CHAPTER 940

CRIMES AGAINST LIFE AND BODILY SECURITY

Cross−reference: See definitions in s. 939.22.

NOTE: 1987 Wis. Act 399 included changes in homicide and lesser included offenses. The sections affected had previously passed the senate as 1987 Senate Bill 191, which was prepared by the Judicial Council and contained explanatory notes. These notes have been inserted following the sections affected and are credited to SB 191 as "Bill 191−S".

SUBCHAPTER I

LIFE

940.01 First−degree intentional homicide.

(1) OFFENSES. (a) Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.

(b) Except as provided in sub. (2), whoever causes the death of an unborn child with intent to kill that unborn child, kill the woman who is pregnant with that unborn child or kill another is guilty of a Class A felony.

(2) MITIGATING CIRCUMSTANCES. The following are affirmative defenses to prosecution under this section which mitigate the offense to 2nd−degree intentional homicide under s. 940.05:

(a) *Adequate provocation.* Death was caused under the influence of adequate provocation as defined in s. 939.44.

(b) *Unnecessary defensive force.* Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.

(c) *Prevention of felony.* Death was caused because the actor believed that the force used was necessary in the exercise of the privilege to prevent or terminate the commission of a felony, if that belief was unreasonable.

(d) *Coercion; necessity.* Death was caused in the exercise of a privilege under s. 939.45 (1).

(3) BURDEN OF PROOF. When the existence of an affirmative defense under sub. (2) has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt under sub. (1).

History: 1987 a. 399; 1997 a. 295.

Judicial Council Note, 1988: First−degree intentional homicide is analogous to the prior offense of first−degree murder. Sub. (2) formerly contained a narrower definition of "intent to kill" than the general definition of criminal intent. That narrower definition has been eliminated in the interest of uniformity. Section 939.23 now defines the intent referred to.

The affirmative defenses specified in sub. (2) were formerly treated in s. 940.05. This caused confusion because they seemed to be elements of manslaughter rather than defenses to first−degree murder. Sub. (2) specifies only those affirmative defenses which mitigate an intentional homicide from first to 2nd degree. Other affirmative defenses are a defense to 2nd−degree intentional homicide also, such as self−defense, i.e., when both beliefs specified in sub. (2) (b) are reasonable. Section 939.48.

The prosecution is required to prove only that the defendant's acts were a substantial factor in the victim's death; not the sole cause. State v. Block, 170 Wis. 2d 676, 489 N.W.2d 715 (Ct. App. 1992).

The trial court must apply an objective reasonable view of the evidence test to determine whether under sub. (3) a mitigating affirmative defense "has been placed in issue" before submitting the issue to the jury. In Interest of Shawn B. N. 173 Wis. 2d 343, 497 N.W.2d 141 (Ct. App. 1992).

Imperfect self−defense contains an initial threshold element requiring a reasonable belief that the defendant was terminating an unlawful interference with his or her person. State v. Camacho, 176 Wis. 2d 860, 501 N.W.2d 380 (1993).

Sub. (1) (a) cannot be applied against a mother for actions taken against a fetus while pregnant as the applicable definition of human being under s. 939.22 (16) is limited to one who is born alive. Sub. (1) (b) does not apply because s. 939.75 (2) (b) excludes from its application actions by a pregnant woman. State v. Deborah J.Z. 228 Wis. 2d 468, 596 N.W.2d 490 (Ct. App. 1999), 96−2797.

Barring psychiatric or psychological opinion testimony on the defendant's capacity to form an intent to kill is constitutional. Haas v. Abrahamson, 910 F. 2d 384 (1990) citing Steele v. State, 97 Wis. 2d 72, 294 N.W.2d 2 (1980).

A privilege for excusable homicide by accident or misfortune is incorporated in s. 939.45 (6). Accident is a defense that negatives intent. If a person kills another by accident, the killing could not have been intentional. Accident must be disproved beyond a reasonable doubt when a defendant raises it as a defense. When the state proves intent to kill beyond a reasonable doubt, it necessarily disproves accident. State v. Watkins, 2002 WI 101, 255 Wis. 2d 265, 647 N.W.2d 244, 00−0064.

A defendant may demonstrate that he or she was acting lawfully, a necessary element of an accident defense, by showing that he or she was acting in lawful self−defense. Although intentionally pointing a firearm at another constitutes a violation of s. 941.20, under s. 939.48 (1) a person is privileged to point a gun at another person in self−defense if the person reasonably believes that the threat of force is necessary to prevent or terminate what he or she reasonably believes to be an unlawful interference. State v. Watkins, 2002 WI 101, 255 Wis. 2d 265, 647 N.W.2d 244, 00−0064.

A defendant seeking a jury instruction on perfect self−defense to a charge of first−degree intentional homicide must satisfy an objective threshold showing that he or she reasonably believed that he or she was preventing or terminating an unlawful interference with his or her person and reasonably believed that the force used was necessary to prevent imminent death or great bodily harm. A defendant seeking a jury instruction on unnecessary defensive force under sub. (2) (b) to a charge of first−degree intentional homicide is not required to satisfy the objective threshold. State v. Head, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413, 99−3071.

A defendant who claims self−defense to a charge of first−degree intentional homicide may use evidence of a victim's violent character and past acts of violence to show a satisfactory factual basis that he or she actually believed he or she was in imminent danger of death or great bodily harm and actually believed that the force used was necessary to defend himself or herself, even if both beliefs were unreasonable. State v. Head, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413, 99−3071.

The common law "year−and−a−day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is abrogated, with prospective application only. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01−3063.

An actor causes death if his or her conduct is a substantial factor in bringing about that result. A substantial factor need not be the sole cause of death for one to be held legally culpable. Whether an intervening act was negligent, intentional or legally wrongful is irrelevant. The state must still prove beyond a reasonable doubt that the defendant's acts were a substantial factor in producing the death. State v. Below, 2011 WI App 64, 333 Wis. 2d 690, 799 N.W.2d 95, 10−0798.

Under the facts of this case, the court did not err in denying an intervening cause instruction. Even if the defendant could have established that the termination of the victim's life support was "wrongful" under Wisconsin law, that wrongful act would not break the chain of causation between the defendant's actions and victim's subsequent death. State v. Below, 2011 WI App 64, 333 Wis. 2d 690, 799 N.W.2d 95, 10−0798.

Importance of clarity in law of homicide: The Wisconsin revision. Dickey, Schultz & Fullin. 1989 WLR 1323 (1989).

State v. Camacho: The Judicial Creation of an Objective Element to Wisconsin's Law of Imperfect Self−defense Homicide. Leiser. 1995 WLR 742.

940.02 First−degree reckless homicide. (1) Whoever recklessly causes the death of another human being under circumstances which show utter disregard for human life is guilty of a Class B felony.

(1m) Whoever recklessly causes the death of an unborn child under circumstances that show utter disregard for the life of that unborn child, the woman who is pregnant with that unborn child or another is guilty of a Class B felony.

(2) Whoever causes the death of another human being under any of the following circumstances is guilty of a Class C felony:

(a) By manufacture, distribution or delivery, in violation of s. 961.41, of a controlled substance included in schedule I or II under ch. 961, of a controlled substance analog of a controlled substance included in schedule I or II under ch. 961 or of ketamine or flunitrazepam, if another human being uses the controlled substance or controlled substance analog and dies as a result of that use. This paragraph applies:

1. Whether the human being dies as a result of using the controlled substance or controlled substance analog by itself or with any compound, mixture, diluent or other substance mixed or combined with the controlled substance or controlled substance analog.

2. Whether or not the controlled substance or controlled substance analog is mixed or combined with any compound, mixture, diluent or other substance after the violation of s. 961.41 occurs.

3. To any distribution or delivery described in this paragraph, regardless of whether the distribution or delivery is made directly to the human being who dies. If possession of the controlled substance included in schedule I or II under ch. 961, of the controlled substance analog of the controlled substance included in schedule I or II under ch. 961 or of the ketamine or flunitrazepam is transferred more than once prior to the death as described in this paragraph, each person who distributes or delivers the controlled substance or controlled substance analog in violation of s. 961.41 is guilty under this paragraph.

(b) By administering or assisting in administering a controlled substance included in schedule I or II under ch. 961, a controlled substance analog of a controlled substance included in schedule I or II of ch. 961 or ketamine or flunitrazepam, without lawful authority to do so, to another human being and that human being dies as a result of the use of the substance. This paragraph applies whether the human being dies as a result of using the controlled substance or controlled substance analog by itself or with any compound, mixture, diluent or other substance mixed or combined with the controlled substance or controlled substance analog.

History: 1987 a. 339, 399; 1995 a. 448; 1997 a. 295; 1999 a. 57; 2001 a. 109.

Judicial Council Note, 1988: [As to sub. (1)] First−degree reckless homicide is analogous to the prior offense of 2nd−degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness, is required for liability. See s. 939.24. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of life". State v. Dolan, 44 Wis. 2d 68 (1969); State v. Weso, 60 Wis. 2d 404 (1973).

Under prior law, adequate provocation mitigated 2nd−degree murder to manslaughter. State v. Hoyt, 21 Wis. 2d 284 (1964). Under this revision, the analogs of those crimes, i.e., first−degree reckless and 2nd−degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01 (3) are inapplicable. [Bill 191−S]

Possession of a controlled substance is not a lesser included offense of sub. (2) (a). State v. Clemons, 164 Wis. 2d 506, 476 N.W.2d 283 (Ct. App. 1991).

Generally expert evidence of personality dysfunction is irrelevant to the issue of intent, although it might be admissible in very limited circumstances. State v. Morgan, 195 Wis. 2d 388, 536 N.W.2d 425 (Ct. App. 1995), 93−2611.

Utter disregard for human life is an objective standard of what a reasonable person in the defendant's position is presumed to have known and is proved through an examination of the acts that caused death and the totality of the circumstances surrounding the conduct. State v. Edmunds, 229 Wis. 2d 67, 598 N.W.2d 290 (Ct. App. 1999), 98−2171.

The common law "year−and−a−day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is abrogated, with prospective application only. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01−3063.

The punishments for first−degree reckless homicide by delivery of a controlled substance under s. 940.02 (2) (a) and contributing to the delinquency of a child with death as a consequence in violation of s. 948.40 (1) and (4) (a) are not multiplicitous when both convictions arise from the same death. State v. Patterson, 2010 WI 130, 329 Wis. 2d 599, 790 N.W.2d 909, 08−1968.

An actor causes death if his or her conduct is a substantial factor in bringing about that result. A substantial factor need not be the sole cause of death for one to be held legally culpable. Whether an intervening act was negligent, intentional or legally wrongful is irrelevant. The state must still prove beyond a reasonable doubt that the defendant's acts were a substantial factor in producing the death. State v. Below, 2011 WI App 64, 333 Wis. 2d 690, 799 N.W.2d 95, 10−0798.

Under the facts of this case, the court did not err in denying an intervening cause instruction. Even if the defendant could have established that the termination of the victim's life support was "wrongful" under Wisconsin law, that wrongful act would not break the chain of causation between the defendant's actions and victim's subsequent death. State v. Below, 2011 WI App 64, 333 Wis. 2d 690, 799 N.W.2d 95, 10−0798.

While swerving has been held to show regard for life, the defendant's conduct must be considered in light of the totality of the circumstances. When the defendant was driving over eighty miles per hour on a major, well−traveled city street after consuming alcohol and prescription pills and never braked or slowed down before running a red light, an ineffectual swerve failed to demonstrate a regard for human life. State v. Geske, 2012 WI App 15, 339 Wis. 2d 170, 810 N.W.2d 226, 10−2808.

Importance of clarity in law of homicide: The Wisconsin revision. Dickey, Schultz & Fullin. 1989 WLR 1323 (1989).

940.03 Felony murder. Whoever causes the death of another human being while committing or attempting to commit a crime specified in s. 940.19, 940.195, 940.20, 940.201, 940.203, 940.225 (1) or (2) (a), 940.30, 940.31, 943.02, 943.10 (2), 943.23 (1g), or 943.32 (2) may be imprisoned for not more than 15 years in excess of the maximum term of imprisonment provided by law for that crime or attempt.

History: 1987 a. 399; 2001 a. 109; 2005 a. 313.

Judicial Council Note, 1988: The prior felony murder statute (s. 940.02 (2)) did not allow enhanced punishment for homicides caused in the commission of a Class B felony. State v. Gordon, 111 Wis. 2d 133, 330 N.W.2d 564 (1983). The revised statute eliminates the "natural and probable consequence" limitation and limits the offense to homicides caused in the commission of or attempt to commit armed robbery, armed burglary, arson, first−degree sexual assault or 2nd−degree sexual assault by use or threat of force or violence. The revised penalty clause allows imposition of up to 20 years' imprisonment more than that prescribed for the underlying felony. Prosecution and punishment for both offenses remain barred by double jeopardy. State v. Carlson, 5 Wis. 2d 595, 93 N.W.2d 355 (1958). [Bill 191−S]

To prove that the defendant caused the death, the state need only prove that the defendant's conduct was a substantial factor. The phrase "while committing or

attempting to commit" encompasses the immediate flight from the felony. A defendant may be convicted if another person, including an intended felony victim, fires the fatal shot. State v. Oimen, 184 Wis. 2d 423, 516 N.W.2d 399 (Ct. App. 1994), State v. Rivera, 184 Wis. 2d 485, 516 N.W.2d 391 (1994) and State v. Chambers, 183 Wis. 2d 316, 515 N.W.2d 531 (Ct. App. 1994).

Attempted felony murder does not exist. Attempt requires intent and the crime of felony murder is complete without specific intent. State v. Briggs, 218 Wis. 2d 61, 579 N.W.2d 783 (Ct. App. 1998), 97−1558.

Oimen affirms that felony murder liability exists if a defendant is a party to one of the listed felonies and a death results. State v. Krawczyk, 2003 WI App 6, 259 Wis. 2d 843, 657 N.W.2d 77, 02−0156.

The common law "year−and−a−day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is abrogated, with prospective application only. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01−3063.

For purposes of calculating initial confinement, felony murder is a stand−alone unclassified crime, not a penalty enhancer. State v. Mason, 2004 WI App 176, 276 Wis. 2d 434, 687 N.W.2d 526, 03−2693.

An actor causes death if his or her conduct is a substantial factor in bringing about that result. A substantial factor need not be the sole cause of death for one to be held legally culpable. Whether an intervening act was negligent, intentional or legally wrongful is irrelevant. The state must still prove beyond a reasonable doubt that the defendant's acts were a substantial factor in producing the death. State v. Below, 2011 WI App 64, 333 Wis. 2d 690, 799 N.W.2d 95, 10−0798.

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940.04 Abortion. **(1)** Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony.

(2) Any person, other than the mother, who does either of the following is guilty of a Class E felony:

(a) Intentionally destroys the life of an unborn quick child; or

(b) Causes the death of the mother by an act done with intent to destroy the life of an unborn child. It is unnecessary to prove that the fetus was alive when the act so causing the mother's death was committed.

