

790 COERCION — § 939.46

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.¹

Coercion

The defense of coercion is an issue in this case. The defense of coercion allows a person to engage in conduct that would otherwise be criminal under certain circumstances.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully under the defense of coercion.²

The law allows the defendant to act under the defense of coercion only if a threat by another person (other than the defendant's co-conspirator)³ caused the defendant to believe that his act was the only means of preventing [imminent public disaster] [imminent death or great bodily harm to himself (or to others)]⁴ and which pressure caused him to act as he did.

In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements of this offense have been proved,⁵ and that the defendant did not act lawfully under the defense of coercion, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 790 was originally published in 1984 and revised in 1995. This revision was approved by the Committee in December 2004.

This instruction deals with the defense of coercion which is defined by § 939.46 as follows:

939.46 Coercion. (1) A threat by a person other than the actor's co-conspirator which causes the actor reasonably to believe that his act is the only means of preventing imminent death or great bodily harm to himself or another and which causes him so to act is a defense to a prosecution for any crime based on that act except that if the prosecution is for first degree intentional homicide the degree of the crime is reduced to second degree intentional homicide.

(2) It is no defense to a prosecution of a married person that the alleged crime was committed by command of the spouse nor is there any presumption of coercion when a crime is committed by a married person in the presence of the spouse.

Coercion is closely related to the defense of necessity, see § 939.47 and Wis JI-Criminal 792. The distinction between the two defenses is that with coercion, the outside force which influences the actor has its source in the actions of other human beings. Necessity involves natural physical forces beyond the actor's control which force him to choose committing the crime as the lesser of two evils. United States v. Bailey, 444 U.S. 394 (1980). For application of this defense to prison or jail escape, see Comment to Wis JI-Criminal 1774.

Coercion is a complete defense to all crimes except first degree intentional homicide, which coercion reduces to second degree intentional homicide. See §§ 939.46(1) and 940.01(2)(d). For cases where first degree intentional homicide is charged, coercion should be handled in the same manner as other mitigating circumstances, such as adequate provocation (see Wis JI-Criminal 1014) and unnecessary defensive force (see Wis JI-Criminal 1016). For cases involving criminal recklessness, coercion is best addressed by including its consideration as part of the determination whether the conduct presents an unreasonable and substantial risk. In cases involving first degree reckless charges, whether the circumstances show "utter disregard for human life" also requires evaluation of facts relating to coercion. See Wis JI-Criminal 1020 for a model.

For a case finding the evidence insufficient to raise the coercion defense, see State v. Keeran, 2004 WI App 4, 268 Wis.2d 761, 674 N.W.2d 570.

1. The Committee recommends that all instructions on defensive matters be combined with the instruction on the underlying offense. Combining the instructions will help the jury understand the issues and clarify the allocation of the burden of persuasion.

Coercion can be considered an "affirmative defense" in the sense that it is not an issue in the case until raised by the evidence and is not necessarily inconsistent with any elements of the crime. The Committee recommends combining the instruction on coercion with that for the underlying crime by inserting Wis JI-Criminal 790 after the explanation of the elements of the crime but before the concluding paragraphs. The nonexistence of the defense should then be included in the concluding paragraph. This will clarify for the jury the facts that it must find in order to return a guilty verdict and make it less likely that the instructions could be interpreted as shifting the burden of persuasion to the defendant. The Wisconsin Court of Appeals has suggested this as "the better policy." State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

2. In Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979), the Wisconsin Supreme Court held that the burden is on the state to disprove an asserted coercion defense beyond a reasonable doubt.

3. The threat must come from someone "other than the actor's co-conspirator." § 939.46(1). If there is an issue about the threat coming from a co-conspirator the phrase should be included in the instruction. It may also be appropriate to instruct the jury on the meaning of "co-conspirator." Wis JI-Criminal 570 defines the crime of "conspiracy."

4. The defense apparently applies where the threat is made to any third person, without limitation. In this respect, coercion has been likened to the defense of others under § 939.48(4), Wis. Stats. See 1950 Report on the Criminal Code of the Wisconsin Legislative Council, pages 35-36 and 38-39.

5. The Committee recommends that the absence of the defense be added to the concluding paragraph. See note 1, supra. The appropriate number of elements should be inserted in the blank. Refer to the applicable instruction for the offense.

Once a defensive matter, such as coercion, is raised by the evidence, the burden is on the state to prove the absence of the defensive matter to support a conviction for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1974).

Using battery as an example, combining the elements with the absence of coercion would result in the following:

If you are satisfied beyond a reasonable doubt that all four elements of battery have been proved, and that at the time of the act the defendant did not act lawfully under the defense of coercion, you should find the defendant guilty.

(See Wis JI-Criminal 1220, Battery.)