821 PRIVILEGE: SELF-DEFENSE: UNINTENDED HARM TO THIRD PARTY CHARGED AS INTENTIONAL CRIME — § 939.48(3)

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

Self Defense

There is evidence in this case that the defendant was acting in self-defense as to (name of person).[1] If the defendant was privileged to use force in self-defense against (name of person), that privilege extended to harm caused to [(name of victim)[2]].

The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference[3] with the defendant's person; and
- the defendant believed that the amount of force the defendant 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.[4] 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.[5] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements _____[6] have been proved [as to the harm caused to (name of victim)] and that the defendant did not act lawfully in self-defense as to (name of person), you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 821 was approved by the Committee in December 2017 and revised in 2021. This revision was approved by the Committee in June 2023; it added to the comment.

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 Committee concluded that two types of cases can arise in which this statute could apply. First, the defendant may be charged with a negligent or reckless crime committed against the third person. For that type of case, see Wis JI-Criminal 820. Second, the defendant may be charged with intentionally causing harm to the third person under a statute that defines an offense as acting with intent to cause harm "to that person or another" or where there is a dispute about whether self-defense applies at all. This instruction is intended for use in that type of case and adapts the wording of Wis JI-Criminal 800 to these circumstances.

For an example where this instruction may be used, consider the crime of simple battery as defined in § 940.19(1): "Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor." A defendant could be charged with committing a battery against the victim by an act done with intent to cause bodily harm to another person – a person as to whom the defendant claims the right to use force in self-defense. If the defendant is lawfully acting in self-defense as to the other person, the privilege extends to "the infliction of unintended harm" upon the victim of the charge offense. That harm is "unintended" as the term is used in § 939.48(3), but is "intentional" under § 940.19(1) which defines the crime as requiring "intent to cause bodily harm to that person or another."

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

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

3. For purposes of self-defense, "unlawful" means "either tortious or expressly prohibited by criminal law or both." Section 939.48(6). Further instruction on what constitutes "unlawful interference" in the context of the facts of a particular case may be desirable. See footnote 1, Wis JI-Criminal 800 for additional discussion.

4. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

5. The phrase "in the defendant"s position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627 28, 230 N.W.2d 789 (1975). See footnote 3, Wis JI-Criminal 800 for additional discussion.

6. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved . . ." See Wis JI-Criminal 1222A.