

**1255 STRANGULATION AND SUFFOCATION — § 940.235****Statutory Definition of the Crime**

Section 940.235 of the Criminal Code of Wisconsin is violated by one who intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another 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 two elements were present.

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

1. The defendant impeded the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of (name of victim).
2. The defendant did so intentionally.

This requires that the defendant acted with the mental purpose to impede normal breathing or circulation of blood or was aware that (his) (her) conduct was practically certain to cause that result.<sup>1</sup>

### 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 both 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.

ADD THE FOLLOWING QUESTION IF THE DEFENDANT HAS A PREVIOUS CONVICTION UNDER § 939.632(1)(e)1 AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACTOR IS ESTABLISHED<sup>2</sup>

If you find the defendant guilty, you must answer the following question(s):

[Did the defendant have a previous conviction for (identify the crime)<sup>3</sup> ?]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied, you must answer the question "no."

### COMMENT

Wis JI-Criminal 1255 was originally published in 2009. The comment was revised in 2014. This revision was approved by the Committee in October 2021; it added the penalty-increasing special question. It also added to the Comment.

This instruction addresses violations of § 940.235, created by 2007 Wisconsin Act 127 [effective date: April 4, 2008].

1. Section 939.23(3). Also see Wis JI-Criminal 923A and B.

2. Section 940.235(2) provides that this offense is a Class G felony if “the actor has a previous conviction under this section or a previous conviction for a violent crime, as defined in § 939.632(1)(e)1.” Violent crimes defined in s. 939.632(1)(e)1. are felonies under 34 specified statutes.

The statutorily-authorized penalty-increasing provision in subsection (2) requires proof of a prior conviction. Therefore, the fact that the defendant was convicted of a “violent crime” under § 939.632(1)(e)1. must be found by the jury. For example, in State v. Warbelton, 2009 WI 6, ¶3, 315 Wis.2d 253, 759 N.W.2d 557, the Wisconsin Supreme Court held that a prior conviction for a violent crime under § 940.32(2m)(a) “is an element of the stalking crime, rather than a penalty enhancer.” The Committee concluded that presenting the penalty-increasing fact as a special question, as done in this instruction, is not inconsistent with its status as an element of the crime.

Warbelton also held that if a defendant stipulates to the existence of the prior conviction, the prior conviction element is still to be presented to the jury in the absence of a jury trial waiver on that element. In the Warbelton case, the parties stipulated to the fact of prior conviction. The stipulation was accepted, but the state refused to consent to a jury trial waiver on the prior conviction element. The Wisconsin Supreme Court held the trial court did not err in submitting the element to the jury. The Court held that State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997), which allows withdrawal of the “status element” in a case involving a charge of operating with a prohibited alcohol concentration, is limited to prosecutions for driving while under the influence of an intoxicant or with a prohibited alcohol concentration. For a discussion of stipulations that go to elements of the crime and jury trial waivers in that context, see Wis JI-Criminal 162A, Law Note: Stipulations.

3. The applicable crimes are: a “violent crime” as defined in § 939.632(1)(e)1.