

**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.

### COMMENT

Wis JI-Criminal 1255 was originally published in 2009. This revision was approved by the Committee in July 2014; it added to the Comment.

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

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 s. 939.632(1)(e)1." Violent crimes defined in s. 939.632(1)(e)1. are felonies under 34 specified statutes. The Committee concluded that this penalty-increasing fact need not be submitted to the jury because it relates solely to prior convictions. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added.)

The Committee concluded that the Apprendi exception applies even though the prior conviction must be for a violation of § 940.235 or another of the specified violations listed in § 939.632(1)(e)1, which could be characterized as a fact that goes beyond the mere fact of a conviction. This appears to be the same as the prior convictions, refusals, etc., that are the basis for increased penalties for operating under the influence or with a prohibited alcohol concentration: those must be priors that are counted under § 343.307, but their existence is determined by the court, not the jury.

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