

**1015 FIRST DEGREE INTENTIONAL HOMICIDE: COERCION: SECOND DEGREE INTENTIONAL HOMICIDE — § 940.01(2)(d); § 940.05****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. First degree intentional homicide requires the State to prove the additional fact that the defendant did not act under the defense of coercion. It is for you to decide of what degree of homicide the defendant is guilty, if guilty at all, according to the instructions which define the two degrees of intentional homicide.

### **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 was not acting under the defense of coercion.<sup>1</sup>

### **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 the Crime 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.<sup>2</sup>

2. The defendant acted with the intent to kill ((name of victim)) (another human being).<sup>3</sup>
3. The defendant did not act under the defense of coercion.<sup>4</sup>

### **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.<sup>5</sup>

### **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.<sup>6</sup>

### **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.

### Coercion

The defense of coercion is an issue in this case. As applied to this case, coercion may reduce a charge of first degree intentional homicide to second degree intentional homicide.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting under the defense of coercion.<sup>7</sup>

The law allows the defendant to act under the defense of coercion only if a threat by another person (other than the defendant's co-conspirator)<sup>8</sup> caused the defendant to believe that (his) (her) act was the only means of preventing [imminent public disaster] [imminent death or great bodily harm to (himself) (herself) (or to others)]<sup>9</sup> and which pressure caused (him) (her) to act as (he) (she) did.

In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. 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. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

### Jury's Decision – First Degree Intentional Homicide

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by an act committed with the intent to kill and that the defendant was not

acting under the defense of coercion, 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 in violation of section 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.<sup>10</sup> 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.

### **Statutory Definition of Second Degree Intentional Homicide**

Second degree intentional homicide, as defined in § 940.05 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.

### State's Burden of Proof

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 two 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).

"Cause" and "intent to kill" have already been defined for you.

The difference between first and second degree intentional homicide is that the first degree offense requires proof of one additional element: that the defendant was not acting under the defense of coercion. Coercion is not a defense to a charge of second degree intentional homicide.

#### **Jury's Decision – Second Degree Intentional Homicide**

If you are satisfied beyond a reasonable doubt that all the elements of first degree intentional homicide were present, except the element requiring that the defendant did not act under the defense of coercion, you should find the defendant guilty of second degree intentional homicide.

In other words, if you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill,<sup>11</sup> you should find the defendant guilty of second degree intentional homicide.

If you are not so satisfied, 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 1015 was approved by the Committee in March 2010.

This instruction is for a case where first degree intentional homicide is charged, there is evidence of coercion, and the lesser included offense of second degree intentional homicide is to be submitted to the jury. The statutes defining these offenses are among those created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989.

Identifying the statutory basis for the mitigating circumstance addressed by this instruction requires putting several separate statutes together. Section 940.01(2) identifies "affirmative defenses" to first degree intentional homicide "which mitigate the offense to 2nd-degree intentional homicide under s. 940.05." Subsection (d) of § 940.01(2) is titled "Coercion; necessity" and provides: "Death was caused in the exercise of a privilege under s. 939.45(1)." Section 939.45(1) provides that a privilege may be claimed "[w]hen the actor's conduct occurs under circumstances of coercion or necessity so as to be privileged under s. 939.46 or 939.47." Section 939.46 defines "coercion," providing that it is "a defense to a prosecution for any crime based on that act, except that if the prosecution is for first degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide."

1. When the issue of coercion "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. See, State v. Moes, 91 Wis.2d 756, 284 N.W.2d 66 (1979), which involved a coercion defense.

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).

2. 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 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.

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

3. The parenthetical reference to "another human being" is to be used in a case involving the common law doctrine of "transferred intent," which 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.

4. See note 1, supra.

5. 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 923.2.

6. 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.

7. In Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979), the Wisconsin Supreme Court held that the burden is on the state to disprove an asserted coercion defense beyond a reasonable doubt. Moes dealt with Wisconsin law as it existed before the 1989 homicide law revision. The procedure it recognized is consistent with that specified in § 940.01.

8. The threat must come from someone "other than the actor's co-conspirator." § 939.46(1). If there is an issue about the threat coming from a co-conspirator the phrase should be included in the instruction. It may also be appropriate to instruct the jury on the meaning of "co-conspirator." Wis JI-Criminal 570 defines the crime of "conspiracy."

9. The defense apparently applies where the threat is made to any third person, without limitation. In this respect, coercion has been likened to the defense of others under § 939.48(4), Wis. Stats. See 1950 Report on the Criminal Code of the Wisconsin Legislative Council, pages 35-36 and 38-39.

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

11. A complete description of the jury's finding at this point would include reference to "coercion" and would be phrased with a double negative: ". . . and you are not satisfied beyond a reasonable doubt that the defendant did not act lawfully under the defense of coercion." The advantage in including such a statement is that it accurately identifies and emphasizes the difference between what is necessary for a finding of guilt on the first and second degree offenses. The disadvantage is that the double negative may be hard to understand. On balance, the Committee decided to leave it out of the text of the instruction, preserving it in this footnote for possible use if it is thought to be helpful.