

1125 ABORTION [FETICIDE]¹ — § 940.04(1)

CAUTION: IT IS GENERALLY CONCEDED THAT THE WISCONSIN CRIMINAL ABORTION STATUTE, § 940.04, IS UNCONSTITUTIONAL AS APPLIED TO MEDICAL PROCEDURES CONDUCTED WITH CONSENT.²

Statutory Definition of the Crime

Section 940.04(1) of the Criminal Code is violated by one, other than the mother, who intentionally destroys the life 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. (Name of mother) was pregnant with a living unborn child.

The term "unborn child" means a human being from the time of conception until it is born alive.³

2. The defendant intentionally destroyed the life of the unborn child.⁴

Meaning of "Intentionally"

The term "intentionally" means that the defendant either had the purpose to destroy the life of an unborn child, or was aware that (his) (her) conduct was practically certain to cause that result.⁵ In addition, the defendant must have known that the unborn child was living at the time of the act claimed by the State to have destroyed the life of the child.⁶

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent 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.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 1125 was originally published in 1966 and revised in 1977 and 1985. The 1985 revision responded to the decision in State v. Black, see discussion below. This revision was approved by the Committee in April 2006 and involved adoption of a new format and nonsubstantive changes to the text.

1. The term "feticide" was used in State v. Black, 188 Wis.2d 639, 643-44, 526 N.W.2d 132 (1994):

This is not an abortion case in the sense of Roe v. Wade. That is, this is not a case about a woman's right to terminate her pregnancy. This is not a case about a physician's right to perform the medical procedure of abortion. Further, this is not a case about when an unborn child "quickens" or becomes "viable."

This is a case about feticide.

Black is discussed in note 2, below.

2. It is generally conceded that § 940.04 is unconstitutional as applied to abortions performed by medical personnel with the consent of the mother of the child. See Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970), Larkin v. McCann, 368 F. Supp. 1352 (E.D. Wis. 1974), and Roe v. Wade, 410 U.S. 113 (1973). However, in State v. Black, 188 Wis.2d 639, 526 N.W.2d 132 (1994), the Wisconsin Supreme Court held that § 940.04(2)(a) could be constitutionally applied to a man who "allegedly caused the death of an unborn quick child . . . by violently assaulting the unborn child's mother." 188 Wis.2d 639, 646. The court held that:

. . . concerns . . . that sec. 940.04(2)(a) could be used against a woman or her physician (in the context of performing an abortion) are unfounded. Section 940.04(2)(a) cannot be used to charge for a consensual abortive type of procedure. By its own terms it cannot apply to a mother. See also

sec. 940.13 (abortion statutes cannot be enforced against any woman who obtains an abortion). Any attempt to apply sec. 940.04(2)(a) to a physician performing a consensual abortion prior to viability would be unconstitutional under Roe v. Wade. Further, any attempt to apply it to a physician performing a consensual abortion after viability would be inconsistent with the newer sec. 940.15 which limits such action and establishes penalties for it.

188 Wis.2d 639, 646.

Black addressed a charge under subsec. (2)(a) of § 940.04. This instruction is drafted for violations of sub. (1). The only difference between the two subsections is that sub. (2)(a) applies a more serious penalty where the defendant destroys the life of an unborn "quick" child.

3. This is the definition provided in § 940.04(6).
4. The previous version of this instruction included the following at this point:

If you are satisfied beyond a reasonable doubt that the unborn child was alive at a particular time, you may infer that it was alive at the time of the act of the defendant unless there is evidence tending to show that the child was dead at such time.

The Committee believes this is an accurate explanation of the reasoning process and may be included in the instruction if supported by the evidence. An instruction in equivalent terms was approved in Holt v. State, 17 Wis.2d 468, 481, 117 N.W.2d 626 (1962).

5. See § 939.23(3) and Wis JI-Criminal 923A and 923B.
6. The knowledge requirement is based on § 939.23(3) which provides that the use of "intentionally" in a criminal requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally.'"