

1238B THREAT TO A WITNESS, A PERSON SHARING A COMMON DOMICILE WITH A WITNESS, OR THE FAMILY MEMBER OF A WITNESS — § 947.016(1)

Statutory Definition of the Crime

Section 947.016(1) of the Criminal Code of Wisconsin is violated by one who threatens to cause 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 threat the defendant knows that the victim is a (current or former witness) (a family member of a current or former witness) (a person sharing a common domicile with a witness), the threat is because of or in response to any action taken in (an official capacity) (a legal proceeding), and the threat is made without the consent of the person threatened.

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. (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 or is expected to attend a proceeding to testify or who has testified.]¹

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

2. The defendant knew² 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).
3. The defendant threatened to cause bodily harm to (name of victim).

A threat requires a true threat. It may be communicated orally, in writing, or by conduct. “True threat” means that a reasonable person would interpret the threat as a serious expression that the speaker will inflict imminent or future bodily harm. It must convey a real possibility that bodily harm will follow.³ 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.⁴

“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.⁵

4. The defendant threatened to cause bodily harm to (name of victim) because of or in response to an action taken in (an official capacity) (a legal proceeding) by (name of witness) as a witness.⁶
5. The defendant consciously disregarded⁴ a substantial risk that others would view the statement as a true threat to cause bodily harm.

[This means the defendant is aware that others could regard the statement(s) as threatening violence and delivers (it) (them) anyway.]⁵

6. The defendant threatened to cause bodily harm without the consent⁷ of (name of

victim).

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. 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 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 1238B was approved by the Committee in June 2026.

The offense of Threat 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 the operative provisions of § 940.201 — including the crime of causing or threatening to cause bodily harm to a witness — as part of a broader reorganization of Wisconsin's battery statutes. The threatening-conduct provisions formerly in § 940.201(2) were recreated in § 947.016(1).

§ 947.016(1), created by 2025 Wisconsin Act 24 [effective August 10, 2025], establishes a Class H felony for threatening to cause bodily harm to 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 Battery to a Witness or Person Sharing a Common Domicile with a Witness, see Wis JI–Criminal 1238A.

§ 947.016(1) was created by 2025 Wisconsin Act 24 [effective August 10, 2025]. Similar offenses against witnesses were formerly addressed by § 940.201. Related property-based threats to witnesses continue to be addressed by § 943.011.

Note: § 947.016(1) does not use the word “intentionally” in connection with the threat. Prior to the enactment of 2025 Wisconsin Act 24 many Wisconsin threat statutes required that the defendant “intentionally threatened.” Under those statutes, the statutory mens rea (intentional purpose) exceeded the constitutional minimum (recklessness) established by Counterman v. Colorado, 600 U.S. 66. By contrast, because § 947.016(1) does not impose an intent requirement for the threat element, Element 5 of this instruction—the Counterman/Kindschy recklessness standard—functions both as the constitutional minimum and as the operative mens rea for true-threat prosecutions under the statute.

1. 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 § 947.016(1). 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 § 940.201 — § 940.26, 1975 Wis. Stats. — 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.”

2. The statute requires that the defendant “know” the victim’s status. This is actual knowledge, not constructive knowledge. Contrast § 947.016(2)(a), which uses the lower “knows or has reason to know” standard for other protected persons. If the evidence raises a question whether the defendant had actual vs. constructive knowledge, the court should consider whether this distinction should be explained to the jury.

3. See Counterman v. Colorado, 600 U.S. 66, 74 (2023). Justice Bradley’s concurrence in Kindschy v. Aish, 2024 WI 27, ¶44, 412 Wis.2d 319, 8 N.W.3d 1, acknowledges Counterman’s recklessness standard. Element 5 reflects the Counterman standard as the constitutionally required minimum mens rea for true-threat prosecutions.

4. This definition was originally 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. Perkins 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 the statute criminalizing language is much narrower.” 2001 WI

46, ¶43.

In Counterman v. Colorado, 600 U.S. 66, 79 (2023), the U.S. Supreme Court clarified that true threats must be evaluated based on their objective content—how a reasonable listener would perceive them—and that criminal liability requires a mens rea of at least recklessness, meaning the speaker must have “consciously disregarded a substantial risk that [the communications] would be viewed as threatening violence.” The Wisconsin Supreme Court adopted the Counterman recklessness standard in Kindschy v. Aish, supra, at ¶¶14–15, abrogating the purely speaker-focused objective test previously employed under Perkins. Accordingly, the Committee revised the former Perkins–based definition to reflect the Counterman/Kindschy approach.

When deciding whether a statement is a true threat, the jury should consider the totality of circumstances. Relevant factors may include whether the threat was conditional; whether it was made directly to a specific person; how the recipient and others reacted; and whether the defendant had made similar statements or had the means to carry out the threat. The jury may also consider all other facts and context to determine if a statement was a true threat. See Perkins, supra, at ¶ 31, citing United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000).

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 U.S.C. § 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. Although Elonis was decided as a matter of federal statutory interpretation, it underscores that criminal “threat” liability should not rest solely on an objective reasonable-person standard. This instruction’s definition of “true threat” includes both an objective reasonable-listener component and the mens rea floor required by the First Amendment under Counterman and Kindschy—that the defendant consciously disregarded a substantial risk that others would view the statement as threatening violence.

5. This is the definition of “bodily harm” provided in § 939.22(4).

6. § 947.016(1) provides that the threat must be “in response to any action taken in an official capacity or in a legal proceeding.” Although the statute uses both phrases because § 947.016(1) 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.

7. 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.

4. Recklessness requires a subjective mental state: the defendant must actually (in his or her own mind) be aware of the risk created by the conduct. The statutory definition of “recklessness” clarifies that subjective awareness of the risk is required. See Wis. Stat. § 939.24.

5. See Counterman v. Colorado, See 600 U.S. 66, *supra*, at 79.