

1031 FELONY MURDER: UNDERLYING CRIME ATTEMPTED — § 940.03**Statutory Definition of the Crime**

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while attempting to commit the crime of (name of crime).¹

State's Burden of Proof

Before you may find the defendant guilty of felony murder, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following elements were present.

Elements of Felony Murder That the State Must Prove

1. The defendant attempted to commit the crime of (name of crime).
2. The death of (name of victim) was caused by the attempt to commit (name of crime).²

Determining Whether the Defendant Attempted to Commit (name of crime)

The first element of felony murder requires that the defendant attempted to commit the crime of (name of crime).

The crime of attempted (name of crime), as defined in § 939.32 and § _____³ of the Criminal Code of Wisconsin, is committed by one who, with intent to commit (name of crime) does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the

crime except for the intervention of another person or some other extraneous factor.⁴

First consider whether the defendant intended to commit (name of crime).

(Name of crime) is committed by one who

LIST THE ELEMENTS OF THE INTENDED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.⁵

The crime involved in this case, however, is not (name of crime) as defined, but an attempt to commit the crime of (name of crime).

Next consider whether the defendant did acts toward the commission of the crime of (name of crime) which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have committed the crime of (name of crime) except for the intervention of another person or some other extraneous factor.

Meaning of “Unequivocally”

“Unequivocally” means that no other inference or conclusion can reasonably and fairly be drawn from the defendant’s acts, under the circumstances.

Meaning of “Another Person”

“Another person” means anyone but the defendant and may include the intended victim.

Meaning of “Extraneous Factor”

An “extraneous factor” is something outside the knowledge of the defendant or outside the defendant’s control.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent 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.

Determining Whether Death was Caused by the Attempt to Commit of (name of crime)

The second element of felony murder requires that the death of (name of victim) was caused by the attempt to commit (name of crime).

The Meaning of "Cause"

"Cause" means that the attempt to commit (name of crime) was a substantial factor in producing the death.⁶

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM AN ATTEMPTED FELONY.⁷

[The phrase "the attempt to commit" the crime includes the period of immediate flight from that crime.]

Jury's Decision on Felony Murder

If you are satisfied beyond a reasonable doubt that the defendant attempted to commit the crime of (name of crime) and that the death of (name of victim) was caused by the attempt to commit (name of crime), you should find the defendant guilty of felony murder. If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1031 was originally published in 2003 and revised in 2007 and 2013. The 2007 revision reflected the addition of several felonies to the list of those that can provide the predicate for a felony murder charge. This revision was approved by the Committee in April 2022; it also reflected the addition of a new felony to the list of those that can provide the predicate for a felony murder charge based on 2021 Wisconsin Act 209 [effective date: March 25, 2022].

This instruction is for a felony murder case based on the attempt to commit the underlying felony. For cases involving complete commission of the underlying felony, see Wis JI-Criminal 1030. For cases based on committing the felony as a party to the crime, see Wis JI-Criminal 1032.

2005 Wisconsin Act 313 amended § 940.03, Felony murder, to add the following offenses as predicate offenses:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.30 False imprisonment
- § 940.31 Kidnapping

2021 Wisconsin Act 209 amended § 940.03, Felony murder, to add the following offense as a predicate offense:

- §940.204 Battery or threat to health care providers and staff

The complete list of predicate offenses is provided in footnote 1. The list of uniform criminal jury instructions for the predicate offenses is provided in footnote 4.

Note that the offenses added by Act 313 include two offenses that define misdemeanor offenses: § 940.19(1) and § 940.195(1). It is not clear whether the application of the revised felony murder statute was intended to be based on the commission of a misdemeanor. Wisconsin had misdemeanor manslaughter statutes until the Criminal Code was revised in 1955. See, for example, § 340.10, 1953 Wis. Stats.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This was a change from 20 years under prior law. Adding 15 years to the total term of imprisonment yields a new “unclassified felony” under § 973.01(2)(b)10. 75% of the term is the maximum period of confinement; 25% of the term is the extended supervision maximum. *State v. Mason*, 2004 WI App 176, 276 Wis.2d 434, 687 N.W.2d 526.

