

832 PRIVILEGE: DEFENSE OF OTHERS: EFFECT OF PROVOCATION BY DEFENDANT — § 939.48(2) and (4)

ADD THE FOLLOWING TO WIS JI-CRIMINAL 825 OR 830 WHEN SUPPORTED BY THE EVIDENCE.

You should consider whether (name of defendant) provoked the attack on (name of third person). A person who engages in unlawful conduct that is likely to provoke others to attack, and who does provoke an attack, is not entitled to claim the privilege of defense of others against that attack.

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

[However, if the attack which follows causes the defendant to reasonably believe that (name of third person) was in imminent danger of death or great bodily harm, the defendant may lawfully act in defense of (name of third person). But the defendant may not use or threaten force intended or likely to cause death or great bodily harm unless the defendant reasonably believes (he) (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 act in defense of others if the person in good faith withdraws from the encounter and gives adequate notice of that withdrawal to the assailant.]

[A person who provokes an attack whether by lawful or unlawful conduct with the intent to use such an attack as an excuse to cause death or great bodily harm to another is not entitled to the privilege of defense of others.]

However, even if (name of defendant) had provoked the attack, (name of defendant) would still be allowed to act in defense of (name of third person) if (name of defendant) actually and reasonably believed that (name of third person) was entitled to act in his or her own defense.

COMMENT

Wis JI-Criminal 832 was approved by the Committee in December 2025.

This instruction is intended for use with Wis JI-Criminal 825 or 830, if applicable.

This instruction was first created in 2025 in response to State v. Cross, 2025 WI App 72, 419 Wis.2d 186, 30 N.W.3d 431, which held that a defendant who provokes an attack may still be entitled to act in defense of others under limited statutory conditions. This instruction is to be used in conjunction with Wis JI-Criminal 825 or 830 when there is evidence that the defendant provoked the attack on the third person.

In State v. Cross, 2025 WI App 72, 419 Wis.2d 186, 30 N.W.3d 431, the court of appeals addressed the application of the self-defense privilege when a defendant acts to defend a third party after having provoked an attack. The court concluded that the statutory limits on self-defense following provocation under Wis. Stat. § 939.48(2) also apply to the privilege of defense of others under § 939.48(4). Specifically, a defendant who unlawfully provokes an attack may still claim the privilege of defense of others if the conditions in § 939.48(2)(a)–(c) are met, including that the defendant reasonably believed the third person faced imminent death or great bodily harm and that there was no other reasonable means to avoid the harm.

See Wis JI-Criminal 835 when the evidence supports a claim that the third party provoked the confrontation.