AMENDED

FILED

MAY ~ 9 2024

KENOSHA COUNTY
CLERK OF CIRCUIT COURT

STATE OF WISCONSIN, CIRCUIT COURT, ~~RACINE~~ Kenosha COUNTY

State of Wisconsin, Plaintiff,
-vs-

CHRYSTUL KIZER
Defendant's Name

Plea Questionnaire/ Waiver of Rights

Case No. 18CF643

I am the defendant and intend to plea as follows:

Charge/Statute	Plea	Charge/Statute	Plea
Ct. 1: 2nd Deg. Reckless Homicide - Use of a Dangerous Weapon	☒ Guilty ☐ ~~No Contest~~ Kizer chrystul 5/9		☐ Guilty ☐ No Contest
	☐ Guilty ☐ No Contest		☐ Guilty ☐ No Contest

☐ **See attached sheet for additional charges**

I am 23 years old. I have completed 12 years of schooling.

I ☐ do ☒ do not have a high school diploma, GED, or HSED.
I ☒ do ☐ do not understand the English language.
I ☒ do ☐ do not understand the charge(s) to which I am pleading.
I ☒ am not ☐ am currently receiving treatment for a mental illness or disorder.
I ☐ have not ☒ have had any alcohol, medications, or drugs within the last 24 hours.

Constitutional Rights

I understand that by entering this plea, I give up the following constitutional rights:

☒ I give up my right to a trial.
☒ I give up my right to remain silent and I understand that my silence could not be used against me at trial.
☒ I give up my right to testify and present evidence at trial.
☒ I give up my right to use subpoenas to require witnesses to come to court and testify for me at trial.
☒ I give up my right to a jury trial, where all 12 jurors would have to agree that I am either guilty or not guilty.
☒ I give up my right to confront in court the people who testify against me and cross-examine them.
☒ I give up my right to make the State prove me guilty beyond a reasonable doubt.

I understand the rights that have been checked and give them up of my own free will.

Understandings

- I understand that the crime(s) to which I am pleading has/have elements that the State would have to prove beyond a reasonable doubt if I had a trial. These elements have been explained to me by my attorney or are as follows: ☒ **See attached sheet.**
- I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty. The maximum penalty I face upon conviction is: 30 years, $100,000 fine, or both
- I understand that the judge must impose the mandatory minimum penalty, if any. The mandatory minimum penalty I face upon conviction is: None
- I understand that the presumptive minimum penalty, if any, I face upon conviction is: None

The judge can impose a lesser sentence if the judge states appropriate reasons.

Understandings

- I understand that if I am placed on probation and my probation is revoked:
  - If sentence is withheld, the judge could sentence me to the maximum penalty, or
  - If sentence is imposed and stayed, I will be required to serve that sentence.
- I understand that if I am not a citizen of the United States, my plea could result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law.
- I understand that if I am convicted of any felony, I may not vote in any election until my civil rights are restored.
- I understand that if I am convicted of any felony, it is unlawful for me to possess a firearm.
- I understand that if I am convicted of any violent felony, it is unlawful for me to possess body armor.
- I understand that if I am convicted of a serious child sex offense, I cannot engage in an occupation or participate in a volunteer position that requires me to work or interact primarily and directly with children under the age of 16.
- I understand that if any charges are read-in as part of a plea agreement they have the following effects:
  - Sentencing – although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased.
  - Restitution – I may be required to pay restitution on any read-in charges.
  - Future prosecution – the State may not prosecute me for any read-in charges.
- I understand that if the judge accepts my plea, the judge will find me guilty of the crime(s) to which I am pleading based upon the facts in the criminal complaint and/or the preliminary examination and/or as stated in court.

Voluntary Plea

I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement. The plea agreement will be stated in court or is as follows: ☐ **See attached**

Amend Ct. 1 to 2nd Deg. Reckless Homicide - UDW, Dismiss Ct. 2, 4, and 5, Read-in Ct. 3, Read-in Ct. 1 in 24CF100, Dismiss balance of 24CF100 outright, State will recommend prison, silent on amount, silent on Consecutive or Concurrent, Defense FTA

Defendant's Statement

I have reviewed and understand this entire document and any attachments. I have reviewed it with my attorney (if represented). I have answered all questions truthfully and either I or my attorney have checked the boxes. I am asking the court to accept my plea and find me guilty.

▶ Chrystul Kizer
Defendant's Signature

Chrystul Kizer
Name Printed or Typed

Address

Email Address

Telephone Number

5/3/24
Date

Attorney's Statement

I am the attorney for the defendant. I have discussed this document and any attachments with the defendant. I believe the defendant understands it and the plea agreement. The defendant is making this plea freely, voluntarily, and intelligently. I saw the defendant sign and date this document.