The underlying felony is a lesser included offense of felony murder. *State v. Carlson*, 5 Wis.2d 595, 608, 93 N.W.2d 355 (1958); *State v. Gordon*, 111 Wis.2d 133, 330 N.W.2d 564 (1983). Thus, the felony could be submitted to the jury as a lesser included offense if the evidentiary standard is met; it should not be charged as separate count. *Carlson* dealt with § 940.03 of the statutes in effect in 1957, defining “third

degree murder.” The current statute is essentially the same as the statute in Carlson, except it is limited to designated felonies. Carlson held that “the correct procedure” would be:

in the first instance to bring but a single charge of third-degree murder and for the court to submit to the jury verdicts of third-degree murder, arson, and not guilty. The arson could properly be submitted to the jury because it is an included crime within the meaning of sec. 939.66(1) of the Criminal Code. But the jury should be instructed to sign but one verdict, so that if they found the defendant guilty of third-degree murder they would make no finding with respect to the separate form of verdict of arson. On the other hand if they found the defendant not guilty of third-degree murder they might still find him guilty of arson, if they found that he set the fire but that it did not cause the death.
5 Wis.2d 595, 608 9.

The felony murder statute applies to a situation where a co-felon is killed by the intended victim of the felony. State v. Oimen, 184 Wis.2d 423, 516 N.W.2d 399 (1994). It also applies when a person present at the crime is killed by the intended victim of the felony. State v. Rivera, 184 Wis.2d 485, 516 N.W.2d 391 (1994). In both cases, the court held that the plain language of the statute applies: the defendants caused the death while committing the felony. The so-called agency approach that limits liability in similar situations in some jurisdictions was rejected.

In Oimen, the court also addressed the proper way to integrate party to the crime with felony murder: “. . . [W]e wish to point out that [Oimen] should not have been charged as a party to the crime of felony murder. Oimen was appropriately charged as a party to the underlying offense, attempted armed robbery. Charging felony murder as a party to the crime is redundant and unnecessary. A person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony.” 184 Wis.2d 423, 449. The court of appeals affirmed a conviction for felony murder, party to the crime, in a case decided shortly before Oimen. See State v. Chambers, 183 Wis.2d 316, 515 N.W.2d 531 (Ct. App. 1994). See Wis JI-Criminal 1032 and 1032 EXAMPLE for uniform instructions combining felony murder and party to the crime.

In State v. Briggs, 218 Wis.2d 61, 579 N.W.2d 783 (Ct. App., 1998), the court held that there is no crime of “attempted felony murder,” meaning that the defendant must be allowed to withdraw his negotiated plea of no contest to that offense. Briggs and his accomplice were interrupted by the victim as they were stealing her car and ordered her back into the house at gun point. They forced her to the floor, placed a pillow over her head, and Briggs’s companion shot her in the head, causing her very serious, permanent injuries. Briggs was charged as party to the crimes of attempted first degree intentional homicide, armed car theft, armed robbery, armed burglary, and criminal damage to property. He reached an agreement with the state to plead no contest to both counts of an amended information charging him with attempted felony murder and armed burglary, both as a party to crime. He later moved to vacate his conviction, contending that the circuit court lacked subject-matter jurisdiction because the crime of attempted felony murder does not exist. The court of appeals agreed, relying in part on State v. Carter, 44 Wis.2d 151, 155, 170 N.W.2d 681, 683 (1969), which had concluded that felony murder does not require intent, and therefore, “is not reconcilable with the concept of attempt.”

1. As amended by Wisconsin Act 209, § 940.03 specifies fourteen statutes defining crimes that can be the basis for a felony murder charge. The fourteen crimes are:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20. Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.204 Battery or threat to health care providers and staff
- § 940.225(1) First Degree Sexual Assault
- § 940.225(2)(a) Second Degree Sexual Assault
- § 940.30 False imprisonment
- § 940.31 Kidnapping
- § 943.02 Arson
- § 943.10(2) Aggravated Burglary
- § 943.23(1g) “Carjacking”
- § 943.32(2) Armed Robbery

As to violations of § 940.225(1), note that sexual contact or sexual intercourse under three different circumstances could be involved:

- (a) without consent and causing pregnancy or great bodily harm
- (b) without consent by use or threat of a dangerous weapon or article
- (c) without consent, while aided and abetted and by use or threat of force.

2. “While committing or attempting to commit” is the phrase used by § 940.03 to identify the connection between the underlying felony and the death. In applying the statutory phrase in the instruction, the Committee adopted the following rationale: the defendant causes the death if he or she was concerned in the commission of the felony and the commission of the felony caused the death. This is consistent with the rationale in the Oimen and Rivera cases, see the comment preceding note 1, and was approved as a correct statement of the law in State v. Krawczyk, 2003 WI App 6, ¶23, 259 Wis.2d 843, 657 N.W.2d 77. For a charge based on an attempted felony, the statement is modified to refer to death being caused by the attempt to commit the felony.

