880 PRIVILEGE TO USE FORCE: REASONABLE ACCOMPLISHMENT OF A LAWFUL ARREST BY A PEACE OFFICER: NONDEADLY FORCE

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

Use of Force by Peace Officer

The use of force by a peace officer[1] is an issue in this case. The law allows a peace officer to use force in making a lawful arrest[2] only if:

- the defendant believed that it was necessary to use force to make an arrest; and,
- the defendant believed that the amount of force used was necessary to secure and detain the person arrested, to overcome any resistance, to prevent escape, or to protect the defendant from bodily harm; and,
- the defendant's beliefs were reasonable.

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 an ordinary, prudent, and reasonably intelligent officer would have believed in the defendant's position, having the knowledge and training that the defendant possessed, and acting under the circumstances that existed at the time of the alleged offense.[3]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in the use of force to make an arrest.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of _____[4] have been proved and that the defendant did not act lawfully in using force to make an arrest, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 880 was originally published in 1974 and revised in 1987 and 1994. This revision was approved by the Committee in April 2005.

The 1987 and 1994 revisions of this instruction changed its format to allow integrating the description of the privilege to use force with the instruction on the crime charged. See the Comment to Wis JI-Criminal 800.

Wis JI-Criminal 880 addresses the privilege to use nondeadly force in making an arrest. Wis JI-Criminal 885 addresses the use of deadly force. The privilege to use force to make a lawful arrest is recognized in broad terms in § 939.45(4). It is not specifically limited to peace officers, though this instruction is. Police may also be privileged to use force in self-defense or in defense of others, situations that are not covered by this instruction. See Wis. Stat. § 939.48 and Wis JI-Criminal 800 through 835.

1. "Peace officer" is defined as follows in § 939.22(22):

> "Peace officer" means any person vested by law with a duty to maintain public order, whether that duty extends to all crimes or is limited to specific crimes.

2. With regard to whether the arrest was lawful, footnote 1 to the 1974 version of this instruction provided as follows:

> 1. An element of this defense is that the arrest is lawful (defined Wis. Stat. § 968.07 (1971)), that is, that the arrest was made pursuant to a warrant or if made without a warrant, there was probable cause for the arrest. The question for arrest, without a warrant, based upon probable cause, is a mixed question of law and fact. If there is no dispute as to the facts of the arrest, then it is up to the court to decide if they show probable cause for arrest. If the facts are in dispute, the court should instruct the jury as to what facts will constitute probable cause, and submit to them only the question of the existence of those facts. 5 Am. Jur.2d Arrest § 49, p. 741 (1962). An arrest made pursuant to a warrant valid in form and issued by a court of competent jurisdiction is considered lawful as to the arresting officer. 5 Am. Jur.2d Arrest § 4, p. 698 (1962). Validity of the warrant then is a matter for the court to decide. It is suggested that the lawfulness of the arrest, if it is a matter for merely the court to decide, should be decided first because if the arrest is found to be unlawful, the defense would be unavailable to the defendant and therefore no longer an issue for the jury to decide.

3. The 1986 and 1994 revisions substantially shortened the text of the instruction. No case law or other developments required the change. The intent was to simplify and clarify the instruction.

The Committee is aware of no reported criminal cases dealing with the privilege of a peace officer to use force in making an arrest. The following are some of the civil cases that discuss the issue: McCluskey v. Steinhorst, 45 Wis.2d 350, 173 N.W.2d 148 (1969); Celmer v. Quarberg, 56 Wis.2d 581, 203 N.W.2d 45 (1973); and Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981). Also see Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975).

4. 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.

