

**1473B EXTORTION: INJURE OR THREATEN TO INJURE — § 943.30(1)****Statutory Definition of the Crime**

Section 943.30(1) of the Criminal Code of Wisconsin is violated by one who (injures) ((verbally) (by written communication) (by printed communication) threatens to injure) the person, property, or business of another, with intent thereby (to extort money) (to compel the person to (do any act against the person's will) (omit to do any lawful act)).<sup>1</sup>

**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 two elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant (injured) (threatened to injure) the person, property,<sup>2</sup> or business of another person.

[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 making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. 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.]<sup>3</sup>

[The person threatened need not be the one from whom (money) (the doing of an act) (the failure to do a lawful act) is being sought.]<sup>4</sup>

2. The defendant acted with intent [to extort money] [to compel (name of person) to do any act against the person's will] [to compel (name of person) to omit to do any lawful act].

[“To extort” means to obtain from another by coercion or intimidation.]<sup>5</sup>

### **Deciding About Intent**

You cannot look into a person's mind to find intent. 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 intent.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that both 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 1473B was originally published in 1974 and revised in 1977, 1994, 2004, and 2005. This revision was approved by the Committee in April 2022; it added a definition of “true threat.”

This instruction is drafted for violations of § 943.30(1) involving injury or threats to injure the person, property, or business of another. For violations involving threats or accusations that another committed a crime see Wis JI-Criminal 1473A.

In State v. Dauer, 174 Wis.2d 418, 497 N.W.2d 766 (Ct. App. 1993), the court of appeals held that extortion is not a lesser included offense robbery because it requires proof of facts in addition to those required for robbery: proof of a threat made by verbal, printed, or written communication.

1. This summary of the offense is a substantial shortening of the full statutory definition. The instruction refers to a threat or injury to the “person, property, or business,” omitting the following that is included in the statute: “. . . calling or trade, or the profits and income of any business, profession, calling or trade . . .” It also refers to “intent to extort money,” deleting the statute’s “or any pecuniary advantage whatever.” The instruction must be modified if the omitted alternatives are involved.

Finally, the word “maliciously” is not used in this instruction. The Committee reads the statute as connecting “maliciously” only with the “threatens to accuse or accuses another of any crime or offense” alternative. The Committee concluded that two alternatives are possible under the statute: “maliciously threatening to accuse or accusing of crime” and “threatening or committing any injury. . . .” The blameworthiness of the conduct covered by this instruction is provided by the requirement that the threat or injury to be done with the intent to extort money or to make the person do an act against the person’s will.

2. In State v. Manthey, 169 Wis.2d 673, 689, 487 N.W.2d 44 (Ct. App. 1992), the court held that “property” under § 943.30(1) is “broad enough to encompass an interest in a lawsuit.” Thus, a complaint charging extortion was sufficient where it alleged that the defendant threatened to testify falsely unless paid.

Threats “to do everything he could to ensure that the student would have to end his studies in the United States and return to Panama” could constitute threats to the student’s profession or to the student’s “calling.” State v. Kittilstad, 231 Wis.2d 245, ¶ 49-51, 603 N.W.2d 732 (1999).

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. In Perkins, the court held that “Only a ‘true threat’ is constitutionally punishable under statutes criminalizing threats.” Id. at ¶ 17. Perkins additionally 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 the statute criminalizing 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 context 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.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce “any communication containing any threat ... to injure the person of another.” 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: “Federal criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state.” The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The committee concluded that the definition of “true threat” used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 2 which requires that “the defendant acted with intent [to extort money]...”

4. The Committee concluded that threats to do harm to a third person are covered by the statute. Thus, for example, if the defendant has threatened injury to John Smith’s son if John Smith does not perform a certain act, the defendant’s conduct falls within the statute.

This result is consistent with the conclusion reached in the previously published versions of this instruction, which cited the following as authority: Baldwin, “Criminal Misappropriations in Wisconsin – Part II,” 44 Marq. L. Rev. 430, 443 (1961). This article referred to the version of the extortion statute in effect in 1961, describing it as a codification of the common law version of the crime, in roughly the same terms used in Wisconsin dating back to 1849. The article concluded, without citation to other authority, that “it is not required that the threat be to injure the person from whom the property, advantage or other action is demanded.”

The statute was revised in 1969, 1977, 1979, and 1981. The 1977 changes came as part of the legislation which created the criminal penalty classification system and amended the statute to read essentially as it does today. The revisions at one time clarified the threat to harm others issue by treating it in a separate subsection. See § 943.30(2), 1969 Wis. Stats. But that section was merged with present sub. (1) by Chapter 173, Laws of 1977, leaving the matter unclear.

The Committee concluded that the present statute is very much like the 1961 version, which had been interpreted to cover threats to harm third persons. In the absence of any indication of legislative intent to change that interpretation, the present version of the instruction preserves the statement that the person threatened with harm need not be the person from whom the doing of an act or the payment of money is being sought.

5. This is the definition provided in the American Heritage Dictionary of the English Language (3rd Edition 1992).