810 PRIVILEGE: SELF-DEFENSE: RETREAT

[ADD THE FOLLOWING TO WIS JI-CRIMINAL 800, 801, OR 805 WHEN SUPPORTED BY THE EVIDENCE. DO NOT GIVE THIS INSTRUCTION IF § 939.48(1m) APPLIES. SEE WIS JI-CRIMINAL 805A.][1]

Retreat

[There is no duty to retreat. However, in determining whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, you may consider whether the defendant had the opportunity to retreat with safety, whether such retreat was feasible, and whether the defendant knew of the opportunity to retreat.].

COMMENT

Wis JI-Criminal 810 was originally published in 1966 and revised in 1993 and 1999. This revision updated the comment and was approved in June 2019; it added footnote 1 and the directions immediately preceding it.

This instruction reflects the rule that a person generally has no duty to retreat before acting in self-defense. A duty to retreat does exist where the person provokes the attack. See Wis JI-Criminal 815.

The Committee concluded that while reference to "duty to retreat" is arguably unnecessary given the potential relevance of retreat to the reasonable use of force, it was advisable to continue to publish Wis JI-Criminal 810. It is intended to be "optional" in the sense that it is to be used only when the trial judge concludes that "retreat" is an important issue in the case and that the jury's understanding will be aided by a statement of the rather general legal standard that applies. It is drafted to apply to both deadly and nondeadly force cases.

The description of law provided in this instruction was cited with apparent approval in State v. Wenger, 225 Wis.2d 495, 502-03, 593 N.W.2d 467 (Ct. App. 1999).

The reference to "duty" to retreat is to a flat rule of the common law making the privilege of self-defense unavailable to one who did not exhaust all means of avoiding physical confrontation. Thus, a factfinder would not be allowed to consider self-defense and a defendant would not be allowed to introduce evidence relating to self-defense unless there was a showing that the duty to retreat was fulfilled.

It appears that the common law duty to retreat distinguished between nondeadly and deadly force cases. The LaFave and Scott treatise states that "it is everywhere agreed that one who can safely retreat need not do so before using nondeadly force." Substantive Criminal Law, § 5.7(f), at 659.

The basis for making a distinction appeared to be a balancing of the interests involved. The actor's interest in staying where he or she has a right to be and in not compromising his or her self-respect by engaging in cowardly conduct was seen as sufficient to outweigh the interest in not causing bodily harm to the aggressor. But the actor's interests in self-respect were not seen as sufficient to outweigh the causing of death or serious bodily harm to the aggressor. A classic law review article on retreat describes this balancing in the following terms:

> A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would always regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow being on his hands.

Beale, "Retreat From Murderous Assault," 16 Harv. L. Rev. 567, 581 (1903).

As to retreat in deadly force cases, LaFave and Scott describe two views. The majority view is that there is no duty to retreat before using deadly force unless the actor is the original aggressor. It appears that Wisconsin adopted this view in the Miller case, discussed below. The minority view imposed a duty to retreat "to the wall" if the actor could do so with safety and knew of the chance to do so.

But even the minority view recognized exceptions to this duty, the leading one being that a person need not retreat in his own home: there is no safer place to which the person can retreat. Some courts recognized the same rule as applying to the place of business.

To summarize the common law rule: "Duty" in "duty to retreat" referred to a flat rule precluding reliance on self-defense in cases where the person did not retreat as required. There was no duty to retreat in nondeadly force cases. There was a split in authority in deadly force cases, but even where retreat was required in deadly force cases, it did not apply where the actor was in his own home and did not provoke the attack.

The common law rule's development and rejection is discussed in three dated but interesting decisions of the United States Supreme Court. See Beard v. United States, 158 U.S. 550 (1895), Rowe v. United States, 164 U.S. 546 (1896), and Brown v. United States, 256 U.S. 335 (1921). Each decision reversed a federal conviction for manslaughter on the basis of jury instructions that incorrectly imposed a duty to retreat on the defendant.

There are relatively few Wisconsin cases on this topic. The leading case, Miller v. State, 139 Wis. 57, 119 N.W. 850 (1909), precedes the 1955 Criminal Code revision, when the current definition of the privilege of self-defense was adopted.

Miller involved a killing that followed a drunken argument at Bromley's house. Miller, Bromley's housekeeper, was charged as a conspirator. The victim and two other men were ordered to leave Bromley's house and, after some scuffling, they did. The victim returned a short time later, asking for his coat and hat. Bromley shot him in the chest with a rifle and killed him. Bromley was standing at his front door at the time; the victim was a short distance away in the yard.

Many errors were argued on appeal. With respect to Bromley's claim of self-defense, the Wisconsin Supreme Court found that the jury was improperly instructed. One of the errors was the requirement that the defendant should have retreated if the incident occurred outside his house. The court rejected this as "offend[ing] against the long-established law of this state."

> The ancient doctrine requiring the party assaulted to "retreat to the wall," . . . may have been all right in the days of chivalry, so called, but, by almost common consent of the moulders of the unwritten law, in later years, it is unadaptable to our modern development and, therefore, has been pretty generally, and in this state very definitely, abandoned. It has been superseded by a doctrine in harmony with the divine right of self-defense; the doctrine that when one is where he has a right to be and does not create the danger by his own wrongful conduct, he may stand his ground. . . .