(5) This section does not apply to a therapeutic abortion which:

(a) Is performed by a physician; and

(b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

(c) Unless an emergency prevents, is performed in a licensed maternity hospital.

(6) In this section "unborn child" means a human being from the time of conception until it is born alive.

History: 2001 a. 109; 2011 a. 217.

Aborting a child against a father's wishes does not constitute intentional infliction of emotional distress. Przybyla v. Przybyla, 87 Wis. 2d 441, 275 N.W.2d 112 (Ct. App. 1978).

Sub. (2) (a) proscribes feticide. It does not apply to consensual abortions. It was not impliedly repealed by the adoption of s. 940.15 in response to *Roe v. Wade*. State v. Black, 188 Wis. 2d 639, 526 N.W.2d 132 (1994).

The common law "year−and−a−day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is abrogated, with prospective application only. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01−3063.

This section is cited as similar to a Texas statute that was held to violate the due process clause of the 14th amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Roe v. Wade, 410 U.S. 113 (1973).

The state may prohibit first trimester abortions by nonphysicians. Connecticut v. Menillo, 423 U.S. 9 (1975).

The viability of an unborn child is discussed. Colautti v. Franklin, 439 U.S. 379 (1979).

Poverty is not a constitutionally suspect classification. Encouraging childbirth except in the most urgent circumstances is rationally related to the legitimate governmental objective of protecting potential life. Harris v. McRae, 448 U.S. 297 (1980).

Abortion issues are discussed. Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Planned Parenthood Assn. v. Ashcroft, 462 U.S. 476 (1983); Simopoulas v. Virginia, 462 U.S. 506 (1983).

The essential holding of *Roe v. Wade* allowing abortion is upheld, but various state restrictions on abortion are permissible. Planned Parenthood v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674 (1992).

Wisconsin's abortion statute, s. 940.04, Stats. 1969, is unconstitutional as applied to the abortion of an embryo that has not quickened. Babbitz v. McCann, 310 F. Supp. 293 (1970).

When U.S. supreme court decisions clearly made Wisconsin's antiabortion statute unenforceable, the issue in a physician's action for injunctive relief against enforcement became mooted, and it no longer presented a case or controversy over which the court could have jurisdiction. Larkin v. McCann, 368 F. Supp. 1352 (1974).

940.05 Second−degree intentional homicide. **(1)** Whoever causes the death of another human being with intent to kill that person or another is guilty of a Class B felony if:

(a) In prosecutions under s. 940.01, the state fails to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01 (2) did not exist as required by s. 940.01 (3); or

(b) The state concedes that it is unable to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01 (2) did not exist. By charging under this section, the state so concedes.

(2) In prosecutions under sub. (1), it is sufficient to allege and prove that the defendant caused the death of another human being with intent to kill that person or another.

(2g) Whoever causes the death of an unborn child with intent to kill that unborn child, kill the woman who is pregnant with that unborn child or kill another is guilty of a Class B felony if:

(a) In prosecutions under s. 940.01, the state fails to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01 (2) did not exist as required by s. 940.01 (3); or

(b) The state concedes that it is unable to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01 (2) did not exist. By charging under this section, the state so concedes.

(2h) In prosecutions under sub. (2g), it is sufficient to allege and prove that the defendant caused the death of an unborn child with intent to kill that unborn child, kill the woman who is pregnant with that unborn child or kill another.

(3) The mitigating circumstances specified in s. 940.01 (2) are not defenses to prosecution for this offense.

History: 1987 a. 399; 1997 a. 295.

Judicial Council Note, 1988: Second−degree intentional homicide is analogous to the prior offense of manslaughter. The penalty is increased and the elements clarified in order to encourage charging under this section in appropriate cases.

Adequate provocation, unnecessary defensive force, prevention of felony, coercion and necessity, which are affirmative defenses to first−degree intentional homicide but not this offense, mitigate that offense to this. When this offense is charged, the state's inability to disprove their existence is conceded. Their existence need not, however, be pleaded or proved by the state in order to sustain a finding of guilty.

When first−degree intentional homicide is charged, this lesser offense must be submitted upon request if the evidence, reasonably viewed, could support the jury's finding that the state has not borne its burden of persuasion under s. 940.01 (3). State v. Felton, 110 Wis. 2d 465, 508 (1983). [Bill 191−S]

The prosecution is required to prove only that the defendant's acts were a substantial factor in the victim's death; not the sole cause. State v. Block, 170 Wis. 2d 676, 489 N.W.2d 715 (Ct. App. 1992).

The common law "year−and−a−day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is abrogated, with prospective application only. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01−3063.

Importance of clarity in law of homicide: The Wisconsin revision. Dickey, Schultz & Fullin. 1989 WLR 1323 (1989).

940.06 Second−degree reckless homicide. **(1)** Whoever recklessly causes the death of another human being is guilty of a Class D felony.

(2) Whoever recklessly causes the death of an unborn child is guilty of a Class D felony.

History: 1987 a. 399; 1997 a. 295; 2001 a. 109.

Judicial Council Note, 1988: Second−degree reckless homicide is analogous to the prior offense of homicide by reckless conduct. The revised statute clearly requires proof of a subjective mental state, i.e., criminal recklessness. See s. 939.24 and the NOTE thereto. [Bill 191−S]

Second−degree reckless homicide is not a lesser included offense of homicide by intoxicated use of a motor vehicle. State v. Lechner, 217 Wis. 2d 392, 576 N.W.2d 912 (1998), 96−2830.

The common law "year−and−a−day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is abrogated, with prospective application only. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01−3063.

The second−degree reckless homicide statute requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk. The circuit court's refusal to instruct the jury about the effect of a parent's sincere belief in prayer treatment for their child on the subjective awareness element of second−degree reckless homicide, did not undermine the parents' ability to defend themselves. The second−degree reckless homicide statute does not require that the actor be subjectively aware that his or her conduct is a cause of the death of his or her child. The statute and the jury instructions require only that the actor be subjectively aware that his or her conduct created the

unreasonable and substantial risk of death or great bodily harm. State v. Neumann, 2013 WI 58, 348 Wis. 2d 455, 832 N.W.2d 560, 11−1044.

Importance of clarity in law of homicide: The Wisconsin revision. Dickey, Schultz & Fullin. 1989 WLR 1323 (1989).

940.07 Homicide resulting from negligent control of vicious animal. Whoever knowing the vicious propensities of any animal intentionally allows it to go at large or keeps it without ordinary care, if such animal, while so at large or not confined, kills any human being who has taken all the precautions which the circumstances may permit to avoid such animal, is guilty of a Class G felony.

History: 1977 c. 173; 2001 a. 109.

The common law "year−and−a−day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is abrogated, with prospective application only. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01−3063.

940.08 Homicide by negligent handling of dangerous weapon, explosives or fire. (1) Except as provided in sub. (3), whoever causes the death of another human being by the negligent operation or handling of a dangerous weapon, explosives or fire is guilty of a Class G felony.

(2) Whoever causes the death of an unborn child by the negligent operation or handling of a dangerous weapon, explosives or fire is guilty of a Class G felony.

(3) Subsection (1) does not apply to a health care provider acting within the scope of his or her practice or employment.

History: 1977 c. 173; 1985 a. 293; 1987 a. 399; 1997 a. 295; 2001 a. 109; 2011 a. 2.

Judicial Council Note, 1988: The definition of the offense is broadened to include highly negligent handling of fire, explosives and dangerous weapons in addition to firearm, airgun, knife or bow and arrow. See s. 939.22 (10). [Bill 191−S]

The common law "year−and−a−day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is abrogated, with prospective application only. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01−3063.

In order to establish that the defendant was guilty of the crime of homicide by negligent handling of a dangerous weapon under sub. (1), the state had to prove three elements beyond a reasonable doubt: 1) the defendant operated or handled a dangerous weapon; 2) the defendant operated or handled a dangerous weapon in a manner constituting criminal negligence; and 3) the defendant's operation or handling of a dangerous weapon in a manner constituting criminal negligence caused the death of another human being. State v. Langlois, 2018 WI 73, 382 Wis. 2d 414, 913 N.W.2d 812, 16−1409.

940.09 Homicide by intoxicated use of vehicle or firearm. (1) Any person who does any of the following may be penalized as provided in sub. (1c):

(a) Causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.

(am) Causes the death of another by the operation or handling of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood.

(b) Causes the death of another by the operation or handling of a vehicle while the person has a prohibited alcohol concentration, as defined in s. 340.01 (46m).

(bm) Causes the death of another by the operation of a commercial motor vehicle while the person has an alcohol concentration of 0.04 or more but less than 0.08.

(c) Causes the death of an unborn child by the operation or handling of a vehicle while under the influence of an intoxicant.

(cm) Causes the death of an unborn child by the operation or handling of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood.

(d) Causes the death of an unborn child by the operation or handling of a vehicle while the person has a prohibited alcohol concentration, as defined in s. 340.01 (46m).

(e) Causes the death of an unborn child by the operation of a commercial motor vehicle while the person has an alcohol concentration of 0.04 or more but less than 0.08.

(1c) (a) Except as provided in par. (b), a person who violates sub. (1) is guilty of a Class D felony. Upon conviction, the court shall impose a bifurcated sentence under s. 973.01 and the term of confinement in prison portion of the bifurcated sentence shall be at least 5 years except that a court may impose a term of confinement that is less than 5 years if the court finds a compelling reason and places its reason on the record.

(b) A person who violates sub. (1) is guilty of a Class C felony if the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307 (2). Upon conviction, the court shall impose a bifurcated sentence under s. 973.01 and the term of confinement in prison portion of the bifurcated sentence shall be at least 5 years except that a court may impose a term of confinement that is less than 5 years if the court finds a compelling reason and places its reason on the record.

(1d) A person who violates sub. (1) is subject to the requirements and procedures for installation of an ignition interlock device under s. 343.301.

(1g) Any person who does any of the following is guilty of a Class D felony:

(a) Causes the death of another by the operation or handling of a firearm or airgun while under the influence of an intoxicant.

(am) Causes the death of another by the operation or handling of a firearm or airgun while the person has a detectable amount of a restricted controlled substance in his or her blood.

(b) Causes the death of another by the operation or handling of a firearm or airgun while the person has an alcohol concentration of 0.08 or more.

(c) Causes the death of an unborn child by the operation or handling of a firearm or airgun while under the influence of an intoxicant.

(cm) Causes the death of an unborn child by the operation or handling of a firearm or airgun while the person has a detectable amount of a restricted controlled substance in his or her blood.

(d) Causes the death of an unborn child by the operation or handling of a firearm or airgun while the person has an alcohol concentration of 0.08 or more.

(1m) (a) A person may be charged with and a prosecutor may proceed upon an information based upon a violation of any combination of sub. (1) (a), (am), or (b); any combination of sub. (1) (a), (am), or (bm); any combination of sub. (1) (c), (cm), or (d); any combination of sub. (1) (c), (cm), or (e); any combination of sub. (1g) (a), (am), or (b); or any combination of sub. (1g) (c), (cm), or (d) for acts arising out of the same incident or occurrence.

(b) If a person is charged in an information with any of the combinations of crimes referred to in par. (a), the crimes shall be joined under s. 971.12. If the person is found guilty of more than one of the crimes so charged for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under s. 23.33 (13) (b) 2. and 3., under s. 23.335 (23) (c) 2. and 3., under s. 30.80 (6) (a) 2. and 3., under s. 343.307 (1) or under s. 350.11 (3) (a) 2. and 3. Subsection (1) (a), (am), (b), (bm), (c), (cm), (d), and (e) each require proof of a fact for conviction which the others do not require, and sub. (1g) (a), (am), (b), (c), (cm), and (d) each require proof of a fact for conviction which the others do not require.

(2) (a) In any action under this section, the defendant has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant, did not have a detectable amount of a restricted controlled substance in his or her blood, or did not have an alcohol concentration described under sub. (1) (b), (bm), (d) or (e) or (1g) (b) or (d).

(b) In any action under sub. (1) (am) or (cm) or (1g) (am) or (cm) that is based on the defendant allegedly having a detectable amount of methamphetamine or gamma−hydroxybutyric acid or delta−9−tetrahydrocannabinol in his or her blood, the defendant has a defense if he or she proves by a preponderance of the evidence that at the time of the incident or occurrence he or she had a valid prescription for methamphetamine or one of its metabolic

precursors or gamma−hydroxybutyric acid or delta−9−tetrahydrocannabinol.

(3) An officer who makes an arrest for a violation of this section shall make a report as required under s. 23.33 (4t), 23.335 (12) (j), 30.686, 346.635 or 350.106.

History: 1977 c. 173; 1981 c. 20, 184, 314, 391; 1983 a. 459; 1985 a. 331; 1987 a. 399; 1989 a. 105, 275, 359; 1991 a. 32, 277; 1993 a. 317; 1995 a. 425, 436; 1997 a. 237, 295, 338; 1999 a. 32, 109; 2001 a. 16, 109; 2003 a. 30, 97; 2009 a. 100; 2015 a. 170; 2015 a. 197 s. 51; 2019 a. 31.

NOTE: For legislative intent see chapter 20, laws of 1981, section 2051 (13).

Probable cause for arrest on a charge of homicide by intoxicated use of a motor vehicle justified taking a blood sample without a search warrant or arrest. State v. Bentley, 92 Wis. 2d 860, 286 N.W.2d 153 (Ct. App. 1979).

Each death caused by an intoxicated operator's negligence is chargeable as a separate offense. State v. Rabe, 96 Wis. 2d 48, 291 N.W.2d 809 (1980).

Because driving while intoxicated is inherently dangerous, the state need not prove a causal connection between the driver's intoxication and the victim's death. Sub. (2) does not violate the right against self−incrimination. State v. Caibaiosai, 122 Wis. 2d 587, 363 N.W.2d 574 (1985).

Affirmed. State v. Fonte, 2005 WI 77, 281 Wis. 2d 654, 698 N.W.2d 594, 03−2097.

The definition of vehicle in s. 939.22 (44) applies to this section and includes a tractor. State v. Sohn, 193 Wis. 2d 346, 535 N.W.2d 1 (Ct. App. 1995).

Sub. (2) does not violate the constitutional guarantee of equal protection. State v. Lohmeier, 196 Wis. 2d 432, 538 N.W.2d 821 (Ct. App. 1995), 94−2187.

The defense under sub. (2) does not require an intervening cause; a victim's conduct can be the basis of the defense. The s. 939.14 rule that contributory negligence is not a defense to a crime does not prevent considering the victim's negligence in relation to causation. State v. Lohmeier, 205 Wis. 2d 183, 556 N.W.2d 90 (1996), 94−2187.

