

**1052 SECOND DEGREE INTENTIONAL HOMICIDE: SELF-DEFENSE —
§ 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.

You must also consider whether the defendant' conduct was privileged under the law of self-defense.

Self-Defense

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another under the following circumstances:

- force is used for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with (his) (her) person by the other person; and,
- the person uses only the amount of force that (he) (she) reasonably believes is necessary to prevent or terminate the interference; and,
- the person may not intentionally use force which is intended or likely to cause death unless (he) (she) reasonably believes that such force is necessary to prevent imminent death or great bodily harm to (himself) (herself).²

As applied to this case, the effect of the law of self-defense is that if the defendant reasonably believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), the defendant is not guilty of second degree intentional homicide.

State' 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 three 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

3. The defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary prevent imminent death or great bodily harm to (himself) (herself).⁶

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' acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.⁷

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' 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.

Reasonable Belief That The Force Used Was Necessary

The third element of second degree intentional homicide requires that the defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent

imminent death or great bodily harm to (himself) (herself). This requires that the State prove any one of the following:⁸

- 1) that a reasonable person in the circumstances of the defendant would not have believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person; or
- 2) that a reasonable person in the circumstances of the defendant would not have believed (he) (she) was in danger of imminent death or great bodily harm; or
- 3) that a reasonable person in the circumstances of the defendant would not have believed that the amount of force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

The reasonableness of the defendant's belief must be determined from the standpoint of the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now. The standard is what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.

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 and did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary prevent imminent death or great bodily

harm to (himself) (herself), 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 1052 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 and where evidence of the complete privilege of self-defense is in the case. The absence of the privilege becomes a fact necessary to constitute the crime of second degree intentional homicide.

For a summary of the effect of self-defense in intentional homicide cases, see note 3, Wis JI-Criminal 1014. That instruction is drafted for a case where first degree intentional homicide is charged, there is evidence that the defendant acted in self defense, and the lesser included offense of second degree intentional homicide (unnecessary defensive force) is to be submitted to the jury.

2. These statements are based on the definition of the privilege of self-defense found in § 939.48.

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. The absence of the complete privilege of self-defense is a fact necessary to constitute the offense of second degree intentional homicide, assuming there is "some evidence" of the complete privilege in the case. See State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413, State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, and the discussion in footnotes 13 and 15, Wis JI-Criminal 1014.

7. 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.

8. The exercise of the privilege may be proved to be unreasonable in any one of three ways: by showing that the defendant's belief that he or she was preventing or terminating an unlawful interference was unreasonable; or, by showing that the defendant's belief that he or she was in danger of imminent death or great bodily harm was unreasonable; or, by showing that the amount of force used was unreasonable. See State v. Head, note 6, supra, and note 15, Wis JI-Criminal 1014.