

1060 SECOND DEGREE RECKLESS HOMICIDE — § 940.06**Statutory Definition of the Crime**

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.

State's Burden Of Proof

Before you may find the defendant guilty of second degree reckless 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.¹

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

"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

Jury's Decision

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 find the defendant not guilty.

COMMENT

Wis JI-Criminal 1060 was originally published in 1989 and revised in 2002. This revision was approved by the Committee in March 2015; it revised footnote 3 to reflect 2013 Wisconsin Act 307.

This instruction is for violations of § 940.06, 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. 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.

This offense, second degree reckless homicide, replaces what was called homicide by reckless conduct under prior law. It differs from first degree reckless homicide only in lacking the element of "circumstance which show utter disregard for human life." See Wis JI-Criminal 1020 for the instruction on first degree reckless homicide.

For a case involving second degree reckless homicide submitted as a lesser included offense where first degree reckless homicide is charged, see Wis JI-Criminal 1022.

Second degree reckless homicide is not a lesser included offense of homicide by intoxicated use of a vehicle under § 940.09. *State v. Lechner*, 217 Wis.2d 392, 576 N.W.2d 912 (1998). (*Lechner* concerned the 1993-94 Wisconsin Statutes, under which both § 940.06 and § 990.09 were Class C felonies.)

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 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.

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:

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.