Second−degree reckless homicide is not a lesser included offense of homicide by intoxicated use of a motor vehicle. State v. Lechner, 217 Wis. 2d 392, 576 N.W.2d 912 (1998), 96−2830.

The common law "year−and−a−day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is prospectively abrogated. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01−3063.

Defendant's conviction under sub. (1) (c) for causing the death of an unborn child was not unconstitutional. The court rejected the assertion that s. 939.75 (2) (b) 3. denies equal protection of the law because a pregnant woman can perform acts that cause the death of her unborn child without criminal liability while others are not similarly exempt for acts causing the death of the same unborn child. Because neither the defendant in this case nor anyone else is similarly situated to a pregnant woman who engages in conduct that causes the death of or harm to the unborn child within the pregnant woman, there is no equal protection violation. State v. Benson, 2012 WI App 101, 344 Wis. 2d 126, 822 N.W.2d 484, 11−1399.

When a blood test reveals the presence of a restricted controlled substance, homicide by intoxicated use of a vehicle is a type of strict liability offense; the state only need prove that the restricted controlled substance was present and the defendant caused the death of another by using a motor vehicle. Though generally structured as a strict liability offense, sub. (2) (a) provides a defense for when there is an intervening cause between the intoxicated operation of the automobile and the death of an individual. A seizure can, as a general matter, be a defense to the charge. State v. Raczka, 2018 WI App 3, 379 Wis. 2d 720, 906 N.W.2d 722, 16−1057.

In this case, the defendant had a history of seizures and failed to take his seizure medication as prescribed. If failing to take the medication was negligent and this negligence caused the seizure and the crash, then the statute offers no defense. However, whether the defendant's failure to take his medication was a failure to exercise due care is a question of fact; it cannot be presumed as a matter of law. State v. Raczka, 2018 WI App 3, 379 Wis. 2d 720, 906 N.W.2d 722, 16−1057.

This statute does not violate due process. Caibaiosai v. Barrington, 643 F. Supp. 1007 (W. D. Wis. 1986).

Homicide By Intoxicated Use Statute. Sines. Wis. Law. April, 1995.

940.10 Homicide by negligent operation of vehicle.

(1) Whoever causes the death of another human being by the negligent operation or handling of a vehicle is guilty of a Class G felony.

(2) Whoever causes the death of an unborn child by the negligent operation or handling of a vehicle is guilty of a Class G felony.

History: 1987 a. 399; 1997 a. 295; 2001 a. 109.

Judicial Council Note, 1988 Homicide by negligent operation of vehicle is analogous to prior s. 940.08. The mental element is criminal negligence as defined in s. 939.25. [Bill 191−S]

A motorist was properly convicted under this section for running a red light at 50 m.p.h., even though the speed limit was 55 m.p.h. State v. Cooper, 117 Wis. 2d 30, 344 N.W.2d 194 (Ct. App. 1983).

The definition of criminal negligence as applied to homicide by negligent operation of a vehicle is not unconstitutionally vague. State v. Barman, 183 Wis. 2d 180, 515 N.W.2d 493 (Ct. App. 1994).

A corporation may be subject to criminal liability under this section. State v. Knutson, Inc. 196 Wis. 2d 86, 537 N.W.2d 420 (Ct. App. 1995), 93−1898. See also State v. Steenberg Homes, Inc. 223 Wis. 2d 511, 589 N.W.2d 668 (Ct. App. 1998), 98−0104.

It is not a requirement for finding criminal negligence that the actor be specifically warned that his or her conduct may result in harm. State v. Johannes, 229 Wis. 2d 215, 598 N.W.2d 299 (Ct. App. 1999), 98−2239.

The common law "year−and−a−day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is abrogated, with prospective application only. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01−3063.

940.11 Mutilating or hiding a corpse.

(1) Whoever mutilates, disfigures or dismembers a corpse, with intent to conceal a crime or avoid apprehension, prosecution or conviction for a crime, is guilty of a Class F felony.

(2) Whoever hides or buries a corpse, with intent to conceal a crime or avoid apprehension, prosecution, or conviction for a crime or notwithstanding s. 946.90 (2) or (3), 946.91 (2), 946.92, or 946.93 (2) or (3) with intent to collect benefits under the assistance program for families with dependent children administered under ss. 49.141 to 49.161, the Medical Assistance program administered under subch. IV of ch. 49, or the food stamp program, as defined in s. 49.79 (1) (c), is guilty of a Class F felony.

(3) A person may not be subject to prosecution under both this section and s. 946.47 or under both this section and s. 948.23 (2) for his or her acts regarding the same corpse.

History: 1991 a. 205; 2001 a. 109; 2011 a. 268; 2013 a. 226; 2015 a. 147.

Evidence that the defendant dragged a corpse behind a locked gate into a restricted, secluded wildlife area, then rolled the corpse into water at the bottom of a ditch was sufficient for a jury to conclude that the defendant hid a corpse in violation of this section. State v. Badker, 2001 WI App 27, 240 Wis. 2d 460, 623 N.W.2d 142, 99−2943.

940.12 Assisting suicide.

Whoever with intent that another take his or her own life assists such person to commit suicide is guilty of a Class H felony.

History: 1977 c. 173; 2001 a. 109.

940.13 Abortion exception.

No fine or imprisonment may be imposed or enforced against and no prosecution may be brought against a woman who obtains an abortion or otherwise violates any provision of any abortion statute with respect to her unborn child or fetus, and s. 939.05, 939.30 or 939.31 does not apply to a woman who obtains an abortion or otherwise violates any provision of any abortion statute with respect to her unborn child or fetus.

History: 1985 a. 56.

940.15 Abortion.

(1) In this section, "viability" means that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him or her, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support.

(2) Whoever intentionally performs an abortion after the fetus or unborn child reaches viability, as determined by reasonable medical judgment of the woman's attending physician, is guilty of a Class I felony.

(3) Subsection (2) does not apply if the abortion is necessary to preserve the life or health of the woman, as determined by reasonable medical judgment of the woman's attending physician.

(4) Any abortion performed under sub. (3) after viability of the fetus or unborn child, as determined by reasonable medical judgment of the woman's attending physician, shall be performed in a hospital on an inpatient basis.

(5) Whoever intentionally performs an abortion and who is not a physician is guilty of a Class I felony.

(6) Any physician who intentionally performs an abortion under sub. (3) shall use that method of abortion which, of those he or she knows to be available, is in his or her medical judgment most likely to preserve the life and health of the fetus or unborn child. Nothing in this subsection requires a physician performing an abortion to employ a method of abortion which, in his or her medical judgment based on the particular facts of the case before him or her, would increase the risk to the woman. Any physician violating this subsection is guilty of a Class I felony.

(7) Subsections (2) to (6) and s. 939.05, 939.30 or 939.31 do not apply to a woman who obtains an abortion that is in violation

of this section or otherwise violates this section with respect to her unborn child or fetus.

History: 1985 a. 56; 2001 a. 109.

The essential holding of *Roe v. Wade* allowing abortion is upheld, but various state restrictions on abortion are permissible. Planned Parenthood v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674 (1992).

940.16 Partial−birth abortion. (1) In this section:

(a) "Child" means a human being from the time of fertilization until it is completely delivered from a pregnant woman.

(b) "Partial−birth abortion" means an abortion in which a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes the delivery of the child.

(2) Except as provided in sub. (3), whoever intentionally performs a partial−birth abortion is guilty of a Class A felony.

(3) Subsection (2) does not apply if the partial−birth abortion is necessary to save the life of a woman whose life is endangered by a physical disorder, physical illness or physical injury, including a life−endangering physical disorder, physical illness or physical injury caused by or arising from the pregnancy itself, and if no other medical procedure would suffice for that purpose.

History: 1997 a. 219.

A Nebraska statute that provided that no partial birth abortion can be performed unless it is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury is unconstitutional. Stenberg v. Carhart, 530 U.S. 949, 147 L. Ed. 2d 743 (2000).

Enforcement of this section is enjoined under *Carhart.* Hope Clinic v. Ryan, 249 F.3d 603 (2001).

SUBCHAPTER II

BODILY SECURITY

940.19 Battery; substantial battery; aggravated battery. (1) Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.

(2) Whoever causes substantial bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class I felony.

(4) Whoever causes great bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class H felony.

(5) Whoever causes great bodily harm to another by an act done with intent to cause great bodily harm to that person or another is guilty of a Class E felony.

(6) Whoever intentionally causes bodily harm to another by conduct that creates a substantial risk of great bodily harm is guilty of a Class H felony. A rebuttable presumption of conduct creating a substantial risk of great bodily harm arises:

(a) If the person harmed is 62 years of age or older; or

(b) If the person harmed has a physical disability, whether congenital or acquired by accident, injury or disease, that is discernible by an ordinary person viewing the physically disabled person, or that is actually known by the actor.

History: 1977 c. 173; 1979 c. 111, 113; 1987 a. 399; 1993 a. 441, 483; 2001 a. 109.

Under the "elements only" test, offenses under subsections that require proof of nonconsent are not lesser included offenses of offenses under subsections for which proof of nonconsent is not required. State v. Richards, 123 Wis. 2d 1, 365 N.W.2d 7 (1985).

"Physical disability" is discussed. State v. Crowley, 143 Wis. 2d 324, 422 N.W.2d 847 (1988).

First−degree reckless injury, s. 940.23 (1), is not a lesser included offense of aggravated battery. State v. Eastman, 185 Wis. 2d 405, 518 N.W.2d 257 (Ct. App. 1994).

The act of throwing urine that strikes another and causes pain constitutes a battery. State v. Higgs, 230 Wis. 2d 1, 601 N.W.2d 653 (Ct. App. 1999), 98−1811.

Section 941.20 (1), 1st−degree recklessly endangering safety, is not a lesser included offense of sub. (5), aggravated battery. State v. Dibble, 2002 WI App 219, 257 Wis. 2d. 274, 650 N.W.2d 908, 02−0538.

940.195 Battery to an unborn child; substantial battery to an unborn child; aggravated battery to an unborn child. (1) Whoever causes bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class A misdemeanor.

(2) Whoever causes substantial bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class I felony.

(4) Whoever causes great bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class H felony.

(5) Whoever causes great bodily harm to an unborn child by an act done with intent to cause great bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class E felony.

(6) Whoever intentionally causes bodily harm to an unborn child by conduct that creates a substantial risk of great bodily harm is guilty of a Class H felony.

History: 1997 a. 295; 2001 a. 109.

940.20 Battery: special circumstances. (1) BATTERY BY PRISONERS. Any prisoner confined to a state prison or other state, county, or municipal detention facility who intentionally causes bodily harm or a soft tissue injury, as defined in s. 946.41 (2) (c), to an officer, employee, visitor, or another inmate of such prison or institution, without his or her consent, is guilty of a Class H felony.

(1g) BATTERY BY CERTAIN COMMITTED PERSONS. Any person placed in a facility under s. 980.065 and who intentionally causes bodily harm to an officer, employee, agent, visitor, or other resident of the facility, without his or her consent, is guilty of a Class H felony.

(1m) BATTERY BY PERSONS SUBJECT TO CERTAIN INJUNCTIONS. (a) Any person who is subject to an injunction under s. 813.12 or a tribal injunction filed under s. 813.128 (3g) and who intentionally causes bodily harm to the petitioner who sought the injunction by an act done without the consent of the petitioner is guilty of a Class I felony.

(b) Any person who is subject to an injunction under s. 813.125 and who intentionally causes bodily harm to the petitioner who sought the injunction by an act done without the consent of the petitioner is guilty of a Class I felony.

(2) BATTERY TO FIRE FIGHTERS AND COMMISSION WARDENS. Whoever intentionally causes bodily harm to a fire fighter, as defined in s. 102.475 (8) (b), or to a commission warden, acting in an official capacity and the person knows or has reason to know that the victim is a fire fighter or commission warden, by an act done without the consent of the person so injured, is guilty of a Class H felony.

(2m) BATTERY TO PROBATION, EXTENDED SUPERVISION AND PAROLE AGENTS, COMMUNITY SUPERVISION AGENTS, AND AFTERCARE AGENTS. (a) In this subsection:

1. "Aftercare agent" means any person authorized by the department of corrections to exercise control over a juvenile on aftercare.

1m. "Community supervision agent" means any person authorized by the department of corrections to exercise control over a juvenile on community supervision.

2. "Probation, extended supervision and parole agent" means any person authorized by the department of corrections to exercise control over a probationer, parolee or person on extended supervision.

(b) Whoever intentionally causes bodily harm to a probation, extended supervision, and parole agent, a community supervision agent, or an aftercare agent, acting in an official capacity and the person knows or has reason to know that the victim is a probation, extended supervision and parole agent, a community supervision

agent, or an aftercare agent, by an act done without the consent of the person so injured, is guilty of a Class H felony.

(2r) BATTERY TO A NURSE. (a) In this subsection, "nurse" means an individual who is licensed pursuant to s. 441.06 or 441.10.

(b) Whoever intentionally causes bodily harm to a nurse, or to an individual acting under the supervision of a nurse, who is acting in his or her professional capacity, and the actor knows or has reason to know that the victim is a nurse or an individual acting under the supervision of a nurse, by an act done without the consent of the individual so injured, is guilty of a Class H felony.

(3) BATTERY TO JURORS. Whoever intentionally causes bodily harm to a person who he or she knows or has reason to know is or was a grand or petit juror, and by reason of any verdict or indictment assented to by the person, without the consent of the person injured, is guilty of a Class H felony.

(4) BATTERY TO PUBLIC OFFICERS. Whoever intentionally causes bodily harm to a public officer in order to influence the action of such officer or as a result of any action taken within an official capacity, without the consent of the person injured, is guilty of a Class I felony.

(5) BATTERY TO TECHNICAL COLLEGE DISTRICT OR SCHOOL DISTRICT OFFICERS AND EMPLOYEES. (a) In this subsection:

1. "School district" has the meaning given in s. 115.01 (3).

2. "Technical college district" means a district established under ch. 38.

(b) Whoever intentionally causes bodily harm to a technical college district or school district officer or employee acting in that capacity, and the person knows or has reason to know that the victim is a technical college district or school district officer or employee, without the consent of the person so injured, is guilty of a Class I felony.

(6) BATTERY TO PUBLIC TRANSIT VEHICLE OPERATOR, DRIVER OR PASSENGER. (a) In this subsection, "public transit vehicle" means any vehicle used for providing transportation service to the general public.

(b) Whoever intentionally causes bodily harm to another under any of the following circumstances is guilty of a Class I felony:

1. The harm occurs while the victim is an operator, a driver or a passenger of, in or on a public transit vehicle.

2. The harm occurs after the offender forces or directs the victim to leave a public transit vehicle.

3. The harm occurs as the offender prevents, or attempts to prevent, the victim from gaining lawful access to a public transit vehicle.

(7) BATTERY TO EMERGENCY MEDICAL CARE PROVIDERS. (a) In this subsection:

1e. "Ambulance" has the meaning given in s. 256.01 (1t).

