

1238A BATTERY TO A WITNESS, THEIR FAMILY MEMBER, OR A PERSON SHARING A COMMON DOMICILE WITH A WITNESS — § 940.62(2)(a)**Statutory Definition of the Crime**

Section 940.62(2)(a) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to ((the person) (the family member) of a current or former (witness)) (a person sharing a common domicile with a witness) where at the time of the act the defendant knew or had reason to know that the victim was a (current or former witness) (a family member of a current or former witness) (a person sharing a common domicile with a witness), the act is in response to any action taken in (an official capacity) (a legal proceeding), and there is no consent by the victim.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that 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 bodily harm to (name of victim).

“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.¹

“Cause” means that the defendant’s conduct was a substantial factor in producing bodily harm.²

2. (Name of victim) was a (current or former witness) (family member of a current or former witness) (person sharing a common domicile with a witness).

[“Witness” means any person who (has attended a proceeding to testify or who has testified.) (is subject to be called or likely to be called as a witness.)]³

[A [insert proper term from the definition in § 940.41(3)] is a witness.]

3. The defendant (knew) (had reason to know) that (name of victim) was a (current or former witness) (family member of a current or former witness) (person sharing a common domicile with a witness).⁴
4. The defendant caused bodily harm to (name of victim) in response to an action taken in (an official capacity) (a legal proceeding) by (name of witness) as a witness.⁵
5. The defendant caused bodily harm without the consent⁶ of (name of victim).
6. The defendant acted intentionally.⁷ This requires that the defendant acted with the mental purpose to cause bodily harm to (name of victim)⁸, or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent.⁹

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 1238A was approved by the Committee in February 2026.

The offense of Battery to a Witness [Witness Has Attended or Testified] — § 940.201 was previously covered by Wis JI–Criminal 1238. That instruction was withdrawn in February 2026 following the enactment of 2025 Wisconsin Act 24, which repealed § 940.201 in its entirety as part of a broader reorganization of Wisconsin's battery statutes.

§ 940.62(2)(a), created by 2025 Wisconsin Act 24 [effective August 10, 2025], establishes a Class H felony for committing battery against certain individuals involved in the court or legal system. While the statute applies broadly—including judges, prosecutors, law enforcement officers, guardians ad litem, corporation counsel, advocates, attorneys, and grand or petit jurors, this instruction is limited in scope and addresses only witnesses and individuals who share a common domicile with a witness.

For an instruction on Threat to a Witness or Person Sharing a Common Domicile with a Witness, see Wis JI–Criminal 1238B.

This instruction is for violations of § 940.62(2)(a), where the alleged battery has taken place in response to any action taken in a legal proceeding. In State v. McLeod, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978), the Wisconsin Court of Appeals held that the battery to witness statute also applies where the victim has not yet testified but is expected to be called.

Section 940.201[now 940.62(2)(a)], was created by 1997 Wisconsin Act 143, effective date: May 5, 1998. Similar offenses against witnesses were formerly addressed by § 943.20(3).

1. This is the definition of “bodily harm” 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 more persons might jointly produce it.

Also see Wis JI–Criminal 901, Cause.

3. The definition of “witness” in the first set of brackets is a simplified version of the definition provided in § 940.41(3), which applies to violations of § 940.62(2)(a). If that statement does not fit the status of the victim, the definition in the second set of brackets should be used, selecting the proper alternative from the full definition, which reads as follows:

(3) “Witness” means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under § 885.01 or under the authority of any court of this state or of the United States.

In State v. McLeod, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978), the Wisconsin Court of Appeals held that the predecessor to § 943.201 B § 940.26, 1975 Wis. Stats. B also applied where the victim has not yet attended or testified but is expected to be summoned to testify. For that type of case, the definition of “witness” in the second element should be modified to refer to “a person who is expected to be summoned to testify.”

4. The statute includes the requirement that the defendant “knew or had reason to know” that the victim is or was a witness. A strong argument can be made that making an element of this statement is unnecessary because of the element that follows. That is, if the defendant committed the battery against the victim in response to an action taken in a legal proceeding, the defendant must have known that the victim was a witness. However, because the “knew or had reason to know” requirement is part of the statute, the Committee concluded that it should be retained as an element. In all cases that the Committee could envision, the defendant who caused harm to another person “by reason of” that person having testified would have known that person was a witness. Thus, the “had reason to know” alternative is placed in brackets because it is not expected to be applicable to the typical case under the statute.

5. § 940.62(2)(a)2. provides that the battery must be “in response to any action taken in an official capacity or in a legal proceeding.” Although the statute uses both phrases because § 940.62(2)(a) applies to a broad list of persons involved in the court or legal system, the Committee concluded that, as a practical matter, the “official capacity” alternative is not ordinarily applicable when the protected person is a witness. Witnesses do not act in an “official capacity” in the sense contemplated by the statute; their relevant conduct is participation in a “legal proceeding” (e.g., testifying, appearing under subpoena, etc.). The Committee views Act 24’s use of both phrases as a drafting choice intended to consolidate the prior, role-specific formulations—former § 940.201 (witness-focused, proceeding-based)—into a single subsection. Accordingly, in prosecutions involving witnesses (and persons associated with witnesses), this instruction

is drafted for use with the “legal proceeding” alternative, and “official capacity” should be selected only if the evidence and the theory of prosecution genuinely implicate that concept.

6. 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.

7. “Intentionally” requires either a 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 § 940.62(2)(a), 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 facts set forth in (2)(a)1. And 2. Sub. (2)(a)1. has its own mental state – “knows or should know” – and thereby breaks the connection between “intentionally” used in sub. (2)(a)2. proper and the other facts that follow.

8. This instruction is drafted for cases involving intent directed at the actual victim because the Committee concluded that this is the scenario most likely to arise in practice. However, the statute provides “intent to cause bodily harm to that person or another.” If it is necessary to instruct on the issue of transferred intent, the instruction should be modified accordingly.

9. 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.”