139 Wis. 57, 75.

The error was found to be harmless, however, since the court found that there was no evidence to support the defendant's claim that he reasonably believed it was necessary to use deadly force when the victim returned, unarmed, to the house to ask for his hat.

State v. Kelley, 107 Wis.2d 540, 319 N.W.2d 869 (1982), considers retreat only in passing. A fight erupted at the home of Kelley's friends. Kelley went to the home and was told that Lowery was in the house and had a gun. Kelley went into the house. Lowery fired a shot at him, hitting Kelley in the right hand and wounding another man, Burgess. Kelley continued up the stairs in pursuit of Lowery and was shot by Lowery again, this time in the left hand. Lowery ran into a bedroom and closed the door. Kelley fired three shots through the door, killing Lowery.

Kelley appealed his conviction for manslaughter, claiming that the evidence showed his conduct was completely privileged. The Wisconsin Supreme Court upheld the conviction, finding the evidence sufficient to show that a reasonable person would not have believed himself to be in imminent danger after Lowery went into the bedroom. Further, the court found that the evidence was sufficient to show that the amount of force used was excessive.

The reference to retreat came in the context of analyzing the sufficiency of the evidence:

> After the defendant had been shot, Lowery disappeared into a bedroom. There was nothing at this point which prevented the defendant from retreating to the first floor rather than proceeding to the second floor. Furthermore, Lowery's disappearance, along with the fact that defendant had received two relatively minor wounds, is sufficient evidence upon which a jury could find that a reasonable person would not have believed himself to be in 'imminent danger. . . .'

107 Wis.2d 540, 548.

State v. Herriges, 155 Wis.2d 279, 119 N.W.2d 850 (Ct. App. 1990), involved a person who physically resisted police when they attempted to arrest him in his home. He was charged with battery; only nondeadly force was involved. The trial court instructed on self-defense, including the rule that a person who provokes the attack must retreat to regain the privilege.

The appellate court upheld the instructions given, holding that the provocation rule applied even though the person was in his home:

> . . . . The home provides a haven, not an arena. 'One assaulted in his house need not flee therefrom. But his house is his castle only for the purposes of defense. It cannot be turned into an arsenal for the purpose of offensive effort against the lives of others. It is a shelter, but not a sally port.' Raines v. State, 455 So.2d 967, 972 (Ala. Crim. App. 1984). We therefore follow the direction given by our supreme court in Miller and adopt the rule that if there has been provocation by the one assaulted, even if that provocation occurs in the home, successful assertion of self-defense requires a reasonable belief that one cannot retreat before force likely to cause death or great bodily harm may be used.

155 Wis.2d 297, 304-05.

By implication, the court approved the rule that aside from the provocation situation, there is no duty to retreat in the home, or anywhere else.

When the privilege of self-defense was codified in the 1956 revision of the Criminal Code, the duty to retreat was recognized only where the person provoked the attack; such a person must "exhaust every other reasonable means to escape" before resorting to deadly force. Subsection 939.48(2)(a). In all other situations, the feasibility of retreat is to be considered along with all the other circumstances, in deciding whether the person reasonably believed the use of force was necessary in self-defense. The Comment to the 1953 Draft of the revised criminal code provides:

> Under this section, the feasibility of retreat from the assailant, with one exception, is handled as an aspect of the question of whether the actor reasonably believed the force used was necessary to prevent or terminate the interference. The exception is the case where the actor himself provoked the attack. In such a case, it is desirable to emphasize the fact that the actor should do everything reasonably possible to escape from the attack before he resorts to the use of deadly force.

Comment to § 339.48(2), 1953 Report on the Criminal Code (Wisconsin Legislative Council, 1953).

Wis JI-Criminal 810 implements the standard set forth in the first sentence of the above comment.

1. Section 939.48(1m) relates to what is commonly termed the "Castle Doctrine." [Note: the Committee recommends that caution should be used in relying on that term to describe the provision. While it is a convenient term, the substance of the "Castle Doctrine" varies state by state; Wisconsin's version is more limited than that of Florida, for example. This footnote uses the term "the new rule."] Section 939.48(1m) was created by 2011 Wisconsin Act 94. [Effective date: December 21, 2011; the act first applies to a use of force that occurs on the effective date.] The Committee's interpretation of the provision is explained in Wis JI-Criminal 805A Law Note: Self-Defense Under § 939.48(1m).

When self-defense is presented to the jury in a case where the new rule applies, JI-810 should not be given. Section 939.48(1m)(ar) addresses retreat, providing that if the predicate facts apply, "the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force . . ." JI-810's statement that while "there is no duty to retreat" evidence relating to retreat may be considered in determining "whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the [unlawful] interference" runs counter to sub. (1m)(ar)'s command that "the court may not consider whether the actor had an opportunity to flee or retreat ..."

In addition, the court should, upon request, instruct the jury as follows:

There is no duty to retreat. You must not consider evidence relating to whether the defendant had an opportunity to flee or retreat in deciding whether the state has proved that the defendant did not act lawfully in self-defense.