1g. "Emergency department" means a room or area in a hospital that is primarily used to provide emergency care, diagnosis or radiological treatment.

2. "Emergency department worker" means any of the following:

a. An employee of a hospital who works in an emergency department.

b. A health care provider, whether or not employed by a hospital, who works in an emergency department.

2d. "Emergency medical responder" has the meaning given in s. 256.01 (4p).

2g. "Emergency medical services practitioner" has the meaning given in s. 256.01 (5).

3. "Health care provider" means any person who is licensed, registered, permitted or certified by the department of health services or the department of safety and professional services to provide health care services in this state.

4. "Hospital" has the meaning given in s. 50.33 (2).

(b) Whoever intentionally causes bodily harm to a health care provider who works in a hospital, an emergency department worker, an emergency medical services practitioner, an emergency medical responder, or an ambulance driver who is acting in an official capacity and who the person knows or has reason to know is a health care provider who works in a hospital, an emergency department worker, an emergency medical services practitioner, an emergency medical responder, or an ambulance driver, by an act done without the consent of the person so injured, is guilty of a Class H felony.

History: 1977 c. 173; 1979 c. 30, 113, 221; 1981 c. 118 s. 9; 1983 a. 189 s. 329 (4); 1989 a. 336; 1993 a. 54, 164, 491; 1995 a. 27 s. 9126 (19); 1995 a. 77, 145, 225, 343; 1997 a. 35, 143, 283; 1999 a. 85; 2001 a. 109; 2005 a. 434; 2007 a. 20 s. 9121 (6) (a); 2007 a. 27, 130; 2011 a. 32, 74; 2015 a. 55, 78, 352; 2017 a. 12; 2019 a. 97.

Resisting or obstructing an officer, s. 946.41, is not a lesser−included offense of battery to a peace officer. State v. Zdiarstek, 53 Wis. 2d 776, 193 N.W.2d 833 (1972).

A county deputy sheriff was not acting in an official capacity under s. 940.205 [now s. 940.20 (2)] when making an arrest outside of his county of employment. State v. Barrett, 96 Wis. 2d 174, 291 N.W.2d 498 (1980).

A prisoner is "confined to a state prison" under sub. (1) when kept under guard at a hospital for treatment. State v. Cummings, 153 Wis. 2d 603, 451 N.W.2d 463 (Ct. App. 1989).

A defendant's commitment to a mental institution upon a finding of not guilty by reason of mental disease or defect rendered him a "prisoner" under sub. (1). State v. Skamfer, 176 Wis. 2d 304, N.W.2d (Ct. App. 1993).

There is no requirement under sub. (2) that the officer/victim be acting lawfully when he or she is hit by a defendant. When an officer was assaulted when doing something within the scope of what the officer was employed to do, the lawfulness of the officer's presence in the house where the defendant hit him was not material to a violation of sub. (2). State v. Haywood, 2009 WI App 178, 322 Wis. 2d 691, 777 N.W.2d 921, 09−0030.

940.201 Battery or threat to witnesses. (1) In this section:

(a) "Family member" means a spouse, child, stepchild, foster child, parent, sibling, or grandchild.

(b) "Witness" has the meaning given in s. 940.41 (3).

(2) Whoever does any of the following is guilty of a Class H felony:

(a) Intentionally causes bodily harm or threatens to cause bodily harm to a person who he or she knows or has reason to know is or was a witness by reason of the person having attended or testified as a witness and without the consent of the person harmed or threatened.

(b) Intentionally causes bodily harm or threatens to cause bodily harm to a person who he or she knows or has reason to know is a family member of a witness or a person sharing a common domicile with a witness by reason of the witness having attended or testified as a witness and without the consent of the person harmed or threatened.

History: 1997 a. 143; 2001 a. 109; 2009 a. 28.

Battery to a prospective witness is prohibited by s. 940.206 [now s. 940.201]. McLeod v. State, 85 Wis. 2d 787, 271 N.W.2d 157 (Ct. App. 1978).

940.203 Battery or threat to an officer of the court or law enforcement officer. (1) In this section:

(ac) "Attorney" means a legal professional practicing law, as defined in SCR 23.01.

(am) "Family member" means a parent, spouse, sibling, child, stepchild, or foster child.

(b) "Judge" means a person who currently is or who formerly was a supreme court justice, court of appeals judge, circuit court judge, municipal judge, tribal judge, temporary or permanent reserve judge, or circuit, supplemental, or municipal court commissioner.

(c) "Law enforcement officer" means any person who currently is or was employed by the state, by any political subdivision, or as a tribal law enforcement officer for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances the person is employed to enforce, whether that enforcement authority extends to all laws or ordinances or is limited to specific laws or ordinances.

(d) "Prosecutor" means a person who currently is or formerly was any of the following:

1. A district attorney, a deputy district attorney, an assistant district attorney, or a special prosecutor appointed under s. 978.045 or 978.05 (8) (b).

2. The attorney general, a deputy attorney general, or an assistant attorney general.

3. A tribal prosecutor.

(2) Whoever intentionally causes bodily harm or threatens to cause bodily harm to the person or family member of any judge, prosecutor, or law enforcement officer under all of the following circumstances is guilty of a Class H felony:

(a) At the time of the act or threat, the actor knows or should have known that the victim is a judge, prosecutor, or law enforcement officer or a member of the judge's, prosecutor's, or law enforcement officer's family.

(b) The act or threat is in response to any action taken by a judge, prosecutor, or law enforcement officer in an official capacity.

(c) There is no consent by the person harmed or threatened.

(3) Whoever intentionally causes bodily harm or threatens to cause bodily harm to the person or family member of a current or former guardian ad litem, corporation counsel, or attorney under all of the following circumstances is guilty of a Class H felony:

(a) At the time of the act or threat, the actor knows or should have known that the victim is a current or former guardian ad litem, corporation counsel, or attorney, or a member of the current or former guardian ad litem's, corporation counsel's, or attorney's family.

(b) The act or threat is in response to an action taken by the current or former guardian ad litem, corporation counsel, or attorney in his or her official capacity in a proceeding under ch. 48, 51, 54, 55, 767, 813, or 938.

(c) There is no consent by the person harmed or threatened.

History: 1993 a. 50, 446; 2001 a. 61, 109; 2009 a. 28; 2015 a. 78; 2017 a. 272, 352.

Only a "true threat" is punishable under this section. 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. Jury instructions must contain a clear definition of a true threat. State v. Perkins, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762, 99−1924.

940.205 Battery or threat to department of revenue employee. (1) In this section, "family member" means a parent, spouse, sibling, child, stepchild, or foster child.

(2) Whoever intentionally causes bodily harm or threatens to cause bodily harm to the person or family member of any department of revenue official, employee or agent under all of the following circumstances is guilty of a Class H felony:

(a) At the time of the act or threat, the actor knows or should have known that the victim is a department of revenue official, employee or agent or a member of his or her family.

(b) The official, employee or agent is acting in an official capacity at the time of the act or threat or the act or threat is in response to any action taken in an official capacity.

(c) There is no consent by the person harmed or threatened.

History: 1985 a. 29; 1993 a. 446; 2001 a. 109; 2009 a. 28.

940.207 Battery or threat to department of safety and professional services or department of workforce development employee. (1) In this section, "family member" means a parent, spouse, sibling, child, stepchild, or foster child.

(2) Whoever intentionally causes bodily harm or threatens to cause bodily harm to the person or family member of any department of safety and professional services or department of workforce development official, employee or agent under all of the following circumstances is guilty of a Class H felony:

(a) At the time of the act or threat, the actor knows or should have known that the victim is a department of safety and professional services or department of workforce development official, employee or agent or a member of his or her family.

(b) The official, employee or agent is acting in an official capacity at the time of the act or threat or the act or threat is in response to any action taken in an official capacity.

(c) There is no consent by the person harmed or threatened.

History: 1993 a. 86, 446; 1995 a. 27 ss. 7227 to 7229, 9116 (5), 9130 (4); 1997 a. 3; 2001 a. 109; 2009 a. 28; 2011 a. 32.

940.208 Battery to certain employees of counties, cities, villages, or towns. Whoever intentionally causes bodily harm to an employee of a county, city, village, or town under all of the following circumstances is guilty of a Class I felony:

(1) At the time of the act, the actor knows or should know that the victim is an employee of a county, city, village, or town.

(2) The victim is enforcing, or conducting an inspection for the purpose of enforcing, a state, county, city, village, or town zoning ordinance, building code, or other construction law, rule, standard, or plan at the time of the act or the act is in response to any such enforcement or inspection activity.

(2p) The enforcement or inspection complies with any law, ordinance, or rule, including any applicable notice requirement.

(3) There is no consent by the victim.

History: 2007 a. 193.

940.21 Mayhem. Whoever, with intent to disable or disfigure another, cuts or mutilates the tongue, eye, ear, nose, lip, limb or other bodily member of another is guilty of a Class C felony.

History: 1977 c. 173; 2001 a. 109.

The forehead qualifies as an "other bodily member" under s. 940.21 because "other bodily member" encompasses all bodily parts. State v. Quintana, 2008 WI 33, 308 Wis. 2d 615, 748 N.W.2d 447, 06−0499.

Failure to instruct a jury that great bodily harm is an essential element of mayhem was reversible error. Cole v. Young, 817 F. 2d 412 (1987).

940.22 Sexual exploitation by therapist; duty to report. (1) DEFINITIONS. In this section:

(a) "Department" means the department of safety and professional services.

(b) "Physician" has the meaning designated in s. 448.01 (5).

(c) "Psychologist" means a person who practices psychology, as described in s. 455.01 (5).

(d) "Psychotherapy" has the meaning designated in s. 455.01 (6).

(e) "Record" means any document relating to the investigation, assessment and disposition of a report under this section.

(f) "Reporter" means a therapist who reports suspected sexual contact between his or her patient or client and another therapist.

(g) "Sexual contact" has the meaning designated in s. 940.225 (5) (b).

(h) "Subject" means the therapist named in a report or record as being suspected of having sexual contact with a patient or client or who has been determined to have engaged in sexual contact with a patient or client.

(i) "Therapist" means a physician, psychologist, social worker, marriage and family therapist, professional counselor, nurse, chemical dependency counselor, member of the clergy or other person, whether or not licensed or certified by the state, who performs or purports to perform psychotherapy.

(2) SEXUAL CONTACT PROHIBITED. Any person who is or who holds himself or herself out to be a therapist and who intentionally has sexual contact with a patient or client during any ongoing therapist−patient or therapist−client relationship, regardless of whether it occurs during any treatment, consultation, interview or examination, is guilty of a Class F felony. Consent is not an issue in an action under this subsection.

(3) REPORTS OF SEXUAL CONTACT. (a) If a therapist has reasonable cause to suspect that a patient or client he or she has seen in the course of professional duties is a victim of sexual contact by

another therapist or a person who holds himself or herself out to be a therapist in violation of sub. (2), as soon thereafter as practicable the therapist shall ask the patient or client if he or she wants the therapist to make a report under this subsection. The therapist shall explain that the report need not identify the patient or client as the victim. If the patient or client wants the therapist to make the report, the patient or client shall provide the therapist with a written consent to the report and shall specify whether the patient's or client's identity will be included in the report.

(b) Within 30 days after a patient or client consents under par. (a) to a report, the therapist shall report the suspicion to:

1. The department, if the reporter believes the subject of the report is licensed by the state. The department shall promptly communicate the information to the appropriate examining board or affiliated credentialing board.

2. The district attorney for the county in which the sexual contact is likely, in the opinion of the reporter, to have occurred, if subd. 1. is not applicable.

(c) A report under this subsection shall contain only information that is necessary to identify the reporter and subject and to express the suspicion that sexual contact has occurred in violation of sub. (2). The report shall not contain information as to the identity of the alleged victim of sexual contact unless the patient or client requests under par. (a) that this information be included.

(d) Whoever intentionally violates this subsection by failing to report as required under pars. (a) to (c) is guilty of a Class A misdemeanor.

(4) CONFIDENTIALITY OF REPORTS AND RECORDS. (a) All reports and records made from reports under sub. (3) and maintained by the department, examining boards, affiliated credentialing boards, district attorneys and other persons, officials and institutions shall be confidential and are exempt from disclosure under s. 19.35 (1). Information regarding the identity of a victim or alleged victim of sexual contact by a therapist shall not be disclosed by a reporter or by persons who have received or have access to a report or record unless disclosure is consented to in writing by the victim or alleged victim. The report of information under sub. (3) and the disclosure of a report or record under this subsection does not violate any person's responsibility for maintaining the confidentiality of patient health care records, as defined in s. 146.81 (4) and as required under s. 146.82. Reports and records may be disclosed only to appropriate staff of a district attorney or a law enforcement agency within this state for purposes of investigation or prosecution.

(b) 1. The department, a district attorney, an examining board or an affiliated credentialing board within this state may exchange information from a report or record on the same subject.

2. If the department receives 2 or more reports under sub. (3) regarding the same subject, the department shall communicate information from the reports to the appropriate district attorneys and may inform the applicable reporters that another report has been received regarding the same subject.

3. If a district attorney receives 2 or more reports under sub. (3) regarding the same subject, the district attorney may inform the applicable reporters that another report has been received regarding the same subject.

4. After reporters receive the information under subd. 2. or 3., they may inform the applicable patients or clients that another report was received regarding the same subject.

(c) A person to whom a report or record is disclosed under this subsection may not further disclose it, except to the persons and for the purposes specified in this section.

(d) Whoever intentionally violates this subsection, or permits or encourages the unauthorized dissemination or use of information contained in reports and records made under this section, is guilty of a Class A misdemeanor.

(5) IMMUNITY FROM LIABILITY. Any person or institution participating in good faith in the making of a report or record under this section is immune from any civil or criminal liability that results by reason of the action. For the purpose of any civil or criminal action or proceeding, any person reporting under this section is presumed to be acting in good faith. The immunity provided under this subsection does not apply to liability resulting from sexual contact by a therapist with a patient or client.

History: 1983 a. 434; 1985 a. 275; 1987 a. 352, 380; 1991 a. 160; 1993 a. 107; 1995 a. 300; 2001 a. 109; 2011 a. 32.

This section applies to persons engaged in professional therapist−patient relationships. A teacher who conducts informal counseling is not engaged as a professional therapist. State v. Ambrose, 196 Wis. 2d 768, 540 N.W.2d 208 (Ct. App. 1995), 94−3391.

Even though the alleged victim feigned her role as a patient at the last counseling session she attended, attending as a police agent for the purpose of recording the session to obtain evidence, any acts that occurred during the session were during an ongoing therapist−patient relationship as those terms are used in this section. State v. DeLain, 2005 WI 52, 280 Wis. 2d 51, 695 N.W.2d 484, 03−1253.

