

**820 [PRIVILEGE: LIMITS OF]<sup>1</sup> SELF-DEFENSE: UNINTENDED INFLICTION OF HARM UPON THIRD PARTY CHARGED AS RECKLESS OR NEGLIGENT CRIME ENUMERATED IN § 939.48(3)<sup>2</sup>**

INSERT THE FOLLOWING AFTER THE ELEMENTS FOR THE OFFENSE CHARGED ARE DEFINED.

**Self-Defense As To (Name Person)**

There is evidence in this case that the defendant was acting in self-defense as to (name person).<sup>3</sup> However, this does not necessarily mean that the unintended infliction of harm to (name of victim)<sup>4</sup> was lawful. This is because self-defense does not apply if the unintended infliction of harm amounted to the crime of (insert enumerated offense)<sup>5</sup>.

FOR ALL OFFENSES INVOLVING [CRIMINAL RECKLESSNESS OR CRIMINAL NEGLIGENCE], ADD THE FOLLOWING:

You should consider the evidence relating to self-defense, along with all other evidence in this case, in determining whether the defendant's conduct created an unreasonable risk of death or great bodily harm to (name of victim).

FOR FIRST DEGREE RECKLESS OFFENSES, ALSO ADD THE FOLLOWING:

You should also consider the evidence relating to self-defense, along with all other evidence in this case, in determining whether the defendant's conduct showed utter disregard for human life.

**Self-Defense**

Self-defense requires that:

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and,
- the defendant believed that the amount of force (he) (she) used or threatened to use was necessary to prevent or terminate the interference; and,
- the defendant's beliefs were reasonable.

ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.

[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).]

#### **Determining Whether Beliefs Were 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) (her) acts and not from the viewpoint of the jury now.

CONCLUDE WITH THE CONCLUDING PARAGRAPHS FROM THE INSTRUCTION FOR THE OFFENSE CHARGED.<sup>6</sup>

**COMMENT**

Wis JI-Criminal 820 was originally published in 1962 and revised in 1994, 2006, 2018, and 2021. This revision was approved by the Committee in December 2023; it amended the paragraph concerning “Self-Defense As To (Name Person).”

This instruction is intended to implement § 939.48(3), which provides as follows:

(3) The privilege of self-defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a 3rd person, except that if the unintended infliction of harm amounts to the crime of first-degree or 2nd-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire, first-degree or 2nd-degree reckless injury or injury by negligent handling of dangerous weapon, explosives or fire, the actor is liable for whichever one of those crimes is committed.

The original version of Wis JI-Criminal 820 paraphrased the statute, explaining that the privilege of self-defense extended to the unintended infliction of harm to a third party unless that infliction amounted to a crime involving what was formerly called “conduct regardless of life,” reckless conduct, or criminal negligence.

It is possible that a case could involve a charge based on intentional harm to the third person – as under a statute such as § 940.19(1), simple battery, which applies to causing bodily harm with intent to cause harm to that person or another. In such a case, conduct that is privileged as to its intended target is also privileged as to the unintended third person who is injured. Such harm is “unintended,” as that term is used in § 939.48(3), but it is “intentional” under the substantive statutes that define crimes in terms of intending to harm “that person or another.” For that case, see Wis JI-Criminal 821, which provides that to establish the crime against the unintended victim, the State must prove beyond a reasonable doubt that the defendant was not privileged in the use of force against the intended target of that force.

