

**1268 ABUSE OF INDIVIDUALS AT RISK — § 940.285****Statutory Definition of the Crime**

Abuse of individuals at risk, as defined in § 940.285 of the Criminal Code of Wisconsin, is committed by one<sup>1</sup> who [(intentionally) (recklessly) (negligently)] subjects an individual at risk to abuse under circumstances that (are likely to) cause [death] [great bodily harm] [(bodily harm)].

**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 four elements were present.

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

1. (Name of victim) was an individual at risk at the time of the alleged offense.

**CHOOSE ONE OF THE FOLLOWING DEFINITIONS**

["Individual at risk" means a person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.]<sup>2</sup>

["Individual at risk" means an adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.]<sup>3</sup>

2. The defendant subjected (name of victim) to [physical abuse] [emotional abuse] [sexual abuse] [treatment without consent] [unreasonable confinement or restraint] [deprivation of a basic need].<sup>4</sup>

CHOOSE ONE OF THE FOLLOWING DEFINITIONS

["Physical abuse" means the intentional or reckless infliction of bodily harm.<sup>5</sup>

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.<sup>6</sup>]

["Emotional abuse" means language or behavior that serves no legitimate purpose and is intended to be intimidating, humiliating, threatening, frightening, or otherwise harassing, and that does or reasonably could intimidate, humiliate, threaten, frighten, or otherwise harass the individual to whom the conduct or language is directed.]<sup>7</sup>

["Sexual abuse" means sexual assault as defined in section 940.225 of the Wisconsin Statutes.]<sup>8</sup>

["Treatment without consent" means the administration of medication to an individual who has not provided informed consent, or the performance of psychosurgery, electroconvulsive therapy, or experimental research on an individual who has not provided informed consent, with the knowledge that no lawful authority exists for the administration or performance."]<sup>9</sup>

["Unreasonable confinement or restraint" includes the intentional and unreasonable confinement of an individual in a locked room, involuntary separation of an individual from his or her living area, use on an individual of physical restraining devices, or the provision of unnecessary or excessive medication to an individual, but does not include the use of these methods or devices in entities regulated by the department if the methods or devices are employed in conformance with state and federal standards governing confinement and restraint.]<sup>10</sup>

["Deprivation of a basic need" means deprivation of a basic need for food, shelter, clothing, or personal or health care, including deprivation resulting from the failure to provide or arrange for a basic need by a person who has assumed responsibility for meeting the need voluntarily or by contract, agreement, or court order.]<sup>11</sup>

3. The defendant acted (intentionally) (recklessly) (negligently).

["Intentionally" means that the defendant acted with the mental purpose to subject (name of victim) to abuse or was aware that (his)(her) conduct was practically certain to cause that result. "Intentionally" also requires that the defendant knew that (name of victim) was an individual at risk .]<sup>12</sup>

["Recklessly" means conduct that creates a situation of unreasonable risk of harm and demonstrates a conscious disregard for the safety of the individual at risk.]<sup>13</sup>

["Negligently" means that the defendant acted in a manner constituting criminal negligence. (ADD WIS JI-CRIMINAL 925 CRIMINAL NEGLIGENCE).]<sup>14</sup>

4. The defendant (intentionally) (recklessly) (negligently) subjected an individual at risk to abuse under circumstances that [(were likely to cause) (caused)] [(death) (great bodily harm) (bodily harm)].<sup>15</sup>

["Cause" means that the defendant's conduct was a substantial factor in producing (death) (great bodily harm) (bodily harm).]<sup>16</sup>

["Great bodily harm" means serious bodily injury.]<sup>17</sup>

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.]<sup>18</sup>

[ADD THE FOLLOWING FOR CASES INVOLVING INTENTIONAL ABUSE]

### **[Deciding About Intent and Knowledge]**

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

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four 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 1268 was originally published in 1986 and revised in 1998 and 2003. This revision was approved by the Committee in December 2006; it reflects changes made by 2005 Wisconsin Acts 264 and 388.

The 2007 revision reflected changes made to §940.285 by 2005 Wisconsin Acts 264 and 388. The primary changes were to replace "vulnerable adult" with "individual at risk" and "maltreatment" with "abuse," adding new definitions for the latter. Act 388 also created an exception in sub. (1m): "Nothing in this section may be construed to mean that a vulnerable adult [sic] is abused solely because he or she consistently relies upon treatment by spiritual means through prayer for healing, in lieu of medical care, in accordance with his or her religious traditions."

Section 940.285 recognizes a variety of harms and a variety of mental states. The Committee concluded that the best way to address the considerable complexity that has resulted is to provide a single model instruction which can be modified to refer to the appropriate mental state and degree of harm. This has resulted in the use of many brackets and parentheses. To illustrate that the instruction becomes simpler when proper selection of alternatives is made, an example is provided at Wis JI-Criminal 1268 EXAMPLE.

Section 940.285, as amended by 2005 Wisconsin Acts 264 and 388, defines the following offenses.

<u>Offense</u>	<u>Penalty</u>
Intentionally or recklessly subject an individual at risk to abuse and cause death	Class C felony [sub. (2)(b)1g.]
Negligently subject an individual at risk to abuse and cause death	Class D felony [sub. (2)(b)1g.]
Intentionally, recklessly, or negligently subject an individual at risk to abuse and cause great bodily harm	Class F felony [sub. (2)(b)1m.]
Intentionally subject an individual at risk to abuse under circumstances likely to cause great bodily harm	Class G felony [sub.(2)(b)1r.]
Recklessly or negligently subject an individual at risk to abuse under circumstances likely to cause great bodily harm	Class I felony [sub.(2)(b)1r.]
Intentionally subject an individual at risk to abuse under circumstances that cause bodily harm	Class H felony [sub. (2)(b)2.]
Intentionally subject an individual at risk to abuse under circumstances likely to cause bodily harm	Class I felony [sub. (2)(b)2.]