The totality of the circumstances determine the existence of an ongoing therapist−patient relationship under sub. (2). A defendant's state of mind, a secret unilateral action of a patient, and explicit remarks of one party to the other regarding the relationship may be factors, but are not necessarily dispositive. Other factors may be: 1) how much time has gone by since the last therapy session; 2) how close together the therapy sessions had been to each other; 3) the age of the patient; 4) the particular vulnerabilities experienced by the patient as a result of mental health issues; and 5) the ethical obligations of the therapist's profession. State v. DeLain, 2005 WI 52, 280 Wis. 2d 51, 695 N.W.2d 484, 03−1253.

It was constitutional error to give a pattern jury instruction that never directed the jury to make an independent, beyond−a−reasonable−doubt decision as to whether the defendant clergy member performed or purported to perform psychotherapy. State v. Draughon, 2005 WI App 162, 285 Wis. 2d 633, 702 N.W.2d 412, 04−1637.

940.225 Sexual assault. (1) FIRST DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class B felony:

(a) Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person.

(b) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.

(c) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(2) SECOND DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class C felony:

(a) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(b) Has sexual contact or sexual intercourse with another person without consent of that person and causes injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care for the victim.

(c) Has sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition.

(cm) Has sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.

(d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious.

(f) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without the consent of that person.

(g) Is an employee of a facility or program under s. 940.295 (2) (b), (c), (h) or (k) and has sexual contact or sexual intercourse with a person who is a patient or resident of the facility or program.

(h) Has sexual contact or sexual intercourse with an individual who is confined in a correctional institution if the actor is a correctional staff member. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse

is subject to prosecution for the sexual contact or sexual intercourse under this section.

(i) Has sexual contact or sexual intercourse with an individual who is on probation, parole, or extended supervision if the actor is a probation, parole, or extended supervision agent who supervises the individual, either directly or through a subordinate, in his or her capacity as a probation, parole, or extended supervision agent or who has influenced or has attempted to influence another probation, parole, or extended supervision agent's supervision of the individual. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

(j) Is a licensee, employee, or nonclient resident of an entity, as defined in s. 48.685 (1) (b) or 50.065 (1) (c), and has sexual contact or sexual intercourse with a client of the entity.

(3) THIRD DEGREE SEXUAL ASSAULT. (a) Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class G felony.

(b) Whoever has sexual contact in the manner described in sub. (5) (b) 2. or 3. with a person without the consent of that person is guilty of a Class G felony.

(3m) FOURTH DEGREE SEXUAL ASSAULT. Except as provided in sub. (3), whoever has sexual contact with a person without the consent of that person is guilty of a Class A misdemeanor.

(4) CONSENT. "Consent", as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of sub. (2) (c), (cm), (d), (g), (h), and (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11 (2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(5) DEFINITIONS. In this section:

(abm) "Client" means an individual who receives direct care or treatment services from an entity.

(acm) "Correctional institution" means a jail or correctional facility, as defined in s. 961.01 (12m), a juvenile correctional facility, as defined in s. 938.02 (10p), or a juvenile detention facility, as defined in s. 938.02 (10r).

(ad) "Correctional staff member" means an individual who works at a correctional institution, including a volunteer.

(ag) "Inpatient facility" has the meaning designated in s. 51.01 (10).

(ai) "Intoxicant" means any alcohol beverage, hazardous inhalant, controlled substance, controlled substance analog, or other drug, or any combination thereof.

(ak) "Nonclient resident" means an individual who resides, or is expected to reside, at an entity, who is not a client of the entity, and who has, or is expected to have, regular, direct contact with the clients of the entity.

(am) "Patient" means any person who does any of the following:

1. Receives care or treatment from a facility or program under s. 940.295 (2) (b), (c), (h) or (k), from an employee of a facility or program or from a person providing services under contract with a facility or program.

2. Arrives at a facility or program under s. 940.295 (2) (b), (c), (h) or (k) for the purpose of receiving care or treatment from a facility or program under s. 940.295 (2) (b), (c), (h) or (k), from an employee of a facility or program under s. 940.295 (2) (b), (c), (h) or (k), or from a person providing services under contract with a facility or program under s. 940.295 (2) (b), (c), (h) or (k).

(ar) "Resident" means any person who resides in a facility under s. 940.295 (2) (b), (c), (h) or (k).

(b) "Sexual contact" means any of the following:

1. Any of the following types of intentional touching, whether direct or through clothing, if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19 (1):

a. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.

b. Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person.

2. Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

3. For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

(c) "Sexual intercourse" includes the meaning assigned under s. 939.22 (36) as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

(d) "State treatment facility" has the meaning designated in s. 51.01 (15).

(6) MARRIAGE NOT A BAR TO PROSECUTION. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.

(7) DEATH OF VICTIM. This section applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse.

History: 1975 c. 184, 421; 1977 c. 173; 1979 c. 24, 25, 175, 221; 1981 c. 89, 308, 309, 310, 311; 1985 a. 134; 1987 a. 245, 332, 352; 1987 a. 403 ss. 235, 236, 256; 1993 a. 445; 1995 a. 69; 1997 a. 220; 2001 a. 109; 2003 a. 51; 2005 a. 273, 344, 388, 435, 436; 2013 a. 83; 2017 a. 174.

Legislative Council Note, 1981: Presently, [in sub. (5) (a)] the definition of "sexual intercourse" in the sexual assault statute includes any intrusion of any part of a person's body or of any object into the genital or anal opening of another person. This proposal clarifies that the intrusion of the body part or object may be caused by the direct act of the offender (defendant) or may occur as a result of an act by the victim which is done in compliance with instructions of the offender (defendant). [Bill 630−S]

Failure to resist is not consent under sub. (4). State v. Clark, 87 Wis. 2d 804, 275 N.W.2d 715 (1979).

Injury by conduct regardless of life is not a lesser−included crime of first−degree sexual assault. Hagenkord v. State, 94 Wis. 2d 250, 287 N.W.2d 834 (Ct. App. 1979).

Separate acts of sexual intercourse, each different in kind from the others and differently defined in the statutes, constitute separate chargeable offenses. State v. Eisch, 96 Wis. 2d 25, 291 N.W.2d 800 (1980). See also State v. Ziegler, 2012 WI 73, 342 Wis. 2d 256, 816 N.W.2d 238, 10−2514.

The trial court did not err in denying the accused's motions to compel psychiatric examination of the victim and for discovery of the victim's past addresses. State v. Lederer, 99 Wis. 2d 430, 299 N.W.2d 457 (Ct. App. 1980).

The verdict was unanimous in a rape case even though the jury was not required to specify whether the sexual assault was vaginal or oral. State v. Lomagro, 113 Wis. 2d 582, 335 N.W.2d 583 (1983).

A jury instruction that touching the "vaginal area" constituted sexual contact was correct. State v. Morse, 126 Wis. 2d 1, 374 N.W.2d 388 (Ct. App. 1985).

"Unconscious" as used in sub. (2) (d) is a loss of awareness that may be caused by sleep. State v. Curtis, 144 Wis. 2d 691, 424 N.W.2d 719 (Ct. App. 1988).

The probability of exclusion and paternity are generally admissible in a sexual assault action in which the assault allegedly resulted in the birth of a child, but the probability of paternity is not generally admissible. HLA and red blood cell test results showing the paternity index and probability of exclusion were admissible statistics. State v. Hartman, 145 Wis. 2d 1, 426 N.W.2d 320 (1988).

Attempted fourth−degree sexual assault is not an offense under Wisconsin law. State v. Cvorovic, 158 Wis. 2d 630, 462 N.W.2d 897 (Ct. App. 1990).

The "use or threat of force or violence" under sub. (2) (a) does not require that the force be directed toward compelling the victim's submission, but includes forcible contact or the force used as the means of making contact. State v. Bonds, 165 Wis. 2d 27, 477 N.W.2d 265 (1991).

A dog may be a dangerous weapon under sub. (1) (b). State v. Sinks, 168 Wis. 2d 245, 483 N.W.2d 286 (Ct. App. 1992).

Convictions under both subs. (1) (d) and (2) (d); 1985 stats., did not violate double jeopardy. State v. Sauceda, 168 Wis. 2d 486, 485 N.W.2d 1 (1992).

A defendant's lack of intent to make a victim believe that he was armed was irrelevant in finding a violation of sub. (1) (b); if the victim's belief that the defendant was armed was reasonable, that is enough. State v. Hubanks, 173 Wis. 2d 1, 496 N.W.2d 96 (Ct. App. 1992).

Sub. (2) (d) is not unconstitutionally vague. Expert evidence regarding sleep based solely on a hypothetical situation similar, but not identical, to the facts of the case was inadmissible. State v. Pittman, 174 Wis. 2d 255, 496 N.W.2d 74 (1993).

Convictions under both sub. (2) (a) and (e); 1987 stats., did not violate double jeopardy. State v. Selmon, 175 Wis. 2d 155, 877 N.W.2d 498 (Ct. App. 1993).

"Great bodily harm" is a distinct element under sub. (1) (a) and need not be caused by the sexual act. State v. Schambow, 176 Wis. 2d 286, N.W.2d (Ct. App. 1993).

Intent is not an element of sub. (2) (a); lack of an intent element does not render this provision constitutionally invalid. State v. Neumann, 179 Wis. 2d 687, 508 N.W.2d 54 (Ct. App. 1993).

A previous use of force, and the victim's resulting fear, was an appropriate basis for finding that a threat of force existed under sub. (2) (a). State v. Speese, 191 Wis. 2d 205, 528 N.W.2d 63 (Ct. App. 1995).

Violation of any of the provisions of this section does not immunize the defendant from violating the same or another provision in the course of sexual misconduct. Two acts of vaginal intercourse are sufficiently different in fact to justify separate charges under sub. (1) (b). State v. Kruzycki, 192 Wis. 2d 509, 531 N.W.2d 429 (Ct. App. 1995).

Sub. (2) (c) is not unconstitutionally vague. State v. Smith, 215 Wis. 2d 84, 572 N.W.2d 496 (Ct. App. 1997), 96−2961.

For a guilty plea to a sexual assault charge to be knowingly made, a defendant need not be informed of the potential of being required to register as a convicted sex offender under s. 301.45 or that failure to register could result in imprisonment, as the commitment is a collateral, not direct, consequence of the plea. State v. Bollig, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199, 98−2196.

Sub. (2) (g) was not applicable to an employee of a federal VA hospital as it is not a facility under s. 940.295 (2). The definition of inpatient care facility in s. 940.295 incorporates s. 51.35 (1), which requires that all of the specifically enumerated facilities be places licensed or approved by DHFS. A VA hospital is subject to federal regulation but is not licensed or regulated by the state. State v. Powers, 2004 WI App 156, 276 Wis. 2d 107, 687 N.W.2d 50, 03−1514.

Expert testimony is not required in every case to establish the existence of a mental illness or deficiency rendering the victim unable to appraise his or her conduct under sub. (2) (c). State v. Perkins, 2004 WI App 213, 277 Wis. 2d 243, 689 N.W.2d 684, 03−3296.

The statutory scheme of the sexual assault law does not require proof of stimulation of the clitoris or vulva for finding cunnilingus under sub. (5) (c). The notion of stimulation of the victim offends the principles underpinning the sexual assault law. State v. Harvey, 2006 WI App 26, 289 Wis. 2d 222, 710 N.W.2d 482, 05−0103.

Sub. (2) (h) does not extend to a sheriff's deputy, who was assigned to work as a bailiff in the county courthouse. State v. Terrell, 2006 WI App 166, 295 Wis. 2d 619, 721 N.W.2d 527, 05−1499.

This section criminalizes sexual contact or sexual intercourse with a victim already dead at the time of the sexual activity when the accused did not cause the death of the victim. State v. Grunke, 2008 WI 82, 311 Wis. 2d 439, 752 N.W.2d 769, 06−2744.

The plain language of sub. (3) requires the state to prove beyond a reasonable doubt that the defendants attempted to have sexual intercourse with the victim without the victim's words or overt actions indicating a freely given agreement to have sexual intercourse. The state does not have to prove that the victim withheld consent. State v. Grunke, 2008 WI 82, 311 Wis. 2d 439, 752 N.W.2d 769, 06−2744.

One who has sexual contact or intercourse with a dead person cannot be charged with 1st− or 2nd−degree sexual assault, because the facts cannot correspond with the elements of those two charges. However, the possibility that the facts of a particular case will not come within the elements necessary to establish every crime listed in the statute does not mean the statute is absurd, but rather that the evidence necessary for all potential crimes under this section does not exist in all cases. State v. Grunke, 2008 WI 82, 311 Wis. 2d 439, 752 N.W.2d 769, 06−2744.

Sub. (7) does not limit sub. (3) to only those circumstances in which the perpetrator kills and has sexual intercourse with the victim in a series of events. State v. Grunke, 2008 WI 82, 311 Wis. 2d 439, 752 N.W.2d 769, 06−2744.

A prisoner participating in the home detention program under s. 302.425 remains at all times "confined," that is to say imprisoned, in a jail. The fact that the prisoner is "detained" during the prisoner's participation in the program at a location other than a jail facility does not negate the fact that the prisoner remains confined in a correctional institution" for purposes of sub. (2) (h). State v. Hilgers, 2017 WI App 12, 373 Wis. 2d 756, 893 N.W.2d 261, 15−2256.

Conviction on 2 counts of rape, for acts occurring 25 minutes apart in the same location, did not violate double jeopardy. Harrell v. Israel, 478 F. Supp. 752 (1979).

A conviction for attempted 1st−degree sexual assault based on circumstantial evidence did not deny due process. Upshaw v. Powell, 478 F. Supp. 1264 (1979).

940.23 Reckless injury. (1) FIRST−DEGREE RECKLESS INJURY. (a) Whoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of a Class D felony.

(b) Whoever recklessly causes great bodily harm to an unborn child under circumstances that show utter disregard for the life of that unborn child, the woman who is pregnant with that unborn child or another is guilty of a Class D felony.

(2) SECOND−DEGREE RECKLESS INJURY. (a) Whoever recklessly causes great bodily harm to another human being is guilty of a Class F felony.

(b) Whoever recklessly causes great bodily harm to an unborn child is guilty of a Class F felony.

History: 1987 a. 399; 1997 a. 295; 2001 a. 109.

Judicial Council Note, 1988: Sub. (1) is analogous to the prior offense of injury by conduct regardless of life.

Sub. (2) is new. It creates the crime of injury by criminal recklessness. See s. 939.24. [Bill 191−S]

First−degree reckless injury, s. 940.23 (1), is not a lesser included offense of aggravated battery. State v. Eastman, 185 Wis. 2d 405, 518 N.W.2d 257 (Ct. App. 1994).

Sub. (1) (a) cannot be applied against a mother for actions taken against a fetus while pregnant as the applicable definition of human being under s. 939.22 (16) is limited to one who is born alive. Sub. (1) (b) does not apply because s. 939.75 (2) (b) excludes actions by a pregnant woman from its application. State v. Deborah J.Z. 228 Wis. 2d 468, 596 N.W.2d 490 (Ct. App. 1999), 96−2797.

