 2538 (1992), which was decided one day before the decision in Mitchell. R.A.V. involved a different approach to the "hate crimes" issue in that the ordinance in question attempted to punish directly speech or other expressive conduct motivated by racial or other discriminatory prejudice: "The ideological context of the thought targeted by the [Wisconsin] hate crimes statute is identical to that targeted by the St. Paul ordinance – racial or other discriminatory animus. And, like the United States Supreme Court, we conclude that the legislature may not single out and punish that ideological content." State v. Mitchell, 169 Wis.2d 153, 172.

The United States Supreme Court reversed in Wisconsin v. Mitchell, 113 S.Ct. 2194, decided June 11, 1993. Chief Justice Rehnquist, writing for a unanimous court, held that the Wisconsin version of a "hate crime" statute did not violate First Amendment protections. Although it allows more severe punishment if a victim is selected because of a particular status, the court found this was no different from the standard practice which allows judges to consider a variety of factors in deciding on the sentence to be imposed:

Mitchell argues that the Wisconsin penalty-enhancement statute is invalid because it punishes the defendant's discriminatory motive, or reason, for acting. But motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge.

The court distinguished the decision in R.A.V., saying that it involved a law aimed at the content of certain communications deemed to be offensive. Mitchell, on the other hand, involves a statute aimed at conduct. Further, said the court,

. . . the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its amici, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. . . . The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases.

The court also rejected *Mitchell's* claim that the statute was overbroad, dismissing it as "too speculative." And, the court disagreed with the Wisconsin Supreme Court's conclusion regarding the evidentiary use of speech:

The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like.