▶ Greg Holdahl
Attorney's Signature

Greg Holdahl
Name Printed or Typed

420 6th St. Racine, WI 53403
Address

holdahlg@opd.wi.gov
Email Address

262-638-7530
Telephone Number

5/3/24
Date

1099182
State Bar No (if any)

1060 SECOND DEGREE RECKLESS HOMICIDE — § 940.06

Statutory Definition of the Crime

Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.

State's Burden Of Proof

Before you may find the defendant guilty of second degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

2. The defendant caused the death by criminally reckless conduct.

   "Criminally reckless conduct" means:[2]

   - 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.[3]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct, you should find the defendant guilty of second degree reckless homicide.

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

COMMENT

Wis JI-Criminal 1060 was originally published in 1989 and revised in 2002. This revision was approved by the Committee in March 2015; it revised footnote 3 to reflect 2013 Wisconsin Act 307.

This instruction is for violations of § 940.06, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The 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.

This offense, second degree reckless homicide, replaces what was called homicide by reckless conduct under prior law. It differs from first degree reckless homicide only in lacking the element of "circumstance which show utter disregard for human life." See Wis JI-Criminal 1020 for the instruction on first degree reckless homicide.

For a case involving second degree reckless homicide submitted as a lesser included offense where first degree reckless homicide is charged, see Wis JI-Criminal 1022.

Second degree reckless homicide is not a lesser included offense of homicide by intoxicated use of a vehicle under § 940.09. State v. Lechner, 217 Wis.2d 392, 576 N.W.2d 912 (1998). (Lechner concerned the 1993-94 Wisconsin Statutes, under which both § 940.06 and § 990.09 were Class C felonies.)

1. 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 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.

Also see, Wis JI-Criminal 901 Cause.

2. "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."

3. 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. Arneen 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.

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.

990 USING OR POSSESSING A DANGEROUS WEAPON — § 939.63

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint)[1] alleges not only that the defendant committed the crime of _____ but also that the defendant did so while (using) (threatening to use) (possessing) a dangerous weapon.

If you find the defendant guilty, you must answer the following question:

"Did the defendant commit the crime of _____ while (using) (threatening to use) (possessing)[2] a dangerous weapon?"

"Dangerous weapon" means[3]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.][4]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant committed the crime while [(using) (threatening to use) a dangerous

weapon.] [possessing a dangerous weapon and possessed the dangerous weapon to facilitate the crime.][5]

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 990 was originally published in 1980 and revised in 1990, 1994, 1996, 1997, and 2003. This revision made editorial corrections in the Comment and footnote 3.

See Wis JI-Criminal 910 for a complete definition of "dangerous weapon" and discussion of relevant case law.

Section 939.63 was revised by 2001 Wisconsin Act 109 [effective date: February 1, 2003]. The basic penalty-enhancing provision was retained, but subs. (2) and (3), which provided for a "presumptive minimum sentence," were repealed. After revision, § 939.63(1) provides for the following increased penalties if a person commits a crime specified under chapters 939 to 951 and 961 while possessing, using, or threatening to use a dangerous weapon.

(a) The maximum term of imprisonment for a misdemeanor may be increased by not more than 6 months.
(b) If the maximum term of imprisonment for a felony is more than 5 years or is a life term, the maximum term of imprisonment for the felony may be increased by not more than 5 years. [This applies to felonies in Classes A through H.]
(c) If the maximum term of imprisonment for a felony is more than 2 years, but not more than 5 years, the maximum term of imprisonment for the felony may be increased by not more than 4 years. [There are no classified felonies with a maximum of more than 2 years, but not more than 5 years.]
(d) The maximum term of imprisonment for a felony not specified in par. (b) or (c) may be increased by not more than 3 years. [This applies to Class I felonies, which have a maximum term of imprisonment of 3 years and 6 months.]

Section 973.01(2)(c), as created by 2001 Wisconsin Act 109, specifies the order in which penalty enhancement statutes are to be applied, including § 939.63.

The increased penalty provided by this statute does not apply if possessing, using, or threatening to use a dangerous weapon is an essential element of the crime charged. Section 939.63(2). In State v. Robinson, 140 Wis.2d 673, 412 N.W.2d 535 (Ct. App. 1987), the court of appeals held that the "possessing a dangerous weapon" penalty enhancer found in § 939.63 can be applied to the offense of (unarmed) robbery under § 943.32(1). Apparently, confusion on the part on the victim about exactly when Robinson pulled out the gun led the prosecutor to elect this charging scheme instead of simply charging armed robbery. The court found no ambiguity in the statute: § 939.63(1)(b), 1987 Wis. Stats., provides that the dangerous weapon penalty increase applies as long as possessing or using a weapon is not an essential element of the crime charged. This does not result in any conflict with the definition of armed robbery, because the two statutes apply to different conduct. Armed robbery requires using or threatening to use the dangerous weapon. Section 939.63 is violated if a person merely possesses a dangerous weapon during a crime.

