950 PRIVILEGE: DISCIPLINE BY A PERSON RESPONSIBLE FOR THE WELFARE OF A CHILD — § 939.45(5)[1]

[AFTER THE ELEMENTS OF THE CRIME, BUT BEFORE THE CONCLUDING PARAGRAPHS, ADD THE FOLLOWING.]

Defense of Reasonable Discipline

Discipline of a child is an issue in this case.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act reasonably in the discipline of a child.

The law allows a person responsible for the child's welfare[2] to use reasonable force to discipline that child.[3] Reasonable force is that force which a reasonable person would believe is necessary.[4]

Whether a reasonable person would have believed that the amount of force used was necessary and not excessive must be determined from the standpoint of the defendant at the time of the defendant's acts. 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]

In determining whether the discipline was or was not reasonable, you should consider the age, physical and mental condition and disposition of the child, the conduct of the child, the nature of the discipline, and all the surrounding circumstances.[6] It is never reasonable discipline to use force which is intended to cause great bodily harm or death or which creates an unreasonable risk of great bodily harm or death.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of this offense[8] have been proved and that the defendant did not act reasonably in the discipline of (name child), you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 950 was originally published in 1962 and revised in 1986, 1989, 1994, 1996, 2001, 2006, and 2013. The 2013 revision added footnotes 3 and 4 and was approved by the Committee in October 2013. Formatting errors were amended in 2023.

This instruction is for cases involving the privilege of reasonable discipline of a child as codified in § 939.45(5). That statute was amended by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. The primary change from prior law was the substitution of "person responsible for the child's welfare" for "parent or a person in the place of a parent." Compare § 939.45(5), 1985-86 Wis. Stats.

This instruction is drafted for cases involving the use of force against a child where it has resulted in a harm prohibited by law. Most often, the harm will be physical injury. However, § 948.04 penalizes the causing of mental harm to a child, a harm that could be caused by conduct not amounting to the use of force, though undertaken in the name of parental discipline. The Committee interprets the statute defining the privilege as applying to all conduct undertaken for the purpose of discipline, including conduct not involving the use of force. This instruction, however, is drafted for a case involving the use of force, which is anticipated to be the most common situation.

Wis JI-Criminal 950 was originally recommended for cases involving intentional causing of harm; Wis JI-Criminal 951 tailored the privilege of parental discipline for cases involving recklessness. In 2014, the Committee concluded that Wis JI-Criminal 950 was suitable for use in all cases and Wis JI-Criminal 951 was withdrawn. The instruction on the privilege should be integrated with the instruction on the offense charged. See, for example, Wis JI-Criminal 1220A, which combines the privilege of self-defense with the instruction on battery.

For a discussion of the substance of this defense, see State v. Kimberly B., 2005 WI App 115, 283 Wis.2d 731, 699 N.W.2d 641, which found the evidence was sufficient to allow the jury to "reasonably conclude that Kimberly was not making a genuine effort to discipline [the victim] by proper means . . . and that she instead was resorting to excessive and unreasonable force, abusive rather than corrective in nature." Kimberly B., ¶37.

1. Statutory privileges are treated as "affirmative defenses" in Wisconsin. That is, the absence of the privilege need not be alleged in the charging document or presented as part of the state's case-in-chief. But once there is some evidence of the privilege in the case, the burden is on the State to prove beyond a reasonable doubt that the defendant's conduct was not privileged. See, e.g., Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979).

2. "Person responsible for the child's welfare" is defined as follows in subsec. (a)3. of § 939.45(5):

> "Person responsible for the child's welfare" includes the child's parent, stepparent, or guardian; an employee of a public or private residential home, institution or agency in which the child resides or is confined or that provides services to the child; or any other person legally responsible for the child's welfare in a residential setting.

[NOTE: "Stepparent" was added to the definition by 1995 Wisconsin Act 214 (effective date: May 1, 1996). This definition is not the same as the one provided in § 948.01(3) for the same term. See Wis JI-Criminal 2114.]

"Child" means a person who has not attained the age of 18 years. See §§ 939.45(5)(a)1 and 948.01(1).

In State v. West, 183 Wis.2d 46, 515 N.W.2d 484 (Ct. App. 1994), the court held that the plain language of § 939.45(5)(a)3. included "foster parent." They are persons "legally responsible for the child's welfare in a residential setting."

In State v. Dodd, 185 Wis.2d 560, 518 N.W.2d 300 (Ct. App. 1994), the court found that a live-in boyfriend was not a "person responsible" under § 939.45(5). The court concluded that the statutory definition does not extend to those who arguably would qualify under an "in loco parentis" standard.

In State v. Evans, 171 Wis.2d 471, 492 N.W.2d 141 (1992), the court interpreted the same phrase – "person responsible for the child's welfare" – as defined in § 948.01(3) for purposes of imposing criminal liability for various Chapter 948 offenses. The court held that under that statute, one who acknowledges in writing that he is the biological father of a child is the child's "parent," even though he had not been adjudicated the father.

Also see State v. Ward, 228 Wis.2d 301, 596 N.W.2d (Ct. App. 1999), holding that an unpaid babysitter is a "person responsible" under § 948.01(3), and State v. Hughes, 2005 WI App 155, 285 Wis.2d 388, 702 N.W.2d 87, reaching the same conclusion with regard to a 17-year-old voluntary caretaker.

