

**1779A ASSAULT BY A PRISONER: THROWING OR EXPELLING A BODILY  
SUBSTANCE AT AN OFFICER, EMPLOYEE, VISITOR, OR INMATE  
— § 946.43(2m)**

**Statutory Definition of the Crime**

Assault by a prisoner, as defined in § 946.43(2m) of the Criminal Code of Wisconsin, is committed by one who is a prisoner confined to a [state prison] [(state) (county) (municipal) detention facility] and who throws or expels a bodily substance<sup>1</sup> at or toward [(an officer) (an employee) (a visitor) (another prisoner) of the prison or facility] under the following circumstances: the prisoner intends that the bodily substance come into contact with the other person; the prisoner intends to cause bodily harm to or to abuse, harass, offend, intimidate, or frighten the other person; and the other person does not consent to the substance being thrown or expelled.

**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 a prisoner confined to a [state prison] [(state) (county) (municipal) detention facility].

This requires that the defendant was confined in a (prison) (detention facility) as a result of a violation of law.<sup>2</sup>

(Name of institution) is a [state prison] [(state) (county) (municipal) detention facility].<sup>3</sup>

2. (Name of victim) was (an officer) (an employee) (a visitor) (another prisoner) of (name of institution).
3. The defendant threw or expelled a bodily substance at or toward (name of victim) with intent that the bodily substance come into contact with (name of victim).<sup>4</sup>

(Identify substance) is a bodily substance.<sup>5</sup>

4. The defendant intended [to cause bodily harm to] [to abuse, harass, offend, intimidate or frighten]<sup>6</sup> (name of victim).
5. (Name of victim) did not consent to the substance being thrown or expelled at or toward (him) (her).<sup>7</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 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 1779A was approved by the Committee in August 2000.

Subsection (2m) of § 946.43 was created by 1999 Wisconsin Act 188 [effective date: June 2, 2000]. The penalty is expressed as follows: ". . . may be fined not more than \$10,000 or imprisoned for not more than 2 years or both." Note that the penalty is not designated as one of the standard penalty classes for felony offenses. Section 973.01(2)(b) defines the imprisonment portion of bifurcated sentences under "Truth In Sentencing" for Class B, BC, C, D, and E felonies. § 973.01(2)(b)1.-5. That section also provides that "[f]or any felony other than a felony specified in subds. 1. to 5., the term of confinement in prison may not exceed 75% of the total length of the bifurcated sentence." Thus, the maximum term of confinement for a violation of § 946.43(2m) appears to be 18 months – 75% of the two year maximum. The sentence must be imposed "consecutive to any sentence previously imposed or which may be imposed for any crime or offense for which the person was in custody when he or she committed the violation of par. (a)." § 946.43(2m)(b).

1. "Bodily substance" is used in place of the following phrase in the statute: ". . . blood, semen, vomit, saliva, urine, feces or other bodily substance . . ."

2. The defendant's status as a "prisoner" should rarely be in question, but the Committee concluded there should be some definition of the term in the instruction. The definition in the instruction was adapted from that found in Wis. Stat. § 46.011 and from the decision in State v. Brill, 1 Wis.2d 288, 83 N.W.2d 721 (1957), where the court made the following observations:

So far as we know, the word "prisoner" has not been defined by this court. Black's Law Dictionary (4th ed.), p. 1358, defines the word as follows:

"One who is deprived of his liberty; one who is against his will kept in confinement or custody."

Webster's New International Dictionary (2d ed.) gives the following definition:

"A person under arrest, in custody or in prison; one involuntarily restrained; a captive; as a prisoner of justice, or war or at the bar; to take one prisoner."

State v. Brill, 1 Wis.2d 288, 291.

The Brill definition has been cited with approval in several cases involving § 940.20(1), Battery by prisoner. Because that statute and § 946.43 are worded similarly, the Committee concluded that "prisoner" should have the same definition under each statute. In C.D.M. v. State, 125 Wis.2d 170, 370 N.W.2d 287 (Ct. App. 1985), the court held that a juvenile confined as a delinquent at the Lincoln Hills School was a "prisoner" under § 940.20(1) because he had violated a criminal law and was confined for a correctional objective. 125 Wis.2d 170, 173.

