

1050 SECOND DEGREE INTENTIONAL HOMICIDE — § 940.05¹**Statutory Definition of the Crime**

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 intent to kill that person or another.²

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 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.³

2. The defendant acted with the intent to kill ((name of victim)) (another human being).⁴

"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.⁵

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 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.⁶

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.

ADD THE FOLLOWING IF IT APPEARS THAT EVIDENCE OF PROVOCATION MAY HAVE AN EFFECT ON THE JURY'S CONSIDERATION OF THE CASE:⁷

[Adequate provocation is not a defense to a charge of second degree intentional homicide.]

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 second degree intentional homicide.

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

COMMENT

Wis JI-Criminal 1050 was originally published in 1989. This revision was approved by the Committee in February 2006.

This instruction is for a violation of § 940.05, 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.

This offense, second degree intentional homicide, is essentially the same as manslaughter under prior law.

1. This instruction is drafted for the case where second degree intentional homicide is charged. Though the charging document need not indicate why the second degree rather than the first degree offense is being charged, this instruction is drafted for a case where evidence of adequate provocation is in the case. See note 7, below.

For a case where second degree intentional homicide is submitted as a lesser included offense (because of evidence of adequate provocation), see Wis JI-Criminal 1012.

A charge of second degree intentional homicide could also lie where "unnecessary defensive force" mitigates what would otherwise be first degree intentional homicide. However, the complete privilege of self-defense could be a defense to that charge and would be likely to be raised by the evidence. See Wis JI-Criminal 1052.

2. The statement of the facts necessary to constitute second degree intentional homicide is the same as the one for the facts that constitute the offense of first degree intentional homicide under § 940.01. The difference between the two offenses is that certain matters are defenses to the first degree offense but not to the second degree offense. Thus, "unnecessary defensive force" and "adequate provocation," for example, mitigate first degree intentional homicide to second degree intentional homicide. The absence of the mitigating circumstance becomes the additional fact necessary to constitute the more serious crime, furnishing the distinction between the two degrees of intentional homicide. By charging the defendant with the second

degree offense, the state is conceding that it could not have proven the absence of the mitigating circumstance had the first degree offense been charged.

3. 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 once 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.

4. The parenthetical reference to "another human being" is to be used in a case based on the theory that the defendant caused the death of the victim "with intent to kill another human being." Wisconsin's intentional homicide statutes incorporate the common law doctrine of "transferred intent." See note 3, Wis JI-Criminal 1010.

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 923B.

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. The statement in brackets ought to be unnecessary in most cases because in a prosecution under § 940.05, the state is required to prove only that the defendant caused the death of another with intent to kill. Adequate provocation is not a defense to a charge of second degree intentional homicide. Section 940.05(3). Evidence or argument advancing the proposition that the defendant is not guilty of second degree intentional homicide because of provocation is therefore inadmissible and improper. However, because evidence of provocation may be presented as part of the testimony describing the incident, it may be desirable to inform the jury that provocation has no effect on what the state must establish to support a guilty finding for second degree intentional homicide.