1902 UNLAWFUL USE OF TELEPHONE — § 947.012(1)(a)

Statutory Definition of the Crime

Unlawful use of telephone, as defined in § 947.012(1)(a) of the Criminal Code of Wisconsin, is committed by one who, with intent to frighten, intimidate, threaten, abuse or harass, makes a telephone call and threatens to inflict injury or physical harm to any person or the property of any person.

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. The defendant made a telephone call to (name of victim).
2. In making the telephone call to (name of victim), the defendant intended to[1] (frighten) (intimidate) (threaten) (abuse) (harass)[2] (name of victim).

   "With intent to (frighten) (intimidate) (threaten) (abuse) (harass)" means that the defendant acted with the mental purpose to (frighten) (intimidate) (threaten) (abuse) (harass) another person or was aware that his or her conduct was practically certain to cause that result.[3]
3. In the course of that telephone call, the defendant threatened[4] to inflict (physical harm to) (damage to the property of) any 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 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 a threat 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.][5]

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.

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

COMMENT

Wis JI-Criminal 1902 was originally published in 1981 and revised in 1992, 1996, 2008, and 1/2024. This revision was approved by the Committee in February 2025. It incorporated the "true threats" language used in other instructions throughout the set to ensure consistency.

Section 947.012, Unlawful Use Of Telephone, was created by Chapter 131, Laws of 1979. The original statute contained six subsections and was apparently modeled after a federal statute, 47 U.S.C. § 223. The statute was revised by 1991 Wisconsin Act 39, effective August 15, 1991. This instruction is for an offense under subsection (1)(a) of the revised statute; the offense was previously defined in § 947.012(1), 1989 90 Wis. Stats. 1991 Wisconsin Act 39 changed some violations of § 947.012 from crimes to forfeitures. The penalty for this offense was not affected; it is a Class B misdemeanor.

1. The Committee recommends that one of the alternatives in parentheses should be selected if possible because it clarifies the issue for the jury. The Committee does not conclude that an instruction joining one or more alternatives in the disjunctive would be error. See Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979); and United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

2. "Harassment" is referred to in § 947.013(1m)(b), which identifies one type of harassment penalized by that statute:

> (b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

The § 947.013(1m)(b) reference is the same as the one used in the harassment restraining order statute, § 813.125(1)(b). The restraining order statute and its definition of harassment were found to be constitutional by the Wisconsin Supreme Court in Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), where the court found the meaning of harassment readily ascertainable by reference to a dictionary: "'Harass' means to worry or impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil, or badger." 139 Wis.2d 397, 407, citing Webster's Third New International Dictionary 1031 (1961).

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary.

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

4. Wisconsin appellate courts have held that some criminal statutes prohibiting threats must be read to apply only to "true threats." For example, in State v. Robert T., 2008 WI App 22, 307 Wis.2d 488, 746 N.W.2d 564, the court of appeals held that "§ 947.015 must be read with the limitation that only a false bomb scare that constitutes a 'true threat' can be charged." ¶12. State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762, reached the same conclusion for violations of § 940.203, Threat to a judge. Also see State v. A.S., 2001 WI 48, 243 Wis.2d 173, 626 N.W.2d 712, holding that a "true threat" is required for disorderly conduct charges based on threats.

5. 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. Perkins 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 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm to another…"

In Counterman v. Colorado, 600 U.S. 661 (43 S.Ct. 2106, 216 L.Ed.2d 775), the Court addressed the necessity of incorporating a subjective component when evaluating threats. According to the Court's opinion, a "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 a threat 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.