885 PRIVILEGE TO USE FORCE: REASONABLE ACCOMPLISHMENT OF A LAWFUL ARREST BY A PEACE OFFICER: DEADLY 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 himself from bodily harm; and,
- the defendant's beliefs were reasonable.

The defendant may intentionally use force which is intended or likely to cause death or great bodily harm in making a lawful arrest only if (he) (she) believed that such force was necessary to prevent the escape of (name of victim) and believed that (name of victim) posed a significant threat of death or serious physical injury to the defendant or others.[3]

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.[4]

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 _____[5] 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 885 was originally published in 1987 and revised in 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 885 attempts to explain the limits on the use of deadly force by peace officers in making a lawful arrest. The privilege to use force to make a lawful arrest is recognized in broad terms by § 939.45(4). It is not specifically limited to peace officers, though this instruction is. Peace officers may also be privileged to use force in self-defense or defense of others, situations that are beyond the scope of 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 standard for the use of deadly force is based on the decision of the United States Supreme Court in Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). Garner held that deadly force may not be used to accomplish an arrest "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." 471 U.S. 1, 3.

The Garner decision is based on the Fourth Amendment's rule against unreasonable seizures: "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." 471 U.S. 1, 7. Thus, Garner does not articulate principles of substantive criminal law. However, the Committee concluded that it was instructive in setting forth the two requirements for the valid use of deadly force which are adopted in the instruction.

It is not clear whether Wisconsin had continued to follow the common law "fleeing felon rule" that Garner invalidated. (The fleeing felon rule being that deadly force could be used to accomplish any felony arrest.) In Garner, the Court assumed that Wisconsin did continue to follow the rule. See footnote 14 at 471 U.S. 1, 16. Also see the discussion in Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975). After Garner, it is obvious that Wisconsin must adopt a rule consistent with that decision.

4. The 1987 revision 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).

5. 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.

