

1400C DAMAGE OR THREAT TO PROPERTY OF A WITNESS — § 943.011**Statutory Definition of the Crime**

Section 943.011 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) damage to any physical property owned by a person who is or was a witness by reason of the owner having attended or testified as a witness and without the owner's consent.

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 (caused) (threatened to cause) damage to physical property that belonged to (name of victim).

The word "damage" includes anything from mere defacement to total destruction.¹

IF THE CASE INVOLVES CAUSING DAMAGE, ADD THE FOLLOWING:

["Cause" means that the defendant's conduct was a substantial factor in producing damage.]²

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A “threat” is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. “True threat” means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.]³

2. (Name of victim) was a witness.

[“Witness” means any person who has attended a proceeding to testify or who has testified.]⁴

[A [insert proper term from the definition in § 940.41(3)] is a witness.]

3. The defendant (caused) (threatened to cause) damage to physical property owned by (name of victim) because⁵ the person attended or testified as a witness.
4. The defendant (caused) (threatened to cause) damage to the property without the consent⁶ of (name of victim).
5. The defendant acted intentionally.⁷ This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) damage to property owned by (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent.⁸

Deciding About Intent and Knowledge

You cannot look into a person’s mind to find intent or 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 1400C was originally published in 1998 and revised in 2004 and 2020. The 2004 revision involved adoption of a new format, adding a definition of “true threat,” and nonsubstantive changes in the text. The instruction was previously designated as Wis JI-Criminal 1400B and was renumbered JI 1400C in 2020. This revision was approved by the Committee in October 2023. It amended the definition of a “true threat” according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker’s perspective (recklessness standard) and the victim’s perspective (reasonable person standard).

This instruction is for violations of § 943.011(2)(a), which was created by 1997 Wisconsin Act 143, effective date: May 5, 1998. Causing criminal damage to the property of a witness was formerly addressed by increasing the penalty for violations of § 943.01, Criminal Damage To Property. Act 143 deleted reference to witnesses from § 943.01 and expanded the scope of the statute by including threats to damage property and, in sub. (2)(b), threats to cause and causing of damage to property owned by family members of a witness. If damage to the property of a family member of a witness is involved, the instruction must be modified.

1. The definition of “damage” is the one provided in Wis JI-Criminal 1400, Criminal Damage To Property. See Vol. V 1953 Judiciary Report on the Criminal Code, Wisconsin Legislative Council, page 97 (February 1953).

2. The Committee concluded that the simple “substantial factor” definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of damage. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also, see Wis JI-Criminal 901, Cause.

3. This definition is based on one of the descriptions of “true threat” in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define “threat” as “true threat.” This created an unacceptable risk that “the jury may have used the common definition of ‘threat,’ thereby violating the defendant’s constitutional right to freedom of speech.” 2001 WI 46, ¶43. The court stated: “The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower.” 2001 WI 46, ¶43.

The following is the most complete definition of “true threat” offered by the court in Perkins:

A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

4. The definition of “witness” in the first set of brackets is a simplified version of the definition provided in § 940.41(3), which applies to violations of § 943.011. If that statement does not fit the status of the victim, the definition in the second set of brackets should be used, selecting the proper alternative from the full definition, which reads as follows:

(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 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 § 885.01 or under the authority of any court of this state or of the United States.

5. The instruction uses “because” in place of the statutory language “by reason of . . .” The Committee intended no substantive change and believed the instruction will be easier for a jury to understand if “because” is used.

6. If a definition of “without consent” is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that “without consent” means “no consent in fact” or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

7. “Intentionally” requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

“Intentionally” also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word “intentionally” in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.207, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of “intentionally” does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – “knows or should know” – and thereby breaks the connection between “intentionally” used in sub. (2) proper and the other facts that follow.

8. The requirement that the defendant know there is no consent is based on the definition of “intentionally” in § 939.23(3): “. . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.