1187 HOMICIDE BY OPERATION OF A VEHICLE WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE — § 940.09(1)(am)

Statutory Definition of the Crime

Section 940.09(1)(am) 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 the person has a detectable amount of a restricted controlled substance in his or her blood.

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 elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[1] a vehicle.[2]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[3]

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[4] in producing the death.

3. The defendant had a detectable amount of a restricted controlled substance in his or her blood at the time the defendant operated a vehicle.

   (Name restricted controlled substance) is a restricted controlled substance.[5]

GIVE THE FOLLOWING IF DELTA-9-TETRAHYDROCANNABINOL IS THE ALLEGED RESTRICTED CONTROLLED SUBSTANCE.

[Delta 9 tetrahydrocannabinol is considered a restricted controlled substance if it is at a concentration of one or more nanograms per milliliter of a person's blood.]

How to Use the Test Result Evidence

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the operating.[6]

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied beyond a reasonable doubt that there was a detectable amount of (name restricted controlled substance) in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the operating, but you are not required to do so. You, the jury, are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the alleged operating unless you are satisfied of that fact beyond a reasonable doubt.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[7]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three 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),[8] 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 detectable amount of (name restricted controlled substance) in his or her blood.

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[9] that this defense is established.

"By the greater weight of the evidence" means 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.[10]

[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[11] does not by itself

provide a defense to the crime charged against the defendant.[12] 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 detectable amount of (name restricted controlled substance) in his or her blood.]

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.[13]]

COMMENT

Wis JI Criminal 1187 was originally published in 2007 and revised in 2010, 2019, and 2021. The 2019 revision added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31. The 2021 revision added an alternative element to the instruction and modified footnotes 5 and 6 to incorporate changes made by the 2019 Wisconsin Act 68. This revision was approve by the Committee in December 2023; it added to the comment.

This instruction is drafted for violations of § 940.09(1)(am), causing death while operating a vehicle with a detectable amount of a restricted controlled substance. The statute was created by 2003 Wisconsin Act 97 and applies to offenses committed on or after the Act's effective date: December 19, 2003. For a general discussion of Act 97, see Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

This instruction may be useful as a model for violations of § 346.63(2)(a)3., which addresses causing great bodily harm and causing injury by operating with a detectable amount of a restricted controlled substance. There is no uniform instruction for this offense.

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 detectable amount of a restricted controlled substance in his or her blood . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 8 and following. 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.

Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. 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.

2. 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.

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

4. The Committee 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.

The statute does provide the defendant with an affirmative defense in certain situations; see footnote 8 below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been operating

"with a detectable amount" and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative 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.

5. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a detectable amount of the substance in his or her blood remains a jury question.

Section 340.01(50m) defines "restricted controlled substance" as follows:

(50m) 'Restricted controlled substance' means any of the following:

(a) A controlled substance included in schedule I other than tetrahydrocannabinol.
(b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
(c) Cocaine or any of its metabolites.
(d) Methamphetamine.
(e) Delta 9 tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person's blood.

2019 Act 68 amended the definition of delta-9-tetrahydrocannabinol to require that delta-9-tetrahydrocannabinol be at a concentration of one or more nanograms per milliliter of a person's blood. Prior to Act 68, the statute required only a detectable amount of delta-9-tetrahydrocannabinol.

6. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI-Criminal 2663. [The Committee's general approach to instructing on test results is discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper to use it for tests in "restricted controlled substance" cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for "detectable amount of a restricted controlled substance" cases is not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

> 885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

As for the admissibility of evidence concerning the concentration of delta-9- tetrahydrocannabinol in a person's blood, sec. 885.235(5), created by 2019 Wisconsin Act 68, reads as follows:

> [t]he only form of chemical analysis of a sample of human biological material that is

admissible as evidence bearing on the question of whether or not the person had delta-9-tetrahydrocannabinol at a concentration of one or more nanograms per milliliter of the person's blood is a chemical analysis of a sample of the person's blood.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of driving;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of driving.

As to the second difference – admissibility – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence" strongly implies that the analysis is admissible. As to the third difference – connection with the time of driving – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence on the issue of the person having . . ." may express a legislative intent that the analysis be admissible to prove the material issue "that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . ." as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the "prima facie" effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue that it is offered to prove.

7. 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 had not been under the influence of an intoxicant . . ." 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.

8. See note 7, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

9. 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."

10. 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.

11. 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.

12. 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 10, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

13. This statement is included to ensure 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.