Utter disregard for human life is not a subpart of the intent element and need not be proven subjectively. It can be proven by evidence relating to the defendant's state of mind or by evidence of heightened risk or obvious potentially lethal danger. However proven, utter disregard is measured objectively on the basis of what a reasonable person would have known. State v. Jensen, 2000 WI 84, 236 Wis. 2d 521, 613 N.W.2d 170, 98−3175.

Utter disregard requires more than a high degree of negligence or recklessness. To evince utter disregard, the mind must not only disregard the safety of another but be devoid of regard for the life of another. A person acting with utter disregard must possess a state of mind that has no regard for the moral or social duties of a human being. State v. Miller, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188, 07−1052.

In evaluating whether there is sufficient proof of utter disregard for human life, factors to be considered include the type of act, its nature, why the perpetrator acted as he/she did, the extent of the victim's injuries, and the degree of force that was required to cause those injuries. Also considered are the type of victim and the victim's age, vulnerability, fragility, and relationship to the perpetrator, as well as whether the totality of the circumstances showed any regard for the victim's life. State v. Miller, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188, 07−1052.

Pointing a loaded gun at another is not conduct evincing utter disregard if it is otherwise defensible, even if it is not privileged. When conduct was to protect the defendant and his friends, although not found to be self defense, the conduct is inconsistent with conduct evincing utter disregard. State v. Miller, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188, 07−1052.

Jensen does not create a rule assigning less weight to a defendant's after−the−fact conduct. When evaluating whether a defendant's conduct reflects utter disregard for human life, the fact−finder should examine the totality of the circumstances surrounding the crime, considering all relevant conduct before, during, and after a crime, giving each the weight it deems appropriate under the circumstances. State v. Burris, 2011 WI 32, 333 Wis. 2d 87, 797 N.W.2d 430, 09−0956.

940.235 Strangulation and suffocation. (1) Whoever intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person is guilty of a Class H felony.

(2) Whoever violates sub. (1) is guilty of a Class G felony if the actor has a previous conviction under this section or a previous conviction for a violent crime, as defined in s. 939.632 (1) (e) 1.

History: 2007 a. 127.

940.24 Injury by negligent handling of dangerous weapon, explosives or fire. (1) Except as provided in sub. (3), whoever causes bodily harm to another by the negligent operation or handling of a dangerous weapon, explosives or fire is guilty of a Class I felony.

(2) Whoever causes bodily harm to an unborn child by the negligent operation or handling of a dangerous weapon, explosives or fire is guilty of a Class I felony.

(3) Subsection (1) does not apply to a health care provider acting within the scope of his or her practice or employment.

History: 1977 c. 173; 1987 a. 399; 1997 a. 295; 2001 a. 109; 2011 a. 2.

Judicial Council Note, 1988: The definition of the offense is broadened to include highly negligent handling of fire, explosives and dangerous weapons other than a firearm, airgun, knife or bow and arrow. See s. 939.22 (10). The culpable mental state is criminal negligence. See s. 939.25 and the NOTE thereto. [Bill 191−S]

Dogs must be intended to be weapons before their handling can result in a violation of this section. That a dog bites does not render the dog a dangerous weapon. Despite evidence of positive steps to restrain the dog, when those measures are inadequate criminal negligence may be found. Physical proximity is not necessary for a defendant's activity to constitute handling. State v. Bodoh, 226 Wis. 2d 718, 595 N.W.2d 330 (1999), 97−0495.

940.25 Injury by intoxicated use of a vehicle. (1) Any person who does any of the following is guilty of a Class F felony:

(a) Causes great bodily harm to another human being by the operation of a vehicle while under the influence of an intoxicant.

(am) Causes great bodily harm to another human being by the operation of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood.

(b) Causes great bodily harm to another human being by the operation of a vehicle while the person has a prohibited alcohol concentration, as defined in s. 340.01 (46m).

(bm) Causes great bodily harm to another human being by the operation of a commercial motor vehicle while the person has an alcohol concentration of 0.04 or more but less than 0.08.

(c) Causes great bodily harm to an unborn child by the operation of a vehicle while under the influence of an intoxicant.

(cm) Causes great bodily harm to an unborn child by the operation of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood.

(d) Causes great bodily harm to an unborn child by the operation of a vehicle while the person has a prohibited alcohol concentration, as defined in s. 340.01 (46m).

(e) Causes great bodily harm to an unborn child by the operation of a commercial motor vehicle while the person has an alcohol concentration of 0.04 or more but less than 0.08.

(1d) A person who violates sub. (1) is subject to the requirements and procedures for installation of an ignition interlock device under s. 343.301.

(1m) (a) A person may be charged with and a prosecutor may proceed upon an information based upon a violation of any combination of sub. (1) (a), (am), or (b); any combination of sub. (1) (a), (am), or (bm); any combination of sub. (1) (c), (cm), or (d); or any combination of sub. (1) (c), (cm), or (e) for acts arising out of the same incident or occurrence.

(b) If a person is charged in an information with any of the combinations of crimes referred to in par. (a), the crimes shall be joined under s. 971.12. If the person is found guilty of more than one of the crimes so charged for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under s. 23.33 (13) (b) 2. and 3., under s. 23.335 (23) (c) 2. and 3., under s. 30.80 (6) (a) 2. or 3., under ss. 343.30 (1q) and 343.305 or under s. 350.11 (3) (a) 2. and 3. Subsection (1) (a), (am), (b), (bm), (c), (cm), (d), and (e) each require proof of a fact for conviction which the others do not require.

(2) (a) The defendant has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant, did not have a detectable amount of a restricted controlled substance in his or her blood, or did not have an alcohol concentration described under sub. (1) (b), (bm), (d) or (e).

(b) In any action under this section that is based on the defendant allegedly having a detectable amount of methamphetamine, gamma−hydroxybutyric acid, or delta−9−tetrahydrocannabinol in his or her blood, the defendant has a defense if he or she proves by a preponderance of the evidence that at the time of the incident or occurrence he or she had a valid prescription for methamphetamine or one of its metabolic precursors, gamma−hydroxybutyric acid, or delta−9−tetrahydrocannabinol.

(3) An officer who makes an arrest for a violation of this section shall make a report as required under s. 23.33 (4t), 23.335 (12) (j), 30.686, 346.635 or 350.106.

History: 1977 c. 193, 272; 1981 c. 20, 184; 1983 a. 459; 1985 a. 331; 1987 a. 399; 1989 a. 105, 275, 359; 1991 a. 277; 1993 a. 317, 428, 478; 1995 a. 425, 436; 1997 a. 237, 295; 1999 a. 32, 109, 186; 2001 a. 16, 109; 2003 a. 30, 97; 2005 a. 253; 2009 a. 100; 2015 a. 170.

NOTE: For legislative intent see chapter 20, laws of 1981, section 2051 (13).

The double jeopardy clause was not violated by a charge under sub. (1) (c) [now sub. (1m)] of violations of subs. (1) (a) and (b). State v. Bohacheff, 114 Wis. 2d 402, 338 N.W.2d 466 (1983).

The trial court did not err in refusing to admit expert testimony indicating that the victims would not have suffered the same injury had they been wearing seat belts; the evidence not relevant to a defense under sub. (2). State v. Turk, 154 Wis. 2d 294, 453 N.W.2d 163 (1990).

The offense under sub. (1) (am) has 2 elements that must be proved beyond a reasonable doubt: 1) the defendant operated a vehicle with a detectable amount of a restricted controlled substance in his or her blood; and 2) the defendant's operation of the vehicle caused great bodily harm to the victim. The elements of the crime do not provide the state with any presumptions that relieves the state of its burden to establish the two elements beyond a reasonable doubt nor did the legislature's enactment, without requiring a causal link between drug use and the injury as an element of the crime, in some way exceeds its authority. State v. Gardner, 2006 WI App 92, 292 Wis. 2d 682, 715 N.W.2d 720, 05−1372.

The affirmative defense under sub. (2) (a) does not shift to the defendant the burden to prove that he or she is innocent. It requires the defendant to prove that despite the fact that the state has satisfied the elements of the offense, the defendant cannot be held legally responsible under the statute. State v. Gardner, 2006 WI App 92, 292 Wis. 2d 682, 715 N.W.2d 720, 05−1372.

"Materially impaired" as used in the definition of "under the influence of an intoxicant" in s. 939.22 (42) does not have a technical or peculiar meaning in the law beyond the time−tested explanations in standard jury instructions. Therefore, the circuit court's response to the jury question to give all words not otherwise defined their ordinary meaning was not error, comported with s. 990.01, and did not constitute an erroneous exercise of discretion. State v. Hubbard, 2008 WI 92, 313 Wis. 2d 1, 752 N.W.2d 839, 06−2753.

940.285 Abuse of individuals at risk.

(1) DEFINITIONS. In this section:

(ag) "Abuse" means any of the following:

1. Physical abuse, as defined in s. 46.90 (1) (fg).

2. Emotional abuse, as defined in s. 46.90 (1) (cm).

3. Sexual abuse, as defined in s. 46.90 (1) (gd).

4. Treatment without consent, as defined in s. 46.90 (1) (h).

5. Unreasonable confinement or restraint, as defined in s. 46.90 (1) (i).

6. Deprivation of a basic need for food, shelter, clothing, or personal or health care, including deprivation resulting from the failure to provide or arrange for a basic need by a person who has assumed responsibility for meeting the need voluntarily or by contract, agreement, or court order.

(am) "Adult at risk" has the meaning given in s. 55.01 (1e).

(dc) "Elder adult at risk" has the meaning given in s. 46.90 (1) (br).

(dg) "Individual at risk" means an elder adult at risk or an adult at risk.

(dm) "Recklessly" means conduct that creates a situation of unreasonable risk of harm and demonstrates a conscious disregard for the safety of the vulnerable adult.

(1m) EXCEPTION. Nothing in this section may be construed to mean that an individual at risk is abused solely because he or she consistently relies upon treatment by spiritual means through prayer for healing, in lieu of medical care, in accordance with his or her religious tradition.

(2) ABUSE; PENALTIES. (a) Any person, other than a person in charge of or employed in a facility under s. 940.29 or in a facility or program under s. 940.295 (2), who does any of the following may be penalized under par. (b):

1. Intentionally subjects an individual at risk to abuse.

2. Recklessly subjects an individual at risk to abuse.

3. Negligently subjects an individual at risk to abuse.

(b) 1g. Any person violating par. (a) 1. or 2. under circumstances that cause death is guilty of a Class C felony. Any person violating par. (a) 3. under circumstances that cause death is guilty of a Class D felony.

1m. Any person violating par. (a) under circumstances that cause great bodily harm is guilty of a Class F felony.

1r. Any person violating par. (a) 1. under circumstances that are likely to cause great bodily harm is guilty of a Class G felony. Any person violating par. (a) 2. or 3. under circumstances that are likely to cause great bodily harm is guilty of a Class I felony.

2. Any person violating par. (a) 1. under circumstances that cause bodily harm is guilty of a Class H felony. Any person violating par. (a) 1. under circumstances that are likely to cause bodily harm is guilty of a Class I felony.

4. Any person violating par. (a) 2. or 3. under circumstances that cause or are likely to cause bodily harm is guilty of a Class A misdemeanor.

5. Any person violating par. (a) 1., 2. or 3. under circumstances not causing and not likely to cause bodily harm is guilty of a Class B misdemeanor.

History: 1985 a. 306; 1993 a. 445; 1997 a. 180; 2001 a. 109; 2005 a. 264, 388; 2007 a. 45.

940.29 Abuse of residents of penal facilities. Any person in charge of or employed in a penal or correctional institution or other place of confinement who abuses, neglects or ill−treats any person confined in or a resident of any such institution or place or who knowingly permits another person to do so is guilty of a Class I felony.

History: 1975 c. 119; 1975 c. 413 s. 18; 1977 c. 173; 1979 c. 124; 1981 c. 20; 1987 a. 161 ss. 12, 13m; 1987 a. 332; 1993 a. 445; 2001 a. 109.

940.291 Law enforcement officer; failure to render aid.

(1) Any peace officer, while acting in the course of employment or under the authority of employment, who intentionally fails to render or make arrangements for any necessary first aid for any person in his or her actual custody is guilty of a Class A misdemeanor if bodily harm results from the failure. This subsection applies whether the custody is lawful or unlawful and whether the custody is actual or constructive. A violation for intentionally failing to render first aid under this subsection applies only to first aid which the officer has the knowledge and ability to render.

(2) Any peace officer who knowingly permits another person to violate sub. (1), while acting in the course of employment or under the authority of employment, is guilty of a Class A misdemeanor.

History: 1983 a. 27.

940.295 Abuse and neglect of patients and residents.

(1) DEFINITIONS. In this section:

(ad) "Abuse" has the meaning given in s. 46.90 (1) (a).

(ag) "Adult at risk" has the meaning given in s. 55.01 (1e).

(am) "Adult family home" has the meaning given in s. 50.01 (1).

(b) "Bodily harm" has the meaning given in s. 46.90 (1) (aj).

(c) "Community−based residential facility" has the meaning given in s. 50.01 (1g).

(cr) "Elder adult at risk" has the meaning given in s. 46.90 (1) (br).

(d) "Foster home" has the meaning given in s. 48.02 (6).

(e) "Great bodily harm" has the meaning given in s. 939.22 (14).

(f) "Group home" has the meaning given in s. 48.02 (7).

(g) "Home health agency" has the meaning given in s. 50.49 (1) (a).

(h) "Hospice" has the meaning given in s. 50.90 (1).

(hr) "Individual at risk" means an elder adult at risk or an adult at risk.

(i) "Inpatient health care facility" has the meaning given in s. 50.135 (1).

(k) "Neglect" has the meaning given in s. 46.90 (1) (f).

(km) "Negligence" means an act, omission, or course of conduct that the actor should realize creates a substantial and unreasonable risk of death, great bodily harm, or bodily harm to another person.

(L) "Patient" means any person who does any of the following:

1. Receives care or treatment from a facility or program under sub. (2), from an employee of a facility or program or from a person providing services under contract with a facility or program.

2. Arrives at a facility or program under sub. (2) for the purpose of receiving care or treatment from a facility or program under sub. (2), from an employee of a facility or program under sub. (2), or from a person providing services under contract with a facility or program under sub. (2).

(o) "Recklessly" means conduct that creates a situation of unreasonable risk of death or harm to and demonstrates a conscious disregard for the safety of the patient or resident.

(p) "Resident" means any person who resides in a facility under sub. (2).

(r) "State treatment facility" has the meaning given in s. 51.01 (15).

(s) "Treatment facility" has the meaning given in s. 51.01 (19).

