1061 SECOND DEGREE RECKLESS HOMICIDE OF AN UNBORN CHILD — § 940.06(2)

Statutory Definition of the Crime

Second degree reckless homicide, as defined in § 940.06(2) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of an unborn child.

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 two elements were present.

Elements of the Crime that the State Must Prove

1. The defendant caused the death of an unborn child.

   "Cause" means that the defendant's act was a substantial factor in producing the death of the unborn child.[1]

   "Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.[2]

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

   "Criminally reckless conduct" means:

   - the conduct created a risk of death or great bodily harm to [an unborn child] [(or) to the woman who is pregnant with the unborn child] [(or) to another]; 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 an unborn child by criminally reckless conduct, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 1061 was originally published in 1999. This revision was approved by the Committee in April 2005 and included adoption of a new format.

This instruction is drafted for the offense defined in § 940.06(2), which was created by 1997 Wisconsin Act 295 [effective date: July 1, 1998]. The act revised all the general homicide statutes to apply to causing the death of an unborn child; several nonhomicide statutes were similarly revised.

Section 939.75, also created by Act 295, defines "unborn child" and sets forth several exceptions to the applicability of the revised statutes. Subsection (2)(b) recognizes the following exceptions:

- induced abortions [subd. 1.]
- acts committed in accordance with usual and customary standards of medical practice during diagnostic testing or therapeutic treatment by a licensed physician [sub. 2.]
- an act by a health care provider that is in accordance with a pregnant woman's power of attorney for health care, etc. [subd. 2h.]
- an act by a woman who is pregnant with an unborn child [subd. 3.]
- the lawful prescription, dispensation or administration, and the use by a woman of, any medicine, drug or device that is used as a method of birth control or is intended to prevent pregnancy. [subd. 4]

Subsection (3) provides that if any of these exceptions are "placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist. . . ." Thus, these exceptions are to be handled in the same manner as, for example, the mitigating circumstance of adequate provocation in cases of intentional homicide: once supported by some evidence, the absence of the exception becomes a fact the state must prove. The Committee decided not to draft instructions for the absence of these exceptions because it appeared to the Committee that their applicability would most likely be determined before charges were filed or at least before trial. Further, in cases involving reckless homicide, most of the exceptions might better be handled as relevant to the elements of the crime. That is, actions taken in accordance with customary standards of medical practice, for example, tend to show that the circumstances do not show utter disregard for life and that the conduct does not create an unreasonable risk of harm. However, § 939.75(3) is unequivocal on this point: if an exception is raised by the evidence at trial, "the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist. . . ."

1. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

2. This is the definition provided in § 939.75(1).

3. This is based on the definition of "criminal recklessness" provided in § 939.24(1) as amended by 1997 Wisconsin Act 295. It is broken into parts to emphasize the separate characteristics of "criminal recklessness."

In the context of this offense, the Committee concluded that the requirement that the defendant be "aware of that risk" means the following. If the conduct creates a substantial risk of death or great bodily harm only because the victim is pregnant, the defendant must be aware that the victim is pregnant. If the conduct creates a substantial risk of death or great bodily harm regardless of the victim being pregnant, the defendant need not

be aware that the victim is pregnant. To put it another way: the defendant must be aware that the conduct creates a substantial risk of death or great bodily harm; if that level of risk exists only because the victim is pregnant, the defendant must be aware that the victim is pregnant.