

1014 FIRST DEGREE INTENTIONAL HOMICIDE: SELF DEFENSE: SECOND DEGREE INTENTIONAL HOMICIDE — § 940.01(2)(b); § 940.05¹**Crimes To Consider**

The defendant in this case is charged with first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree intentional homicide, you must consider whether or not the defendant is guilty of second degree intentional homicide which is a less serious degree of criminal homicide.

Intentional Homicide

The crimes referred to as first and second degree intentional homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates intentional homicides into two degrees, there are certain elements which are common to each crime. Both first and second degree intentional homicide require that the defendant caused the death of the victim with the intent to kill. It will also be important for you to consider the privilege of self defense in deciding which crime, if any, the defendant has committed.

Self-Defense

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another for the purpose of preventing or terminating what (he) (she)

reasonably believes to be an unlawful interference with (his) (her) person by the other person. However, (he) (she) may intentionally use only such force as (he) (she) reasonably believes is necessary to prevent or terminate the interference. (He) (She) may not intentionally use force which is intended or likely to cause death unless (he) (she) reasonably believes that such force is necessary to prevent imminent death or great bodily harm to (himself) (herself).²

As applied to this case, the effect of the law of self defense is:

- The defendant is not guilty of either first or second degree intentional homicide if the defendant reasonably believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person, and reasonably believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).³
- The defendant is guilty of second degree intentional homicide if the defendant caused the death of (name of victim) with the intent to kill and actually believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), but the belief or the amount of force used was unreasonable.⁴
- The defendant is guilty of first degree intentional homicide if the defendant caused the death of (name of victim) with the intent to kill and did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).⁵

Because the law provides that it is the State's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty for first or second degree intentional homicide. If the State does not satisfy you that those facts are established by the evidence, you will be instructed to find the defendant not guilty.

The elements of each crime will now be defined for you in greater detail.

Statutory Definition of First Degree Intentional Homicide

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another. In this case, first degree intentional homicide also requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself.⁶

State's Burden of Proof

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

Elements of First Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).

“Cause” means that the defendant's act was a substantial factor in producing the death.⁷

2. The defendant acted with the intent to kill ((name of victim)) (another human being).⁸
3. The defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself.⁹

Meaning of “Intent to Kill”

“Intent to kill” means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.¹⁰

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person’s mind to find intent. Intent to kill must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.¹¹

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. “Motive” refers to a person’s reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Actual Belief That The Force Used Was Necessary

The third element of first degree intentional homicide requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires the State to prove¹² either:

- 1) that the defendant did not actually believe (he) (she) was in imminent danger of death or great bodily harm; or
- 2) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to (himself) (herself).

When first degree intentional homicide is considered, the reasonableness of the defendant’s belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide.¹³

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and that the defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree intentional homicide, and you must consider whether the defendant is guilty of second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before considering the offense of second degree intentional homicide.¹⁴ However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree intentional homicide, you should consider whether the defendant is guilty of second degree intentional homicide.

Second Degree Intentional Homicide

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

Elements of Second Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).
2. The defendant acted with the intent to kill ((name of victim)) (another human being).
3. The defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).¹⁵

You have already been instructed on the definitions of “causing death” and “with intent to kill.” The same definitions apply to your consideration of second degree intentional homicide.

Reasonable Belief That The Force Used Was Necessary

The third element of second degree intentional homicide requires that the defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires that the State prove any one of the following:¹⁶

- 1) that a reasonable person in the circumstances of the defendant would not have believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person; or

2) that a reasonable person in the circumstances of the defendant would not have believed (he) (she) was in danger of imminent death or great bodily harm; or

3) that a reasonable person in the circumstances of the defendant would not have believed that the amount of force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.¹⁷ In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.¹⁸ The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of second degree intentional homicide.

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of second

degree intentional homicide, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

COMMENT

Wis JI Criminal 1014 was originally published in 1988 and revised in 1991, 1994 and 2002. The 2002 revision made changes required by State v. Head, 2002 WI 99, and adopted the new format. This revision was approved by the Committee in February 2021; it amended the paragraph on “Determining Whether Beliefs Were Reasonable” to mirror the language provided in Wis JI-Criminal 800 and Wis JI-Criminal 805 and added to the comment.

