

791 [COERCION:]¹ TRAFFICKING: DEFENSE FOR A VICTIM OF § 940.302(2) or 948.051 — § 939.46(1m)

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.²

Defense for a victim of human trafficking or trafficking of a child

The defense for a victim of (human trafficking) (trafficking of a child) is an issue in this case. This defense 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 this defense.³

The law allows the defendant to act under this defense if the defendant was a victim of (human trafficking) (trafficking of a child) and the offense of (identify crime)⁴ was committed as a direct result of (human trafficking) (trafficking of a child).

CONTINUE WITH THE APPROPRIATE BRACKETED OPTION(S)

[Human trafficking, as defined in section 940.302 of the Criminal Code of Wisconsin, is committed by one who knowingly [(recruits) (entices) (harbors) (transports) (provides) (obtains)] [attempts to (recruit) (entice) (harbor) (transport) (provide) (obtain)] an individual for the purpose of (labor or services) (a commercial sex act⁵) and does so by (insert applicable term or terms.)⁶]

[Trafficking of a child, as defined in section 948.051 of the Criminal Code of Wisconsin, is committed by one who knowingly [(recruits) (entices) (provides) (obtains)

(harbors) (transports) (patronizes) (solicits)] [attempts to (recruit) (entice) (provide) (obtain) (harbor) (transport) (patronize) (solicit)] any child for the purpose of commercial sex acts.⁷

“Commercial sex act” means (sexual contact) (sexual intercourse) (sexually explicit performance) (any conduct done for the purpose of sexual humiliation, degradation, arousal, or gratification) for which anything of value is given to, promised, or received, directly or indirectly, by any person.^{8]}

This defense applies to any offense committed as a direct result of (human trafficking) (trafficking of a child) without regard to whether anyone was prosecuted or convicted for (human trafficking) (trafficking of a child).⁹

Direct Result

An offense is committed as a direct result of (human trafficking) (trafficking of a child) if there is a logical, causal connection between the offense and the trafficking such that the offense is not the result, in significant part, of other events, circumstances, or considerations apart from the trafficking.¹⁰ The offense need not be a foreseeable result of the trafficking and need not proceed relatively immediately from the trafficking.¹¹

Jury’s Decision

If you are satisfied beyond a reasonable doubt that all _____ elements of this offense have been proved,¹² and that the defendant did not act lawfully under the defense of being a victim of (human trafficking) (trafficking of a child), you should find the defendant

guilty.

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

COMMENT

Wis JI-Criminal 791 was approved by the Committee in April 2023.

This instruction is drafted for the defense set forth in sub. (1m) of sec. 939.46. It may be raised by a defendant claiming to be the victim of a trafficking crime and claiming that the crime with which the defendant is charged was committed as a direct result of the trafficking crime:

939.46 Coercion. (1m). A victim of a violation of § 940.302(2) or § 948.051 has an affirmative defense for any offense committed as a direct result of the violation of § 940.302(2) or § 948.051 without regard to whether anyone was prosecuted or convicted for the violation of § 940.302(2) or § 948.051.

Although set forth in § 939.46, which is titled “Coercion,” the defense in sub. (1m) is defined in completely different terms. The traditional coercion defense recognizes a situation commonly referred to as a “choice of evils,” where individuals are presented with circumstances that force them to choose between committing a crime and facing death or significant bodily injury. The requirements of this defense are enumerated in § 939.46(1) as follows:

- a threat from another person [other than a coconspirator]
- causes the person to reasonably believe
- that his or her [criminal] act is the only means
- of preventing imminent death or great bodily harm to that person or another.

Further, in a prosecution for first-degree intentional homicide, coercion under § 939.46(1) is not a complete defense but mitigates the crime to second-degree intentional homicide. See also Wis JI-Criminal 700 sec. II. A. 4.

The defense defined in sub. (1m) does not share any of the requirements of traditional coercion. Specific threats are not required, nor is an inquiry into what the person believed [“reasonably” or not]. Moreover, committing the crime does not have to be the sole method of preventing harm, and there is no requirement of imminent death or great bodily harm. Furthermore, the scope of the defense is not limited when it is applied to first-degree intentional homicide. Given these disparities, the Committee has determined that it is advisable to refrain from using the term “coercion” in the instructional language to the extent that it can be avoided.

Subsection (1m) specifically designates this defense as an “affirmative defense.” This means that “the defendant must produce some evidence on which a reasonable jury could find that the defense applies.” (Emphasis added.) State v. Kizer, 2022 WI 58, ¶19, 403 Wis.2d 142, 976 N.W.2d 356. See also, State v. Johnson, 2021 WI 61, ¶19, 397 Wis.2d 633, 961 N.W.2d 18. Though the burden of producing “some

evidence” is commonly referred to as the defendant’s burden, that is not literally correct. The source of the evidence may be facts presented by the prosecution, facts elicited from prosecution witnesses by defense cross-examination, or evidence affirmatively presented by the defense. State v. Coleman, 206 Wis.2d 199, 214, 556 N.W.2d 701 (1996). The two elements that must be satisfied in order to utilize this defense are as follows: (1) the defendant was a victim of either human trafficking, as defined in § 940.302, or child trafficking, as defined in sec. 948.051; and (2) the crime for which the defendant is charged was committed as a direct result of the trafficking crime.

To satisfy the “some evidence” standard, the defendant must provide some degree of specification as to what trafficking crime or crimes are allegedly involved. Section 940.302 and § 948.051 are complex and provide many alternative methods of commission. See Wis JI-Criminal 1276 for violations of § 940.302 and Wis JI-Criminal 2124 for violations of § 948.051.

