1021 FIRST DEGREE RECKLESS HOMICIDE — 940.02(2)[1]

Statutory Definition of the Crime

First degree reckless homicide, as defined in § 940.02(2) of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by delivery[2] of a controlled substance in violation of § 961.41, which another human being uses and dies as a result of that use.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following five elements[4] were present.

Elements of the Crime that the State Must Prove

1. The defendant delivered[5] a substance.

   "Deliver" means to transfer something from one person to another.[6]

2. The substance was by itself or contained (name controlled substance).[7]

   [(Name statutorily listed controlled substance) is a controlled substance, the delivery of which is prohibited by law.]

3. The defendant knew or believed that the substance was by itself or contained [(name controlled substance)] [a controlled substance. A controlled substance is a substance the delivery of which is prohibited by law.][8]

You cannot look into a person's mind to determine knowledge or belief. You may determine knowledge or belief directly or indirectly from all the evidence concerning this offense. You may consider any statements or conduct of the defendant which indicate state of mind. You may find knowledge or belief from such conduct or statements, but you are not required to do so.

4. (Name of victim) used the substance alleged to have been delivered by the defendant.

5. (Name of victim) died as a result of the use of that substance.

This requires that the use of the controlled substance was a substantial factor in causing the death.[9]

[A substantial factor need not be the sole or primary factor causing death.][10]

[There may be more than one cause of death. The use of one substance may produce it, or the use of two or more substances might jointly produce it.][11]

IF THE SUBSTANCE ALLEGED TO HAVE BEEN DELIVERED BY THE DEFENDANT IS A COMPOUND, MIXTURE, DILUENT, OR OTHER SUBSTANCE MIXED OR COMBINED WITH A CONTROLLED SUBSTANCE, ADD THE FOLLOWING:

[Whether the substance is a (controlled substance) (controlled substance analog) by itself, or a mixture or combination of a (controlled substance) (controlled substance analog) with any compound, mixture, diluent or other substance is not relevant as long as (name of victim) died as a result of using the substance.][12]

IF DELIVERY BY MORE THAN ONE PERSON IS INVOLVED, ADD THE FOLLOWING:[13]

[It is not required that the defendant delivered the substance directly to (name of victim). If possession of the substance was transferred more than once before it was used by (name of victim), each person who transferred possession of that substance has delivered it.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant delivered (name controlled substance), that the defendant knew that the substance was by itself or contained [(name controlled substance)] [a controlled substance],[14] that (name of victim) used the substance delivered by the defendant, and that (name of victim) died as a result of that use, you should find the defendant guilty of first degree reckless homicide.

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

COMMENT

Wis JI-Criminal 1021 was originally published in 1989 and revised in 1992, 1998, 2006, 2009, 2011, and 2022. The 2022 revision amended language in element 5 to clarify the meaning of "substantial factor" as the term pertains to causation, as well as mixed or combined substances. This revision was approved by the Committee in December 2023; it added to the comment.

The 1997 revision addressed changes made by 1995 Wisconsin Act 448. [Effective date: July 9, 1996.] The primary changes were:

(1) renumbering the controlled substance statutes from Chapter 161 to Chapter 961;
(2) adding "distributing" to the conduct prohibited by § 940.02(2); and
(3) extending the coverage of the statute to "controlled substance analogs."

The instruction continues to refer only to "deliver" because that term seems to include "distribute" as well. "Distribute" is defined in § 961.01(9) as "to deliver other than by administering or dispensing. . . ." For offenses involving "manufacture," see Wis JI-Criminal 6021 and use the first and second elements of that instruction in place of the first element provided here. For offenses involving a "controlled substance analog," see Wis JI-Criminal 6005, which provides the definition of the term, and Wis JI-Criminal 6020A, which illustrates how an instruction must be modified to employ the "analog" alternative.

Possession of a controlled substance is not a lesser included offense of reckless homicide as defined in § 940.02(2)(a). State v. Clemons, 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991). In Clemons, the court held that the strict statutory elements test for lesser included offenses was not satisfied: one can "deliver" without "possessing," as where a doctor provides drugs to a person by writing an illegitimate prescription. 164 Wis.2d 506, 512.

