1900 DISORDERLY CONDUCT — § 947.01

Statutory Definition of the Crime

Disorderly conduct, as defined in § 947.01 of the Criminal Code of Wisconsin, is committed by a person who, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance.

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 engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct.[1]
2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

Meaning of "Disorderly Conduct"

"Disorderly conduct" may include physical acts, or language, or both.[2]

[The general phrase "otherwise disorderly conduct" means conduct having a tendency to disrupt good order and provoke a disturbance.[3] It includes all acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether

committed by words or acts. Conduct is disorderly although it may not be violent, abusive, indecent, profane, boisterous, or unreasonably loud if it is of a type which tends to disrupt good order and provoke a disturbance.][4]

The principle upon which this offense is based is that in an organized society a person should not unreasonably offend others in the community.[5] This does not mean that all conduct that tends to disturb another is disorderly conduct. Only conduct that unreasonably offends the sense of decency or propriety of the community is included. It does not include conduct that is generally tolerated by the community at large, but that might disturb an oversensitive person.

Meaning of "Tend to Cause or Provoke a Disturbance"

It is not necessary that an actual disturbance must have resulted from the defendant's conduct. The law requires only that the conduct be of a type that tends to cause or provoke a disturbance under the circumstances as they then existed.[6] You must consider not only the nature of the conduct but also the circumstances surrounding that conduct. What is proper under one set of circumstances may be improper under other circumstances. This element requires that the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

WHERE THE STATE'S CASE RELIES IN PART ON EVIDENCE THAT THE DEFENDANT WAS CARRYING A FIREARM AT THE TIME OF THE ALLEGED OFFENSE, ADD THE FOLLOWING:[7]

[Loading, carrying, or going armed with a firearm does not, by itself, constitute disorderly conduct unless other facts and circumstances indicate a criminal or malicious 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 1900 was originally published in 1966. Non-substantive revisions and additions to the comment were made in 1989, 1991, 1998, 1999, 2001, 2002, 2004, 2009, 2022, and 1/2024. This revision was approved by the Committee in August 2025. It modified the former Perkins-based "true threat" language in footnote 1 to reflect the objective standard established in Counterman v. Colorado, 600 U.S. 66, and subsequently adopted by the Wisconsin Supreme Court in Kindschy v. Aish, 2024 WI 27.

In State v. Givens, 28 Wis.2d 109, 135 N.W.2d 780 (1965), the court affirmed the convictions of several civil rights demonstrators on the grounds that the defendant's conduct met the requirements of the disorderly conduct statute as to being disruptive of good order and tending to provoke a disturbance and on the additional grounds that each defendant deliberately and knowingly violated commands of persons in authority. In so ruling, the court held that persons in authority over public buildings must be accorded discretion to regulate conduct therein. In appropriate cases, the jury should be instructed on failure to obey lawful commands of persons in authority as constituting disorderly conduct. See note 4, below.

The application of disorderly conduct and related statutes often involves claims that the exercise of constitutional rights prevents such application or excuses what would otherwise be a criminal violation. For recent discussions, see the following: City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989) (disorderly conduct ordinance); State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989) (criminal trespass to medical facility statute); Milwaukee v. K.F., 145 Wis.2d 24, 426 N.W.2d 329 (1988) (juvenile loitering ordinance); Milwaukee v. Nelson, 149 Wis.2d 434, 439 N.W.2d 562 (1989) (adult

loitering ordinance); State v. Dronso, 90 Wis.2d 110, 279 N.W.2d 710 (Ct. App. 1979) (§ 947.01). Also see Texas v. Johnson, 109 S. Ct. 2533 (1989), dealing with the federal flag desecration statute.

In State v. Olsen, 99 Wis.2d 572, 299 N.W.2d 632 (Ct. App. 1980), the defendants were charged with disorderly conduct as a result of demonstrations against a shipment of spent fuel from a nuclear power plant. The court of appeals held that the trial court acted properly in excluding evidence offered by the defendant to show that his conduct was privileged under the defense of necessity as set forth in § 939.47. The court held that necessity is limited to the pressure of natural physical forces such as "storms, fires and privations" and, therefore, is not available in the context of a protest against the transportation of spent nuclear fuel. 99 Wis.2d 572, 576.

