

**1296A INTIMIDATION OF A PERSON ACTING ON BEHALF OF A VICTIM
— §§ 940.44 and 940.45**

Statutory Definition of the Crime

Intimidation of a person acting on behalf of a victim, as defined in § 940.44 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 a person who is acting on the behalf of the victim of any crime from making any report of the victimization to any peace officer or law enforcement agency.²

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)³ was a victim of a crime.

“Victim” means a person against whom a crime has been committed or attempted in this state.⁴

In this case, it is alleged that (name of crime victim) was a victim of (name of crime). (Name of crime), as defined in § ____ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).⁵ Before you may find the defendant guilty of intimidation

of a person acting on behalf of a victim, you must be satisfied beyond a reasonable doubt that (name of crime victim) was the victim of (name of crime).

2. (Name of person acting on behalf of crime victim)⁶ was acting on behalf of (name of crime victim).
3. The defendant (prevented) (dissuaded)⁷ (attempted to prevent) (attempted to dissuade) (name of person acting on behalf of crime victim) from reporting the crime to any law enforcement agency.⁸
4. The defendant acted knowingly and maliciously.⁹

This requires that the defendant knew (name of crime victim) was a victim of a crime and knew that (name of person acting on behalf of crime victim) was acting on behalf of (name of crime victim). This also requires that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and 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 knowledge and intent.¹⁰

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 [and answer the following question “yes” or “no”].¹¹

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 § 940.45 IS ESTABLISHED:¹²

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 victim)] [(identify relative)¹³ of (name of victim)]?”]¹⁴

[FOR CHARGES UNDER SUB. (2)]

[“Was the defendant’s act accompanied by damage to the property of [(name of victim)] [(identify relative)¹⁵ of (name of victim)]?”]¹⁶

[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 § 940.45)?”]¹⁷

[FOR CHARGES UNDER SUB. (4)]

[“Was the defendant’s act in furtherance of any conspiracy?”]¹⁸

[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)]¹⁹

[“Was the underlying crime an act of domestic abuse²⁰ or one subject to a domestic abuse surcharge?”²¹]

[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 1296A was originally published in 2001 and revised in 2010 and 2020. The Committee approved revisions in February 2022 and October 2022. The February 2022 revision corrected an inadvertent error in sub. (7) of § 940.45, which was created by 2019 Wisconsin Act 112. See footnote 19. The October 2022 revision removed a “Reporter’s Note” concerning issues relating to instructing the jury on a domestic abuse surcharge pursuant to s. 973.055(4).

This instruction adapts Wis JI-Criminal 1296 for charges alleging intimidation of a person acting on behalf of a crime victim. It is drafted for use in both misdemeanor and felony charges under §§ 940.44 and 940.45. The definition of the four basic elements is to be used in both situations; for felony offenses, a question is to be added so that the jury makes a finding as to whether the fact embodied in the question is proved. Each of the facts increases the penalty to that for a Class G felony.

See the Comment to Wis JI-Criminal 1296 for general information about §§ 940.41 940.49.

1. Section 940.44 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 making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report 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 concluding phrase of this paragraph, “. . . from making any report of the victimization to any peace officer or law enforcement agency,” is a simplified paraphrasing of subsec. (1) of 940.44. There are two other subsections that are not addressed by the instruction. The three subsections read as follows:

- (1) Making any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency, or to any judge.
- (2) Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof. [See Wis JI-Criminal 1297.]
- (3) Arresting or causing or seeking the arrest of any person in connection with the victimization.

3. Where the instruction calls for the “name of crime victim” use the name of the person who is alleged to be the victim of the underlying crime. The victim of the offense defined in this instruction is indicated by blanks labeled “name of person acting on behalf of the crime victim.” See note 4, below.

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

(2) “Victim” means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

5. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI-Criminal 1296A would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI-Criminal 1296A. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, supra.

6. Where the instruction calls for the “name of person acting on behalf of crime victim” use the name of the person who is alleged to be the victim of the crime defined by this instruction. The victim of the underlying crime is referred to in the instruction as the “crime victim.” See note 3, supra.

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

8. This statement substitutes “reporting the crime” for the statute’s “report of the victimization” on the grounds that it means the same thing and will be more understandable. The second element reflects one alternative of several that are possible under the statute. See note 2, supra.

9. Section 940.44 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.

10. 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 [formerly JI 923.1].

11. 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 . . .”

12. Section 940.45 specifies seven 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.

13. The penalty increase provided by § 940.45(1) applies 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.

14. The Committee concluded that the aggravating factors described in subs. (1), (2), and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

15. The same relatives are covered as under sub. (1) of the statute. See note 13, supra.

16. The Committee concluded that the aggravating factors described in subs. (1), (2), and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

17. 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.

The Committee concluded that the aggravating factors described in subs. (1), (2) and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

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

19. 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: “(7) Where the underlying 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 a conviction, is subject to the surcharge in s. 973.055.”

20. 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.

For an instruction on committing a domestic abuse crime, see Wis JI-Criminal 984.

21. A person is subject to a domestic abuse surcharge if that person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain criminal offenses or municipal ordinances specified under § 973.055(a)1 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.