

**998 VIOLENT CRIME AGAINST AN ELDER PERSON — § 939.647**

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

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 (name violent felony)<sup>1</sup> but also that the defendant committed that crime against an elder person.

If you find the defendant guilty of (name violent felony), you must answer the following question:

"Did the defendant commit the crime of (name violent felony) against a person who was 62 years of age or older?"<sup>2</sup>

Knowledge of the victim's age is not required and mistake about the victim's age is not a defense.<sup>3</sup>

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of (name violent felony) against a person who was 62 years of age or older, you should answer the question "yes."

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

**COMMENT**

Wis JI-Criminal 998 was originally published in 1999. This revision was approved by the Committee in February 2003.

Section 939.647 was repealed by 2001 Wisconsin Act 109, effective February 1, 2003. This instruction is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by § 939.647 have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(5).

Section 939.647 was created by 1997 Wisconsin Act 266 (effective date June 25, 1998). It provides for a five-year increase in the maximum penalty if a person commits a specified "violent felony" against an elder person. (See footnote 1 for the list of specified felonies.)

The statute provides that "the court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (2)." See § 939.647(4). Sub. (2) apparently specifies two issues: that the defendant committed a violent felony and that the victim is an elder person. Since this instruction would only be considered by the jury if they found the defendant guilty of one of the specified violent felonies, the Committee concluded that only the victim's status as an elder person need be submitted to the jury in 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.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant commit the crime of \_\_\_\_\_ against person who was 62 years of age or older?"

1. The "violent felonies" to which § 939.647 applies are listed in subsection (1)(b) and include the following:

- battery under § 940.19(2), (3), (4), (5), or (6);
- first, second or third degree sexual assault under § 940.225(1), (2), or (3);
- first or second degree reckless injury under § 940.23; and
- robbery under § 943.32.

2. Strictly following the statutory format would mean first stating the term "elder person" and then providing the definition: one who is 62 years of age or older. The Committee concluded that it was more direct simply to ask: Was the victim 62 years of age or older?

3. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (3) of § 939.647 provides a similar rule for this offense: "Subsection (2) applies even if the person mistakenly believed that the victim had not attained the age of 62 years." The Committee concluded that the standard statement is clearer; no change in meaning is intended.