

1292 INTIMIDATION OF A WITNESS — §§ 940.42 and 940.43**Statutory Definition of the Crime**

Intimidation of a witness, as defined in § 940.42 of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)¹ any witness from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

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 three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a witness.

“Witness” means any person who has been called to testify or who is expected to be called to testify.²

2. The defendant (prevented) (dissuaded)³ (attempted to prevent) (attempted to dissuade) (name of victim) from attending or giving testimony at a proceeding authorized by law.

(A (name of proceeding) is a proceeding authorized by law.)⁴

3. The defendant acted knowingly and maliciously.⁵

This requires that the defendant knew (name of victim) was a witness and that the defendant acted with the purpose to prevent (name of victim) from (attending) (testifying).

Deciding About Knowledge and Purpose

You cannot look into a person's mind to find knowledge and purpose. Knowledge and purpose 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 knowledge and purpose.⁶

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty [and answer the following question “yes” or “no”].⁷

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.43 IS ESTABLISHED:⁸

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

[FOR CHARGES UNDER SUB. (1)]

[“Was the defendant's act accompanied by (attempted) force or violence upon [(name of witness)] [(identify relative)⁹ of (name of witness)]?”]

[FOR CHARGES UNDER SUB. (2)]

[“Was the defendant's act accompanied by damage to the property of [(name of witness)] [(identify relative)¹⁰ of (name of witness)]?”]

[FOR CHARGES UNDER SUB. (3)]

[“Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.43)?”]¹¹

[FOR CHARGES UNDER SUB. (4)]

[“Was the defendant's act in furtherance of any conspiracy?”]¹²

[FOR CHARGES UNDER SUB. (5)]

[“Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?”]

[FOR CHARGES UNDER SUB. (6)]

[“Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?”]

[FOR CHARGES UNDER SUB. (7)]¹³

[Did the defendant commit the act in connection with a trial, proceeding, or inquiry in a felony case in which he was charged?]

[FOR CHARGES UNDER SUB. (8)]¹⁴

[Was the proceeding a criminal trial where the crime charged was an act of domestic abuse¹⁵ or one subject to a domestic abuse surcharge?]¹⁶

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question “yes.”

If you are not so satisfied, you must answer the question “no.”

COMMENT

Wis JI-Criminal 1292 was originally published in 1982 and revised in 1987, 1994, 1998, 2001, 2006, and 2010. The 2001 revision changed the instruction to apply to both misdemeanor and felony offenses; it also replaced Wis JI-Criminal 1290 and 1292A. The 2006 revision added reference to sub. (7) of § 940.43, which was created by 2005 Wisconsin Act 280. See footnote 13. The 2020 revision added reference to sub. (8) of § 940.43, which was created by 2019 Wisconsin Act 112. See footnote 14.

This instruction is drafted for use in both misdemeanor and felony charges under §§ 940.42 and 940.43. The definition of the three basic elements is based on § 940.42 and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in subs. (1)-(8) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

Several other statutes define criminal offenses directed against a witness:

§ 940.201 Battery of Threat to Witness (See Wis JI-Criminal 1238 and 1239)

§ 943.011 Damage or Threat to Property of a Witness (See Wis JI-Criminal 1400B)

§ 946.61 Bribery of Witnesses

In *State v. Moore*, 2006 WI App 61, 292 Wis.2d 101, 713 N.W.2d 131, the court affirmed convictions for 14 counts of intimidating a witness. The evidence was sufficient to prove Moore attempted to intimidate the second witness/victim by letters written to the first witness/victim. Charging 14 counts based on 7 letters attempting to dissuade two witnesses did not violate the rules against multiplicity – there is no evidence of legislative intent to limit the number of charges.

1. Section 940.42 prohibits attempts to “prevent or dissuade” as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define “attempt” for the jury. The following is suggested:

Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from attending or giving testimony and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from attending or giving testimony except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of “attempt” found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The definition of “witness” in the instruction is a simplified version of the definition provided in § 940.41(3):

(3) “Witness” means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who has provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under s. 885.01 or under the authority of any court of this state or of the United States.

Subsection 940.41(1g) provides that “law enforcement agency” has the meaning specified in § 165.83(1)(b).

Reading the statutory definition of “witness” in the context of the required elements of the crime led the Committee to conclude that the simplified version would be suitable for most cases. The facts of a particular situation may require more complete incorporation of the provisions of § 940.41(3).

3. “Dissuade” means “to advise against” or “to turn from by persuasion,” Webster’s New Collegiate Dictionary.

4. The Committee concluded that using the phrase “proceeding authorized by law” would cover the longer phrase used in the statute: “trial, proceeding or inquiry authorized by law.” The broader term, “proceeding,” would clearly include “trial” and “inquiry.”

Most “proceedings authorized by law” will be authorized by a specific section of the statutes. When there is specific statutory authority, the Committee believes this may be communicated to the jury by stating, for example: “A John Doe hearing is a proceeding authorized by law.”

5. Section 940.42 does not use any of the regular criminal code “intent” words, such as “intentionally” but rather contains the phrase “knowingly and maliciously.” The terms “malice” and

“maliciously” are not used anywhere else in the Wisconsin Criminal Code. “Maliciously” is defined in § 940.41(1r) as follows:

(1r) “Malice” or “maliciously” means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

6. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

7. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with “guilty” and read the next sentence, beginning with “If you are not so satisfied . . .”

8. Section 940.43 specifies eight different facts that increase the penalty for the basic misdemeanor offense to that for a Class G felony. A bracketed question is provided for each statutory option.

9. The penalty increase provided by § 940.43(1) applies to the following specified relatives of the witness: “. . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness.” Reference to “treatment foster child” was deleted by 2009 Wisconsin Act 28.

10. The same relatives are covered as under sub. (1) of the statute. See note 9, supra.

11. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: “Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2).” The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to “any express or implied threat of force. . . .” (Emphasis supplied.) The suggested instruction does not include “express or implied” because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

12. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

13. This option was added to reflect the alternative created by 2005 Wisconsin Act 280. [Effective date: April 20, 2006.] The question is a paraphrase of the statute, which reads as follows: “(7) Where the act is committed by a person who is charged with a felony in connection with a trial, proceeding, or inquiry for that felony.”

14. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: “(8) If the proceeding is a criminal trial, where the crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following conviction, is subject to the surcharge in s. 973.055.”

15. Subsection 968.075(1)(a) defines “domestic abuse” as follows:

“Domestic abuse” means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225 (1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

16. A person is subject to a domestic abuse surcharge of \$100 if a person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain specified crimes and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.