1072 ATTEMPTED FIRST DEGREE INTENTIONAL HOMICIDE: SELF-DEFENSE: ATTEMPTED SECOND DEGREE INTENTIONAL HOMICIDE — § 940.01(2)(b); § 940.05[1]; § 939.32

Crimes to Consider

The defendant in this case is charged with attempted first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of attempted first degree intentional homicide, you must consider whether or not the defendant is guilty of attempted second degree intentional homicide which is a less serious degree of criminal homicide.

Intentional Homicide

The crimes referred to as attempted first and second degree intentional homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of attempted homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates attempted intentional homicides into two degrees, there are certain elements which are common to each crime. Both attempted first and second degree intentional homicide require that:

- the defendant intended to kill another person; and
- the defendant did acts toward the commission of that crime which indicate unequivocally, under all the circumstances, that (he) (she) had formed that intent and would have caused the death of (name of victim) except for the intervention

of another person or some other extraneous factor.

It will also be important for you to consider the privilege of self-defense in deciding which crime, if any, the defendant has committed.

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]

If you find that the elements of attempted first or second degree intentional homicide have been proved in this case, the effect of the law of self-defense is as follows:

- The defendant is not guilty of either attempted first or second degree intentional homicide if the defendant:

  (1) reasonably believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person, and

(2) reasonably believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[3]

- The defendant is guilty of attempted second degree intentional homicide if the defendant actually believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), but the belief or the amount of force used was unreasonable.[4]
- The defendant is guilty of attempted first degree intentional homicide if the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[5]

Because the law provides that it is the State's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty for attempted first or second degree intentional homicide. If the State does not satisfy you that those facts are established by the evidence, you will be instructed to find the defendant not guilty.

The elements of each crime will now be defined for you in greater detail.

Attempted First Degree Intentional Homicide

Before you may find the defendant guilty of attempted first 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 Attempted First Degree Intentional Homicide

That the State Must Prove

1. The defendant intended to kill (name of victim).

   "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.[6]

2. The defendant did acts which demonstrate unequivocally, under all the circumstances, that (he)(she) had formed that intent and would have caused the death of (name of victim) except for the intervention of another person or some other extraneous factor.[7]

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

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

   An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

3. The defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself.[8]

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 be 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.[9]

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.

Actual Belief That The Force Used Was Necessary

The third element of attempted first degree intentional homicide requires that the defendant did not actually believe the force used was necessary to prevent imminent death

or great bodily harm to (himself) (herself). This requires the State to prove[10] either:

1) that the defendant did not actually believe (he) (she) was in imminent danger of death or great bodily harm; or

2) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to (himself) (herself).

When attempted first degree intentional homicide is considered, the reasonableness of the defendant's belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of attempted second degree intentional homicide.[11]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intended to kill (name of victim), and that the defendant's acts demonstrated unequivocally that the defendant intended to kill and would have killed (name of victim) except for the intervention of another person or some other extraneous factor, and that the defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of attempted first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty[12] of attempted first degree intentional homicide, and you must consider whether the defendant is guilty of

attempted second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of attempted first degree intentional homicide.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on the charge of attempted first degree intentional homicide before considering the offense of attempted second degree intentional homicide.[13] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of attempted first degree intentional homicide, you should consider whether the defendant is guilty of attempted second degree intentional homicide.

Attempted Second Degree Intentional Homicide

Before you may find the defendant guilty of attempted 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 Attempted Second Degree Intentional Homicide

That the State Must Prove

1. The defendant intended to kill (name of victim).
2. The defendant did acts which demonstrate unequivocally, under all the circumstances, that (he)(she) had formed that intent and would have caused the death of (name of victim) except for the intervention of another person or some

other extraneous factor.

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 to prevent imminent death or great bodily harm to (himself) (herself).[14]

You have already been instructed on the definitions of "intent to kill," "unequivocally," "another person," and "extraneous factor." The same definitions apply to your consideration of attempted second degree intentional homicide.

Reasonable Belief That the Force Used Was Necessary

The third element of attempted 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:[15]

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).

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[16] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[17] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intended to kill (name of victim), and that the defendant's acts demonstrated unequivocally that the defendant intended to kill and would have killed (name of victim) except for the intervention of another person or some other extraneous factor, and 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), you should find the defendant guilty of attempted second degree intentional homicide.

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of attempted second degree intentional homicide, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

COMMENT

Wis JI-Criminal 1072 was approved by the Committee in February 2005. This revision was approved by the Committee in December 2022; it amended the language concerning reasonable beliefs to be consistent with the definition provided in § 939.22(32). See footnote 16.

This instruction combines Wis JI-Criminal 1014 and 1070 to address the following situation:

- attempted first degree intentional homicide under §§ 939.32 and 940.01 is charged;
- attempted second degree intentional homicide based on unnecessary defensive force under §§ 939.32 and 940.05 is submitted as a lesser included offense; and,
- there is evidence of the complete privilege of self-defense in the case.

The Committee concluded that the same substantive standards and procedures apply to attempt cases as apply to cases involving completed crimes. The substantive standards for completed homicides involving claims of self-defense are set forth in State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413, which is discussed extensively in the notes to Wis JI-Criminal 1014.

