

**996A SELECTING PROPERTY DAMAGED BECAUSE OF THE RACE,
RELIGION, ETC., OF THE OWNER — § 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 property damaged² by the crime in whole or in part because of the defendant's belief or perception regarding the race³ of the owner⁴ of that property.

If you find the defendant guilty, you must answer the following question:⁵

"Did the defendant intentionally select the property damaged by the crime of _____ because of the race of the owner of that property?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant intentionally⁶ selected the property damaged by the crime of _____ in whole or in part because of the defendant's belief or perception regarding the race of the owner of that property, whether or not that belief or perception was correct.⁷

If you are satisfied beyond a reasonable doubt that the defendant intentionally selected the property damaged by the crime of _____ because of his belief or perception regarding the race of the owner of that property, you should answer the question "yes."

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

COMMENT

Wis JI-Criminal 996.1 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 It was withdrawn in June 1992 and republished in 1993.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 when it was renumbered as Wis JI-Criminal 996A. The 2003 revision also added 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 996A is drafted for cases involving crimes against property; Wis JI-Criminal 996 is drafted for cases involving crimes against the person.

A brief history of § 939.645 follows note 5, Wis JI-Criminal 996.

The penalty increases depend on the original penalty for the underlying offense. See Comment to Wis JI-Criminal 996.

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 property damaged by the crime of _____ because of the race of the owner of that property?"

1. Section 939.645 applies only to crimes "under chs. 939 to 948." § 939.645(1)(a).
2. The statute refers to "property which is damaged or otherwise affected by the crime." § 939.645(1)(b).
3. 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.

4. The statute refers to "the owner or occupant of that property." § 939.645(1)(b).
5. Section 939.645(3) requires the use of a special verdict. See the Comment preceding note 1, supra.
6. Although § 939.645(1)(b) uses the word "intentionally," it apparently does not have its usual meaning. See note 4, Wis JI-Criminal 996.
7. 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.