

**924A AGGRAVATED RECKLESSNESS: CIRCUMSTANCES WHICH SHOW
UTTER DISREGARD FOR HUMAN LIFE**

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all the other facts and circumstances relating to the conduct.

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.¹

[Consider also the defendant's conduct after the [death] [great bodily harm] [act alleged to have endangered safety] to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the [death] [great bodily harm] [act alleged to have endangered safety] occurred.]

COMMENT

This instruction was originally published as Wis JI-Criminal 924.1 in 1994, revised as Wis JI-Criminal 924A in 2005, and revised in 2010. This revision added the material at footnote 1 and was approved by the Committee in December 2011.

This instruction contains the definition of "utter disregard for human life" found in the published instructions for "first degree reckless" offenses. It is published separately here to provide a convenient means of collecting appellate court decisions that deal with "utter disregard" and to discuss issues in more detail than may be appropriate in the footnotes for individual offenses.

The phrase "utter disregard for human life" was created by 1987 Wisconsin Act 399 as part of the revision of Wisconsin's homicide statutes. It applies to offenses committed on or after January 1, 1989. "Utter disregard" is used in the definition of the following offenses: First Degree Reckless Homicide, § 940.02(1); First Degree Reckless Injury, § 940.23(1); and First Degree Recklessly Endangering Safety, § 941.30(1).

"Under circumstances which show utter disregard for human life" is the factor that distinguishes first degree reckless offenses from second degree reckless offenses. Therefore, it is used only in connection with crimes involving criminal recklessness. See Wis JI-Criminal 924 for the definition of "criminal recklessness." The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

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, stats. 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 human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).

Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to an aggravated reckless offense.

A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further clarified." Attempts to explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978), Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977), and Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15 [No. 2010AP2808-CR], ___ Wis.2d ___, ___ N.W.2d ___, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). 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), stats., are inapplicable.

Judicial Council Note to § 940.02, 1987 Senate Bill 191.

In State v. Holtz, 173 Wis.2d 515, 496 N.W.2d 668 (Ct. App. 1992), the defendant appealed his conviction for first degree recklessly endangering safety. The charges were based on his attacking his wife with an axe. He argued that his conduct during the entire episode should be considered, claiming that he finally ceased his aggression, thus showing some regard for his wife's well-being. The court of appeals affirmed, finding that the defendant's show of regard came too late B doing so only after having shown no regard for his wife's life and safety. The court distinguished this case from Wagner and Balistreri, supra where, the court says, concern for the life of another was shown during the commission of the act.

For other discussions of the "utter disregard" standard under current law, see State v. Barksdale, 160 Wis.2d 284, 466 N.W.2d 198 (Ct. App. 1991), and State v. Blair, 164 Wis.2d 64, 473 N.W.2d 566 (Ct. App. 1991). In both cases, the evidence was found to be sufficient to meet the standard: discharge of a gun during an attempt to collect a drug debt (Barksdale); hitting a person in the head three times with a loaded pistol, which then discharged (Blair).

Also see Arave v. Creech, 507 U.S. 463 (1993), where the court rejected a challenge to the Idaho capital punishment statute, which uses "utter disregard for human life" as a factor authorizing imposition of the death penalty. The majority found it to be a "close question" whether the standard was unconstitutionally vague in the death penalty context. The majority found that further definition of "utter disregard" by the state court made it sufficiently objective to meet constitutional standards.

1. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The committee decided it was not necessary to include a reference to conduct before or during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.