1231 BATTERY OR THREAT TO A PROBATION, EXTENDED SUPERVISION AND PAROLE AGENT, COMMUNITY SUPERVISION AGENT, OR AN AFTERCARE AGENT — § 940.20(2m)

Statutory Definition of the Crime

Section 940.20(2m) of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent) where at the time of the (act) (threat) the defendant knows or has reason to know that the victim is (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent) (a family member of (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent)), the (act) (threat) is in response to an action by the agent acting in (his) (her) official capacity, and there is no consent by the person (harmed) (threatened).

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 six elements were present.

Elements of the Crime That the State Must Prove

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

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[1]

IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

["Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.][2]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][3]

2. (Name of victim) was ((a probation, extended supervision and parole agent)[4] (a community supervision agent)[5] (an aftercare agent)[6]) (a family member of (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent)).

[For the purpose of this offense, a (e.g., child) is a family member.][7]

3. At the time of the (act) (threat), the defendant knew, or had reason to know, that (name of victim) was (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent) (a family member of (a probation, extended supervision and parole agent) (a community supervision

agent) (an aftercare agent)).[8]

4. The (act) (threat) was in response to an action taken by the agent acting in (his) (her) official capacity.

(Probation, extended supervision and parole agents) (community supervision agents) (aftercare agents) act in an official capacity when they perform duties that they are employed[9] to perform.[10] [These duties include: _____.][11]

5. The defendant (caused) (threatened to cause) bodily harm without the consent[12] of (name of victim).

6. The defendant acted intentionally.[13] This requires that the defendant intended to (cause) (threaten to cause) bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent to the causing of bodily harm.[14]

Meaning of "Intentionally"

Intent to (cause) (threaten to cause) bodily harm means that the defendant had the mental purpose to (cause) (threaten to cause) bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another.[15]

Deciding About Intent and Knowledge

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

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six 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 1231 was originally published in 1994 and revised in 1996, 2005, 2008, 2019, and 2022. The 2022 revision amended the body of the instruction and the comment based on 2021 Wisconsin Act 187. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.20(2m) was created by 1989 Wisconsin Act 336 and originally applied to battery of probation and parole agents. It was amended by 1995 Wisconsin Act 77 to include battery to "aftercare agents." [Effective date: July 1, 1996]. "Extended supervision agents" were added by 1997 Wisconsin Act 283. [Effective date: June 24, 1998]. 2015 Wisconsin Act 55 added "community supervision agents" [with a delayed effective date of September 24, 2017]. § 940.20 (2m)(b) 2021 was amended by Wisconsin Act 187 to provide that it is a Class H felony to commit, or threaten to commit, battery against an agent or the family member of an agent. The Act also amended the definitions of "aftercare agent" and "community supervision agent" [Effective date: March 19, 2022].

1. This is the definition provided in § 939.22(4).

2. 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.

Also, see Wis JI-Criminal 901 Cause.

3. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats." Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm" to another…

4. Section 940.20(2m)(a)2. provides that "'probation, extended supervision and parole agent' means any person authorized by the department of corrections to exercise control over a probationer, parolee, or person on extended supervision or authorized by a federally recognized American Indian tribe or band to exercise control over a probationer, parolee, or person on extended supervision or a comparable program that is authorized by the tribe or band."

5. "Community supervision agent" is defined as follows in § 940.20(2m)(a)1m.: ". . . any person authorized by the department of corrections to exercise control over a juvenile on community supervision or authorized by a federally recognized American Indian tribe or band to exercise control over a juvenile

on community supervision or a comparable program that is authorized by the tribe or band."

6. "Aftercare agent" is defined as follows in § 940.20(2m)(a)1.: ". . . any person authorized by the department of corrections to exercise control over a juvenile on aftercare or authorized by a federally recognized American Indian tribe or band to exercise control over a juvenile on aftercare or a comparable program that is authorized by the tribe or band."

7. Section 940.20 (2m) (a) 1p. provides:

"Family member" means a spouse, child, stepchild, foster child, parent, sibling, or grandchild.

8. The "knew or had reason to know" requirement is taken directly from § 940.20(2m)(b)1. It is treated as a separate element rather than being combined with the sixth element, where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as a probation, extended supervision and parole agent, a community supervision agent, or an aftercare agent, or a member of the agent's family and the agent "acting in an official capacity." The statute expressly applies "reason to know" only to status as a probation, extended supervision and parole agent, a community supervision agent, or an aftercare agent, or a member of the agent's family. But the two requirements are so closely connected that the Committee concluded the same knowledge standard has to apply to each.

9. "Employed" is used here in the general sense of being engaged in the performance of a duty.

10. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

11. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

Wisconsin Administrative Code, Chapter DOC 328, Community Supervision Of Offenders, provides "rules, services, and programs for offenders who are under the supervision of the department." DOC 328.04(2) extensively describes the duties of agents who provide community supervision. All the agents specified in § 940.20(2m) must be "authorized by the department to exercise control" over specific categories of persons who are being supervised. See the definitions quoted in footnotes 3, 4, and 5 above. Thus, it appears that all would be subject to the standards and grants of authority in DOC 328.

12. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

13. Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.20(2m)(b), which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2m)(b)1., through 2. and 3. Sub. (2m)(b)1. has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2m)(b) proper and the other facts that follow.

14. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

15. See note 12, supra.