

**1284A STALKING: PENALTY FACTORS — § 940.32(2m) and (3)**

ADD ONE OF THE FOLLOWING QUESTIONS TO WIS JI-CRIMINAL 1284 IF ONE OF THE PENALTY FACTORS SET FORTH IN SUBS. (2m) OR (3) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACTOR IS ESTABLISHED.<sup>1</sup>

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

FOR CHARGES UNDER SUB. (2m)(a)

[Did the defendant have a previous conviction for (identify the crime)<sup>2</sup>?

FOR CHARGES UNDER SUB. (2m)(b)

[Did the defendant have a previous conviction for a crime?

Was the victim of that crime the victim of the crime in this case?

Did the crime in this case occur within 7 years after the previous conviction?<sup>3</sup>

FOR CHARGES UNDER SUB. (2m)(c)

[Did the defendant intentionally (gain access to) (cause another person to gain access to) a record in electronic format that contained personally identifiable information regarding the victim in order to facilitate the crime in this case?]<sup>3</sup>

FOR CHARGES UNDER SUB. (2m)(d)

[Did the defendant violate [§ 968.31(1)] [§ 968.34(1)] in order to facilitate the crime in this case? Section [968.31(1)] [968.34(1)] is violated by one who (define the alleged crime).]<sup>4</sup>

FOR CHARGES UNDER SUB. (2m)(e)

[Was (name of victim) under the age of 18 years at the time of the crime?]

FOR CHARGES UNDER SUB. (3)(a)

[Did the act result in bodily harm to [(name of victim)] [a member of (name of victim)'s (family)<sup>5</sup> (household)<sup>6</sup>]?]

“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.<sup>7</sup>]

FOR CHARGES UNDER SUB. (3)(b)

[Did the defendant have a previous conviction for (identify the crime)<sup>8</sup>?]

Was the victim of that crime the victim of the crime in this case?

Did the crime in this case occur within 7 years after the previous conviction?]

FOR CHARGES UNDER SUB. (3)(c)

[Did the defendant use a dangerous weapon in carrying out an act of (identify act listed in sub. (1)(a)1. to 9.)?]

“Dangerous weapon” means (see Wis JI-Criminal 910).]

CONTINUE WITH THE FOLLOWING IN ALL CASES

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 1284A was originally published in 2003 and revised in 2010. This revision was approved by the Committee in February 2011; it involved updating the Comment and footnote 3.

This instruction addresses the penalty-increasing factors set forth in subs. (2m) and (3) of § 940.32. Both subsections were created by 2001 Wisconsin Act 109, effective date: July 30, 2001. Application of the penalty factors depends on a finding of guilt for a violation of sub. (2), the offense addressed by Wis JI-Criminal 1284.

A violation of § 940.32(2) is a Class I felony. The facts listed in sub. (2m) increase the penalty to a Class H felony. The facts listed in sub. (3) increase the penalty to a Class F felony. These penalty classifications take effect February 1, 2003.

Penalty-increasing provisions in subsections (2m)(a), (2m)(b), and (3)(b) require proof of a prior conviction. In State v. Warbelton, 2009 WI 6, ¶3, 315 Wis.2d 253, 759 N.W.2d 557, the court held that the penalty-increasing provision in sub. (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 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.

The facts must be found by the jury because they increase the statutorily-authorized penalty range. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of stalking under Wis. Stat. § 940.32, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question “yes” or “no”:

[State the applicable question.]

1. The penalty-increasing facts set forth in sub. (2m) and (3) of § 940.32 apply to violations of § 940.32(2).

2. The applicable crimes are: a violent crime as defined in § 939.632(1)(e)1.; stalking under § 940.32; or, harassment under § 947.013(1r), (1t), (1v), or (1x).

3. In State v. Conner, 2009 WI App 143, 321 Wis.2d 449, 775 N.W.2d 105, the court addressed the defendant’s challenges to a conviction for stalking under § 940.32(2m)(b) – a Class H felony for the second violation within 7 years. As to the 7-year time period, the court concluded:

. . . the seven year time restriction specified in § 940.32(2m)(b) requires that only the final act charged as part of a course of conduct occur within seven years of the previous conviction, and does not restrict by time the other acts used to establish the underlying course of conduct element of sub. (2).

2009 WI App 143, ¶19.

The Wisconsin Supreme Court affirmed. State v. Conner, 2011 WI 8, ¶47, 331 Wis.2d 352, 795 N.W.2d 750, holding that the statute “was properly applied in this case because, in this case, the ‘present violation’ was a continuing course of conduct that included the acts on November 30, 2005, and that occurred within seven years after the 2003 convictions for crimes involving the same victim.”

4. Sub. (1)(cg) of § 940.32 provides: “‘Personally identifiable information’ has the meaning given in s. 19.62(5).”

Sub. (1)(cr) of § 940.32 provides: “‘Record’ has the meaning given in s. 19.32(2).”

5. Section 968.31(1) provides a criminal penalty for violating the “wiretap” statute. Sections 968.34(1) does the same for unauthorized use of a “pen register.” A definition of the alleged crime should be included in the penalty question. There are no uniform instructions for these violations.

6. “Member of a family” is defined in § 940.32(1)(cb).

7. “Member of a household” is defined in § 940.32(1)(cd).

8. This is the definition of “bodily harm” provided in § 939.22(4).

9. The applicable crimes are: a violent crime as defined in § 939.632(1)(e)1.; stalking under § 940.32; or, harassment under § 947.013(1r), (1t), (1v), or (1x).