Applying § 939.63 to a misdemeanor does not change the misdemeanor to a felony, and no preliminary examination is required. State v. Denter, 121 Wis.2d 118, 357 N.W.2d 555 (1984).

The Committee recommends that the "use of a dangerous weapon" issue be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).
>
> We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

> "Did the defendant commit the crime of _____ while (possessing) (using) (threatening to use) a dangerous weapon?"

When the provision in § 939.63 is invoked, it is not only a penalty enhancer, it is also an element of the crime charged. State v. Villarreal, 153 Wis.2d 323, 329, 450 N.W.2d 519 (Ct. App. 1989), citing State v. Carrington, 130 Wis.2d 212, 222, 386 N.W.2d 512 (Ct. App. 1986), reversed on other grounds, 134 Wis.2d 260, 397 N.W.2d 484 (1986). The Wisconsin Supreme Court confirmed that the "use of a dangerous weapon" provision, when charged, becomes an element of the crime. State v. Peete, 185 Wis.2d 4, 517 N.W.2d 149 (1994). See note 3, below. However, this is not inconsistent with submitting use of a dangerous weapon as a special question as recommended in this instruction. "The procedure suggested by the committee merely provides a convenient and efficient means of determining whether the accused has committed only the underlying crime or the greater crime with the added element." Villarreal, 153 Wis.2d 323 at 330.

The Villarreal court also noted that it "had no disagreement with" the suggestion made in the comment of the 1980 version of this instruction that the parties could agree to have the judge rather than the jury decide the use of a weapon issue. However, the court noted that if that approach is taken, there must be a personal waiver by the defendant of the right to a jury trial on the use of a weapon element.

1. The prosecutor's intention to seek the enhanced penalty authorized by § 939.63 should be disclosed by alleging the use of a weapon in the information or complaint. Section 939.63 may not be applied to any offense which has as an element the use or possession of a dangerous weapon.

2. See Wis JI-Criminal 920 for a definition of "possession."

3. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in § 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

4. A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, ¶62.

Wis JI-Criminal 990 was revised after Tomlinson to include all the statutory alternatives in the text of the instruction. Using the alternative involved in that case would result in the following:

> "Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

> The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

5. This alternative is intended to reflect the decision in State v. Peete, 185 Wis.2d 4, 517 N.W.2d 149 (1994), where the Wisconsin Supreme Court held that a "nexus" must be established between the predicate offense and the "possession" of a dangerous weapon before the penalty enhancer in § 939.63 can apply. Further, the jury must be instructed on the nexus.

Police executed a search warrant at the home of Peete's girlfriend. They found cocaine, cash, a beeper, and Peete's clothes in one of the bedrooms. A loaded handgun was found stuffed between the mattresses in that bedroom. Three other handguns were found in a cereal box in the kitchen pantry. Peete was charged with possession of cocaine with intent to deliver while possessing a dangerous weapon. He was convicted and appealed.

The court first held that "possession" includes "constructive possession" and cited the definition in Wis JI-Criminal 920 with approval.

The court also held that § 939.63 is intended to apply only where there is a relationship or "nexus" between the weapon and the substantive crime. Further, the jury must be instructed on this requirement. The court adopted a definition offered by the state:

> when a defendant is charged with committing a crime while possessing a dangerous weapon . . . the state should be required to prove that the defendant possessed the weapon to facilitate commission of the predicate offense.

185 Wis.2d 4, 18.

The court held that the "nexus" is always present where the offense involves using or threatening to use a weapon. Further definition is need only in "possessing" cases.

Peete did not offer a general definition of "facilitate." If one is desired, the Committee believes something like the following would be correct:

Possession of a dangerous weapon facilitates the commission of a crime when the possession is with the intent to use the weapon if the need arises, for example, to protect the defendant, to protect contraband, or to make an escape possible.

Possession does not facilitate a crime if it is accidental, coincidental or entirely unrelated to the crime.

This is based on examples offered in the Peete decision. See 185 Wis.2d 4, 18. Also see Smith v. United States, 110 S. Ct. 2050 (1993), interpreting 18 U.S.C. § 924, a federal statute similar to § 939.63.

In State v. Howard, 211 Wis.2d 269, 564 N.W.2d 753 (1997), the Wisconsin Supreme Court extended the nexus requirement to a case where the gun was in the personal possession of a person arrested for delivery of cocaine. The court held that the jury must still make a factual finding that the defendant possessed the gun to facilitate the crime. The court also held that the Peete requirement applied retroactively.

The Peete requirement was interpreted in State v. Page, 2000 WI App. 267, ¶13,240 Wis.2d 276, 622 N.W.2d 285:

Under the correct reading of Peete, if the evidence is such that a reasonable jury may find beyond a reasonable doubt that the defendant possessed a dangerous weapon in order to use it or threaten to use it should that become necessary, the evidence is sufficient under § 939.63 even if the defendant did not actually use or threaten to use the weapon in the commission of the crime.