

1227 BATTERY TO AN UNBORN CHILD — § 940.195(1), (2), (4), (5)¹**Statutory Definition of the Crime**

Battery to an unborn child, as defined in § 940.195 of the Criminal Code of Wisconsin, is committed by one who causes [(bodily harm) (substantial bodily harm) (great bodily harm)]² to an unborn child by an act done with the intent to cause [(bodily harm) (or) (great bodily harm)]³ [(to that unborn child) (or) (to the woman who is pregnant with that unborn child) (or) (to another)].⁴

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 two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused (bodily harm) (substantial bodily harm) (great bodily harm) to an unborn child.

"Cause" means that the defendant's act was a substantial factor in producing the (bodily harm) (substantial bodily harm) (great bodily harm).⁵

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.]⁶

"Substantial bodily harm" means bodily injury that causes [a laceration that requires (stitches) (staples) (a tissue adhesive)] [any fracture of a bone] [a broken

nose] [a burn] [a petechia] [a temporary loss of consciousness, sight, or hearing] [a concussion] [a loss or fracture of a tooth].⁷

["Great bodily harm" means serious bodily injury.⁸ (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.)]

"Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.⁹

2. The defendant intended to cause [(bodily harm) (or) (great bodily harm)] [(to the unborn child) (or) (to the woman who was pregnant with the unborn child) (or) (to another)].

"Intent to cause [(bodily harm) (or) (great bodily harm)]" means that the defendant had the mental purpose to cause [(bodily harm) (or) (great bodily harm)] [(to an unborn child) (or) (to the woman who was pregnant with the unborn child) (or) (to another human being)] or was aware that his or her conduct was practically certain to cause [(bodily harm) (or) (great bodily harm)] [(to an unborn child) (or) (to the woman who was pregnant with the unborn child) (or) (to another human being)].

[DEFINE THE INTENDED HARM IF IT IS DIFFERENT FROM THE HARM CAUSED]¹⁰

Deciding About Intent

You cannot look into a person's mind to find intent. Intent 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.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both 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 1227 was originally published in 1999 and revised in 2003. This revision was approved by the Committee in June 2017; it updated the definition of "substantial bodily harm."

This instruction is drafted to provide a model for the offenses defined in § 940.195, which was created by 1997 Wisconsin Act 295 [effective date: July 1, 1998]. Two changes were made in the statute by 2001 Wisconsin Act 109: sub. (3) – causing substantial bodily harm to an unborn child with intent to cause substantial bodily harm – was repealed; sub. (5) was amended to delete the reference to intent to cause "substantial bodily harm." The effective date of those changes was February 1, 2003.

As amended by 2001 Wisconsin Act 109, there are five subsections of § 940.195, each roughly the same as the subsections of § 940.19, the general battery statute. Act 109 repealed former subsection (3), which applied to causing substantial bodily harm with intent to cause substantial bodily harm. The approach used in this instruction ought to work for all violations except for violations under sub. (6): intentionally causing bodily harm by conduct that creates a substantial risk of great bodily harm. See the discussion in footnote 1, suggesting that Wis JI-Criminal 1226 be used as a model for violations of sub. (6).

Section 939.75, also created by Act 295, defines "unborn child" and sets forth several exceptions to the applicability of the revised statutes. Subsection (2)(b) recognizes the following exceptions:

- induced abortions [subd. 1.]
- acts committed in accordance with usual and customary standards of medical practice during diagnostic testing or therapeutic treatment by a licensed physician [sub. 2.]
- an act by a health care provider that is in accordance with a pregnant woman's power of attorney for health care, etc. [subd. 2h.]
- an act by a woman who is pregnant with an unborn child [subd. 3.]

- the lawful prescription, dispensation or administration, and the use by any a woman of, any medicine, drug or device that is used as a method of birth control or is intended to prevent pregnancy. [subd. 4]

Subsection (3) provides that if any of these exceptions are "placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist . . ." Thus, these exceptions are to be handled in the same manner as, for example, the mitigating circumstance of adequate provocation under the general homicide law: once supported by some evidence, the absence of the exception becomes a fact the state must prove. The Committee decided not to draft instructions for the absence of these exceptions because it appeared to the Committee that their applicability would most likely be determined before charges were filed or at least before trial.

1. As amended by 2001 Wisconsin Act 109, there are five subsections of § 940.195, each roughly the same as the subsections of § 940.19, the general battery statute. Act 109 repealed former subsection (3) which applied to causing substantial bodily harm with intent to cause substantial bodily harm.

The offenses differ from one another depending on three variables: 1) the type of harm caused – whether it was bodily harm, substantial bodily harm, or great bodily harm; 2) the type of harm intended to be caused – whether it was bodily harm or great bodily harm; and, 3) the entity intended to be harmed – the unborn child, the woman who is pregnant with the unborn child, or another. This instruction is set up with these alternatives in brackets throughout, allowing the user to select the alternatives that apply to the offense charged. This approach ought to work for all violations except for violations under sub. (6): intentionally causing bodily harm by conduct that creates a substantial risk of great bodily harm. For that offense, Wis JI-Criminal 1226 can be used as a model and should be modified to refer to causing harm to an unborn child as illustrated by the first element of this instruction.

2. Select the alternative within the bracket that applies. Subs. (1) and (6) of § 940.195 require causing bodily harm; sub. (2) requires causing substantial bodily harm; subs. (4) and (5) require causing great bodily harm.

3. Select the alternative within the bracket that applies. Subs. (1), (2), and (4) of § 940.195 require intent to cause bodily harm; sub. (5) requires intent to cause great bodily harm. The alternatives do not address the offense defined in sub. (6): intentionally causing bodily harm by conduct that creates a substantial risk of great bodily harm. For that offense, Wis JI-Criminal 1226 can be used as a model, modified to refer to causing harm to an unborn child as illustrated by the first element of this instruction.

4. Select the alternative within the bracket that applies. This set of options includes the traditional one of defining the crime as involving intent to harm the victim (here, the unborn child), "or another" (sometimes termed "transferred intent"), and the addition of intent to harm the woman who is pregnant with the unborn child. More than one alternative may be selected if supported by the evidence.

5. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

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

7. This is the definition of "substantial bodily harm" provided in § 939.22(36). Also see footnote 2, Wis JI-Criminal 1222.

8. 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. See Wis JI-Criminal 914 for a complete discussion of "great bodily harm."

9. This is the definition of "unborn child" provided in § 939.75(1).

10. As amended by 2001 Wisconsin Act 109, the statute defines two offenses where the harm caused is different from the harm intended: sub. (2) covers causing substantial bodily harm with intent to cause bodily harm; sub. (4) covers causing great bodily harm with intent to cause bodily harm. For those cases, "bodily harm" should be separately defined here, as part of the "intent to cause bodily harm" element. If the harm caused and harm intended match, the definition of the term in the first element is sufficient.