(2) APPLICABILITY. This section applies to any of the following types of facilities or programs:

(a) An adult day care center.

(b) An adult family home.

(c) A community−based residential facility.

(d) A foster home.

(e) A group home.

(f) A home health agency.

(g) A hospice.

(h) An inpatient health care facility.

(i) A program under s. 51.42 (2).

(j) The Wisconsin Educational Services Program for the Deaf and Hard of Hearing under s. 115.52 and the Wisconsin Center for the Blind and Visually Impaired under s. 115.525.

(k) A state treatment facility.

(L) A treatment facility.

(m) A residential care center for children and youth operated by a child welfare agency licensed under s. 48.60 or an institution operated by a public agency for the care of neglected, dependent, or delinquent children.

(n) Any other health facility or care−related facility or home, whether publicly or privately owned.

(3) ABUSE AND NEGLECT; PENALTIES. (a) Any person in charge of or employed in any facility or program under sub. (2) who does any of the following, or who knowingly permits another person to do so, may be penalized under par. (b):

1. Intentionally abuses or intentionally neglects a patient or resident.

2. Recklessly abuses or recklessly neglects a patient or resident.

3. Except as provided in par. (am), abuses, with negligence, or neglects a patient or a resident.

(am) Paragraph (a) 3. does not apply to a health care provider acting in the scope of his or her practice or employment who commits an act or omission of mere inefficiency, unsatisfactory conduct, or failure in good performance as the result of inability, incapacity, inadvertency, ordinary negligence, or good faith error in judgment or discretion.

(b) 1g. Any person violating par. (a) 1. or 2. under circumstances that cause death to an individual at risk is guilty of a Class C felony. Any person violating par. (a) 3. under circumstances that cause death to an individual at risk is guilty of a Class D felony.

1m. Any person violating par. (a) under circumstances that cause great bodily harm to an individual at risk is guilty of a Class E felony.

1r. Except as provided in subd. 1m., any person violating par. (a) 1. under circumstances that cause great bodily harm is guilty of a Class F felony. Any person violating par. (a) 1. under circumstances that are likely to cause great bodily harm is guilty of a Class G felony.

2. Any person violating par. (a) 1. under circumstances that cause bodily harm is guilty of a Class H felony. Any person violating par. (a) 1. under circumstances that are likely to cause bodily harm is guilty of a Class I felony.

3. Except as provided in subd. 1m., any person violating par. (a) 2. or 3. under circumstances that cause great bodily harm is

guilty of a Class H felony. Any person violating par. (a) 2. or 3. under circumstances that are likely to cause great bodily harm is guilty of a Class I felony.

4. Any person violating par. (a) 2. or 3. under circumstances that cause or are likely to cause bodily harm is guilty of a Class A misdemeanor.

5. Any person violating par. (a) 1., 2. or 3. under circumstances not causing and not likely to cause bodily harm is guilty of a Class B misdemeanor.

History: 1993 a. 445; 1995 a. 225; 1997 a. 180; 1999 a. 9; 2001 a. 57, 59, 109; 2005 a. 264, 388; 2007 a. 45; 2011 a. 2.

Evidence that residents suffered weight loss and bedsores was sufficient to support the conviction of a nursing home administrator for abuse of residents. State v. Serebin, 119 Wis. 2d 837, 350 N.W.2d 65 (1984).

Section 50.135 (1), as incorporated in sub. (1) (i), requires that all of the specifically enumerated facilities must be places licensed or approved by DHFS. A VA hospital is subject to federal regulation but is not licensed or regulated by the state and thus not within the definition of inpatient health care facility. State v. Powers, 2004 WI App 156, 276 Wis. 2d 107, 687 N.W.2d 50, 03−1514.

Seeking Justice in Death's Waiting Room: Barriers to Effectively Prosecuting Crime in Long−term Care Facilities. Hanrahan. Wis. Law. Aug. 2004.

A Response: Issues Affecting Long−term Care. Purtell. Wis. Law. Oct. 2004.

940.30 False imprisonment. Whoever intentionally confines or restrains another without the person's consent and with knowledge that he or she has no lawful authority to do so is guilty of a Class H felony.

History: 1977 c. 173; 2001 a. 109.

False imprisonment is not a lesser included offense of the crime of kidnapping. Geitner v. State, 59 Wis. 2d 128, 207 N.W.2d 837.

A victim need only take advantage of reasonable means of escape; a victim need not expose himself or herself or others to danger in attempt to escape. State v. C.V.C. 153 Wis. 2d 145, 450 N.W.2d 463 (Ct. App. 1989).

False imprisonment, or confinement, is the intentional, unlawful, and uncontested restraint by one person of the physical liberty of another. State v. Burroughs, 2002 WI App 18, 250 Wis. 2d 180, 640 N.W.2d 190, 01−0738.

In the context of false imprisonment, consent means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to be confined or restrained. Under the circumstances of the case, even if the jury did not believe that the victim said no, a reasonable jury could have determined beyond a reasonable doubt that she did not consent to the restraint. State v. Long, 2009 WI 36, 317 Wis. 2d 92, 765 N.W.2d 557, 07−2307.

940.302 Human trafficking. (1) In this section:

(a) "Commercial sex act" means any of the following for which anything of value is given to, promised, or received, directly or indirectly, by any person:

1. Sexual contact.

2. Sexual intercourse.

3. Except as provided in sub. (2) (c), any of the following:

a. Sexually explicit performance.

b. Any other conduct done for the purpose of sexual humiliation, degradation, arousal, or gratification.

(b) "Debt bondage" means the condition of a debtor arising from the debtor's pledge of services as a security for debt if the reasonable value of those services is not applied toward repaying the debt or if the length and nature of the services are not defined.

(c) "Services" means activities performed by one individual at the request, under the supervision, or for the benefit of another person.

(d) "Trafficking" means recruiting, enticing, harboring, transporting, providing, or obtaining, or attempting to recruit, entice, harbor, transport, provide, or obtain, an individual.

(2) (a) Except as provided in s. 948.051, whoever knowingly engages in trafficking is guilty of a Class D felony if all of the following apply:

1. One of the following applies:

a. The trafficking is for the purposes of labor or services.

b. The trafficking is for the purposes of a commercial sex act.

2. The trafficking is done by any of the following:

a. Causing or threatening to cause bodily harm to any individual.

b. Causing or threatening to cause financial harm to any individual.

c. Restraining or threatening to restrain any individual.

d. Violating or threatening to violate a law.

e. Destroying, concealing, removing, confiscating, or possessing, or threatening to destroy, conceal, remove, confiscate, or possess, any actual or purported passport or any other actual or purported official identification document of any individual.

f. Extortion.

g. Fraud or deception.

h. Debt bondage.

i. Controlling or threatening to control any individual's access to an addictive controlled substance.

j. Using any scheme, pattern, or other means to directly or indirectly coerce, threaten, or intimidate any individual.

k. Using or threatening to use force or violence on any individual.

L. Causing or threatening to cause any individual to do any act against the individual's will or without the individual's consent.

(b) Whoever benefits in any manner from a violation of par. (a) is guilty of a Class D felony if the person knows or reasonably should have known that the benefits come from or are derived from an act or scheme described in par. (a).

(c) Whoever knowingly receives compensation from the earnings of debt bondage, a prostitute, or a commercial sex act, as described in sub. (1) (a) 1. and 2., is guilty of a Class F felony.

(3) Any person who incurs an injury or death as a result of a violation of sub. (2) may bring a civil action against the person who committed the violation. In addition to actual damages, the court may award punitive damages to the injured party, not to exceed treble the amount of actual damages incurred, and reasonable attorney fees.

History: 2007 a. 116; 2013 a. 362 ss. 27 to 33, 37.

Halting Modern Slavery in the Midwest: The Potential of Wisconsin Act 116 to Improve the State and Federal Response to Human Trafficking. Ozalp. 2009 WLR 1391.

Under the Radar: Human Trafficking in Wisconsin. Monaco−Wilcox and Mueller. Wis. Law. Oct. 2017.

940.305 Taking hostages. (1) Except as provided in sub. (2), whoever by force or threat of imminent force seizes, confines or restrains a person without the person's consent and with the intent to use the person as a hostage in order to influence a person to perform or not to perform some action demanded by the actor is guilty of a Class B felony.

(2) Whoever commits a violation specified under sub. (1) is guilty of a Class C felony if, before the time of the actor's arrest, each person who is held as a hostage is released without bodily harm.

History: 1979 c. 118; 1993 a. 194; 2001 a. 109.

The constitutionality of s. 940.305 is upheld. State v. Bertrand, 162 Wis. 2d 411, 469 N.W.2d 873 (Ct. App. 1991).

940.31 Kidnapping. (1) Whoever does any of the following is guilty of a Class C felony:

(a) By force or threat of imminent force carries another from one place to another without his or her consent and with intent to cause him or her to be secretly confined or imprisoned or to be carried out of this state or to be held to service against his or her will; or

(b) By force or threat of imminent force seizes or confines another without his or her consent and with intent to cause him or her to be secretly confined or imprisoned or to be carried out of this state or to be held to service against his or her will; or

(c) By deceit induces another to go from one place to another with intent to cause him or her to be secretly confined or imprisoned or to be carried out of this state or to be held to service against his or her will.

(2) (a) Except as provided in par. (b), whoever violates sub. (1) with intent to cause another to transfer property in order to obtain the release of the victim is guilty of a Class B felony.

(b) Whoever violates sub. (1) with intent to cause another to transfer property in order to obtain the release of the victim is

guilty of a Class C felony if the victim is released without permanent physical injury prior to the time the first witness is sworn at the trial.

History: 1977 c. 173; 1993 a. 194, 486; 2001 a. 109.

A conviction under sub. (1) (c) does not require proof of express or implied misrepresentations. State v. Dalton, 98 Wis. 2d 725, 298 N.W.2d 398 (Ct. App. 1980).

"Service," as used in this section includes acts done at the command of another and clearly embraces sexual acts performed at the command of another. State v. Clement, 153 Wis. 2d 287, 450 N.W.2d 789 (Ct. App. 1989).

Parental immunity does not extend to an agent acting for the parent. State v. Simplot, 180 Wis. 2d 383, 509 N.W.2d 338 (Ct. App. 1993).

Forced movement of a person from one part of a building to another satisfies the "carries another from one place to another" element of sub. (1) (a). State v. Wagner, 191 Wis. 2d 322, 528 N.W.2d 85 (Ct. App. 1995).

Confinement is the intentional, unlawful, and uncontested restraint by one person of the physical liberty of another. State v. Burroughs, 2002 WI App 18, 250 Wis. 2d 180, 640 N.W.2d 190, 01–0738.

Sub. (2) (b) allows for a lesser degree of kidnapping if two additional elements are present: 1) the victim is released prior to the first witness testimony, and 2) there is no permanent physical injury to the victim. Once there is some evidence of the mitigating factor of no permanent injury, the burden is on the state to prove the absence of that factor and a court accepting a guilty plea to a charged kidnapping offense under sub. (2) (a) should ascertain a factual basis for excluding the lesser–related offense under sub. (2) (b). State v. Ravesteijn, 2006 WI App 250, 297 Wis. 2d 663, 727 N.W.2d 53, 05–1955.

940.315 Global positioning devices. (1) Whoever does any of the following is guilty of a Class A misdemeanor:

(a) Places a global positioning device or a device equipped with global positioning technology on a vehicle owned or leased by another person without that person's consent.

(b) Intentionally obtains information regarding another person's movement or location generated by a global positioning device or a device equipped with global positioning technology that has been placed without that person's consent.

(2) This section does not apply to a motor vehicle manufacturer or a person, acting within the scope of his or her employment, who installs an in–vehicle communication or telematics system, to a device installed by or with the permission of the vehicle owner for automobile insurance rating, underwriting, or claims handling purposes, to a law enforcement officer acting in his or her official capacity, to a parent or guardian acting to track the movement or location of his or her minor child or his or her ward, to a lienholder or agent of a lienholder acting to track the movement or location of a motor vehicle in order to repossess the motor vehicle, or to an employer or business owner acting to track the movement or location of a motor vehicle owned, leased, or assigned for use by the employer or business owner.

History: 2015 a. 45.

940.32 Stalking. (1) In this section:

(a) "Course of conduct" means a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose, including any of the following:

1. Maintaining a visual or physical proximity to the victim.

2. Approaching or confronting the victim.

3. Appearing at the victim's workplace or contacting the victim's employer or coworkers.

4. Appearing at the victim's home or contacting the victim's neighbors.

5. Entering property owned, leased, or occupied by the victim.

6. Contacting the victim by telephone or causing the victim's telephone or any other person's telephone to ring repeatedly or continuously, regardless of whether a conversation ensues.

6m. Photographing, videotaping, audiotaping, or, through any other electronic means, monitoring or recording the activities of the victim. This subdivision applies regardless of where the act occurs.

7. Sending material by any means to the victim or, for the purpose of obtaining information about, disseminating information about, or communicating with the victim, to a member of the victim's family or household or an employer, coworker, or friend of the victim.

8. Placing an object on or delivering an object to property owned, leased, or occupied by the victim.

9. Delivering an object to a member of the victim's family or household or an employer, coworker, or friend of the victim or placing an object on, or delivering an object to, property owned, leased, or occupied by such a person with the intent that the object be delivered to the victim.

10. Causing a person to engage in any of the acts described in subds. 1. to 9.

(am) "Domestic abuse" has the meaning given in s. 813.12 (1) (am).

(ap) "Domestic abuse offense" means an act of domestic abuse that constitutes a crime.

(c) "Labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(cb) "Member of a family" means a spouse, parent, child, sibling, or any other person who is related by blood or adoption to another.

(cd) "Member of a household" means a person who regularly resides in the household of another or who within the previous 6 months regularly resided in the household of another.

(cg) "Personally identifiable information" has the meaning given in s. 19.62 (5).

(cr) "Record" has the meaning given in s. 19.32 (2).

(d) "Suffer serious emotional distress" means to feel terrified, intimidated, threatened, harassed, or tormented.

(2) Whoever meets all of the following criteria is guilty of a Class I felony:

(a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear bodily injury to or the death of himself or herself or a member of his or her family or household.

(b) The actor knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury to or the death of himself or herself or a member of his or her family or household.

(c) The actor's acts cause the specific person to suffer serious emotional distress or induce fear in the specific person of bodily injury to or the death of himself or herself or a member of his or her family or household.

(2e) Whoever meets all of the following criteria is guilty of a Class I felony:

(a) After having been convicted of sexual assault under s. 940.225, 948.02, 948.025, or 948.085 or a domestic abuse offense, the actor engages in any of the acts listed in sub. (1) (a) 1. to 10., if the act is directed at the victim of the sexual assault or the domestic abuse offense.

(b) The actor knows or should know that the act will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury to or the death of himself or herself or a member of his or her family or household.

