

**1246 MAYHEM — § 940.21****Statutory Definition of the Crime**

Mayhem, as defined in § 940.21 of the Criminal Code of Wisconsin, is committed by one who cuts or mutilates the tongue, eye, ear, nose, lip, limb, or other bodily member of another with intent to disable or disfigure that person.

**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 three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant cut or mutilated (the tongue) (the eye) (the ear) (the nose) (the lip) (a limb) (any bodily part)<sup>1</sup> of (name of victim).
2. The cutting or mutilation caused great bodily harm to (name of victim).<sup>2</sup>

"Cause" means that the defendant's conduct was a substantial factor<sup>3</sup> in producing great bodily harm.

"Great bodily harm" means 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.<sup>4</sup>

3. The defendant intended to disable or disfigure (name of victim).

This requires that the defendant had the mental purpose to disable or disfigure (name of victim) or was aware that (his) (her) conduct was practically certain to disable or disfigure (name of victim).

### **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 all three elements of mayhem have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Until 1994, violations of § 940.21, Mayhem, were addressed by Wis JI-Criminal 1230, which was originally published in 1969 and revised in 1982, 1987, and 1992. That instruction was revised and republished as Wis JI-Criminal 1246 in 1994 and revised in 2005. This revision was approved by the Committee in June 2008 and involved revising the definition of the first element and adding footnote 1.

The second element of the instruction, requiring the causing of great bodily harm, was added in 1982 and reflects the holding in State v. Kirby, 86 Wis.2d 292, 272 N.W.2d 113 (Ct. App. 1978). Kirby held that "causing great bodily harm" was an element of mayhem, even though it was not expressly stated in the statute. Kirby also held that injury by conduct regardless of life [which would be "reckless injury" under § 940.23 under current law] and endangering safety by conduct regardless of life [which would be "recklessly endangering safety" under § 941.30 under current law] were lesser included offenses of mayhem. The Committee revised the instruction in September 1982 to comply with the Kirby decision.

In July 1982, the Wisconsin Court of Appeals (District I) decided State v. Cole (not published) and held that the 1969 version of Wis JI-Criminal 1230, without "great bodily harm," was a proper statement of the law. Though written by the author of Kirby, the Cole decision did not mention that case or acknowledge the great bodily harm issue.

On January 27, 1987, the Wisconsin Court of Appeals (District IV) decided State v. Webie. The defendant appealed his conviction for endangering safety by conduct regardless of life. The conviction was reversed because the court found that "endangering safety. . ." was not a lesser included offense of mayhem, the crime with which Webie was originally charged. This result required expressly overruling Kirby on the lesser included offense issue. Webie also noted that "we need not consider whether mayhem continues to incorporate the unexpressed great bodily harm requirement." Though it reversed a previous decision and was recommended for publication, Webie was ordered not published on April 2, 1987.

In the meantime, Cole (see State v. Cole, above) had gone to federal court, claiming that the failure to instruct on an element (great bodily harm) of the crime (mayhem) deprived him of due process. The U.S. Court of Appeals for the 7th Circuit granted habeas corpus relief in Cole v. Young, 817 F.2d 412 (7th Cir. 1987). The court reviewed Kirby, Cole, and Webie and decided that state law made great bodily harm an element of mayhem. That being the case, the court found a constitutional violation in the failure to instruct on that element.

Since it is the only published opinion, Kirby remains the law of the state. While at least one district of the Wisconsin Court of Appeals disagrees with it, that disagreement did not manifest itself in a published opinion. Thus, Kirby must be followed until it is officially overruled.

In State v. Quintana, 2008 WI 33, ¶73, 308 Wis.2d 615, 748 N.W.2d 447, (see note 1, below) the court acknowledged the above discussion but noted that "the legislature has not acted to correct any possible misinterpretation that arose out of the 1978 Kirby decision or its progeny. The inclusion of great bodily harm as an element supports our conclusion that the legislature sought a broad definition of 'other bodily member' as great bodily harm is not limited to specific parts of the body."

1. In State v. Quintana, 2008 WI 33, 308 Wis.2d 615, 748 N.W.2d 447, the court held that the term "other bodily member" in the mayhem statute is to be broadly construed and includes the forehead:

¶90 . . . . We conclude that the forehead qualifies as an "other bodily member" under Wis. Stat. § 940.21, Mayhem. Wisconsin's mayhem statute seeks to punish those who intentionally disable or disfigure another person's bodily member. The manner in which the legislature used the phrase, "other bodily member," requires that we give that phrase a broad construction. If "other bodily member" were to be narrowly construed, the construction would produce absurd results, and the purpose of the statute would easily be defeated. Because the legislature intended the phrase "other bodily member" to be construed broadly rather than narrowly, the phrase "other bodily member" in the mayhem statute encompasses all bodily parts, including a person's forehead. The application of the mayhem statute is limited by the need to prove that a person specifically intended to disable or disfigure.

In light of this decision, the Committee decided that list of alternatives in the first element should be revised to include a general reference to "any bodily part." In addition to the paragraph quoted above, see ¶33: "In short, 'other bodily member' encompasses all bodily parts."

2. Kirby v. State, 86 Wis.2d 292, 301, 272 N.W.2d 113 (Ct. App. 1978):

Although at common law mayhem required proof of mutilation or dismemberment that affected one's combat ability, the statutory enactments creating the crime have not required such extensive mutilation or disfigurement. Nonetheless, "cuts or mutilates" as used in the statute requires proof of

an act of greater severity than a mere nick with a knife. We believe that "cutting or mutilation," a statutory element of mayhem, requires an injury that constitutes "great bodily harm" as interpreted in LaBarge [74 Wis.2d 327, 246 N.W.2d 794 (1976)] and required as an element of injury by conduct regardless of life.

Also see LaFave and Scott, Criminal Law (1972) at 614-17.

3. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.
4. See Wis JI-Criminal 914 for a complete discussion of "great bodily harm."