1345 FIRST DEGREE RECKLESSLY ENDANGERING SAFETY — § 941.30(1)

Statutory Definition of the Crime

First degree recklessly endangering safety, as defined in § 941.30(1) of the Criminal Code of Wisconsin, is committed by one who recklessly endangers the safety of another human being under circumstances that show utter disregard for human life.

State's Burden of Proof

Before you may find the defendant guilty of first degree recklessly endangering safety, 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 endangered the safety of another human being.

2. The defendant endangered the safety of another by criminally reckless conduct.

"Criminally reckless conduct" means:[1]

- the conduct created a risk of death or great bodily harm to another person; 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.[2]

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent

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or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.[3]

3. The circumstances of the defendant's conduct showed utter disregard[4] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all other facts and circumstances relating to the conduct.[5]

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[6]

[Consider also the defendant's conduct after the act alleged to have endangered safety to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the act alleged to have endangered safety occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense were present, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 1345 was originally published in 1962 and revised in 1989, 1993, 2002, 2003, 2009, 2012, and 2015. The 2012 revision added the material at footnote 6. The 2015 revision revised footnote 2 to reflect 2013 Wisconsin Act 307. The Comment was updated in April 2019. A "Reporter's Note" was removed in 2020.

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This instruction is for a violation of § 941.30(1), as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The amended statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

First degree recklessly endangering safety replaces what was called "endangering safety by conduct regardless of life" under prior law.

The homicide revision also created § 941.30(2), Second Degree Recklessly Endangering Safety. See Wis JI-Criminal 1347.

In State v. Kloss, 2019 WI App 13, 386 Wis.2d 314, 925 N.W.2d 563, the court of appeals held that solicitation of first-degree recklessly endangering safety is a crime and that it is a lesser included offense of solicitation of first-degree reckless injury. Therefore convicting the defendant of both offenses was multiplicitous.

1. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

2. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

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Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

3. See § 939.22(14) and Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

4. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. However, if voluntary intoxication prevents the actor from being aware of the risk, such intoxication is not a defense. Section 939.24(3) provides:

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

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> Note to § 939.24(3), 1987 Senate Bill 191.

In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

5. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

> First-degree reckless homicide is analogous to the prior offense of 2nd-degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness,

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> is required for liability. See s. 939.24, stats. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).
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> Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to aggravated reckless homicide offense.

A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further clarified." Attempts to explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978); Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); and, Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15, 339 Wis.2d 170, 810 N.W.2d 226, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the

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> victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

> Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). Under this revision, the analogs of those crimes, i.e., first-degree reckless and 2nd-degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01(3), stats., are inapplicable.
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> Judicial Council Note to § 940.02, 1987 Senate Bill 191.

6. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

> ¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

> ¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis

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JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The committee decided it was not necessary to include a reference to conduct before or during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.

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