1297 INTIMIDATION OF A VICTIM — §§ 940.44(2) and 940.45

Statutory Definition of the Crime

Intimidation of a victim, as defined in § 940.44(2) of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] another person who has been the victim of any crime from causing a complaint, indictment, or information to be sought and prosecuted and assisting in the prosecution thereof.

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 three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a victim of a crime.

   "Victim" means a person against whom a crime has been committed or attempted in this state.[2]

   In this case, it is alleged that (name of victim) was a victim of (name of crime). (Name of crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).[3] Before you may find the defendant guilty of intimidation

of a victim, you must be satisfied beyond a reasonable doubt that (name of victim) was the victim of (name of crime).

2. The defendant (prevented) (dissuaded)[4] (attempted to prevent) (attempted to dissuade) (name of victim) from [causing a (complaint) (indictment) (information) to be sought] (or) [causing a (complaint) (indictment) (information) to be prosecuted] (or) [assisting in the prosecution of a (complaint) (indictment) (information)].[5]

3. The defendant acted knowingly and maliciously.[6]

This requires that the defendant knew (name of victim) was a victim of a crime and that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. They 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 knowledge and intent.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].[8]

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:[9]

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

[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative)[10] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of victim)] [(identify relative)[11] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45)?"][12]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][13]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

[FOR CHARGES UNDER SUB. (7)][14]

["Was the underlying crime an act of domestic abuse[15] or one subject to a domestic abuse surcharge?"[16]]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question "yes."

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

COMMENT

Wis JI-Criminal 1297 was originally published in 2010 and revised in 2016 and 2020. The Committee approved revisions in February 2022 and October 2022. The February 2022 revision corrected an inadvertent error in sub. (7) of § 940.45, which was created by 2019 Wisconsin Act 112. See footnote 14. The October 2022 revision removed a "Reporter's Note" concerning issues relating to instructing the jury on a domestic abuse surcharge pursuant to s. 973.055(4).

This instruction is drafted for use for both misdemeanor and felony charges under §§ 940.44(2) and 940.45. For violations of § 940.44(1) see Wis JI-Criminal 1296. A separate instruction is drafted for cases involving intimidation of a person acting on behalf of a victim. See Wis JI-Criminal 1296A.

Section 940.44(2) was amended by 2013 Wisconsin Act 14 [effective date: April 10, 2015] to codify the interpretation of the statute in State v. Freer, 2010 WI App 9, 323 Wis.2d 29, 779 N.W.2d 12. The text of the instruction already reflected the Freer interpretation so it was not affected by Act 14. See footnote 5, below.

The definition of the three basic elements is based on § 940.44(2) and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in subs. (1)-(6) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

1. Section 940.44 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The definition of "victim" in the instruction is a simplified version of the definition provided in § 940.41(2):

> (2) "Victim" means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

3. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

> The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI-Criminal 1294 would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI-Criminal 1294. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, supra.

4. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

5. Subsection (2) of § 940.44 reads as follows: "Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof." The instruction provides for three alternatives as set forth in State v. Freer, 2010 WI App 9, 323 Wis.2d 29, 779 N.W.2d 12, which concluded that the statute was ambiguous because "'and' in the statutes is not always interpreted as a conjunctive term." The court relied on an LRB analysis of the bill to interpret the statute as though it read "or" instead of "and":

> In light of the LRB analysis, we conclude that the legislature intended the victim intimidation statute to prohibit any act of intimidation that seeks to prevent or dissuade a crime victim from assisting in the prosecution. Accordingly, we read "and" in the phrase "causing a complaint . . . to be sought and prosecuted and assisting in the prosecution thereof" in the disjunctive, and thereby conclude that Wis. Stat. § 940.44(2) prohibits knowingly or maliciously preventing or dissuading a crime victim from providing any one or more of the following forms of assistance to prosecutors: (1) causing a complaint, indictment or information to be sought; (2) causing a complaint to be prosecuted; or (3) assisting in the prosecution.
> 2010 WI App 9, ¶24.

Section 940.44(2) was amended by 2013 Wisconsin Act 14 [effective date: April 10, 2015] to codify the interpretation of the statute in Freer. The text of the instruction already reflected the Freer interpretation so it was not affected by Act 14.

6. Section 940.44 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and "maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

7. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

8. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

9. Section 940.45 specifies seven different facts that increase the penalty for the basic misdemeanor offense to that for a Class D felony. A bracketed question is provided for each statutory option.

10. The penalty increase provided by § 940.45(1) applies to the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

11. The same relatives are covered as under sub. (1) of the statute. See note 10, supra.

12. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

13. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

14. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: "(7) Where the underlying crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following a conviction, is subject to the surcharge in s. 973.055."

15. Subsection 968.075(1)(a) defines "domestic abuse" as follows:

> "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:
> 1. Intentional infliction of physical pain, physical injury or illness.
> 2. Intentional impairment of physical condition.
> 3. A violation of s. 940.225 (1), (2) or (3).

4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

For an instruction on committing a domestic abuse crime, see Wis JI-Criminal 984.

16. A person is subject to a domestic abuse surcharge if that person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain criminal offenses or municipal ordinances specified under § 973.055(a)1 and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.