Charging a defendant with violating § 940.02(2) and with contributing to the delinquency of a child resulting in death under § 948.40(4)(a) is not multiplicitous. The offenses each require proof of a fact that the other does not, and there is no evidence that the legislature did not intend multiple punishments. Further, a violation of § 948.40(4)(a) is not "a less serious type of criminal homicide" under § 939.66(2) and thus is not a lesser included offense of first degree reckless homicide. State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909.

A defendant who intentionally assists another person in purchasing a controlled substance may be liable as an aider and abettor to reckless homicide as defined in § 940.02(2)(a) if the buyer dies as a result of using the substance. State v. Hibbard, 2022 WI App 53, 404 Wis. 2d 668, 982 N.W.2d 105. Hibbard rejected the defendant's claim that the interplay of §§ 939.05 and 940.02(2)(a) rendered the statutes unconstitutionally vague by not providing sufficient notice that his conduct could make him liable for the death caused by the drugs delivered by the dealer. The court held the statutes inform persons that assisting another in the delivery of a controlled substance exposes the actor to liability for reckless homicide if the person who assists in completing the delivery (1) knows the person making the actual delivery is committing a crime or intends to do so, and (2) intends their conduct to assist in the commission of the crime. "As applied here, the statutes informed Hibbard that, because he knew [the dealer] intended to sell heroin to [the decedent], anything he did to facilitate that sale with the intent that the sale occur could subject him to liability for a homicide resulting from a person's use of the drugs that were sold." 404 Wis. 2d 668, ¶32.

1. Section 940.02(2) defines a crime denominated "first degree reckless homicide," which applies to causing death by furnishing controlled substances. This offense was not part of the original homicide revision bill but was created by separate legislation referred to at the time as the "Len Bias Law." (See 1987 Wisconsin Act 339.) It was reenacted as part of the homicide revision.

2. This instruction is drafted for "delivery" of a controlled substance. For a case involving "manufacture," see Wis JI-Criminal 6021 and use the first and second elements of that instruction in place of the first element provided here. Also, see the discussion of "distribute" above in the comment preceding note 1.

3. This statement of the offense is essentially the same as the one found in § 940.02(2)(a). A different variation is found in subsection (2)(b), which applies where the defendant causes death by "administering or assisting in administering" a controlled substance.

The balance of the instruction recasts the statutory statement of the offense by first establishing the requirements for a delivery in violation of § 961.41 and then adding the requirement that the victim dies as a result of using the substance so delivered.

4. The first three elements are based on those required for delivery of a controlled substance under § 961.41(1). See Wis JI-Criminal 6020. The fourth element uses the language of § 940.02(2)(a).

5. See note 2, supra.

6. This definition was adopted from that found in § 961.01(6), which reads as follows:

"Deliver" or "delivery" means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

The statute applies where the controlled substance is diluted after delivery and to each person who transfers the substance. Section 940.02(2)(a) provides that "[t]his paragraph applies:

> . . . .
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> 2. Whether or not the controlled substance or controlled substance analog is mixed or combined with any compound, mixture, diluent or other substance after the violation of s. 961.41 occurs.
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> 3. To any distribution or delivery described in this paragraph, regardless of whether the distribution or delivery is made directly to the human being who dies. If possession of the controlled substance . . . is transferred more than once prior to the death as described in this paragraph, each person who distributes or delivers the controlled substance or controlled substance analog in violation of s. 961.41 is guilty under this paragraph."

7. Section 940.02(2) applies to controlled substances listed in Schedule I or II, which are listed in §§ 961.14 and 961.16, respectively. The statute also applies to delivery of "a controlled substance analog of a controlled substance included in Schedule I or II or of ketamine or flunitrazepam." See 940.02(2)(a). The instruction has been drafted to provide for the insertion of the specific name of the substance. It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the alleged substance tested positive for cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the alleged substance tested positive for "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," *not* that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

Whether the defendant actually delivered the substance remains a question for the jury (see the first element).

8. For offenses under § 961.41, the defendant must know that the substance was a controlled substance. State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973). Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978).

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they know the substance is a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

It is sometimes a problem in controlled substance cases that the substance is known by its street name rather than by its proper scientific or chemical name. In such a case, Wis JI-Criminal 6020 recommends adding the following:

> This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance), and that the defendant knew or believed the substance he is alleged to have delivered was (street name), you may find that he knew or believed the substance was a controlled substance.