This instruction is drafted for a charge of first degree intentional homicide under § 940.01, where second degree intentional homicide in violation of § 940.05 is submitted as a lesser included offense. The statutes are among those created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statutes apply to offenses committed on or after January 1, 1989. For a discussion of the homicide revision generally, and of the offense covered by this instruction, see the Introductory Comment at Wis JI Criminal 1000.

1. This instruction is for a case where first degree intentional homicide is charged, there is evidence that the defendant acted in self defense, and the lesser included offense of second degree intentional homicide is to be submitted to the jury.

2. These statements are based on the definition of the privilege of self defense found in § 939.48.

3. The effect of the privilege of self defense in a case where first degree intentional homicide is charged is as follows:

- (a) if the exercise of the privilege was reasonable, both in inception and scope, the defendant is not guilty of any crime;
- (b) if the defendant actually believed it was necessary to use force in self defense, but acts unreasonably, the defendant is guilty of second degree intentional homicide. He or she may act unreasonably in either of two ways:
 - i) the belief that it was necessary to act in self defense may be unreasonable; or
 - ii) the amount of force used may be unreasonable
- (c) if the defendant did not actually believe it was necessary to use force in self defense, the defendant is guilty of first degree intentional homicide.

4. Section 940.01(2)(b) provides that causing the death by “unnecessary defensive force” mitigates what would otherwise be first degree intentional homicide to second degree intentional homicide: “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.”

5. The absence of the mitigating circumstance — no actual belief that the force used was necessary to prevent imminent death or great bodily harm — becomes a fact necessary to constitute the first degree offense. See § 940.01(3) and State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Also see the discussion in notes 12 and 13, below.

The Committee considered adding a “subjective threshold” to the definition of the mitigating circumstance. A “subjective threshold” would require that the defendant actually believed that there was an unlawful interference. The Head decision is unclear on this point. One statement in the opinion is consistent with adding this requirement:

... If unnecessary defensive force is been [sic] placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the defendant did not actually believe she was preventing or terminating an unlawful interference with her person or did not actually believe that the force she used was necessary to prevent imminent death or great bodily harm — even if those beliefs were unreasonable — to sustain a conviction for first-degree intentional homicide. 2002 WI 99, ¶70.

However, in two other paragraphs in the opinion the court stated the requirements for unnecessary defensive force without including the “actual belief in an unlawful interference” element. See 2002 WI 99, ¶¶5 and 90. Because § 940.01(2)(b) does not include this requirement, and because the Head decision placed great emphasis on the plain language of the statutes, the Committee decided that it should not be added to the instruction. As a practical matter, the requirement is probably implicit in the other aspects of the standard. Someone who actually believes that it is necessary to use force to prevent imminent death or great bodily harm almost certainly will believe that the source of that threat is an unlawful interference.

In State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, the court of appeals reversed a conviction for first degree intentional homicide because, under the standard set forth in the Head decision, second degree intentional homicide [unnecessary defensive force] and the complete privilege of self defense should have been submitted to the jury. As to unnecessary defensive force, Peters met the obligation set out in Head “to present only ‘some’ evidence that she actually believed that she was in imminent danger of death or great bodily harm and actually believed that the force she used was necessary to defend herself.” 2002 WI App 243 at ¶19.

6. When the issue of self defense “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” for a violation of § 940.01. § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged.

A defense is “placed in issue” when “a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense.” Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485,

508, 329 N.W.2d 161 (1983).

7. The Committee has 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:

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.

Also see Wis JI-Criminal 901, **CAUSE**.

8. The parenthetical reference to “another human being” is based on § 940.01(1), which addresses the common law doctrine of “transferred intent.” That doctrine has been described as follows:

It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent." 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

9. See note 5, supra.

10. The phrase “or aware that his conduct is practically certain to cause that result” was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, “with intent to kill” was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923B.

11. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

12. Section 940.01(2) recognizes four circumstances as affirmative defenses which mitigate first degree intentional homicide to second degree intentional homicide. When the existence of an affirmative defense “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” for a violation of § 940.01. See § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979).

A defense is “placed in issue” when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

Two beliefs must be held by the defendant in order to mitigate first degree intentional homicide on the basis of “unnecessary defensive force”: a belief that the defendant (or another) was in imminent danger of death or great bodily harm; and a belief that the force used was necessary to defend against that danger. See § 940.01(2)(b). By proving that the defendant did not actually hold either one of these beliefs, the state may meet its burden of proving that “the facts constituting the defense did not exist.” Section 940.01(3).

