815 PRIVILEGE: SELF-DEFENSE: NOT AVAILABLE TO ONE WHO PROVOKES AN ATTACK: REGAINING THE PRIVILEGE — § 939.48(2)

[ADD THE FOLLOWING TO WIS JI-CRIMINAL 800, 801, OR 805 WHEN SUPPORTED BY THE EVIDENCE.]

Provocation

You should also consider whether the defendant provoked the attack. A person who engages in unlawful conduct[1] of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack.

[USE ANY OF THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.]

[However, if the attack which follows causes the person reasonably to believe that he or she is in imminent danger of death or great bodily harm, he or she may lawfully act in self-defense. But the person may not use or threaten force intended or likely to cause death unless he or she reasonably believes he or she has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.]

[A person who provokes an attack may regain the right to use or threaten force if the person in good faith withdraws from the fight and gives adequate notice of the withdrawal to his assailant.]

[A person who provokes an attack whether by lawful or unlawful conduct with intent to use such an attack as an excuse to cause death or great bodily harm to another person is not entitled to use or threaten force in self-defense.]

COMMENT

Wis JI-Criminal 815 was originally published in 1962 and revised in 1994 and 1999. The 1999 revision updated the comment. This revision amended the language of the instruction to more accurately reflect the language of Wis. Stat. 939.48(2)(a) and was approved by the Committee in July 2019.

The 1962 version of Wis JI-Criminal 815 was cited as a correct statement of the law in State v. Walker, 99 Wis.2d 687, 695-96, 299 N.W.2d 861 (1981). It was reviewed again in State v. Herriges, 155 Wis.2d 297, 455 N.W.2d 635 (Ct. App. 1990). The court held that a person who provokes an attack must retreat in order to regain the privilege of self-defense, even if that person is in his own 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 purposes of offensive effort against the lives of others. It is a shelter, but not a sally-port." Raines v. State, 445 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.

The "duty to retreat" is extensively discussed in Wis JI-Criminal 810.

1. The first paragraph of the instruction reflects the rule stated in sub. (2) of § 939.48, which provides that a "person who engages in unlawful conduct of a type likely to provoke others . . ." loses the right to claim the privilege of self-defense. In State v. Boughneit, 97 Wis.2d 687, 294 N.W.2d 675 (Ct. App. 1980), the court held that engaging in what would be considered disorderly conduct under § 947.01 would constitute "unlawful conduct" for the purposes of § 939.48(2).

