1020A FIRST DEGREE RECKLESS HOMICIDE OF AN UNBORN CHILD — § 940.02(1m)

Statutory Definition of the Crime

First degree reckless homicide, as defined in § 940.02(1m) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of an unborn child under circumstances that show utter disregard for the life of [that unborn child] [(or) the woman who is pregnant with that unborn child] [(or) another].[1]

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 the Crime That the State Must Prove

1. The defendant caused the death of an unborn child.

   "Cause" means that the defendant's act was a substantial factor in producing the death of the unborn child.[2]

   "Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.[3]

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

   "Criminally reckless conduct" means:[4]

   - the conduct created a risk of death or great bodily harm to [an unborn child] [(or) to the woman who is pregnant with the unborn child] [(or) to another]; 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.[5]

3. The circumstances of the defendant's conduct showed utter disregard[6] [for the life of the unborn child] [(or) for the life of the woman who is pregnant with the unborn child] [(or) for the life of another].

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;[7] and, all other facts and circumstances relating to the conduct.

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[8]

[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 an unborn child by criminally reckless conduct and that the circumstances of the conduct showed utter disregard [for the life of the unborn child] [(or) for the life of the woman who is

pregnant with the unborn child] [(or) for the life of another], you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 1020A was originally published in 1999 and revised in 2002 and 2012. The 2012 revision added footnote 8 and the text accompanying it. This revision was approved by the Committee in March 2015; it revised footnote 5 to reflect 2013 Wisconsin Act 307.

This instruction is drafted for the offense defined in § 940.02(1m), which was created by 1997 Wisconsin Act 295 [effective date: July 1, 1998]. The Act revised all the general homicide statutes to apply to causing the death of an unborn child; several non-homicide statutes were similarly revised.

Section 939.75, also created by Act 295, defines "unborn child" and sets forth several exceptions to the applicability of the revised statutes. Subsection (2)(b) recognizes the following exceptions:

- induced abortions [subd. 1.]
- acts committed in accordance with usual and customary standards of medical practice during diagnostic testing or therapeutic treatment by a licensed physician [sub. 2.]
- an act by a health care provider that is in accordance with a pregnant woman's power of attorney for health care, etc. [subd. 2h.]
- an act by a woman who is pregnant with an unborn child [subd. 3.]
- the lawful prescription, dispensation or administration, and the use by any a woman of, any medicine, drug or device that is used as a method of birth control or is intended to prevent pregnancy. [subd. 4]

Subsection (3) provides that if any of these exceptions are "placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist. . ." Thus, these exceptions are to be handled in the same manner as, for example, the mitigating circumstance of adequate provocation in cases of intentional homicide: once supported by some evidence, the absence of the exception becomes a fact the state must prove. The Committee decided not to draft instructions for the absence of these exceptions because it appeared to the Committee that their applicability would most likely be determined before charges were filed or at least before trial. Further, in cases involving reckless homicide, most of the exceptions might better be handled as relevant to the elements of the crime. That is, actions taken in accordance with customary standards of medical practice, for example, tend to show that the circumstances do not show utter disregard for life and that the conduct does not create an unreasonable risk of harm. However, § 939.75(3) is unequivocal on this point: "if an exception is raised by the evidence at trial, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist . . ."

1. The bracketed material sets forth the options provided in § 940.02(1m), which reads: ". . . under circumstances that show utter disregard for the life of that unborn child, the woman who is pregnant with that unborn child or another . . ." Only the alternatives supported by the evidence should be selected. If more than one alternative is submitted, the Committee has concluded that jury agreement on one alternative is not required as long as the jury is satisfied that the circumstances of the conduct showed "utter disregard. . ."

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. This is the definition provided in § 939.75(1).

4. "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."

5. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

6. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. For a complete discussion of this factor, see Wis JI-Criminal 924A or note 4, Wis JI-Criminal 1020.

7. 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.

8. 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.