3. State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719, stated that the first part of the test for the privilege of parental discipline is that it be for the purpose of disciplining the child:

> ¶29 Under *Kimberly B.*, the privilege of reasonable parental discipline imposes a two-part inquiry. First, the force used must be disciplinary, and not imposed "with a malicious desire to inflict pain." Id. Thus, if the parent's acts are not disciplinary, but merely an expression of rage and frustration towards the child, the acts are not protected by the privilege of reasonable parental discipline. If the acts are disciplinary, they are privileged if the amount and nature of force is reasonable, and not inflicted "immoderately, cruelly, or mercilessly." Id.

4. State v. Williams, 2006 WI App 212, ¶29, 296 Wis.2d 834, 723 N.W.2d 719, also identified three factors for determining if discipline is reasonable:

"(1) the use of force must be reasonably necessary; (2) the amount and nature of the force used must be reasonable; *and* (3) the force used must not be known to cause, or create a substantial risk of, great bodily harm or death." Id., ¶30 We also explained that the reasonableness of the amount of force used in imposing discipline is an objective standard:

> Wis JI-Criminal 950 includes (1) and (2) in narrative form, without breaking them down into a list. It also includes a statement containing the rule in (3). After identifying these three factors, the Williams decision then quotes and cites with apparent approval the paragraph from Wis JI-Criminal 950 that explains how to decide whether "reasonable force" was used. The Committee concluded that because the concepts were covered in the instruction, it was not necessary to include them in list form.

5. This paragraph is intended to describe the general "reasonable person" standard in the context of the privilege of child discipline. It was cited with apparent approval in State v. Kimberly B., 2005 WI App 115, ¶32, 283 Wis.2d 731, 699 N.W.2d 641. It differs slightly from the statement typically used (see, for example, Wis JI-Criminal 800, Privilege: Self-Defense) because the statutory definition does not directly state the privilege in terms of "reasonably believes." Rather, the statute refers to "reasonable discipline" and defines it as "only such force as a reasonable person believes is necessary," adding a step to the process of reasoning.

Section 118.31 addresses corporal punishment in schools, generally forbidding it, with some exceptions. Assuming that a school teacher would be considered a "person responsible for the child's welfare," the Committee concluded that § 118.31 would not be the source of any additional substantive rights or limitations relating to the privilege of reasonable discipline. Its provisions may be relevant to evaluating what may be considered "reasonable" in the use of force to impose discipline in the school setting.

Section 118.31 was amended by 1999 Wisconsin Act 137 by adding a new sub. (7):

> (7) Nothing in this section abrogates or restricts any statutory or common law defense to prosecution for any crime.

As to "statutory" defenses, this section seems to confirm the Committee's conclusion that § 118.31 would not be the source of any additional substantive rights or limitations relating to the privilege of reasonable discipline. As to a common law defense, the only case law authority explaining the common law defense of discipline by a teacher is Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925). The Steber decision was the primary resource for the original version of Wis JI-Criminal 950.

6. This paragraph was included in previous versions of Wis JI-Criminal 950. Because the 1989 revision of the definition of the privilege did not change the general standard of reasonableness, the Committee concluded it was appropriate to include this list of factors to consider.

7. This rule is explicitly set forth in § 939.45(5)(b), supra.

This provision apparently has the effect of limiting the application of the privilege to those crimes that do not have an element of intent to cause great bodily harm or engaging in conduct that creates an unreasonable risk of great bodily harm.

For example, a person charged with physical abuse of a child under § 948.03(2)(a), intentionally causing great bodily harm, would not be entitled to an instruction on the privilege of reasonable discipline – the law defining the privilege provides that it is never reasonable discipline to use force intended to cause great bodily harm. If the state proves the elements of the crime, including intent to cause great bodily harm, the state has also proved that the privilege cannot apply.

The situation with respect to other types of physical abuse under § 948.03 is less clear. Subsection (2)(c) prohibits intentionally causing bodily harm by conduct which creates a high probability of great bodily harm. Is "high probability" in that section the equivalent of "unreasonable risk" in § 939.45(5)? As a general matter, both statements are part of the concept of recklessness and refer to different things. "High probability" refers to the likelihood that the harm will occur, while "unreasonable risk" refers to whether there is any reason for the conduct, that is, whether it has any social utility. The two aspects are separately stated in the standard definition of "criminal recklessness" in § 939.24 which refers to "unreasonable and substantial risk." ("Substantial" was adopted by the homicide revision as a substitute for "high probability.")

Section 939.45(5)(a)2 as originally enacted stated that "great bodily harm" has the meaning provided in § 948.01(4) which in fact defines "sadomasochistic abuse." This was believed to be an inadvertent drafting error, which was corrected by 1989 Wisconsin Act 31 (Section 2825h), which deleted subsection (5)(a)2. The definition of "great bodily harm" in § 939.22(14) applies. See Wis JI-Criminal 914 for a suggested definition.

8. The number of elements for the offense should be stated in the blank. If the offense has a simple title, the title should be used in place of "this offense." But many of the crimes to which this privilege may be relevant are likely to have long titles – for example, "physical abuse of a child: intentionally causing great bodily harm" – making it advisable to use "this offense" instead of the title.