

1018 FIRST DEGREE INTENTIONAL HOMICIDE; FIRST DEGREE RECKLESS HOMICIDE — § 940.01(1)(a); § 940.02(1)

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 first degree reckless homicide which is a less serious degree of criminal homicide.

Intentional and Reckless Homicide

The crimes referred to as first degree intentional and first degree reckless homicide are different types 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.

Both intentional and reckless homicide require that the defendant caused the death of the victim. First degree intentional homicide requires the State to prove that the defendant acted with the intent to kill. First degree reckless homicide requires that the defendant acted recklessly, under circumstances which show utter disregard for human life. It is for you to decide of what type of homicide the defendant is guilty, if guilty at all, according to the instructions which define the two offenses.

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.

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 two 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.¹

2. The defendant acted with the intent to kill ((name of victim)) (another human being).²

"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.³

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.⁴

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.

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, you should find the defendant guilty of first degree intentional homicide.

If you are not so satisfied, you must find the defendant not guilty of first degree intentional homicide, and you should consider whether the defendant is guilty of first degree reckless homicide in violation of section 940.02(1) 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 first degree reckless homicide.⁵

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 first degree reckless homicide.

Statutory Definition of First Degree Reckless Homicide

First degree reckless homicide, as defined in § 940.02(1) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being under circumstances that show utter disregard for human life.

State's Burden of Proof

Before you may find the defendant guilty of first degree reckless 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 Reckless 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.⁶

2. The defendant caused the death by criminally reckless conduct.

"Criminally reckless conduct" means:⁷

- the conduct created a risk of death or great bodily harm to another person; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.⁸

3. The circumstances of the defendant's conduct showed utter disregard⁹ 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.¹⁰

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.¹¹

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

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct and that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of first degree reckless 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 offense.

COMMENT

Wis JI-Criminal 1018 was originally published in 1989 and revised in 2000 and 2010. This revision was approved the Committee in December 2011; it involved adding footnote 11 and the text accompanying it.

This instruction is for a case where first degree intentional homicide under § 940.01 is charged and second degree reckless homicide under § 940.02 is submitted as a lesser included offense. It applies to those statutes as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The revised statutes, and this instruction, apply to offenses committed on or after January 1, 1989.

This instruction combines the text of Wis JI-Criminal 1010, First Degree Intentional Homicide, and Wis JI-Criminal 1020, First Degree Reckless Homicide. See the comment to each of those instructions for discussion of substantive issues.

1. See note 2, Wis JI-Criminal 1010.
2. See note 3, Wis JI-Criminal 1010.
3. See note 4, Wis JI-Criminal 1010.
4. 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.

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

6. See note 2, Wis JI-Criminal 1010.

7. "Criminal recklessness" is defined as follows in § 939.24(1):

. . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness 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."

8. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. However, voluntary intoxication that may prevent the actor from being aware of the risk is not a defense. See § 939.24(3) and note 3, Wis JI-Criminal 1020.

9. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. See Wis JI-Criminal 924A or note 4, Wis JI-Criminal 1020.

10. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. See Wis JI-Criminal 924A or note 5, Wis JI-Criminal 1020.

11. 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. For a complete discussion of this issue, see Wis JI-Criminal 924A or note 6, Wis JI-Criminal 1020.