1. The Committee recommends selecting one of the terms in parentheses where possible but believes it is proper to instruct on all alternatives that are supported by the evidence. The Wisconsin Supreme Court affirmed this position in Doubek v. Kaul, 2022 WI 31, ¶14, 401 Wis.2d 575, 973 N.W.2d 756, stating that "[T]he language of Wis. Stat. § 947.01(1) is most naturally read as creating a single crime of disorderly conduct, while listing alternative means to satisfy its first element. The focus of the list is any type of conduct that is disorderly." Based on this finding, the court concluded that "Wisconsin's disorderly conduct statute is indivisible, and enumerates different means of committing the same crime." Id.

Speech alone, in certain contexts, can constitute disorderly conduct. *State v. A.S.*, 2001 WI 48, ¶1, 243 Wis. 2d 173, 626 N.W.2d 712; see also *State v. Douglas D.*, 2001 WI 47, ¶3, 243 Wis. 2d 204, 626 N.W.2d 725. Verbal or written statements may qualify as "abusive conduct" if they "tended to provoke retaliatory conduct on the part of the person or persons to whom the statements were addressed." *A.S.*, ¶29; see also *Douglas D.*, ¶32. Additionally, speech may be deemed "otherwise disorderly" if it is the type that tends to disrupt good order. *A.S.*, ¶33.

When the statements in question are alleged to be threats, they must rise to the level of "true threats" to fall within the scope of disorderly conduct. *Douglas D.*, ¶32; *A.S.*, ¶22. Both *A.S.* and *Douglas D.* adopted the definition of "true threat" articulated in *State v. Perkins*, 2001 WI 46, ¶29, 243 Wis. 2d 141, 626 N.W.2d 762. In *Perkins*, the Court interpreted § 940.203, which prohibits threats against a judge.

Subsequently, in Counterman v. Colorado, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023), the United States Supreme Court clarified the constitutional standard for evaluating true threats. The Court held that (1) whether speech qualifies as a "true threat" is determined objectively, based on how a reasonable listener would perceive the statement, and (2) a criminal conviction for such speech additionally requires proof that the speaker acted at least recklessly—that is, the speaker "consciously disregarded a substantial risk that [the communications] would be viewed as threatening violence."

The Wisconsin Supreme Court adopted this standard in Kindschy v. Aish, 2024 WI 27, ¶¶14–15 & n.9, 412 Wis. 2d 319, 8 N.W.3d 1, expressly abrogating the objective standard (as to the speaker) previously articulated in Perkins. In light of this development, the Committee amended the former Perkins-based definition of "true threat" to reflect the objective standard established in Counterman and subsequently adopted by the Wisconsin Supreme Court in Kindschy.

It is important to note, however, that Wisconsin's threat statutes (§§ 940.203, 947.019) continue to require that the defendant acted "intentionally." Under Wisconsin law, "intentionally" means the defendant acted with the conscious purpose to make a threat—not merely with reckless disregard. See Wis JI–Criminal 923A; Wis. Stat. § 939.23(3). This purpose-based mens rea standard exceeds the constitutional

minimum established in Counterman. Because the First Amendment permits states to impose a more stringent mental-state requirement than recklessness, Wisconsin's existing "intentionally threatens" language not only meets but surpasses the constitutional threshold articulated in Counterman.

The following definition of "true threat" is based on Perkins and Counterman:

> 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 threatening violence 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.

2. Teske v. State, 256 Wis. 440, 444, 41 N.W.2d 642 (1950).

A common disorderly conduct situation involves directing abusive language to police officers. The Wisconsin Supreme Court has discussed the general principles applicable to this situation in a civil case where a person arrested for disorderly conduct sued the arresting officer for false imprisonment:

> The fact that the abusive language is directed to a policeman or other law enforcement officer and is not overheard by others does not prevent it from being a violation . . . [of a disorderly conduct statute or ordinance].
>
> However, a police officer cannot provoke a person into a breach of the peace, such as directing abusive language to the police officer, and then arrest him without a warrant. Lane v. Collins, 29 Wis.2d 66, 72, 138 N.W.2d 264 (1965) (footnote omitted).

3. In State v. Givens, 28 Wis.2d 109, 115, 135 N.W.2d 780 (1965), the court held that the phrase "otherwise disorderly conduct" which tends to provoke a disturbance means conduct of a type not previously enumerated in the statute but similar thereto in having a tendency to disrupt good order and to provoke a disturbance. This interpretation rests upon the rule of ejusdem generis. The statute is not unconstitutionally vague.

