1186A HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.02 GRAMS OR MORE — § 940.09(1)(b)

Statutory Definition of the Crime

Section 940.09(1)(b) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while that person has a prohibited alcohol concentration.[1]

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 [three] [four][2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[3] a vehicle.[4]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[5]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[6] in producing the death.

3. The defendant had a prohibited alcohol concentration at the time the defendant operated a vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[7]

[.02 grams or more of alcohol in 210 liters of the person's breath].

[.02 grams or more of alcohol in 100 milliliters of the person's blood].

NOTE: THE DEFENDANT'S ADMISSION OF THREE OR MORE PRIOR CONVICTIONS DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THIS ELEMENT AND PROCEED TO THE PARAGRAPH CAPTIONED "HOW TO USE THE TEST RESULT EVIDENCE."[8]

[4. The defendant had three or more convictions, suspensions, or revocations, as counted under § 343.307(1).][9]

IF THE FOURTH ELEMENT IS INCLUDED AND IF REQUESTED BY THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:[10]

[Evidence has been received that the defendant had prior convictions, suspensions, or revocations. This evidence was received as relevant to the status of the defendant's driving record, which is an issue in this case. It must not be used for any other purpose and, particularly, you should bear in mind that conviction, suspension, or revocation at some previous time is not proof that the defendant operated a motor vehicle with a prohibited alcohol concentration on this occasion.]

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[11]

IF AN ALCOHOL TEST IS INVOLVED, THE FOLLOWING MAY BE ADDED:[12]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[13]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all the 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.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[14] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[15] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[16]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[17] does not by itself provide a defense to the crime charged against the defendant.[18] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a prohibited alcohol concentration and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.][19]

COMMENT

This instruction was originally published as Wis JI-Criminal 1186.1 in 1992. It was revised and renumbered Wis JI-Criminal 1186A in 1998 and revised again in 2004. This revision was approved by the Committee in December 2019; it added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31.

This instruction has been revised for use for offenses involving a prohibited alcohol concentration level [PAC] of .02 or more, which applies to persons with three or more priors. See § 340.01(46m)(c), created by 1999 Wisconsin Act 109. [Effective date: January 1, 2001.]

The fact of having three or more priors is included as a bracketed fourth element in this instruction. It is an element because the existence of priors changes the substantive definition of the crime from an alcohol concentration of .08 or more to one of .02 or more. It is in brackets because it is not to be submitted to the jury if the defendant admits having the priors. See footnotes 2 and 8, below. When priors change the offense from a forfeiture to a crime or increase the criminal penalty, they need not be submitted to the jury. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

The instruction previously published as Wis JI-Criminal 1186A dealt with a PAC of .08 or more. 2003 Wisconsin Act 30 changed the generally applicable PAC level to .08 or more for persons with 2 or fewer prior convictions, suspensions or revocations, as counted under § 343.307(1). [Effective date: September 30, 2003.] Wis JI-Criminal 1186 has been revised to apply to those cases.

See Wis JI-Criminal 1185 for the related offense of causing death while operating under the influence, as defined in § 940.09(1)(a). For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. See sub. (1c)(a) and sub. (1c)(b). Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09 was revised by 2019 Wisconsin Act 31. The offense definition did not change but sub. (1c)(a) and (b) were amended to require a mandatory minimum term of five years confinement unless the court finds "a compelling reason and places its reason on the record." [The effective date of Act 31 is November 22, 2019; but this date does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the department of transportation or sentencing court.]

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 12 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 1188, which has been withdrawn. The

constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the statutory definition of "prohibited alcohol concentration," see note 1, Wis JI-Criminal 1186.

2. The instruction is drafted to allow for use with either three or four elements, depending on whether the fourth element, relating to the defendant having three or more prior convictions, suspensions or revocations, is submitted to the jury. See discussion at note 8, below.

3. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

4. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. See note 5, Wis JI-Criminal 1186.

7. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

8. The fourth element has been placed in brackets because the Committee concluded that the "status element" of this offense must be addressed in the same manner as for .08 offenses under the version of the law addressed in State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997). In Alexander, the Wisconsin Supreme Court referred to this element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions or revocations [the relevant number under prior law], the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 628, 646. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 628, 651. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 628, 649-50.

The court gave explicit direction to the trial courts as to how to handle this situation:

> "When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The 'prohibited alcohol concentration' means 0.08 . . ."
> 214 Wis.2d 628, 651-52.

By placing the "status element" in brackets, the Committee intends to implement the approach approved in Alexander. If the defendant admits the "status element," the instruction should be given with three elements: causing death, by operating a vehicle, and, having an alcohol concentration of more than .02. If the defendant does not admit the "status element," the instruction should be given with a fourth element: having three or more prior convictions, suspensions or revocations as counted under § 343.307(1).

Because the defendant's admission removes an element from the jury's consideration, the record should reflect the defendant's acknowledgment that a jury determination is, in effect, being waived on the "status element."

9. This element is not to be included if the defendant admits the priors. See note 8, supra.

The text of the fourth element is based on the definition of "prohibited alcohol concentration" in § 340.01(46m)(b). The types of convictions, suspensions, and revocations that are counted under § 343.307(1) are convictions for operating while intoxicated or suspensions or revocations for refusal to submit to chemical tests for alcohol. The priors may include offenses in other jurisdictions. The text of § 343.307(1) is provided in Wis JI-Criminal 2600 Introductory Comment.

The Committee concluded that the instruction should use the statutory language "as counted under § 343.307(1)" because evidence of the defendant's driving record will usually be submitted with testimony that the prior offenses are those that are counted under the statute.

10. Making the fact of prior convictions, etc., an issue for the jury creates the possibility that a jury may make improper use of the evidence relating to the defendant's driving record. Therefore, upon request, an instruction should be given on the limited use to be made of the driving record evidence. In State v. Ludeking, 195 Wis.2d 132, 536 N.W.2d 119 (Ct. App. 1995), the court pointed to this cautionary paragraph as a way to offset the inevitable prejudicial impact of presenting this evidence to the jury.

11. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of .02 or more any prima facie effect. So there is no statutory authority for the typical statement that discusses test results like the ones included in the instructions for .08 offenses. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising

due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

14. See note 12, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

15. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

16. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

17. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

18. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 16, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

19. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

