1185 HOMICIDE BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE — § 940.09(1)(a)

Statutory Definition of the Crime

Section 940.09(1)(a) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle.[3]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[4]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[5] in producing the death.

3. The defendant was under the influence of an intoxicant at the time the defendant operated a vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was materially impaired because of consumption of an alcoholic beverage.[6]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be materially impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[7]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[8]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[9] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[10] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210

liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[11]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[12]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

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

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[13] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[14] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[15]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[16] does not by itself provide a defense to the crime charged against the defendant.[17] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not been under the influence of an intoxicant and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[18]]

COMMENT

Wis JI-Criminal 1185 was originally published in 1962 and revised in 1980, 1982, 1985, 1986, 1993, 2004, 2006, and 2014. This revision was approved by the Committee in December 2019; it added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31.

This instruction is drafted for violations of § 940.09(1)(a), causing death while operating under the influence an intoxicant. For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

See Wis JI-Criminal 1186 for the related offense involving a prohibited alcohol concentration [PAC] of .08 or more. For persons with three or more priors, the PAC level is .02. See Wis JI-Criminal 1186A. For cases involving two charges – under the influence and PAC – see Wis JI-Criminal 1189.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. See sub. (1c)(a) and sub. (1c)(b). Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09 was revised by 2019 Wisconsin Act 31. The offense definition did not change but sub. (1c)(a) and (b) were amended to require a mandatory minimum term of five years confinement unless the court finds "a compelling reason and places its reason on the record." [The effective date of

Act 31 is November 22, 2019; but this date does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the department of transportation or sentencing court.]

Section 940.09(2) provides that 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 . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 13 and following. The defense was formerly addressed in a separate instruction, Wis JI Criminal 1188, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

Offenses involving firearms and airguns are also covered by § 940.09, see sub. (1g) and Wis JI-Criminal 1190 and 1191.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. This instruction is drafted for cases involving the influence of an intoxicant, which is defined to include "an alcohol beverage, hazardous inhalant, . . . a controlled substance or controlled substance analog under ch. 961, . . . any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or . . . any other drug, or . . . an alcohol beverage and any other drug." See § 939.22(42) in note 6, below. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

2. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

3. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

4. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 12, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been under the influence and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

6. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. The definition in the instruction paraphrases the full definition provided in § 939.22(42):

> "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.

Note: "hazardous inhalant" was added to the definition in § 939.22(42) by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013]. Act 83 also created a definition of "hazardous inhalant" in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

7. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

8. It may be that cases will be charged under § 940.09(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

9. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Section 940.09(2) provides that 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 . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI Criminal 2600 Introductory Comment, Sec. X.

13. See note 12, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

14. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

15. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

16. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

17. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 15, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

18. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.