(c) The actor's act causes the specific person to suffer serious emotional distress or induces fear in the specific person of bodily injury to or the death of himself or herself or a member of his or her family or household.

(2m) Whoever violates sub. (2) is guilty of a Class H felony if any of the following applies:

(a) The actor has a previous conviction for a violent crime, as defined in s. 939.632 (1) (e) 1., or a previous conviction under this section or s. 947.013 (1r), (1t), (1v), or (1x).

(b) The actor has a previous conviction for a crime, the victim of that crime is the victim of the present violation of sub. (2), and the present violation occurs within 7 years after the prior conviction.

(c) The actor intentionally gains access or causes another person to gain access to a record in electronic format that contains personally identifiable information regarding the victim in order to facilitate the violation.

(d) The person violates s. 968.31 (1) or 968.34 (1) in order to facilitate the violation.

(e) The victim is under the age of 18 years at the time of the violation.

(3) Whoever violates sub. (2) is guilty of a Class F felony if any of the following applies:

(a) The act results in bodily harm to the victim or a member of the victim's family or household.

(b) The actor has a previous conviction for a violent crime, as defined in s. 939.632 (1) (e) 1., or a previous conviction under this section or s. 947.013 (1r), (1t), (1v) or (1x), the victim of that crime is the victim of the present violation of sub. (2), and the present violation occurs within 7 years after the prior conviction.

(c) The actor uses a dangerous weapon in carrying out any of the acts listed in sub. (1) (a) 1. to 9.

(3m) A prosecutor need not show that a victim received or will receive treatment from a mental health professional in order to prove that the victim suffered serious emotional distress under sub. (2) (c) or (2e) (c).

(4) (a) This section does not apply to conduct that is or acts that are protected by the person's right to freedom of speech or to peaceably assemble with others under the state and U.S. constitutions, including, but not limited to, any of the following:

1. Giving publicity to and obtaining or communicating information regarding any subject, whether by advertising, speaking or patrolling any public street or any place where any person or persons may lawfully be.

2. Assembling peaceably.

3. Peaceful picketing or patrolling.

(b) Paragraph (a) does not limit the activities that may be considered to serve a legitimate purpose under this section.

(5) This section does not apply to conduct arising out of or in connection with a labor dispute.

(6) The provisions of this statute are severable. If any provision of this statute is invalid or if any application thereof is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

History: 1993 a. 96, 496; 2001 a. 109; 2003 a. 222, 327; 2005 a. 277.

This section does not violate the right to interstate travel and is not unconstitutionally vague or overbroad. State v. Ruesch, 214 Wis. 2d 548, 571 N.W.2d 898 (Ct. App. 1997), 96−2280.

The actor's "acts" under sub. (2) (c) are not the equivalent of the actor's "course of conduct" under sub. (2) (a). There must be proof that the actor's acts caused fear and not that the course of conduct caused fear. State v. Sveum, 220 Wis. 2d 396, 584 N.W.2d 137 (Ct. App. 1998), 97−2185.

A "previous conviction for a violent crime" is a substantive element of the Class H felony stalking offense under sub. (2m) (a), not a penalty enhancer. It was not error to allow the introduction of evidence at trial that the defendant had stipulated to having a previous conviction for a violent crime, nor was it error to instruct the jury to make a finding on that matter. State v. Warbelton, 2009 WI 6, 315 Wis. 2d 253, 759 N.W.2d 557, 07−0105.

The 7−year time restriction specified in sub. (2m) (b) requires that only the final act charged as part of a course of conduct occur within 7 years of the previous conviction, and does not restrict by time the other acts used to establish the underlying course of conduct element of sub. (2). State v. Conner, 2009 WI App 143, 321 Wis. 2d 449, 775 N.W.2d 105, 08−1296.

Although the acts in this case spanned apparently fewer than 15 minutes, this section specifically provides that stalking may be a series of 2 acts over a short time if the acts show a continuity of purpose. State v. Eichorn, 2010 WI App 70, 325 Wis. 2d 241, 783 N.W.2d 902, 09−1864.

This section is not overbroad under the 1st amendment. Although a stalker might use language in committing the crime, the core of the statute is the stalker's intent to engage in conduct that he or she knows or should know will cause fear in the victim and does cause the victim's actual distress or fear. The language used by the defendant in stalking his victim was merely evidence of his crime and not prohibited in and of itself. State v. Hemmingway, 2012 WI App 133, 345 Wis. 2d 297, 825 N.W.2d 303, 11−2372.

940.34 Duty to aid victim or report crime. (1) (a) Whoever violates sub. (2) (a) is guilty of a Class C misdemeanor.

(b) Whoever violates sub. (2) (b) is guilty of a Class C misdemeanor and is subject to discipline under s. 440.26 (6).

(c) Whoever violates sub. (2) (c) is guilty of a Class C misdemeanor.

(2) (a) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim.

(b) Any person licensed as a private detective or granted a private security permit under s. 440.26 who has reasonable grounds to believe that a crime is being committed or has been committed shall notify promptly an appropriate law enforcement agency of the facts which form the basis for this belief.

(c) 1. In this paragraph, "unlicensed private security person" means a private security person, as defined in s. 440.26 (1m), who is exempt from the permit and licensure requirements of s. 440.26.

NOTE: The cross−reference to s. 440.26 (1m) was changed from s. 440.26 (1m) (h) by the legislative reference bureau under s. 13.92 (1) (bm) 2. to reflect the consolidation and renumbering of s. 440.26 (1m) (intro.) and (h) under s. 13.92 (1) (bm) 2.

2. Any unlicensed private security person who has reasonable grounds to believe that a crime is being committed or has been committed shall notify promptly an appropriate law enforcement agency of the facts which form the basis for this belief.

(d) A person need not comply with this subsection if any of the following apply:

1. Compliance would place him or her in danger.

2. Compliance would interfere with duties the person owes to others.

3. In the circumstances described under par. (a), assistance is being summoned or provided by others.

4. In the circumstances described under par. (b) or (c), the crime or alleged crime has been reported to an appropriate law enforcement agency by others.

(2m) If a person is subject to sub. (2) (b) or (c), the person need not comply with sub. (2) (b) or (c) until after he or she has summoned or provided assistance to a victim.

(3) If a person renders emergency care for a victim, s. 895.48 (1) applies. Any person who provides other reasonable assistance under this section is immune from civil liability for his or her acts or omissions in providing the assistance. This immunity does not apply if the person receives or expects to receive compensation for providing the assistance.

History: 1983 a. 198; 1985 a. 152, 332; 1987 a. 14; 1995 a. 461; s. 13.92 (1) (bm) 2.

This section is not unconstitutional. For a conviction, it must be proved that an accused believed a crime was being committed and that a victim was exposed to bodily harm. The reporting required does not require the defendant to incriminate himself or herself as the statute contains no mandate that an individual identify himself or herself. Whether a defendant fits within an exception under sub. (2) (d) is a matter of affirmative defense. State v. LaPlante, 186 Wis. 2d 427, 521 N.W.2d 448 (Ct. App. 1994).

940.41 Definitions. In ss. 940.42 to 940.49:

(1g) "Law enforcement agency" has the meaning given in s. 165.83 (1) (b).

(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.

(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) "Witness" means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who has provided information

concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under s. 885.01 or under the authority of any court of this state or of the United States.

History: 1981 c. 118; 1993 a. 128.

940.42 Intimidation of witnesses; misdemeanor. Except as provided in s. 940.43, whoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade any witness from attending or giving testimony at any trial, proceeding or inquiry authorized by law, is guilty of a Class A misdemeanor.

History: 1981 c. 118.

When a mother and child were to testify against the defendant and the defendant sent letters to the mother urging that she and the child not testify, regardless of whether the letters were addressed to the child or the child was aware of the letter's contents, the defendant attempted to dissuade the child through her mother. As the mother of the minor child, had the parental responsibility and practical authority to monitor communications by third parties with the child, and to influence whether the child cooperated with the court proceedings, there was sufficient evidence to convict. State v. Moore, 2006 WI App 61, 292 Wis. 2d 101, 713 N.W.2d 131, 04−3227.

This section supports charging a person with a separate count for each letter sent, and each other act performed, for the purpose of attempting to dissuade any witness from attending or giving testimony at a court proceeding or trial. State v. Moore, 2006 WI App 61, 292 Wis. 2d 101, 713 N.W.2d 131, 04−3227.

940.43 Intimidation of witnesses; felony. Whoever violates s. 940.42 under any of the following circumstances is guilty of a Class G felony:

(1) Where the act is accompanied by force or violence or attempted force or violence upon the witness, or the spouse, child, stepchild, foster child, parent, sibling, or grandchild of the witness, or any person sharing a common domicile with the witness.

(2) Where the act is accompanied by injury or damage to the real or personal property of any person covered under sub. (1).

(3) Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or (2).

(4) Where the act is in furtherance of any conspiracy.

(5) Where the act is committed by any person who has suffered any prior conviction for any violation under s. 943.30, 1979 stats., ss. 940.42 to 940.45, or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation under ss. 940.42 to 940.45.

(6) Where the act is committed by any person for monetary gain or for any other consideration acting on the request of any other person. All parties to the transactions are guilty under this section.

(7) Where the act is committed by a person who is charged with a felony in connection with a trial, proceeding, or inquiry for that felony.

(8) If the proceeding is a criminal trial, where the 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.

History: 1981 c. 118; 1997 a. 143; 2001 a. 109; 2005 a. 280; 2007 a. 96; 2009 a. 28; 2019 a. 112.

Conspiracy to intimidate a witness is included under sub. (4). State v. Seibert, 141 Wis. 2d 753, 416 N.W.2d 900 (Ct. App. 1987).

940.44 Intimidation of victims; misdemeanor. Except as provided in s. 940.45, whoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade, another person who has been the victim of any crime or who is acting on behalf of the victim from doing any of the following is guilty of a Class A misdemeanor:

(1) Making any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency, or to any judge.

(2) Causing a complaint, indictment, or information to be sought or prosecuted, or assisting in the prosecution thereof.

(3) Arresting or causing or seeking the arrest of any person in connection with the victimization.

History: 1981 c. 118; 2015 a. 14.

A jury instruction for a violation of s. 940.44 should specify the underlying crime and that a defendant cannot be found guilty of intimidating a victim of a crime unless the elements of the underlying crime are proved beyond a reasonable doubt. State v. Thomas, 161 Wis. 2d 616, 468 N.W.2d 729 (Ct. App. 1991).

Acquittal on the underlying charge does not require acquittal on a charge under s. 940.44 as the jury may have exercised its right to return a not guilty verdict irrespective of evidence on the underlying charge. State v. Thomas, 161 Wis. 2d 616, 468 N.W.2d 729 (Ct. App. 1991).

The disorderly conduct statute, s. 947.01, does not require a victim, but when the disorderly conduct is directed at a person, that person is the victim for the purpose of prosecuting the perpetrator for intimidating a victim under this section. State v. Vinje, 201 Wis. 2d 98, 548 N.W.2d 118 (Ct. App. 1996), 95−1484.

In the phrase "causing a complaint ... to be sought and prosecuted and assisting in the prosecution thereof" in sub. (2), "and" is read in the disjunctive. Sub. (2) includes alleged acts of intimidation that occur after a victim has caused a complaint to be sought and applies to all acts of intimidation that attempt to prevent or dissuade 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, more generally, 3) assisting in a prosecution. State v. Freer, 2010 WI App 9, 323 Wis. 2d 29, 779 N.W.2d 12, 08−2233.

940.45 Intimidation of victims; felony. Whoever violates s. 940.44 under any of the following circumstances is guilty of a Class G felony:

(1) Where the act is accompanied by force or violence or attempted force or violence upon the victim, or the spouse, child, stepchild, foster child, parent, sibling, or grandchild of the victim, or any person sharing a common domicile with the victim.

(2) Where the act is accompanied by injury or damage to the real or personal property of any person covered under sub. (1).

(3) Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or (2).

(4) Where the act is in furtherance of any conspiracy.

(5) Where the act is committed by any person who has suffered any prior conviction for any violation under s. 943.30, 1979 stats., ss. 940.42 to 940.45, or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation under ss. 940.42 to 940.45.

(6) Where the act is committed by any person for monetary gain or for any other consideration acting on the request of any other person. All parties to the transactions are guilty under this section.

(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.

History: 1981 c. 118; 1997 a. 143; 2001 a. 109; 2007 a. 96; 2009 a. 28; 2019 a. 112.

940.46 Attempt prosecuted as completed act. Whoever attempts the commission of any act prohibited under ss. 940.42 to 940.45 is guilty of the offense attempted without regard to the success or failure of the attempt. The fact that no person was injured physically or in fact intimidated is not a defense against any prosecution under ss. 940.42 to 940.45.

History: 1981 c. 118.

940.47 Court orders. Any court with jurisdiction over any criminal matter, upon substantial evidence, which may include hearsay or the declaration of the prosecutor, that knowing and malicious prevention or dissuasion of any person who is a victim or who is a witness has occurred or is reasonably likely to occur, may issue orders including but not limited to any of the following:

(1) An order that a defendant not violate ss. 940.42 to 940.45.

(2) An order that a person before the court other than a defendant, including, but not limited to, a subpoenaed witness or other person entering the courtroom of the court, not violate ss. 940.42 to 940.45.

(3) An order that any person described in sub. (1) or (2) maintain a prescribed geographic distance from any specified witness or victim.

(4) An order that any person described in sub. (1) or (2) have no communication with any specified witness or any victim, except through an attorney under such reasonable restrictions as the court may impose.

History: 1981 c. 118.

940.48 Violation of court orders. Whoever violates an order issued under s. 940.47 may be punished as follows:

(1) If applicable, the person may be prosecuted under ss. 940.42 to 940.45.

(2) As a contempt of court under ch. 785. A finding of contempt is not a bar to prosecution under ss. 940.42 to 940.45, but:

(a) Any person who commits a contempt of court is entitled to credit for any punishment imposed therefor against any sentence imposed on conviction under ss. 940.42 to 940.45; and

(b) Any conviction or acquittal for any substantive offense under ss. 940.42 to 940.45 is a bar to subsequent punishment for contempt arising out of the same act.

(3) By the revocation of any form of pretrial release or forfeiture of bail and the issuance of a bench warrant for the defendant's arrest or remanding the defendant to custody. After hearing and on substantial evidence, the revocation may be made whether the violation of order complained of has been committed by the defendant personally or was caused or encouraged to have been committed by the defendant.

History: 1981 c. 118.

940.49 Pretrial release. Any pretrial release of any defendant whether on bail or under any other form of recognizance shall be deemed to include a condition that the defendant neither do, nor cause to be done, nor permit to be done on his or her behalf, any act proscribed by ss. 940.42 to 940.45 and any willful violation of the condition is subject to punishment as prescribed in s. 940.48 (3) whether or not the defendant was the subject of an order under s. 940.47.

History: 1981 c. 118.