13. The 2002 revision of the instruction changed this element in response to the decision in *State v. Head*, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Head modified *State v. Camacho*, 176 Wis.2d 860, 501 N.W.2d 380 (1993), by holding that there is no “objective threshold” for invoking the mitigating factor of “unnecessary defensive force.” The “objective threshold” refers to a requirement that the defendant reasonably believe that he or she was preventing or terminating an unlawful interference. Head holds that it is sufficient for purposes of “unnecessary defensive force” that a defendant actually believe that the defensive force used was necessary. This is summarized in the following paragraphs of the opinion:

¶103. Based on the plain language of Wis. Stat. § 940.05(2), supported by the legislative history and articulated public policy behind the statute, we conclude that when imperfect self defense is placed in issue by the trial evidence, the state has the burden to prove that the person had no actual belief that she was in imminent danger of death or great bodily harm, or no actual belief that the amount of force she used was necessary to prevent or terminate this interference. If the jury concludes that the person had an actual but unreasonable belief that she was in imminent danger of death or great bodily harm, the person is not guilty of first degree intentional homicide but should be found guilty of second degree intentional homicide.

¶104. In light of this analysis, we must modify Camacho to the extent that it states that Wis. Stat. § 940.01(2)(b) contains an objective threshold element requiring a defendant to have a reasonable belief that she was preventing or terminating an unlawful interference with her person in order to raise the issue of unnecessary defensive force (imperfect self defense).

Also see State v. Peters, 2002 WI App 243, note 5 supra.

14. This paragraph builds in part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

15. The absence of the complete privilege of self defense is a fact necessary to constitute the offense of second degree intentional homicide, assuming there is evidence of the complete privilege in the case. Since there already has been a finding of “some evidence” of the imperfect privilege, (now called “unnecessary defensive force”), there will almost always be a basis for submitting the existence of the complete privilege to the jury. See State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

The 2002 revision of the instruction added the requirement that the “defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference.” This requirement was previously part of the requirements for the mitigating factor of unnecessary defensive force. When State v. Head modified State v. Camacho, see note 13, supra, this “objective threshold” was removed from the mitigating factor determination. However, it remains part of the complete privilege of self defense and must be added here. Head’s holding that the objective threshold does apply to claims of the complete privilege of self defense was stated as follows:

. . . [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 she reasonably believed

that she was preventing or terminating an unlawful interference with her person and reasonably believed that the force she used was necessary to prevent imminent death or great bodily harm. A defendant is entitled to an instruction on perfect self defense when the trial evidence places self defense in issue. Perfect self defense is placed in issue when, under a reasonable view of the trial evidence, a jury could conclude that the state has failed to meet its burden to disprove one of the elements of self defense beyond a reasonable doubt. (Emphasis in original.) 2002 WI 99, ¶4.

In State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, the court of appeals reversed a conviction for first degree intentional homicide because, under the standard set forth in the Head decision, second degree intentional homicide [unnecessary defensive force] and the complete privilege of self defense should have been submitted to the jury. As to the complete privilege, Peters met the obligation set out in Head to present “some evidence” supporting the claim of self defense. “[V]iewing the evidence in the light most favorable to Peters, a jury could conclude the State had not disproved the perfect self-defense theory beyond a reasonable doubt and that Peters reasonably believed she was preventing or terminating an unlawful interference with her person and reasonably believed that the force she used was necessary to prevent imminent death or great bodily harm. 2002 WI App 243 at ¶24.

16. The exercise of the privilege may be proved to be unreasonable in any one of three ways: by showing that the defendant's belief that he or she was preventing or terminating an unlawful interference was unreasonable; or, by showing that the defendant's belief that he or she was in danger of imminent death or great bodily harm was unreasonable; or, by showing that the amount of force used was unreasonable. See note 15, supra.

17. This treatment of “reasonably believes” is intended to be consistent with the definition provided in § 939.22(32).

18. The phrase “in the defendant’s position under the circumstances that existed at the time of the alleged offense” is intended to allow consideration of a broad range of circumstances that relate to the defendant’s situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627 28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to use doctrines other than self defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to “heat of passion, caused by reasonable and adequate provocation” rather than self defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines. However, some cases of this type may legitimately be considered under self defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).