792 NECESSITY — § 939.47

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

Necessity

The defense of necessity is an issue in this case. The defense of necessity 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 necessity.

The law allows the defendant to act under the defense of necessity only if the pressure of natural physical forces[2] caused the defendant to believe that his act was the only means[3] of preventing [imminent public disaster] [imminent death or great bodily harm to himself (or to others)] and which pressure caused him to act as he did.[4]

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 necessity, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 792 was originally published in 1995 and revised in 1996. This revision was approved by the Committee in December 2004.

This instruction deals with the defense of necessity which is defined by § 939.47 as follows:

> 939.47 Necessity. Pressure of natural physical forces which causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to the actor or another and which causes him or her 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 2nd-degree intentional homicide.

Necessity is closely related to the defense of coercion, see § 939.46 and Wis JI-Criminal 790.

Necessity is a complete defense to all crimes except first degree intentional homicide, which necessity reduces to second degree intentional homicide. See §§ 938.46(1) and 940.01(2)(d). For cases where first degree intentional homicide is charged, necessity 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, necessity 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 necessity. See Wis JI-Criminal 1020 for a model.

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.

Necessity 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 necessity with that for the underlying crime by inserting Wis JI-Criminal 792 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 State v. Olsen, 99 Wis.2d 572, 299 NW.2d 632 (Ct. App. 1980), the court held that the defense of necessity was unavailable as a matter of law to a demonstrator who sought to stop the transportation of spent nuclear fuel. The court held that the defense is limited to the pressure of forces such as:

> . . . storms, fires and privations. Thus, a person lost in a storm who breaks into an isolated house in order to take refuge is justified in so doing by the doctrine of necessity. A person who, seeking to stop the spread of a fire, razes a building in order to save a town is similarly justified. A third example is that of a person who throws property from an overcrowded boat in order to prevent it from sinking. 99 Wis.2d 572, 576.

Similar examples were provided in the 1953 Legislative Council Report on the Criminal Code, Comment to § 339.47, which was adopted, with minor changes, as § 939.47. Also see LaFave and Scott, Substantive Criminal Law, Sec. 5.4 (West, 1986).

In State v. Anthuber, 201 Wis.2d 512, 518, 549 N.W.2d 477 (Ct. App. 1996), the court rejected a claim that heroin addiction, coupled with the Department of Corrections refusal to provide him with methadone treatment, established a necessity defense: ". . . the 'force' affecting Anthuber was not a 'natural physical force' because he set it in motion when he made the decision to start using heroin **and** there is no evidence that he had no control over whether to make this initial choice." 201 Wis.2d 512, 520.

3. In State v. Horn, 126 Wis.2d 447, 377 N.W.2d 176 (Ct. App. 1985), the defendants challenged their convictions for criminal trespass, which arose out of their refusal to leave a health care facility that provided abortions. They alleged that the trial court erred in ruling as a matter of law that the defenses of coercion and necessity were not available to them. The appellate court affirmed the conviction, holding that since the abortion services provided by the clinic were legal:

> . . . it is unreasonable [for the defendants] to believe that one must commit an act of criminal trespass in order to prevent an activity that is legal and constitutionally protected. If appellants wish to attempt to change the legal status of abortion, they must do so within channels provided by our democratic form of government. A contrary holding would allow an individual to violate the law without sanction whenever he felt that government had not made the proper choice between conflicting values.

126 Wis.2d 447, 456.

4. The statement of the necessity defense is taken almost verbatim from § 939.47. The only change is to split the statutory definition into two parts: the first describes the belief required; the second describes the requirement that the belief be reasonable. This is the way other privileges are defined in the instructions C see, for example, Wis JI-Criminal 800 Privilege: Self Defense.

In State v. Anthuber, 201 Wis.2d 512, 538, 549 N.W.2d 477 (Ct. App. 1996), the court cited an earlier decision as identifying four elements of the necessity defense:

1) the defendant must have acted under pressure from natural physical forces;

2) the defendant's act was necessary to prevent imminent public disaster, or death, or great bodily harm;

3) the defendant had no alternative means of preventing the harm; and

4) the defendant's beliefs were reasonable.

Citing, State v. Olsen, note 2, supra, at 577-78.

In a footnote, the Anthuber decision noted that Wis JI-Criminal 792 takes a different approach and stated: "While we find no substantive difference in the two tests, we nonetheless believe that the four-part test is simpler to understand and discuss." 201 Wis.2d 512, 518-19, at note 1. The Committee carefully reviewed the issue and decided not to change the text of the instruction. First, the instruction follows the words of the

statute. Second, the Olsen decision did not actually set forth four separate "elements" in the manner summarized in Anthuber. And third, there may be a substantive difference. The statute, and the text of the instruction, require that the defendant reasonably believe that the act was necessary to prevent the harm and reasonably believe that no alternative means existed. The statute does not require, as suggested by the "four elements" approach, that the defendant's act actually be necessary to prevent the harm and that there actually be no alternative means. A reasonable belief as to each aspect is sufficient.

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 necessity, 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 necessity 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 necessity, you should find the defendant guilty.

(See Wis JI-Criminal 1220, Battery.)

