710 LAW NOTE: RIGHT TO RECAPTURE

The Committee concluded that a pattern instruction for the so-called right to recapture, claim of right, or self-help defense should not be drafted because such an instruction may relate to more than one element of a crime and should be closely tailored to the facts of the case. The defense, referred to here as "right to recapture," is best viewed as a general reference to factual situations where an element of the crime may not be present. Thus, it is not a true "defense" in the sense that facts are established which excuse or justify what would otherwise be criminal conduct. Rather, the right to recapture is what is sometimes referred to as a "negative defense" (meaning that it negates an element of the crime) or a "failure of proof" defense (meaning that the state fails to prove a fact necessary to constitute the crime.) Because the elements of the crime are already covered by the jury instructions for that crime, some believe that no additional instruction is required for a defense that attacks an element. Others believe that relating the defense to a specific element is helpful to the jury, especially where the matter has been emphasized during the trial. The Committee concluded that the matter is best resolved by the trial judge on a case-by-case basis.

Two elements of typical property crimes may be affected by the claim of a right to recapture. First, theft, robbery, and burglary all apply to taking "the property of another." If a person recaptures his or her own property, this element is not established. A simple statement to this effect would be the most that is needed by way of additional jury instruction if this aspect of the right to recapture is involved in a case.

The second, and more common, situation involves the "intent to steal" element. A person who intends to take back what is his does not intend to take and carry away property of another, thus lacking the intent to steal. In this situation, an additional jury instruction could simply apply the standard mistake instruction, Wis JI-Criminal 770, to the mental element of intent to steal.

This approach is consistent with the Comment to § 343.27, Robbery, in the 1953 Draft of the Criminal Code which states:

> . . . If the actor mistakenly but honestly believes that he is recovering his own property, he is guilty of neither stealing nor robbery. For example, the actor thinks the other person has cheated at gambling, so he forcibly retakes the money he has lost. If the actor believes the property to be his own, he is not guilty of robbery though he may be guilty of battery.
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> 1953 Judiciary Committee Report on the Criminal Code, Vol. V, p. 124

This approach is also believed to be consistent with Wisconsin case law. The leading case is Edwards v. State, 49 Wis.2d 105, 181 N.W.2d 383 (1970), where the defendant claimed he was not guilty of robbery because he was just collecting money the victim owed him. The trial court instructed the jury that as a matter of law an indebtedness is not a defense to a charge of attempted robbery. The Edwards decision reviewed the majority and minority views on this issue and did not adopt either one. Instead, the court announced the "same property" rule: the defense is available if the "accused can trace his ownership to specific coins and bills in the possession of the debtor." 49 Wis.2d 105, 113. The rule has been cited with approval in two more recent cases: Austin v. State, 86 Wis.2d 213, 271 N.W.2d 668 (1978), and State v Pettit, 171 Wis.2d 627, 492 N.W.2d 633 (Ct. App. 1992). Both Austin and Pettit involved attempts to recover money; convictions were affirmed in each case because the evidence was sufficient to show that the money obtained was not the same money that originally belonged to the defendant.

The "same money" rule is referred to in these cases in a way that may seem to be inconsistent with the mistake approach recommended here. Under the mistake approach, it would be a defense (or, more precisely, the state would be unable to prove intent to steal) if the defendant subjectively intended to take only the property that belonged to him. The property would not, in fact, have to be the same; an actual belief on the part of the defendant would be enough to negate the intent to steal.

The Committee believes the mistake approach is consistent with the Edwards decision. Edwards reviewed the so-called majority and minority positions and rejected both. The majority position was described as follows:

> . . . a charge of robbery will fail where the money or property was taken at gunpoint with an intent to collect or secure payment of the debt, or as the rule is sometimes stated, if the taker in good faith believes he owns or is entitled to the possession of the property, 77 C.J.S., Robbery, p. 464, sec. 22. This rule is based on the theory than an animus furandi (intent to steal) does not exist when a person takes property under the belief he has a bona fide claim to it. It is this belief, whether valid or not, that the majority of jurisdictions hold is inconsistent with an intent to steal.

49 Wis.2d 105, 111-112.

The court rejected this rule, saying it could not:

> . . . accept the view of the majority cases which see no distinction between the reclaiming of one's own property by force and the taking of money by force from a debtor to repay a debt which is presently owing. We think the intent to steal is

> present when one at gunpoint or by force secures specific money which does not belong to him in order to apply it by such self-help to a debt owed to him.

