1023 FIRST DEGREE RECKLESS HOMICIDE: SECOND DEGREE RECKLESS HOMICIDE: NEGLIGENT HOMICIDE — § 940.02(1); § 940.06; § 940.08

Crimes to Consider

The defendant in this case is charged with first degree reckless 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 reckless homicide, you must consider whether or not the defendant is guilty of second degree reckless homicide which is a less serious degree of criminal homicide. If you are not satisfied that the defendant is guilty of second degree reckless homicide, you must consider whether or not the defendant is guilty of homicide by negligent handling of a dangerous weapon which is also a less serious degree of criminal homicide.

The crimes referred to as first degree reckless homicide, second degree reckless homicide, and homicide by negligent handling of a dangerous weapon are varying 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.

Reckless Homicide

While the law separates reckless homicides into two degrees, there are certain elements which are common to each crime. Both first and second degree reckless homicide require that the defendant caused the death of the victim by criminally reckless

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conduct. First degree reckless homicide requires the State to prove the additional fact that the circumstances of the defendant's conduct showed utter disregard for human life.

Homicide by negligent handling of a dangerous weapon requires that the defendant caused the death of the victim by criminally negligent conduct in the operation or handling of a dangerous weapon.

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 these offenses.

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.[1]

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

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"Criminally reckless conduct" means:[2]

- 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.[3]

3. The circumstances of the defendant's conduct showed utter disregard[4] 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;[5] 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.[6]

[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 <u>(name of victim)</u> by criminally reckless conduct and that the circumstances of the

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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 not find the defendant guilty of first degree reckless homicide, and you should consider whether the defendant is guilty of second degree reckless homicide in violation of § 940.06 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree reckless homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree reckless homicide before considering the offense of second degree reckless homicide.[7] 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 reckless homicide, you should consider whether the defendant is guilty of second degree reckless homicide.

Statutory Definition of Second Degree Reckless Homicide

Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.

Difference Between First and Second Degree Reckless Homicide

The difference between first and second degree reckless homicide is that the first degree offense requires proof of one additional element: that the circumstances of the defendant's conduct showed utter disregard for human life.[8]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of first degree reckless homicide were present, except the element requiring that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of second degree reckless homicide.

In other words, if you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct, you should find the defendant guilty of second degree reckless homicide.

If you are not so satisfied, you must not find the defendant guilty of second degree reckless homicide, and you should consider whether the defendant is guilty of homicide by negligent handling of a dangerous weapon in violation of § 940.08 of the Criminal Code of Wisconsin, which is a lesser included offense of first and second degree reckless homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of second degree reckless homicide before considering the offense of homicide by negligent handling of a dangerous weapon.[9] 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 second degree reckless homicide, you should consider

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whether the defendant is guilty of homicide by negligent handling of a dangerous weapon.

Statutory Definition of Homicide By Negligent Handling Of A Dangerous Weapon

Homicide by negligent handling of a dangerous weapon, as defined in § 940.08 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by the negligent operation or handling of a dangerous weapon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, 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 operated or handled a dangerous weapon.
2. The defendant operated or handled a dangerous weapon in a manner constituting criminal negligence.
3. The defendant's operation or handling of a dangerous weapon in a manner constituting criminal negligence caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[10]

Meaning of "Dangerous Weapon"

"Dangerous weapon" means[11]

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[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.[12]]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm.[13] "Great bodily harm" means serious bodily injury.[14]]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Meaning of "Criminal Negligence"

"Criminal negligence" means:[15]

- the defendant's operation or handling of a dangerous weapon created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) operation or handling of a dangerous weapon created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[16]

The Difference Between Criminal Recklessness and Criminal Negligence

Criminal recklessness and criminal negligence both require conduct that creates an unreasonable and substantial risk of death or great bodily harm. Criminal recklessness

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requires that the person engaging in that conduct be aware of that risk, while criminal negligence requires that the person engaging in that conduct should have been aware of that risk.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminal negligence in the operation or handling of a dangerous weapon, you should find the defendant guilty.

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 1023 was approved by the Committee in October 2018.

This instruction is for a case where first degree reckless homicide under § 940.02(1) is charged and second degree reckless homicide under § 940.06 and homicide by negligent handling of a dangerous weapon under § 940.08 are submitted as lesser included offenses. Section 940.08 applies to criminal negligence in the operation or handling of "dangerous weapons, explosives or fire." The instruction is drafted for a case involving a "dangerous weapon" and would need to be modified if "fire" or "explosives" was involved. The material relating to negligent homicide is adapted from Wis JI-Criminal 1175.

A case illustrating the sequence of offenses addressed by this instruction is State v. Langlois, 2018 WI 73, 382 Wis.2d 414, 913 N.W.2d 812. The defendant challenged the instructions given in part on the grounds that it was error for the trial court to refer to "the risk" rather than referring to the full term – unreasonable and substantial risk – in referring to the elements of a lesser included offense. The Wisconsin Supreme Court concluded that using that "short cut" was not reversible error, but also noted:

> We recognize that the circuit court was reasonably concerned about the length of the instructions in this case. Although we conclude that the abbreviated jury instructions given in this case were not erroneous, it is best practice to read the pattern instructions for each charge, except, of course, where the pattern instructions themselves are abbreviated.
> 2018 WI 73, ¶42, footnote 23.

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Langlois also involved a claim of self defense. The defendant alleged it was error for the trial court to fail to repeat that the burden was on the prosecution to prove beyond a reasonable doubt that the defendant was not privileged to act in self defense when addressing the lesser included offenses. Instead, the instructions stated "as I previously indicated," referring to the definition given when instructing on 1st degree reckless homicide which included a full description of the burden of proof. The court held that this was not error – the context made the reference clear. In the Committee's judgment, it is preferable to repeat the full statement of the burden of proof with each of the lesser included offenses. See Wis JI-Criminal 801 which provides an instruction for the privilege of self defense as applied to crimes involving criminal recklessness and criminal negligence.

This instruction applies to the statutes as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The revised statutes apply to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

1. 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.

2. "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."

3. 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:

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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."

4. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. 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).
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> 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 aggravated reckless homicide 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

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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, 339 Wis.2d 170, 810 N.W.2d 226, 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.

5. 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:

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> 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.

6. 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.

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7. 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.

8. This statement is based on Wis JI-Criminal 112A which is recommended as an alternative style of submitting a lesser included offense. The Committee concluded it should be used here to emphasize the distinction between first and second degree reckless homicide.

9. 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.

10. 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.

11. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in § 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

12. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

13. A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, ¶62.

In light of Tomlinson, the Committee concluded that the definition of "dangerous weapon" in the instructions should be revised to include all the statutory alternatives in the text of the instruction. The alternative to be used in a case like Tomlinson would be the following:

> "Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

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The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

14. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

15. The definition of "criminal negligence" is based on the one provided in § 939.25. The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

16. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

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