

**1910 HARASSMENT: SUBJECTING ANOTHER TO PHYSICAL CONTACT
— § 947.013(1r) and (1m)(a)**

Statutory Definition of the Crime

Harassment, as defined in § 947.013 of the Criminal Code of Wisconsin, is committed by one who is subject to an order under § _____¹ that prohibits or limits contact with another person and who, with intent to harass or intimidate that person, strikes, shoves, kicks, or otherwise subjects the person to physical contact or attempts to do the same, and accompanies the conduct with a credible threat that places the person in reasonable fear of death or great bodily harm.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. An order under § _____ prohibited or limited the defendant's contact with (name of victim).
2. The defendant [subjected] [attempted to subject]³ (name of victim) to physical contact.⁴
3. The defendant engaged in the conduct with intent to harass or intimidate (name of victim).

"With intent to harass or intimidate" means that the defendant acted with the mental purpose to harass or intimidate another person or was aware that (his) (her) conduct was practically certain to harass or intimidate another.⁵

4. The defendant's conduct was accompanied by a credible threat that placed (name of victim) in reasonable fear of death or great bodily harm.

"Credible threat" means a threat made with the intent and apparent ability to carry out the threat.⁶

"Great bodily harm" means serious bodily injury.⁷

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 four 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.

ADD THE FOLLOWING IF ONE THE PENALTY FACTORS SET FORTH IN SUBS. (1t), (1v), OR (1x) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACTOR IS ESTABLISHED⁸

If you find the defendant guilty, you must answer the following question(s):

FOR CHARGES UNDER SUB. (1t)⁹

[Did the defendant have a previous conviction for (identify the crime)?¹⁰

Was the victim of that crime the victim of the crime in this case?

Did the crime in this case occur within 7 years after the previous conviction?]

FOR CHARGES UNDER SUB. (1v)

[Did the defendant intentionally gain access to a record in electronic format that contained personally identifiable information regarding the victim in order the facilitate the crime in this case?]¹¹

FOR CHARGES UNDER SUB. (1x)

[Did the defendant have a previous conviction for (identify the crime)?¹²

Did the defendant intentionally gain access to a record in order the facilitate the crime in this case?]¹³

CONTINUE WITH THE FOLLOWING IN ALL CASES

Before you may answer "yes", you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1910 was originally published in 1993 and revised in 1994. This revision was approved by the Committee in December 2002 and involved adoption of a new format.

This instruction is for one type of offense defined in subsec. (1m)(a) of § 947.013 – subjecting another to physical contact. For threats to engage in physical contact, see Wis JI-Criminal 1911.

Prior to the revision of the statute in 1992, there had been no instruction for violations of § 947.013, Harassment, because violations were Class B forfeitures, not crimes. When the statute was amended in 1992 to punish some offenses as misdemeanors and others as felonies, instructions were drafted. The penalties were revised by 2001 Wisconsin Act 109, effective date: February 1, 2003.

Closely related offenses are covered by other statutes. Section 940.32 prohibits "stalking." See Wis JI-Criminal 1248, 1248A, and 1248B. Violations of restraining orders are already made criminal by §§ 813.12, 813.122, and 813.125. See Wis JI-Criminal 2040, which offers a suggested instruction for the three different restraining order offenses recognized by Wisconsin law. In State v. Sveum, 2002 WI App 105, 254 Wis.2d 868, 648 N.W.2d 496, the court held that violations of restraining orders are not lesser included offenses of charges under § 947.013(1r).

A violation of § 943.017(1r) is a Class A misdemeanor. The facts identified in sub. (1t) increase the penalty to a Class I felony. The facts identified in subs. (1v) and (1x) increase the penalty to a Class H felony. These penalty classifications take effect February 1, 2003.

The facts specified in subs. (1t), (1v), and (1x) must be submitted to the jury because they increase the statutorily-authorized penalty range. The following form is suggested for the verdict:

"We, the jury, find the defendant guilty of harassment under Wis. Stat. § 947.013, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

[State the applicable question.]"

1. Here insert the number of the statute under which the order was entered: § 813.12, § 813.122, or § 813.125. See § 947.013(1r)(b). The validity of the underlying order may not be collaterally attacked in the criminal prosecution for violating the order, absent a showing of fraud in the obtaining of the order. State v. Bouzek, 168 Wis.2d 642, 484 N.W.2d 362 (Ct. App. 1992).

2. Identifying the elements of this offense requires combining facts found in several subsections of § 947.013. Subsection (1r) states that it is a Class A misdemeanor if a person "violates subsection (1m) under all the following circumstances":

(a) The act is accompanied by a credible threat that places the victim in reasonable fear of death or great bodily harm.

(b) The act occurs while the actor is subject to an order or injunction under s. 813.12, 813.122 or 813.125 that prohibits or limits his or her contact with the victim.

So two of the elements of the offense are those specified above. The other two are provided in subsection (1m). Subsection (1m)(a) refers to: "Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same." This was adapted for the second element. The introductory clause of subsection (1m) refers to engaging in conduct "with intent to harass or intimidate another person." This is used as the third element in the instruction.

3. If a case is based on the claim that the defendant attempted to subject the victim to physical contact, definition of "attempt" should be included. See Wis JI-Criminal 580.

4. The full description of the offense used in the statute provides: "strikes, shoves, kicks, or otherwise subjects the person to physical contact or attempts . . . to do the same." The instruction uses only "physical contact" because that term includes the other, more specific, alternatives.

5. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary. Also see footnote 3, Wis JI-Criminal 1912.

"Intimidate" is defined as "to make timid or fearful" in Webster's New Collegiate Dictionary.

6. Section 947.013(1)(b). The Wisconsin statutes uses the same definition of "credible threat" that is found in § 646.9 of the California Penal Code, which defines the crime of "stalking."

7. See Wis JI-Criminal 914 for a more complete definition of "great bodily harm."

8. The questions address the penalty-increasing facts set forth in subs. (1t), (1v), and (1x) of § 943.017.

9. The following three questions address the penalty-increasing provision set forth in sub. (1t) of § 943.017: "Whoever violates sub. (1r) is guilty of a Class I felony if the person has a prior conviction under this subsection or (sub. (1r), (1v), or (1x) or s. 940.32 (2), (2e), (2m), or (3) involving the same victim and the present violation occurs within 7 years of the prior conviction."

10. The applicable crimes are: a violent crime as defined in § 939.632(1)(e)1.; stalking under § 940.32; or, harassment under § 947.013(1r), (1t), (1v), or (1x).

11. The factor specified in § 947.013(1v) increases the penalty to that for a Class H felony.

Sub. (1)(c) of § 943.017 provides: "'Personally identifiable information' has the meaning given in s. 19.62(5)."

Sub. (1)(d) of § 943.017 provides: "'Record' has the meaning given in s. 19.32(2)."

12. The facts set forth in sub. (1x) increase the penalty to that for a Class H felony.

The applicable crimes are: violations § 947.013(1r), (1t), or (1v); or, violations of § 940.32(2), (2e), (2m), or (3).

13. Note that this fact is not worded in the same manner as the similar fact in sub. (1v). This statement requires only access to a "record," not a "record in electronic format that contains personally identifiable information regarding the victim."

Sub. (1)(d) of § 943.017 provides: "'Record' has the meaning given in s. 19.32(2)."