

1278 TAKING A HOSTAGE — § 940.305**Statutory Definition of the Crime**

Taking a hostage, as defined in § 940.305 of the Criminal Code of Wisconsin, is committed by one who, by force or threat of imminent force, seizes, confines, or restrains a person without the person's consent and with intent to use the person as a hostage in order to influence another person to perform or not to perform some action demanded by the defendant [and does not release the person held as a hostage without bodily harm prior to the time of arrest].¹

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 (five) (six)² elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (seized) (confined) (restrained)³ (name of victim).
2. The defendant (seized) (confined) (restrained) (name of victim) without (his) (her) consent.
3. The defendant (seized) (confined) (restrained) (name of victim) forcibly.
4. The defendant (seized) (confined) (restrained) (name of victim) with intent to use⁴ (name of victim) as a hostage in order to influence a person to perform (or not to perform) some action demanded by the defendant.

5. The defendant demanded by conduct or statements that another person (not) perform some action.⁵

[6. The defendant did not release (name of victim) without bodily harm prior to the defendant's arrest. Bodily harm means physical pain or injury, illness, or any impairment of physical condition.⁶]⁷

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.⁸

[Meaning of "Without Consent"]

["Without consent," as used here, means that there was no consent in fact or that consent was given by (name of victim) because of fear caused by the defendant's use or threat of imminent use of physical violence on ((name of victim)) (on another person in the presence of (name of victim)) (on a member of (name of victim)'s immediate family).]

Meaning of "Forcibly"

"Forcibly" means that the defendant actually used force or threatened the use of imminent force to overcome or to prevent (name of victim)'s resistance to being (seized) (confined) (restrained).⁹ "Imminent" means "near at hand" or "on the point of happening."¹⁰

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.¹¹

["Forcibly" includes the (use of) (threat to use) force directed at a (third person in the presence of) (member of the immediate family of) (name of victim) if that (use of) (threat to use) force results in the (seizing) (confining) (restraining) of (name of victim).]

Deciding About Intent

You cannot look into a person's mind to find out 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 [five] [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.¹²

COMMENT

Wis JI-Criminal 1278 was originally published in 1981 and revised in 1990 and 2006. This revision was approved by the Committee in June 2015; it involved a nonsubstantive change to the text.

Section 940.305 was created by Chapter 118, Laws of 1979, and was intended to fill a gap in the kidnapping statute, § 940.31, which fails to cover the situation where a person is kidnapped and held not for money ransom but for the purpose of making someone else do something.

The offense defined by § 940.305 is punishable as a Class B felony if the defendant does not release the hostage without bodily harm prior to his arrest. If this aggravating factor is not present, the crime is a Class C felony. The instruction is drafted for use with either crime; the material in brackets constituting the sixth element is to be included if the Class B felony is charged.

The constitutionality of § 940.305 was upheld in the face of a variety of challenges in State v. Bertrand, 162 Wis.2d 411, 469 N.W.2d 873 (Ct. App. 1991).

1. Read this bracketed material if the defendant is charged with a Class B felony, which involves the additional element of failing to release the hostage without injury prior to the defendant's arrest. If this aggravating factor is not present, the offense is punished as a Class C felony. If the Class B felony is charged, it may often be appropriate to submit the Class C felony as a lesser included offense. In that event, the Committee suggests that the procedure described in footnote 12, below, be followed.

2. Read "five elements" if the Class C felony is charged; read "six elements" if the Class B felony is charged. See note 1, supra.

3. The Committee recommends that one of the alternatives be elected but does not conclude that an instruction joining the three alternatives in the disjunctive would be error. See Clark v. State, 92 Wis.2d 617, 642, 286 N.W.2d 344 (1979), and discussion at note 9, below.

4. Under § 939.23(4), "with intent that" is defined to mean "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B for further discussion.

5. Whether this element is required is open to question because the statute is ambiguous. Section 940.305, in relevant part, reads as follows:

Whoever by force or threat of imminent force seizes, confines or restrains a person without the person's consent and with intent to use the person as a hostage in order to influence a person to perform or not to perform some action demanded by the actor is guilty. . . .
(Emphasis added.)

Is the underlined phrase intended to mean "some action to be demanded" or does it mean "some action that has been demanded?" It can be argued that the underlined phrase is superfluous since the statute would make sense without it: the defendant must have the intent to influence another to perform or not to perform some action. On the other hand, it is a standard rule of statutory construction that a law should be so construed that no word or phrase is rendered surplusage or superfluous. Donaldson v. State, 93 Wis.2d 306, 286 N.W.2d 817 (1980); State v. Wacksmuth, 73 Wis.2d 318, 243 N.W.2d 410 (1976). Further, "taking hostages" is a serious crime, constituting a Class B felony if the hostage is not released without injury.

Given the ambiguity of the statute and the seriousness of the offense, the Committee determined that the ambiguity must be resolved in favor of the defendant. Thus, the fifth element of the instruction requires that an actual demand must have been made by the defendant. Like all other facts, however, the making of a demand may be established circumstantially by consideration of all the conduct and statements of the defendant.

6. This is the definition of "bodily harm" provided in § 939.22(4).

7. Read the sixth element only if the Class B felony is charged. See notes 1 and 2, supra.

8. "Without consent" is defined in § 939.22(48). The material in brackets reflects the rule stated in § 939.22(48)(a) and has been included because the use of force, required as an element of the crime of taking a hostage, will often be relevant to the consent issue as well. When the bracketed material is used, additional explanation is recommended, especially where consent was given because of threats to a third person or family member.

9. This paragraph restates the statutory requirements that the defendant act "by force or threat of imminent force" by phrasing them as alternative ways of satisfying the core requirement that the defendant act "forcibly." The Committee has concluded that this properly emphasizes the intent of the statute to require a link between the seizing or confining of the victim and the defendant's use of force. The Committee has concluded that it is not necessary to elect between the "use of force" and "threat of imminent force" alternatives, although in the usual case election would clarify the issue for the jury and should be done where possible. In support of the proposition that election is not necessary, see Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979), and Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

10. The definition of "imminent" is adapted from the one provided in Black's Law Dictionary, p. 884 (4th ed., 1981).

11. The seizing, confining, or restraining of the victim must be accomplished by force or threat of imminent force. The Committee has concluded that this element may be satisfied when the use or threat of force is directed at a third person or family member as well as if it is directed at the victim. This is based on analogy with the definition of "without consent" in § 939.22(48), see note 8, supra.

12. If the Class B felony is submitted to the jury and an instruction on the Class C felony is appropriate as a lesser included offense, the Committee suggests using the alternative approach for submitting a lesser included offense illustrated in Wis JI-Criminal 112A. That approach highlights the difference between the greater and the lesser offense by focusing on the single element that is different. Here that element is the sixth, requiring that the defendant did not release the victim without bodily harm prior to arrest.