9. The Committee has 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:

> 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.
> See note 9, supra.

Section 940.02(2) states the causal requirement in two different ways. It requires that the defendant "cause the death of another human being" by, for example, manufacture of a controlled substance which a person uses "and dies as a result of that use." The statute is one of several criminal statutes using "results in" or "as a result" to establish the causal connection between the actor's conduct and the prohibited result. The Committee has concluded that "as a result" or "results in" should be interpreted to mean "cause," traditionally defined in terms of "substantial factor." This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court construed "results in" as used in § 346.17(3).

The court held that the statute was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant's conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

10. Several cases have addressed the definition of "substantial factor." In the context of felony murder, the Wisconsin Supreme Court has held that a "'substantial factor' need not be the sole cause of death." See State v. Oimen, 184 Wis.2d 423, 516 N.W.2d 399 (1994). In State v. Owen, 202 Wis.2d 620, 631, 551 N.W.2d 50, (Ct. App. 1996), the court concluded, "A substantial factor need not be the sole or primary factor causing the great bodily harm."

In State v. Miller, 231 Wis.2d 447, 457, 605 N.W.2d 567 (1999) the court determined that the Oimen and Owen holdings are not inconsistent with each other. The Miller court noted, "Both cases use a definite article in explaining that a substantial factor need not be limited to one sole or primary cause" . . . "[O]ur reading of Oimen and Owen convinces us that a substantial factor contemplates not only the immediate or primary cause, but other significant factors that lead to the ultimate result." Id., at 457.

In Burrage v. United States, 571 U.S. 204, 134 S.Ct. 881 (2014), the U.S. Supreme Court interpreted a federal statute – 21 USC § 844(a)(1), (b)(1)A-C – which provides for a 20-year mandatory minimum sentence where death or great bodily harm results from the use of a controlled substance. The Court held that "results from" means "actual cause" and that "actual cause" means that the harm would not have occurred but-for the defendant's conduct. The Court rejected the government's argument [a position also adopted by several federal circuits] that it was sufficient if the defendant's conduct was a "contributing cause" of the harm. In rejecting that argument, the court referred to [but did not necessarily accept] the government's characterization that "contributing cause" and "substantial factor" cause were the same thing. That reference should have no impact on Wisconsin law because Burrage is a decision interpreting a federal criminal statute and is not binding in Wisconsin. Further, the Wisconsin "substantial factor" test requires "actual" or "physical" cause [and thus would satisfy the concerns addressed in Burrage if that decision did apply].

11. See note 10, supra. The bracketed language is an adaptation of language provided in Wis JI-Criminal 901 concerning cases where there is evidence of more than one cause.

12. See note 9, supra.

13. The paragraph in brackets is intended to explain the rule stated in § 940.02(2)(a):

> (a) This paragraph applies:
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> . . .
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> 3. To any distribution or delivery described in this paragraph, regardless of whether the distribution or delivery is made directly to the human being who dies. If possession of the controlled substance . . . is transferred more than once prior to the death as described in this paragraph, each person who distributes or delivers the controlled substance or controlled substance analog in violation of s. 961.41 is guilty under this paragraph.

Because of this rule—referred to as the "chain of delivery" method of proof—a trial on a charge under § 940.02(2)(a) may involve evidence of multiple transfers of a controlled substance by multiple persons. In addition, if the charge is coupled with charges of deliveries of a controlled substance in violation of § 961.41 that did not cause death, the trial will include evidence of those deliveries. In such cases, the court must take care to instruct the jury only on the method (or methods) of proof of the § 940.02(2)(a) charge that is sufficiently supported by trial evidence. See State v. Harvey, 2022 WI App 60, 405 Wis. 2d 322, 983 N.W.2d 700 (it was error to instruct the jury on chain of delivery and aiding-and-abetting methods of proof because those methods of proof were not supported by sufficient evidence; however, the error did not require a new trial because the jury was also instructed on the direct delivery method and there was sufficient evidence the defendant directly delivered the controlled substance to the victim).

14. See note 8, supra.