Wisconsin law establishes a “low bar” that the defendant must overcome to be entitled to a jury instruction on the privilege of self-defense. State v. Stietz, 2017 WI 58, ¶16, 375 Wis.2d 572, 895 N.W.2d 796 citing State v. Schmidt, 2012 WI App 113, ¶12, 344 Wis. 2d 336, 824 N.W.2d 839. A defendant needs only to produce “**some evidence**” in support of the privilege of self-defense. Stietz, supra, at ¶16 (emphasis added). See also, State v. Head, 2002 WI 99, ¶112, 255 Wis.2d 194, 648 N.W.2d 413. Evidence satisfies the “some evidence” quantum of evidence even if it is “weak, insufficient, inconsistent, or of doubtful credibility” or “slight.” State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). Though the burden of producing “some evidence” of a defense 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). When applying the “some evidence” standard, a court is not to weigh the testimony, as this would invade that province of the jury. Stietz, supra, at ¶18. Instead, the court should focus on “whether there is ‘some evidence’ supporting the defendant’s self-defense theory.” Id. at ¶58. Failure “to instruct on an issue which is raised by the evidence” is error. State v. Weeks, 165 Wis. 2d 200, 208, 477 N.W.2d 642 (Ct. App. 1991).

In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court concluded that the trial court erred by declining to instruct on self-defense. The Court held that although

Johnson unlawfully entered K.M.'s home in the middle of the night, there was some evidence that he had an objectively reasonable belief that he was preventing an unlawful interference with his person. Although the physical attack in Johnson occurred entirely inside K.M.'s home, the opinion did not interpret, apply, or limit the castle doctrine in any way because the Court was tasked with examining Johnson's, not K.M.'s, actions. Therefore, this decision did not alter the "some evidence" standard used to determine whether a jury should be instructed on self-defense.

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. The title of § 939.48(3) addresses the privilege of self-defense as to the intentional infliction of harm upon a real or apparent wrongdoer and the unintended infliction of harm upon a third person. However, this instruction provides that the extension of self-defense does not apply to offenses amounting to the crimes of first-degree or second-degree reckless homicide, homicide by negligent handling of dangerous weapons, explosives, or fire, first-degree or second-degree reckless injury or injury by negligent handling of dangerous weapon, explosives or fire.

The bracketed language "privilege: limits of" is optional and can be omitted if the trial judge believes it will confuse the jury. Confusion may arise when the charged offense is one of the enumerated offenses listed under § 939.48(3) and the right to self-defense is not applicable to the victim.

2. The privilege of self-defense, as outlined in § 939.48(3), extends to the unintentional infliction of harm on a third party, except when such harm amounts to any of the following crimes:

- first-degree reckless homicide
- second-degree reckless homicide
- homicide by negligent handling of dangerous weapon, explosives or fire
- first-degree reckless injury
- second-degree reckless injury
- injury by negligent handling of dangerous weapon, explosives or fire

Whether the unintended harm caused by the defendant amounts to one of the enumerated crimes depends on the reasonableness of the defendant's conduct and whether it constituted a significant level of recklessness or negligence.

Therefore, when a defendant is charged with an offense listed in § 939.48(3), and the finder of fact concludes that the defendant's actions created an unreasonable risk of death or great bodily harm to the victim, satisfying the recklessness or negligence element, the resulting harm amounts to the enumerated crime and the State is not obligated to prove that the defendant acted unlawfully in self-defense.

3. Here, use the name of the person against whom the defendant intended to use force in self-defense.

4. Insert the name of the injured party, who is the victim of the crime charged.

5. Here, insert one of the following offenses provided in § 939.48(3):

- first-degree reckless homicide
- second-degree reckless homicide

- homicide by negligent handling of dangerous weapon, explosives or fire
- first-degree reckless injury
- 2nd-degree reckless injury
- injury by negligent handling of dangerous weapon, explosives or fire

§ 939.48(3) addresses reckless or negligent offenses that result in the “unintended infliction of harm.” As a result, the offenses of first and second degree recklessly endangering safety, which concern the “risk” of harm rather than the “unintended infliction of harm,” are not covered under this section.

6. In cases where the offense charged falls under the specific crimes listed in Section 939.48(3) and it is determined that the defendant’s actions created an unreasonable risk of death or great bodily harm to the victim, the State is not required to prove that the defendant acted unlawfully in self-defense.