The Committee concluded that "prisoner" includes all persons who are confined to one of the identified institutions as a result of a violation of the law. "Prisoner" is also defined in § 46.011(2) (for purposes of chapters 46 to 51, 55, and 58) and in § 301.01(2) (for purposes of chapters 301 to 304). But

the Committee concluded that these definitions are not directly applicable here because they are concerned primarily with defining the authority of state agencies.

A person committed to a state mental health facility (in this case, the Mendota Mental Health Institute) after being found not guilty by reason of mental disease or defect is a "prisoner" for purposes of § 940.20(1), Battery by prisoner. State v. Skampfer, 176 Wis.2d 304, 500 N.W.2d 369 (Ct. App. 1993). The important fact is that the person's liberty was restrained premised on a finding that the person had violated the criminal law.

A probationer who violates a condition of probation and as a result is taken into custody is a prisoner "confined as a result of a violation of the law" as provided in C.D.M., supra, and this instruction. State v. Fitzgerald, 2000 WI App 55, 12, 233 Wis.2d 584, 608 N.W.2d 391 [also involving a charge under § 940.20(1)].

3. The institution's status as one of the designated facilities should not be a contested issue in most cases, and the Committee concluded that it is appropriate for the trial court to so instruct the jury.

Before being amended by Chapter 173, Laws of 1977, § 946.43 applied to "any prisoner confined to a state prison or to any other institution by virtue of a transfer from a state prison. . . ." (Wis. Stat. § 946.43 (1975).) As amended, the statute applies to "any prisoner confined to a state prison or other state, county or municipal detention facility. . . ." The Wisconsin Legislative Council staff note to 1977 Senate Bill 14, which was enacted as Chapter 173, Laws of 1977, stated: "This bill expands the application of § 946.43 to cover assaults by prisoners in all detention facilities in the state."

The question of what institutions are covered by the statute is arguably difficult only with regard to "state detention facilities." "County detention facility" most likely refers to a county jail (and possibly to the House of Correction in Milwaukee County); "municipal detention facility" most likely refers to city jails. But it is not clear what institutions are included in the term "state detention facility." The term "state prison" in the former statute included all correctional institutions (§ 53.01), so it could be argued that the revision was intended to include state mental health institutes. The Committee concluded that the statute may be applied to persons confined in mental health institutes provided their confinement is a result of criminal charges. This interpretation would include those committed for determination of competency to stand trial, those committed as not competent to stand trial, and those committed as not guilty by reason of mental disease or defect. This conclusion is consistent with the decision in State v. Skampfer, see note 2, supra.

Section 302.01 identifies the institutions which are "state prisons." Also see § 302.02 which defines the "precincts" of the state prisons, that is, those locations that are considered part of the prisons for legal purposes. See note 2, Wis JI-Criminal 1228.

4. The statute requires two intents. The instruction places the first one in this element and treats the second one as a separate element 5.

5. Subsection 946.43(2m) applies to the following: "blood, semen, vomit, saliva, urine, feces or other bodily substance." Because the statute specifies certain substances as "bodily substances," the Committee concluded that the jury may be told, for example, that "blood is a bodily substance."

6. The offense is defined as engaging in one of the prohibited acts "with the intent either to cause bodily harm . . . or to abuse, harass, offend, intimidate or frighten . . ." The instruction puts the alternative intents in parentheses on the assumption that one or the other is likely to apply. However, the Committee concluded that it would be permissible to instruct on more than one type of intent and that jury agreement on the intent involved would not be required. The Wisconsin Supreme Court has reached that conclusion with offenses under § 948.07, Child enticement. State v. Derango, 2000 WI 89, 236 Wis.2d 721, 613 N.W.2d 833.

7. If 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.