1226 BATTERY WITH SUBSTANTIAL RISK OF GREAT BODILY HARM — § 940.19(6)

Statutory Definition of the Crime

Battery, as defined in § 940.19(6) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to another by conduct which creates a substantial risk of great bodily harm.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[1]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

   "Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct

was practically certain to cause bodily harm to another human being.[4]

3. The defendant's conduct created a substantial risk of great bodily harm.[5]

"Great bodily harm" means serious bodily injury.[6] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

[IF THERE IS EVIDENCE THAT THE VICTIM HAD A PHYSICAL DISABILITY, ADD THE FOLLOWING.][7]

[If you find that (name of victim) had a physical disability at the time of the offense, and that the disability was discernible by an ordinary person viewing the victim, or was actually known by the defendant,[8] you may find from that fact alone that the defendant's conduct created a substantial risk of great bodily harm. But you are not required to do so, and you must be satisfied beyond a reasonable doubt from all the evidence that the defendant's conduct created a substantial risk of great bodily harm.][9]

4. The defendant knew that (his) (her) conduct created a substantial risk of great bodily harm.[10]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and

knowledge.[11]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1226 was originally published in 1994 and revised in 2001 and 2014. This revision was approved by the Committee in October 2021; it made changes pursuant to 2021 Wisconsin Act 76.

This offense was originally defined in § 940.19(3), created by Chapter 113, Laws of 1979. It was renumbered § 940.19(6) by 1993 Wisconsin Act 441 and the penalty increased to a Class D felony. The law was originally drafted as a straightforward "Battery To Older Persons" provision, with an increased penalty for battery committed against persons 60 years of age or older (see 1979 Assembly Bill 8). The bill was amended to apply to all batteries involving a "high probability of great bodily harm," with the facts that the victim was over age 62 or suffering from physical disability creating "a rebuttable presumption of conduct creating a high probability of great bodily harm." The 1994 revision changed "high probability" to "substantial risk." § 940.19(6), the provision that presumed that a defendant's conduct created a substantial risk of great bodily harm when the victim was 62 years of age or older, was repealed by 2021 Wisconsin Act 76 [effective date: August 8, 2021]. 2021 Act 76 also created various provisions related to crimes and other proceedings involving individuals who are 60 years of age or older. For the new crime of physical abuse to an elder person, see Wis JI-Criminal 1249A through 1249F.

Instructing the jury when the "presumption" is in the case is discussed at notes 7 and 9, below.

The 1994 revision corrected what was probably an inadvertent technical error in the former statute. The introductory section of § 940.19(3), 1991 92 Wis. Stats., reads as follows (emphasis added):

Whoever intentionally causes bodily harm to another by conduct which creates a high probability of great bodily harm is guilty of a Class E felony. A rebuttable presumption of conduct creating a substantial risk of great bodily harm arises . . .

1993 Wisconsin Act 441 preserved the inconsistency when it recreated former sub. (3) as sub. (b), but "high probability" was changed to "substantial risk" by a "revisor's bill," 1994 Wisconsin Act 483.

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. This is the definition of "bodily harm" provided in § 939.22(4).

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

5. For offenses committed before August 8, 2021, include the following language after the definition of "great bodily harm" in element 3.

> [IF THERE IS EVIDENCE THAT THE VICTIM WAS 62 YEARS OF AGE OR OLDER, ADD THE FOLLOWING.]
>
> [If you find that (<u>name of victim</u>) was age 62 or older at the time of the offense, you may find from that fact alone that the defendant's conduct created a substantial risk of great bodily harm, but you are not required to do so, and you must be satisfied beyond a reasonable doubt from all the evidence that the defendant's conduct created a substantial risk of great bodily harm.]

This paragraph on the "rebuttable presumption" established by § 940.19(3) follows the rule set out in § 903.03(3) for instructing the jury on presumptions in criminal cases. See Wis JI-Criminal 225 for a discussion of the Committee's approach to instructing on "presumptions" and "prima facie" cases. See also, footnote 7, regarding the submission of presumptions to the jury.

6. The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

7. See § 903.03(2) regarding the submission of presumptions to the jury. It provides in part:

> When the presumed fact establishes guilt or is an element of the offense or negates a defense, the judge may submit the question of guilt or the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt.

Therefore, there must be sufficient evidence of the "presumed fact" – substantial risk of great bodily harm – to enable a reasonable juror to be convinced of its existence beyond a reasonable doubt, before an instruction on the "presumption" flowing from the "basic facts" of disability may be submitted.

The Wisconsin Supreme Court addressed the "physical disability" presumption in State v. Crowley, 143 Wis.2d 324, 422 N.W.2d 847 (1988). The court dealt with two issues: the general validity of the presumption relating a physical disability to the likelihood of great bodily harm; and the validity of associating physical disability with the condition of the victim in the case before the court.

As to the first issue, the court applied the rule of Ulster County Court v. Allen, 442 U.S. 140 (1979), described as holding that "a presumption may be impermissible if there is no reasonable nexus or relationship between the evidentiary facts and the fact to be presumed." 143 Wis.2d 324, 339. The court concluded that "the relationship, the nexus, between physical disability and the likelihood that violence against one physically disabled will lead to great bodily harm, is unassailable. . . ." 143 Wis.2d 324, 339.

The court also concluded that the victim in the Crowley case, who was 48 years old, weighed 96 lbs., was 4' 9" in height, and was legally blind, was "physically disabled" within the meaning of the statute. The court concluded that disability need not be found as a medical fact but only as a matter discernibly evident to a lay person. Further, the court held that it is not necessary that the victim qualify as a "handicapped person" as that term is used in the Fair Employment laws.

8. The 1994 revision of the statute added the phrase, "or that is actually known by the actor," to sub. (6)(b).

9. This paragraph on the "rebuttable presumption" established by § 940.19(3) follows the rule set out in § 903.03(3) for instructing the jury on presumptions in criminal cases. See Wis JI-Criminal 225 for a discussion of the Committee's approach to instructing on "presumptions" and "prima facie" cases.

10. Subsection 940.19(6) applies to those who "intentionally cause bodily harm by conduct which creates a substantial risk of great bodily harm." Subsection 939.23(3) provides that when "intentionally" is used in a criminal statute, it requires that the actor "have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally'." The Committee concluded that this requires that the defendant charged under § 940.19(6) must have known that his conduct created a substantial risk of great bodily harm. The Committee further concluded that it need not be established that the defendant knew that the victim was over the age of 62 or suffering from a physical disability, because those two factors are essentially treated only as evidence of the fourth element of the crime: that the defendant's conduct has created a substantial risk of great bodily harm. See notes 6 through

10, supra.

11. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.