

1284B STALKING — § 940.32(2e)**Statutory Definition of the Crime**

Stalking, as defined in § 940.32(2e) of the Criminal Code of Wisconsin, is committed by one who has been convicted of (specify applicable sexual assault or domestic abuse offense),¹ directs an act of (specify applicable act listed in § 940.32(1)(a)1. to 10.)² at the victim of that offense, causes that person [to suffer serious emotional distress] [to fear bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household))] and where the actor knows or should know that the act will [cause the person to suffer serious emotional distress] [place the person in reasonable fear of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household))].

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 elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was convicted of (specify applicable sexual assault or domestic abuse offense).³
2. (Name of person) was the victim of that offense.
3. The defendant directed an act of (specify applicable act listed in § 940.32(1)(a)1. to 10.)⁴ at (name of person).
4. The act [caused (name of person) to suffer serious emotional distress] [induced

fear in (name of person) of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)).

[“Suffer serious emotional distress” means to feel terrified, intimidated, threatened, harassed, or tormented. This does not require that (name of person) received treatment from a mental health professional.]⁵

[“Member of a family” means a spouse, parent, child, sibling, or any other person who is related by blood or adoption to another.]⁶

[“Member of a household” means a person (who regularly resides in the household of another) (who within the previous 6 months regularly resided in the household of another).]⁷

5. The defendant knew or should have known that the act would [cause (name of person) to suffer serious emotional distress] [place (name of person) in reasonable fear of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household))].⁸

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and 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 five 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 1284B was originally published in 2003 and revised in 2004 and 2006. The 2006 revision revised footnote 1 to reflect changes made by 2005 Wisconsin Act 277. This revision was approved by the Committee in June 2021; it revised footnote 2 to reflect changes made by 2021 Wisconsin Act 28.

2003 Wisconsin Act 222 [effective date: April 27, 2004] amended § 940.32(2e) to add causing a person to “suffer serious emotional distress” and changing the mental state requirement addressed in the fifth element from “intends” to “knows or should know.”

Section 940.32(2e) was created by 2001 Wisconsin Act 109, [effective date: July 30, 2002]. Section 940.32, as revised by Act 109, defines two related offenses: violations of sub. (2e) are addressed by this instruction. Violations of sub. (2) are addressed by Wis JI-Criminal 1284. Subsections (2m) and (3) provide for increase in the penalty for violations of sub. (2) if specified facts are established. See Wis JI-Criminal 1284A.

1. Sub. (2e)(a) identifies the applicable prior offenses: sexual assault under § 940.225, sexual assault of a child under § 948.02, repeated sexual assault of a child under § 948.025, sexual assault of a child placed in substitute care under § 948.085, or a domestic abuse offense. § 940.32(1)(ap) provides: “‘Domestic abuse offense’ means an act of domestic abuse that constitutes a crime.” § 940.32(1)(am) provides: “‘Domestic abuse’ has the meaning given in s. 813.12(1)(am).” That definition was amended by 2001 Wisconsin Act 109 to add reference to crimes committed “by an adult caregiver against an adult who is under the caregiver’s care” and “by an adult against an adult with whom the individual has or had a dating relationship.” 2005 Wisconsin Act 277 [effective date: April 20, 2006] amended the list of offenses in § 940.32(2e)(a) to include § 948.085, an offense created by Act 277.

2. Here specify the type of conduct alleged to be involved in the case and supported by the evidence, based on the list provided in subd. 1. through 10. of § 940.32(1)(a). The list of types of conduct is preceded by the statement: “. . . including any of the following: . . .” The Committee concluded that this means that acts constituting the course of conduct are limited to the types listed.

2003 Wisconsin Act 222 added to the list in subds. 1. through 10 by creating subd. 6m.:

6m. Photographing, videotaping, audiotaping, or through any other electronic means, monitoring or recording the activities of the victim. This subdivision applies regardless of where the act occurs.

2021 Wisconsin Act 28 [effective date: April 25, 2021] amended subds. 6., 7., and 7m. It confirmed that electronic stalking is a violation of the statute. Specifically:

(1)(a)6. Contacting the victim by telephone, text message, electronic message, electronic mail, or other means of electronic communication or causing the victim’s telephone or electronic device

or any other person's telephone or electronic device to ring or generate notifications repeatedly or continuously, regardless of whether a conversation ensues.

(1)(a)7. Sending to the victim any physical or electronic material or contacting the victim by any means, including any message, comment, or other content posted on any Internet site or web application.

(1)(a)7m. Sending to a member of the victim's family or household, or any current or former employer of the victim, or any current or former coworker of the victim, or any friend of the victim any physical or electronic material or contacting such person by any means, including any message, comment, or other content posted on any Internet site or web application for the purpose of obtaining information about, disseminating information about, or communicating with the victim.

In 2010, the Committee reviewed its conclusion that acts constituting the course of conduct were limited to the types listed. Usually, when a statute introduces a list with "including," that indicates that the list is non-exhaustive. But in this statute the meaning appeared to be ambiguous, especially in light of the overall introduction to the crime definition which begins "whoever meets all of the following criteria." The Committee reviewed the legislative history and found that it did not resolve the ambiguity; while it showed an intent to broaden the coverage of the statute it also showed that some options were considered and not included. Further, two sections of the statute clearly appear to be limited to acts enumerated in the list. Subdivision 10. of § 940.32(1)(a) extends liability to "causing a person to engage in any of the acts described in subs. 1. to 9." Subsection (2e) is also limited to one who "engages in any of the acts listed in sub. (1)(a)1. to 10." The review convinced the Committee to reaffirm the original conclusion.

3. See note 1, supra. If the case involves a "domestic abuse offense" the state must prove that the defendant was convicted of a crime that involved "domestic abuse" as defined in § 813.12(1)(am). The conviction itself will be a matter of record, but that conviction must be shown to have involved "domestic abuse," which is not likely to be established by the mere fact of the conviction.

4. See note 2, supra.

5. The definition of "suffer serious emotional distress" is provided in § 940.32(1)(d), which was created by 2003 Wisconsin Act 222. The statement that receiving treatment is not required is based on § 940.32(3m), was also created by Act 22, which reads as follows:

(3m) A prosecutor need not need [sic] show that a victim received or will receive treatment from a mental health professional in order to prove that the victim suffered serious emotional distress under sub. (2)(c) or (2e)(c).

6. This is the definition provided in § 940.32(1)(cb).

7. This is the definition provided in § 940.32(1)(cd).

8. 2003 Wisconsin Act 222 amended § 940.32(2e)(b) to require that the actor "knows or should know that the act will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear . . ." Before that amendment, the statute had required that "the actor intends . . ."