49 Wis.2d 105, 113

Edwards described the minority position as one held by a few states which simply deny the defense on grounds of public policy. The court also rejected this position:

> . . . the intent must be to steal. If a person seeks to repossess himself of specific property which he owns and to which he has the present right of possession and the means he uses involves a gun or force, he might not have the intention to steal.

The Committee concluded that the mistake approach discussed here is consistent with the general principles of Wisconsin law as applied to mental states and mistake. Further, it is consistent with Edwards and the cases which follow it if Edwards can fairly be read to apply only to collecting-a-debt cases where the defendant claims that he believed it was lawful to reclaim an amount of money that would satisfy the debt. This could be characterized as a mistake of law, which is not a defense. However, even in a collecting-a-debt case, if the defendant intends to take back his own property, he lacks the intent to steal, whether or not the property he takes back is really his.

The final paragraph in Edwards appears to be consistent with this analysis:

> Neither Higgins' nor Edwards' view of the facts suggests an attempt to get specific money, the ownership title to which was in Edwards, and thus the crime of attempted robbery was committed. The trial court was correct in instructing the jury that the existence of a debt was not a defense to the charge of attempted armed robbery.

49 Wis.2d 105, 114

To summarize:

If the defendant's claim is that he thought it was lawful to take property from the victim equal in value to that which the victim owed the defendant, there is no defense. That is, all the elements of the crime can be established.

If the defendant claims that he intended to take back the specific property (which in the case of a money debt must be the same bills) that the victim had wrongfully appropriated from the defendant, that would be enough, if believed, to prevent the proof of intent to steal.

In crafting an instruction, care should be taken to avoid two problems discussed in the Pettit case. Pettit involved two specific challenges to the instruction given by the trial judge, which was modelled after language in the Edwards decision. In each instance, the court of appeals found the instruction given was not error but suggested that the alleged defects be avoided. The instruction given in Pettit read:

> Evidence has been received in this trial that one or more of the defendants believed he had a bona fide claim to money possessed by Larry Morrison. The use of self-help by force to enforce a bona fide claim for money does not necessarily negate an intent to steal. A person may have intent to steal when he takes money from another's possession against the possessor's consent even though he intends to apply the money to what he believes is a bona fide claim.
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> Unless an accused can trace his ownership to specific coins and bills in the possession of another, the other is the owner of the money in his pocket.

First, the defendants claimed that the instruction did not focus the jury's attention on the need to prove that intent to steal existed at the time of entry for purposes of the burglary charge. The court acknowledged that the instruction given "might suggest that an alleged burglar's intent is measured at the time of the later theft B not at the time of the entry . . . [T]his portion of the instruction should have been more focused as to when the requisite intent must exist in a burglary situation." 171 Wis.2d 627, 637.

Second, the defendants claimed that the instruction shifted the burden to them to prove that they did not have the intent to steal, referring particularly to the last sentence of the instruction. The court of appeals rejected this argument, concluding that the instruction placed a burden on the defendants only to produce evidence that the bills repossessed "were the identical funds previously stolen by Morrison." The burden to prove intent to steal remained on the state. Again, the court said that if this could be considered error, it was isolated and cured by the rest of the instructions. The court suggested that an instruction on this topic "ideally should be accompanied by proximate language which stresses again that the state retains the burden of proof on the element of intent." 171 Wis.2d 627, 642, n. 7.

Pettit illustrates the potential confusion that can develop in a "right to recapture" case. Under the Pettit facts, the Committee believes the following analysis should apply. If Pettit entered Morrison's trailer with the intent to recover money Morrison stole from Pettit, Pettit is not guilty of burglary because he did not enter with the intent to steal. He lacked intent to steal because he intended to take property belonging to him, not "property of another." Pettit would not be guilty of armed robbery for the same reason: If he believed he was taking back

his own property, he did not intend to steal. Further, if he really did take only money Morrison had stolen from him, he would not be guilty for the additional reason that he did not take "property of another." It is with respect to the latter point, that the "same property rule" requires that bills must be exactly the same as those taken from Pettit.

COMMENT

Wis JI-Criminal 710 was approved by the Committee in October 1993.