

**830 PRIVILEGE: DEFENSE OF OTHERS: FORCE INTENDED OR
LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48(4)**

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

Defense of Others

Defense of others is an issue in this case. The law of defense of others allows the defendant to threaten or intentionally use force to defend another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the person of (name of third person); and,
- the defendant believed that (name of third person) was entitled to use or to threaten to use force in self-defense; and,
- the defendant believed that the amount of force used or threatened by the defendant was necessary for the protection of (name of third person); and,
- the defendant's beliefs were reasonable.

The defendant may intentionally use or threaten 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 (name of third person).

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 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 THIRD PERSON PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 835].

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 defense of others.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements of _____¹ have been proved and that the defendant did not act lawfully in defense of others, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 830 was originally published in 1966 and revised in 1989 and 1994. This revision was approved by the Committee in April 2005.

This instruction deals with the privilege to use or threaten the use of "deadly force" in the defense of a third person. See § 939.48(4).

The 1994 revision of this instruction changed the format to allow integrating the description of defense of others with the instruction for the crime charged. See the Comment to Wis JI-Criminal 800.

This instruction was revised in 1988 in response to State v. Ambuehl, 145 Wis.2d 343, 425 N.W.2d 649 (Ct. App. 1988). Ambuehl held that the 1966 version of Wis JI-Criminal 830 was in error because it referred only to "use of force" and did not mention the other alternative, "threat of force." The 1994 revision includes reference to "use" and "threat of use" of force throughout.

The facts in Ambuehl illustrate why the omission of "threat of force" may be a problem. Ambuehl was charged with attempted murder and injury by conduct regardless of life. The charges arose from a barroom fight during which a gun Ambuehl was holding went off, injuring one of the combatants. Ambuehl claimed she intentionally pointed the gun at the man who was fighting with her friend, and the gun went off accidentally. Thus, she claimed she intentionally threatened force but did not intentionally use force. The actual use was accidental. In this situation, the court of appeals found that the instruction's failure to include reference to the threat of force alternative "was likely to divert the jury from Ambuehl's version of the shooting to a version which she denied had occurred." 145 Wis.2d 343, 373. This resulted in the real controversy not being tried and required reversal, even though the instruction had not been objected to.

1. 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.