The version of the Wisconsin felony murder statute that preceded current § 940.03 required that the death be caused “as a natural and probable consequence of the commission of or attempt to commit a felony.” The nature of the connection between the felony and the death has been a source of considerable difficulty in many states which have felony murder statutes. See the Introductory Comment at Wis JI-Criminal 1000 and LaFave and Scott, *Substantive Criminal Law*, Vol. 2, pages 222-28 (West 1986).

Some of the difficulty in defining the connection between the causing of death and the commission of the felony has been the result of the wide range of felonies to which the felony murder rule could apply. Wisconsin’s statute addresses that problem by specifying a limited number of felonies. Thus, it could be argued that it is appropriate to extend liability for deaths caused by those felonies, even to those deaths that are more remote.

The other issue that may come up with respect to the cause issue involves relating the time of the death to the time the felony was committed. Since § 940.03 specifically includes attempts to commit the named felonies, the primary questions are likely to arise with respect to deaths caused after the felony is technically complete. For example, does the statute apply to deaths caused by the felon while fleeing the scene of the

crime? Statutes in some states include deaths caused “while fleeing immediately after committing” a felony (§ 2903.01, Ohio Rev. Codes) or those caused in the “immediate flight after committing” the felony (17 A § 202, Me. Rev. Stats.). Wisconsin has reached the same result by case law. See note 6, below.

The Committee concluded that questions about the connection between the felony and deaths caused after the felony is committed are best resolved by asking: Did the commission of the felony cause the death? As stated in the LaFave treatise: “. . . If this causal connection does exist, the killing may take place at some time before or after . . . whether there was sufficient causal connection between the felony and the homicide depends on whether the defendant’s felony dictated his conduct which led to the homicide.” LaFave and Scott, *Substantive Criminal Law*, Vol. 2, pages 222 and 227 (West 1986).

3. Here include the statute violated, for example: “The crime of first degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin. . .” This is the way the first sentence of the uniform instruction for the underlying felony will read.

4. This statement and the material immediately following are based on Wis JI-Criminal 580, Attempt. See the Comment and footnotes for that instruction for explanation of the issues relating to defining attempt.

5. The uniform jury instructions for the potential underlying felonies are as follows:

- for § 940.19 Battery – Wis JI-Criminal 1220-1226
- for § 940.195 Battery to an unborn child – Wis JI-Criminal 1227
- for § 940.20 Battery: special circumstances – Wis JI-Criminal 1228-1237
- for § 940.201 Battery or threat to witness – Wis JI-Criminal 1238
- for § 940.203 Battery or threat to judge – Wis JI-Criminal 1248
- for § 904.204(2) Battery or threat to a staff member of a health care facility – Wis JI-Criminal 1247A
- for § 904.204(3) Battery or threat to a health care provider – Wis JI-Criminal 1247B
- for § 940.225(1) First Degree Sexual Assault – Wis JI-Criminal 1200-1207
- for § 940.225(2)(a) Second Degree Sexual Assault – Wis JI-Criminal 1208, 1209
- for § 940.30 False imprisonment – Wis JI-Criminal 1275
- for § 940.31 Kidnapping – Wis JI-Criminal 1280-1282
- for § 943.02 Arson – Wis JI-Criminal 1404, 1405
- for § 943.10(2) Armed Burglary – Wis JI-Criminal 1422
- for § 943.23(1g) “Carjacking” – Wis JI-Criminal 1463
- for § 943.32(2) Armed Robbery – Wis JI-Criminal 1480, 1480A

If an attempt to commit one of these felonies is the basis for the charge, Wis JI-Criminal 1031 provides a model.

6. The Committee 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.

7. In State v. Oimen, 184 Wis.2d 423, 428, 516 N.W.2d 399 (1994), the Wisconsin Supreme Court concluded “as a matter of law that the phrase in § 940.03, ‘while committing or attempting to commit’, encompasses the immediate flight from a felony.” The court further directed that in the future, courts should utilize an instruction that includes the quoted language.

The Oimen decision upheld the felony murder conviction of the “mastermind” of an armed burglary which resulted in the shooting death of his co-felon by the intended victim of the burglary. The death occurred as the co felon fled the scene.