

1343A POSSESSION OF A FIREARM BY A FELON: PRIVILEGE

[INSERT THE FOLLOWING INTO WIS JI-CRIMINAL 1343 AFTER THE ELEMENTS OF THE CRIME ARE DEFINED IN PLACE OF THE TWO CONCLUDING PARAGRAPHS.]

The law allows a person convicted of a felony to possess a firearm under certain circumstances.

The state must prove by evidence which satisfies you beyond a reasonable doubt that the circumstances permitting the defendant to possess a firearm did not exist in this case.

The law allows the defendant to possess a firearm if all the following circumstances are present:

- (1) the defendant reasonably believed (he) (she) was under an unlawful threat of imminent death or great bodily harm;¹
- (2) the defendant reasonably believed (he) (she) had no alternative way to avoid the threatened harm other than by possessing a firearm;²
- (3) the defendant did not recklessly or negligently place (himself) (herself) in a situation in which it was probable that (he) (she) would be forced to possess a firearm; and,
- (4) the defendant possessed the firearm only for the time necessary to prevent the threatened harm.³

If you are satisfied beyond a reasonable doubt that the defendant knowingly possessed a firearm, that the defendant had previously been convicted of a felony and that the

circumstances permitting the defendant to possess a firearm did not exist, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 1343A was approved by the Committee in May 1997 and republished without substantive change in 2008.

This instruction was drafted to implement the decision in State v. Coleman, 206 Wis.2d 198, 556 N.W.2d 701 (1996), where the Wisconsin Supreme Court held that "a narrow defense of privilege exists to a charge of felon in possession of a firearm." However, the court agreed with the state that the generally applicable defenses like coercion, self defense, defense of others, and defense of property should not apply. Rather, a special privilege, based on U.S. v. Gant, 691 F.2d 1159 (5th Cir. 1982), was adopted:

In order to be entitled to the defense, the defendant must prove:

- (1) the defendant was under an unlawful, present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury, or the defendant reasonably believes he or she is under such a threat;
- (2) the defendant did not recklessly or negligently place himself or herself in a situation in which it was probable that he or she would be forced to possess a firearm;
- (3) the defendant had no reasonable, legal alternative to possessing a firearm, or reasonably believed that he or she had no such alternative; in other words, the defendant did not have a chance to refuse to possess the firearm and also to avoid the threatened harm, or reasonably believed he or she did not have such a chance;
- (4) a direct causal relationship may be reasonably anticipated between possessing the firearm and the avoidance of the threatened harm;
- (5) the defendant did not possess the firearm for any longer than reasonably necessary.

206 Wis.2d 198, 209-10.

The Committee concluded that the substance of this five-part test could be captured in the four factors that are used in the instruction. See notes 1-3, below. No change in meaning was intended.

The Coleman decision was ambiguous on the crucial issue of the allocation of the burden of persuasion. The quoted material above was introduced by the phrase: "the defendant must prove." Later however, the court refers to the defendant "bear[ing] the burden of producing sufficient evidence" and noted that "the source of such evidence may be facts produced by the defense or by the state." And, in two other instances, the court

noted that "Coleman presented sufficient evidence in support of the privilege" because the jury "could have determined that Coleman had satisfied the five-part test."

In the absence of more specific direction, the Committee concluded that this instruction should be drafted to reflect the typical Wisconsin approach to privileges: the defendant bears the burden of production which may be satisfied by producing or pointing to "some evidence" of the privilege; upon that showing, the burden switches to the state to prove beyond a reasonable doubt that the privilege does not apply. With a multi-part privilege like this one, that burden can be satisfied by proving that any part of the privilege is not present.

1. This is a paraphrase of the first factor in the test adopted in Coleman, which was stated as follows: ". . . the defendant was under an unlawful, present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury, or the defendant reasonably believes he or she is under such a threat. . . ." No change in meaning is intended.

2. The Committee believes this captures the substance of the third part of the test adopted in Coleman, which was stated as follows: "the defendant had no reasonable, legal alternative to possessing a firearm, or reasonably believed that he or she had no such alternative; in other words, the defendant did not have a chance to refuse to possess the firearm and also to avoid the threatened harm, or reasonably believed he or she did not have such a chance; . . ." No change in meaning is intended.

3. The Committee concluded that this captures the substance of the fourth and fifth parts of the test adopted in Coleman, which provided: "(4) a direct causal relationship may be reasonably anticipated between possessing the firearm and the avoidance of the threatened harm; and, (5) the defendant did not possess the firearm for any longer than reasonably necessary." No change in meaning is intended.