When there is evidence of the complete privilege of self-defense, there will always be a sufficient evidentiary basis for instructing on "unnecessary defensive force" – what was called "imperfect self-defense" under pre-1989 Wisconsin law. If the jury is instructed on the complete privilege, "an independent analysis of the property of imperfect self-defense as a lesser included offense is not required." State v. Gomaz, 141 Wis.2d 302, 309, 414 N.W.2d 626 (1987), citing Ross v. State, 61 Wis.2d 160, 211 N.W.2d 827 (1973).

1. This instruction is for a case where attempted first degree intentional homicide is charged, there is evidence that the defendant acted in self-defense, and the lesser included offense of attempted second degree intentional homicide is to be submitted to the jury. The same substantive standards and procedural approach used for the completed crime are used here. Compare Wis JI-Criminal 1014.

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

3. The effect of the privilege of self-defense in a case where attempted first degree intentional homicide is charged is the same as for the competed crime and is as follows:

(a) if the exercise of the privilege was reasonable, both in inception and scope, the defendant is

not guilty of any crime;

(b) if the defendant actually believed it was necessary to use force in self defense, but acts unreasonably, the defendant is guilty of attempted second degree intentional homicide. He or she may act unreasonably in either of two ways:

i) the belief that it was necessary to act in self-defense may be unreasonable; or

ii) the amount of force used may be unreasonable

(c) if the defendant did not actually believe it was necessary to use force in self defense, the defendant is guilty of attempted first degree intentional homicide.

4. Section 940.01(2)(b) provides that causing the death by "unnecessary defensive force" mitigates what would otherwise be first degree intentional homicide to second degree intentional homicide: "Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable." The same standard applies to attempts.

5. As with the completed crime, the absence of the mitigating circumstance "no actual belief that the force used was necessary to prevent imminent death or great bodily harm" becomes a fact necessary to constitute the attempted first degree offense. As to the completed crime, see § 940.01(3) and State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. See notes 14 and 15, below, and note 5, Wis JI-Criminal 1014.

6. 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 1000 and 923B.

7. The statement of the facts necessary to constitute an "attempt" and the definitions of the relevant terms are based on those used in the standard attempt instruction. See Wis JI-Criminal 580. Also see Wis JI-Criminal 1070, Attempted First Degree Intentional Homicide.

8. See note 5, supra.

9. 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.

10. Section 940.01(2) recognizes four circumstances as affirmative defenses which mitigate first degree intentional homicide to second degree intentional homicide. The same standards apply to attempt cases. When the existence of an affirmative defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. See § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged. Moes v. State, 91 Wis.2d 756,

284 N.W.2d 66 (1979).

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

Two beliefs must be held by the defendant in order to mitigate attempted first degree intentional homicide on the basis of "unnecessary defensive force": a belief that the defendant (or another) was in imminent danger of death or great bodily harm; and a belief that the force used was necessary to defend against that danger. See § 940.01(2)(b). By proving that the defendant did not actually hold either one of these beliefs, the state may meet its burden of proving that "the facts constituting the defense did not exist." Section 940.01(3).

11. The statement of the alternative ways of satisfying this element is the same as that used in Wis JI-Criminal 1014. The 2002 revision of that instruction changed the element in response to the decision in State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Head modified State v. Camacho, 176 Wis.2d 860, 501 N.W.2d 380 (1993), by holding that there is no "objective threshold" for invoking the mitigating factor of "unnecessary defensive force." The "objective threshold" refers to a requirement that the defendant reasonably believe that he or she was preventing or terminating an unlawful interference. Head holds that it is sufficient for purposes of "unnecessary defensive force" that a defendant actually believe that the defensive force used was necessary. See note 13, Wis JI-Criminal 1014.

12. The instruction refers to "you must not find the defendant guilty . . ." rather than the typical "you must find the defendant not guilty . . ." in making the transition to consideration of the lesser included offense. This is to reflect the common practice of giving the jury only one not guilty verdict, along with guilty verdicts for the charged crime and the lesser included crime. Under that practice, the jury would not make a specific finding of "not guilty" on the charged crime – here, attempted first degree intentional homicide.

Thus, the jury would proceed to consider the lesser – here, attempted second degree intentional homicide – under two circumstances: 1) the jury unanimously agrees that the defendant is not guilty of attempted first degree intentional homicide; or , 2) the jury is unable to reach unanimous agreement on that charge. The next paragraph in the instruction addresses the latter situation.

13. This paragraph builds in part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

14. As with the completed crime, the absence of the complete privilege of self-defense is a fact necessary to constitute the offense of attempted second degree intentional homicide, assuming there is evidence of the complete privilege in the case. Since there already has been a finding of "some evidence" of the imperfect privilege, (now called "unnecessary defensive force"), there will almost always be a basis for submitting the existence of the complete privilege to the jury. As to completed crimes, see State v. Gomaz, 141 Wis.2d 302, 310, 414 N.W.2d 626 (1987), recognizing that the two comparable offenses under prior law "differ only in regard to the factual determination of 'reasonableness.'" Also see note 15, Wis JI-Criminal 1014.

15. 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 note 14, supra, and note 15, Wis JI-Criminal 1014.

16. This paragraph was modified in 2022 based on suggested amendments to Wis JI-CRIMINAL 1016 made by the Wisconsin Court of Appeals in State v. Ochoa, 2022 WI App 35, ¶60, 404 Wis.2d 261 978 N.W.2d 501. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

17. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627 28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to use doctrines other than self defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to "heat of passion, caused by reasonable and adequate provocation" rather than self defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines. However, some cases of this type may legitimately be considered under self defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).