If the defendant successfully meets the “some evidence” standard, the burden of proof shifts to the State to demonstrate, beyond a reasonable doubt, that the defense does not apply. The State may satisfy this burden by showing that either: (1) the defendant was not a victim of a trafficking crime or (2) the crime for which the defendant is charged was not committed as a direct result of the trafficking crime.

Affirmative defenses and the “some evidence” standard are discussed in JI 700 Law Note Theory Of Defense Instructions; Instructing The Jury On Defensive Matters. See Section I, C.

The defense in sub. (1m) is a complete defense to “any offense committed as a direct result of the violation without regard to whether anyone was prosecuted or convicted for the violation of § 940.302(2) or § 948.051.” See § 939.46(1m). See also State v. Kizer, 2022 WI 58, ¶5, 403 Wis.2d 142, 976 N.W.2d 356.

In Kizer, *supra*, the Wisconsin Supreme Court addressed the question of whether the provisions of § 939.46(1m) create a complete defense or merely mitigate a conviction for first-degree intentional homicide to one of second-degree intentional homicide, as is the case with coercion under § 939.46(1). After examination of the legislative history of § 939.46(1m), the Court found the statute to be ambiguous with respect to whether it creates a complete or mitigating defense to first-degree intentional homicide. In accordance with the principle of lenity, the Court resolved the ambiguity in favor of the defendant and held that § 939.46(1m) operates as a complete defense to a charge of first-degree intentional homicide. *Id.* at ¶¶27-29. See also State v. Cole, 262 Wis. 2d 167, ¶68, 663 N.W.2d 700.

Wis JI-Criminal 791 EXAMPLE is provided to demonstrate that selecting appropriate alternatives can simplify this instruction.

1. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. If the court chooses to include the title of this instruction, the omission of the bracketed term “coercion” is advised. Although the affirmative defense of being a victim of human trafficking or trafficking of a child as set forth in § 939.46 is titled “Coercion,” the defense in sub. (1m) is defined in completely different terms. Therefore, including the term in the instruction may cause misunderstandings among the jurors. See the comment above for more information.

2. 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.

Subsection (1m) specifically calls this defense an “affirmative defense.” This means that it is not an issue in the case until raised by the evidence and is not necessarily inconsistent with any element of the crime. The Committee recommends combining the instruction on the defense with that for the underlying crime by inserting Wis JI-Criminal 791 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).

3. 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 [under sec. 939.46(1)] beyond a reasonable doubt.

4. Here, insert the specific crime for which the defendant has been charged (e.g., first-degree intentional homicide). See Wis JI-Criminal 791 Example for how this instruction would be adapted for the offense of battery.

5. If the purpose chosen is a commercial sex act, include the definition of the term directly after the bracketed language pertaining to human trafficking. See footnote 8 below.

6. Here, insert at least one of the following ways in which the trafficking was done:

- Causing or threatening to cause bodily harm to any individual.
- Causing or threatening to cause financial harm to any individual.
- Restraining or threatening to restrain any individual.
- Violating or threatening to violate a law.
- Destroying, concealing, removing, confiscating, or possessing, or threatening to destroy, conceal, remove, confiscate, or possess, any actual or purported passport or any other actual or purported official identification document of any individual.
- Extortion.
- Fraud or deception.
- Debt bondage.
- Controlling or threatening to control any individual’s access to an addictive controlled substance.
- Using any scheme or pattern or other means to directly or indirectly coerce, threaten, or intimidate any individual.
- Using or threatening to use force or violence on any individual.
- Causing or threatening to cause any individual to do any act against the individual’s will or without the individual’s consent.

§ 940.302(2)(a)2.a.-L. (See Wis JI-Criminal 1276).

For example, in a human trafficking case where the trafficking is done by use of force on an individual, the instructions would read:

Human trafficking, as defined in section 940.302 of the Criminal Code of Wisconsin, is committed by one who knowingly recruits an individual for the purpose of labor or services and does so by use of force.

7. See Wis JI-Criminal 2124 for additional information concerning the offenses of-trafficking of a child.

8. The definition of commercial sex act will be given in [adult] human trafficking cases that rely on that alternative and in all child trafficking cases.

This is the definition provided in § 940.302(1)(a) as amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014]. Section 948.051(1) specifically refers to this definition. For a definition of “sexual contact,” see Wis JI-Criminal 934 and § 939.22(34). The Committee concluded that the definition in § 939.22(34) applies to the offense because § 948.051(1) specifically refers to trafficking “any child for the purpose of commercial sex acts, as defined in s. 940.302(1)(a) . . .” The definition in § 940.302(1)(a) refers to “sexual contact” and, since that statute is not part of § 940.225 or in Chapter 948, the definition of “sexual contact” in § 939.22(34) applies.

9. See Wis. Stat. § 939.46(1m).

10. In Kizer, *supra*, the Wisconsin Supreme Court concluded that with regard to the phrase “committed as a direct result of the violation,” § 939.46(1m) “does not require that the trafficker be aware of the offense, or that it occur at the trafficker’s behest in furtherance of the trafficking violation. It simply requires that the offense occur as a direct result of the violation of the trafficking statutes.” *Id.* at ¶18.

11. Kizer, *supra*, held that “an offense that is unforeseeable or that does not occur immediately after a trafficking offense is committed can be a direct result of the trafficking offense, so long as there is still the necessary logical connection between the offense and the trafficking.” *Id.* at ¶15.

12. The Committee recommends that the absence of the claimed trafficking 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.

For example, incorporating the elements of the offense of battery along with the absence of the human trafficking defense 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 being a victim of human trafficking, you should find the defendant guilty.

(See Wis JI-Criminal 1220, Battery.)