Recklessly or negligently  
subject an individual at risk to abuse  
under circumstances that cause or are likely  
to cause bodily harm

Class A misdr.  
[sub. (2)(b)4.]

Intentionally, recklessly, or negligently  
subject an individual at risk to abuse  
under circumstances not causing and not likely  
to cause bodily harm

Class B misdr.  
[sub. (2)(b)5.]

Because the statute defines so many different offenses, there is the potential for a variety of lesser included offense questions.

One potential question is easily resolved: a special subsection of § 939.66 provides that all less serious violations of § 940.285 are included offenses of more serious violations. See § 939.66(6c).

Two general categories of variables govern the lesser included offense possibilities. First, there may be a different mental state: the statute provides three alternatives: subjecting an individual at risk to abuse intentionally, recklessly, or negligently. Second, the abuse may have occurred under circumstances involving different levels of harm: causing death, great bodily harm, or bodily harm; likely to cause great bodily harm or bodily harm; and not causing and not likely to cause bodily harm.

Presenting lesser included offenses in a way that will be understandable to the jury is a challenge. One approach would be the traditional long form, whereby a complete instruction on the charged offense would be followed by a complete instruction on each applicable lesser included offense. This has the serious disadvantage of resulting in a set of instructions that might be very long and repetitious. However, depending on the lessers and the complexity of their relationship to the charged crime, this may be the most effective way to approach the problem.

The other approach would be take the shorter approach described in Wis JI-Criminal 112A: specifying the difference between the charged crime and the lesser included crime and instructing the jury on that difference.

1. Before being amended by 2005 Wisconsin Act 264, section 940.285 applied to "any person, other than a person in charge of or employed in any facility enumerated in § 940.29 or in a facility or program under s. 940.295(2). . . ." The amended statute lacks any reference to the persons to whom it applies, except for the reference to "any person " in sub. (2)(b).

2. Section 940.285(1)(dg) provides: "'Individual at risk' means an elder adult at risk or an adult at risk" and cross references the definition of "elder adult at risk" in s. 46.90(1)(br). The definition in the instruction is the definition provided in s. 46.90(1)(br) without change.

3. Section 940.285(1)(dg) provides: "'Individual at risk' means an elder adult at risk or an adult at risk" and cross references the definition of "adult at risk" in s. 55.01(1e). The definition in the instruction is the definition provided in s. 55.01(1e) without change.

4. Section 940.285(1)(ag) provides that "abuse" means any of the alternatives listed in subds. 1. - 6. Of that statute and provides cross references to other statutes for definitions of those alternatives. The applicable alternative should be selected and the appropriate definition used.

5. The definition of "physical abuse" is the one provided in § 46.90(1)(fg), which applies because cross referenced in § 940.285(1)(ag)1.
6. This is the definition provided in § 939.22(4) and in § 46.90(1)(aj). The term may also be used as part of the fourth element.
7. The definition of "emotional abuse" is the one provided in § 46.90(1)(cm), which applies because cross referenced in § 940.285(1)(ag)2.
8. The definition of "sexual abuse" is a paraphrase of the one provided in § 46.90(1)(gd), which applies because cross referenced in § 940.285(1)(ag)3. Section 46.90(1)(gd) states: "'Sexual abuse' means a violation of s. 940.225(1), (2), (3), or (3m)." Definition of the applicable sexual assault offense should be included.
9. The definition of "treatment without consent" is the one provided in § 46.90(1)(h), which applies because cross referenced in § 940.285(1)(ag)4. Select the part of the definition that applies to the case.
10. The definition of "unreasonable confinement or restraint" is the one provided in § 46.90(1)(I), which applies because cross referenced in § 940.285(1)(ag)5. Select the part of the definition that applies to the case.
11. This is definition provided in subd. 6. of s. 940.285(1)(ag).
12. This is based on the general definition of "intentionally" provided in § 939.23(3).
13. This definition of "recklessly" is the one provided in § 940.285(1)(dm). It differs from the general definition of "recklessness" in § 939.24 in several respects. First, it refers to risk of harm; the § 939.24 definition is limited to risks of great bodily harm or death. Second, it refers only to an "unreasonable" risk; § 939.24 requires an unreasonable "and substantial" risk. Third, it refers to "conscious disregard for the safety"; § 939.24 refers to being "aware of the risk." The latter is not believed to be a substantive difference – "conscious disregard" was used in the definition of reckless homicide before the revision in 1989 when it was changed to clarify that a subjective mental state was required.  
  
Note: The definition in § 940.285(1)(dm) continues to refer to "vulnerable adult." That term was replaced by "individual at risk" elsewhere in the statute.
14. Wis JI-Criminal 925 provides a standard definition of "criminal negligence" based on the one provided in § 939.25. That definition applies whenever a criminal statute uses the term "negligent" or "negligently." [See § 939.25(2).] Section 940.285(2)(a)3. contains the phrase: "negligently subjects an individual at risk to abuse."
15. Here insert the appropriate level of harm from the options provided in § 940.285(2)(b). The different levels and the associated penalties are summarized in the Comment preceding footnote 1.
16. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.
17. See § 939.22(14) and Wis JI-Criminal 914.
18. This is the definition provided in § 939.22(4). There is no need to repeat the definition here if it has already been given as part of the second element.