In State v. Schwebke, 2002 WI 55, 253 Wis.2d 1, 644 N.W.2d 666, the court upheld the application of the disorderly conduct statute to mailings sent by the defendant to three different victims. The conduct can be considered "otherwise disorderly conduct" under § 947.01:

> . . . [T]he disorderly conduct statute does not necessarily require disruptions or disturbances that implicate the public directly. The statute encompasses conduct that tends to cause a disturbance or disruption that is personal or private in nature, as long as there exists the real possibility that this disturbance or disruption will spill over and disrupt the peace, order or safety of the surrounding community as well. Conduct is not punishable under the statute when it tends to cause only personal annoyance to a person. See Douglas D., 2001 WI 47, ¶27. An examination of the circumstances in which the conduct occurred must take place, considering such factors as the location of the conduct, the parties involved, and the manner of the conduct. 2002 WI 55, ¶30.

> . . . [T]he disorderly conduct statute requires, at a minimum, that, when the conduct tends to cause or provoke a disturbance that is private or personal in nature, there must exist the real possibility that this disturbance will spill over and cause a threat to the surrounding community as well. 2002 WI 55, ¶31.
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> . . . [W]e conclude that the disorderly conduct statute was appropriately applied to Schwebke's conduct in this case. In each instance, the conduct at issue, in light of the circumstances, went beyond conduct that merely tended to annoy or cause personal discomfort in another person. In each instance, the mailings constituted conduct that not only caused disturbances to the lives of the recipients, but the conduct was of the type that would be disruptive to peace and good order in the community. 2002 WI 55, ¶32.

4. The paragraph in brackets is intended for use primarily where the "otherwise disorderly conduct" alternative is used. In Teske v. State, supra, the court quotes this definition from 17 Am. Jur. Disorderly Conduct § 1 (1957), which is also adopted by the court in State v. Givens, supra.

In City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989), the Wisconsin Supreme Court reviewed the application of a disorderly conduct ordinance (modeled after § 947.01) to a television reporter who refused to obey police orders to leave the scene of the 1985 Midwest Express airplane crash. The court held that the defendant's conduct violated the statute under the "otherwise disorderly" provision. There was a legitimate need to maintain control at the crash site, which was threatened by the defendant's refusal to obey the police order to stay out of the restricted area. The conduct tended to cause a disturbance because others may have followed the defendant if he had been allowed to disobey the officer.

5. This statement is based on the decision in State v. Givens, supra, where the court quoted from the comment to a proposed disorderly conduct section contained in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The 1999 revision made minor changes in this statement in the interest of clarity; no change in meaning was intended.

Deciding whether conduct "unreasonably" offends the sense of decency or propriety of the community may be aided by comparing the harm to the public and the social value of the defendant's conduct.

An instruction attempting to explain this comparison might read as follows:

> In determining whether the conduct "unreasonably" offends the public sense of decency and propriety, you should weigh the degree to which decency and propriety were offended by the conduct against any contribution to the public interest made by the conduct. In this case, (here specify the reason the conduct was engaged in). [EXAMPLE: In this case the defendant has testified that he engaged in the conduct in order to protest the Viet Nam War.] Conduct unreasonably offends the public sense of decency and propriety if, but only if, the harm to the public outweighs the social value achieved by the defendant's conduct.

6. This statement is found in the comment to proposed § 347.01 in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The phrase "tending to create or provoke a breach of the peace," as found in § 943.145, Criminal Trespass To A Medical Facility, was discussed in State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989).

7. Section 947.01 was amended by 2011 Wisconsin Act 35, the "licensed carry" law. The current statute was renumbered § 947.01(1) and a new subsection (2) was created to read:

> (2) Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section for loading, carrying, or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried.

The Committee concluded that the new provision is best addressed by adding a statement for cases where there is evidence that the defendant was carrying a firearm at the time of the alleged disorderly conduct.

The phrase "criminal or malicious intent" is used in new sub. (2) of § 947.01. The Committee concluded that "criminal intent" means "intent to commit a crime." "Malicious" does not have an established meaning in the current Wisconsin Criminal Code [with one exception: see § 940.41(1r), that is not applicable here].