

940.23. Reckless injury

(1) FIRST-DEGREE RECKLESS INJURY.

(a) Whoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of a Class D felony.

(b) Whoever recklessly causes great bodily harm to an unborn child under circumstances that show utter disregard for the life of that unborn child, the woman who is pregnant with that unborn child or another is guilty of a Class D felony.

(2) SECOND-DEGREE RECKLESS INJURY.

(a) Whoever recklessly causes great bodily harm to another human being is guilty of a Class F felony.

(b) Whoever recklessly causes great bodily harm to an unborn child is guilty of a Class F felony.

History:

1987 a. 399; 1997 a. 295; 2001 a. 109.

Case Note:

First-degree reckless injury, s. 940.23(1), is not a lesser included offense of aggravated battery. *State v. Eastman*, 185 Wis. 2d 405, 518 N.W.2d 257 (Ct. App. 1994).

Sub. (1) (a) cannot be applied against a mother for actions taken against a fetus while pregnant as the applicable definition of human being under s. 939.22(16) is limited to one who is born alive. Sub. (1) (b) does not apply because s. 939.75(2) (b) excludes actions by a pregnant woman from its application. *State v. Deborah J.Z.* 228 Wis. 2d 468, 596 N.W.2d 490 (Ct. App. 1999), 96-2797.

Utter disregard for human life is not a subpart of the intent element and need not be proven subjectively. It can be proven by evidence relating to the defendant's state of mind or by evidence of heightened risk or obvious potentially lethal danger. However proven, utter disregard is

measured objectively on the basis of what a reasonable person would have known. *State v. Jensen*, 2000 WI 84, 236 Wis. 2d 521, 613 N.W.2d 170, 98-3175.

Utter disregard requires more than a high degree of negligence or recklessness. To evince utter disregard, the mind must not only disregard the safety of another but be devoid of regard for the life of another. A person acting with utter disregard must possess a state of mind that has no regard for the moral or social duties of a human being. *State v. Miller*, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188, 07-1052.

In evaluating whether there is sufficient proof of utter disregard for human life, factors to be considered include the type of act, its nature, why the perpetrator acted as he/she did, the extent of the victim's injuries, and the degree of force that was required to cause those injuries. Also considered are the type of victim and the victim's age, vulnerability, fragility, and relationship to the perpetrator, as well as whether the totality of the circumstances showed any regard for the victim's life. *State v. Miller*, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188, 07-1052.

Pointing a loaded gun at another is not conduct evincing utter disregard if it is otherwise defensible, even if it is not privileged. When conduct was to protect the defendant and his friends, although not found to be self defense, the conduct is inconsistent with conduct evincing utter disregard. *State v. Miller*, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188, 07-1052.

Jensen does not create a rule assigning less weight to a defendant's after-the-fact conduct. When evaluating whether a defendant's conduct reflects utter disregard for human life, the fact-finder should examine the totality of the circumstances surrounding the crime, considering all relevant conduct before, during, and after a crime, giving each the weight it deems appropriate under the circumstances. *State v. Burris*, 2011 WI 32, 333 Wis. 2d 87, 797 N.W.2d 430, 09-0956.

