1239 BATTERY OR THREAT TO WITNESS [WITNESS LIKELY TO BE CALLED TO TESTIFY] — § 940.201

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1239 was originally published 1998, replacing Wis JI-Criminal 1233 for offenses against persons who have not yet testified as a witness but are likely to do so. It was withdrawn in 2003 because the Committee concluded that an offense of that type could be addressed by making relatively minor adjustments in Wis JI-Criminal 1238.

The separate instruction formerly provided by Wis JI-Criminal 1239 addressed the type of violation recognized by the Wisconsin Court of Appeals in McLeod v. State, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978). McLeod held that the predecessor to § 940.201 applied to a battery against a person who had not yet attended or testified as a witness, but who was expected to do so. McLeod dealt with § 940.206, 1975 Wis. Stats., which was renumbered § 940.20(3) without substantive change by Chapter 173, Laws of 1977. Current § 940.201 replaced § 940.20(3) in 1998.

McLeod dealt with the conflict between the definition of the crime, which refers to "by reason of having attended or testified," and the reference in the definition of "witness" which includes anyone who "is expected to be summoned to testify" or who is "likely to be called as a witness, whether or not any action has as yet been commenced." (As described above, the definition of "witness" in § 940.41(3) now applies. However, the McLeod issue remains the same under the new definition.) In McLeod, the Wisconsin Court of Appeals determined that the statute applies to batteries upon witnesses who have not testified:

> Despite this clear and precise definition of who is a "witness" and protected by this battery-to-a-witness statute, it is here contended that a person who has not already testified from the witness stand is not protected by this statute. Reliance for this contention is based upon a phrase in the sentence in the battery-to-a-witness statute requiring the assault to be "with intent to cause bodily harm to that person [a witness as defined in § 943.30(3)(b)]." As to such intent, the statute states that is to be "by reason of his [the witness] having attended or testified as a witness . . . ." Does this use of the past tense operate to replace or alter the definition of "witness," carefully spelled out in the earlier part of the same section of the same statute? We think not. It is true that the legislature, in its rules of construction of statutes, has prescribed that "[t]he present tense of a verb includes the future when applicable," but not that the past tense include the future. However, in such construction-of-laws statute, the legislature has provided its rules shall be observed "unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature. . . ." In the statute before us here, the manifest intent of the legislature is spelled out by the definition of "witness" to include persons expected to be summoned to testify in the future. The reference to intent to harm "by reason of" the victim having testified, we hold, includes an

> assault intended to prevent the consequences of the victim having testified as well as to punish such witness for testimony already given. Our state Supreme Court has said that "the meaning of a word takes color and expression from the purport of the entire phrase of which it is a part, and it must be construed to harmonize with the context as a whole." Here, dealing with a single sentence statute, with a clear definition by incorporation of who is to be protected by the statute, we hold that "by reason of" reference to include the attacker's fear of future, as well as past consequences, to the attacker of the witness, "having attended or testified as a witness . . . ." No other construction of the "by reason of" reference harmonizes with or carries out the manifest and expressed purpose of the battery-to-a-witness statutes. [footnotes omitted, 85 Wis.2d 787, 791-92]

In cases like McLeod, even though the witness has not testified, there must be a connection between the battery and the victim's status as a witness, and the instruction so requires.

