1247A BATTERY OR THREAT TO A STAFF MEMBER OF A HEALTH CARE FACILITY — § 940.204(2)

Statutory Definition of the Crime

Section 940.204(2) of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of any health care facility worker[1] where at the time of the (act) (threat), the person knows[2] that the victim ((works) (formerly worked) in a health care facility) (is a family member of a person who (works) (formerly worked) in a health care facility), [the (act) (threat) is in response to an action occurring at the health care facility], [the (act) (threat) is in response to an action taken in the employee's official capacity],[3] 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.[4]

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

["Cause" means that the defendant's act was a substantial factor in producing the bodily harm.][5]

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 making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. 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.][6]

2. (Name of victim) was ((a worker at) (a former worker at)) (a family member of (a worker at) (a former worker at)) a health care facility.[7]

[For the purpose of this offense, a (e.g., child) is a family member.][8]

3. At the time of the (act) (threat) the defendant knew or should have known[9] that (name of victim) was ((a worker at) (a former worker at)) (a family member of (a worker at) (a former worker at)) a health care facility.

4. [The (act) (threat) was in response to an action occurring at the health care facility.] [The (act) (threat) was in response to an action taken by the official, employee, or agent of a health care facility acting in their official capacity.][10]

IF THE CASE INVOLVES AN OFFICIAL, EMPLOYEE, OR AGENT OF THE HEALTH CARE FACILITY ACTING IN AN OFFICIAL CAPACITY, ADD THE FOLLOWING:

Officials, employees, or agents of the health care facility act in an official capacity when they perform duties that they are authorized to perform.

5. The defendant (caused) (threatened to cause) bodily harm without the consent[11] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) bodily harm.[12]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and 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.[13]

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 was 1247A approved by the Committee in April 2022.

Section 940.204(2) was created by 2022 Wisconsin Act 209 [effective date: March 25, 2022]. This instruction applies to battery or threat to a staff member of a health care facility and family members of a staff member of a health care facility. For battery or threat to a health care provider, see Wis JI-Criminal 1247B.

1. Section 940.204(2) applies to offenses against the person or family of anyone "who works in a health care facility." The instruction refers to "worker" throughout, since that appears to be the most inclusive term.

2. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the employee's official capacity. That is, the act or threat must be committed either in response to an action occurring at the health care facility or in response to an action taken in the employee's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

3. One of the alternatives in brackets should be selected.

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

5. 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.

6. 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…

7. Section 940.204(1)(b) provides:

"In this section: 'health care facility' means any of the following:

1. A hospital, as defined in s. 50.33 (2).
2. A clinic, which is a location with the primary purpose of providing outpatient diagnosis, treatment, or management of health conditions.
3. A pharmacy that is licensed under s. 450.06.
4. An adult day care center, as defined in s. 49.45(47).
5. An adult family home, as defined in s. 50.01 (1).
6. A community−based residential facility, as defined in s. 50.01 (1g).
7. A residential care apartment complex, as defined in s. 50.01 (6d).
8. A nursing home, as defined in s. 50.01 (3).
9. A mental health or substance use disorder facility, which is a location that provides diagnosis, treatment, or management of mental health or substance use disorders.
10. An ambulatory surgical center, as defined in 42 CFR 416.2."

8. Section 940.204(1)(a) provides:

"In this section: 'family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

9. See note 2, supra.

10. Based on the evidence, one or both of the alternatives in brackets should be selected. If the evidence supports selecting both, the alternatives should be separated by the disjunctive "or."

11. If 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.

12. "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 § 940.204(2) 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 (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

13. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.