2152A FAILURE TO SUPPORT: AFFIRMATIVE DEFENSE — § 948.22[1]

[USE THIS INSTRUCTION IF THERE IS EVIDENCE OF THE DEFENSE UNDER § 948.22(6).][2]

Statutory Definition of the Crime

Failure to support, as defined in § 948.22 of the Criminal Code of Wisconsin, is committed by one who intentionally fails for 120 or more consecutive days[3] to provide spousal or child support[4] which the person knows or reasonably should know the person is legally obligated to provide.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally failed to provide (spousal) (child) support.[5]

"Intentionally" means that the defendant had the mental purpose to fail to pay support or was aware that his conduct was practically certain to cause that result.[6]

IF THERE IS EVIDENCE THAT THE DEFENDANT FAILED TO PAY SUPPORT REQUIRED UNDER A COURT ORDER, ADD THE FOLLOWING:[7]

[Evidence has been received that the defendant failed to pay support payments required by a court order.

If you are satisfied beyond a reasonable doubt that the defendant knew or reasonably should have known that he was required to pay support under a court order and failed to pay support payments as required, you may find that the failure to provide support was intentional, but you are not required to do so. You must not find that the failure to support was intentional unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[It is not a defense that support was provided wholly or partially by any other person.][8]

2. The failure to provide support continued for 120 or more consecutive days.[9]
3. The defendant (knew) (reasonably should have known) that (he) (she) was legally obligated to provide the (spousal) (child) support.

Consider Whether the Defense is Proved

Wisconsin law provides that it is a defense to this crime if the defendant was unable to provide support. The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that (he) (she) was unable to provide support.

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[A person may not demonstrate inability to provide support if the person is employable but, without reasonable excuse, either fails to diligently seek employment, terminates employment, or reduces his earnings or assets.][10]

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.[11]

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, and you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you must find the defendant not guilty.[12]

COMMENT

Wis JI-Criminal 2152A was approved by the Committee in May 2000.

This instruction is drafted for violations of § 948.22 involving evidence of the affirmative defense provided by sub. (6). For offenses not involving the affirmative defense, see Wis JI-Criminal 2152.

1. Failure to support under § 948.22 is a Class E felony if the failure continues for 120 or more consecutive days. (§ 948.22(2).) If the failure is for less than 120 consecutive days, the offense is punished as a Class A misdemeanor. (§ 948.22(3).) Wis JI-Criminal 2152 is drafted for the felony offense. It can be modified for a misdemeanor charge simply by dropping the phrase "for 120 or more consecutive days" wherever it appears and reducing the elements from three to two.

Subsection 948.22(2) has been interpreted to permit "a prosecutor to charge one count of felony

nonsupport for each 120-day term a person fails to pay child support, even if that person failed to pay over one continuous period." State v. Grayson, 172 Wis.2d 156, 158 493 N.W.2d 23 (1992). Thus, "if a person fails to pay child support for 360 consecutive days, a prosecutor could charge him with three counts of felony nonsupport." Ibid., at footnote 1.

2. Subsection (6) of § 948.22 provides as follows:

> 948.22(6) Under this section, affirmative defenses include but are not limited to inability to provide child, grandchild or spousal support. A person may not demonstrate inability to provide child, grandchild or spousal support if the person is employable but, without reasonable excuse, either fails to diligently seek employment, terminates employment or reduces his or her earnings or assets. A person who raises an affirmative defense has the burden of proving the defense by a preponderance of the evidence.

The Committee's decision on how to implement this provision can best be explained by a brief review of affirmative defenses generally, followed by an analysis of the nonsupport statute.

Consideration of affirmative defenses, presumptions (their close relatives), and burdens of production and persuasion can be complicated. But the general rule can be stated quite simply: The legislature has the power to define the conduct that is subject to criminal penalty and in doing so may specify whatever facts it wishes as those necessary to constitute the crime. The burden of persuasion is always on the state to prove these facts beyond a reasonable doubt. If the legislature wishes to identify defenses which are not inconsistent with the facts necessary to constitute the crime, it may do so. On such defenses, the state may impose the burden of persuasion on the defendant.

These statements are the distillation of several decisions of the United States Supreme Court. Specifically, In re Winship, 397 U.S. 358 (1970), is the source of the requirement that the burden is on the prosecution to prove all facts necessary to constitute the crime beyond a reasonable doubt. In Mullaney v. Wilbur, 421 U.S. 684 (1975), the Court elaborated on Winship, holding that it is a denial of due process to relieve the state of its burden to prove such facts, or shift the burden to the defendant, by presumptions or similar evidentiary devices.

The Winship/Mullaney principles were refined by a later decision in Patterson v. New York, 432 U.S. 197 (1977), which held that those principles extended only to the elements included in the definition of the offense. The state is not required to prove the absence of an affirmative defense, so long as the defense is not inconsistent with the statutory elements of the crime. And it is up to the legislature to determine which facts will be elements and which will be defenses. (The court noted that there are some limits beyond which the legislature may not go but did not identify what those limits are.)

The Patterson decision and its limits on the application of Mullaney and Winship have been followed in subsequent cases. See McMillan v. Pennsylvania, 477 U.S. 79 (1986) – possession of a firearm is a sentencing factor, not an element, and Martin v. Ohio, 480 U.S. 228 (1987) – a defendant charged with murder can be required to prove the affirmative defense of self-defense because it is not inconsistent with any of the elements of the crime.

[Note the importance of the change from the broad concept – facts necessary to constitute the crime – used in Winship and, to a lesser degree, in Mullaney to the narrower concept – statutory elements –

adopted in Patterson.]

It is now well established that the constitutional principles set forth in Mullaney and Patterson allow the state legislatures to recognize affirmative defenses and to require the defendant to carry the burden of persuasion on such defenses. Wisconsin has generally chosen to stay with a Mullaney type of procedure for most defenses: when there is evidence of a defense in the case, the state must prove its absence to justify a finding of guilt. To put it in Winship terms, the absence of the defense becomes a fact necessary to constitute the crime (though it is not, in Patterson terms, a statutory element). There are exceptions to this approach, however, the most notable being the affirmative defense recognized in § 940.09, Homicide by Intoxicated Use of Vehicle or Firearm. The constitutionality of this affirmative defense has been upheld. State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 1188.

Subsection 948.22(2) makes it a crime to "intentionally" fail to provide support. Subsection 948.22(6) recognizes an affirmative defense – inability to provide support – and provides that the defendant has the burden of proving the defense by a preponderance of the evidence. This drafting style creates a question – is the defense of inability to provide support something that can coexist with the element of intentional failure to pay? If it can, making it an affirmative defense and imposing the burden on the defendant is all right under Patterson. If it cannot, doing so violates the principle of Mullaney.

The former nonsupport statute, § 940.27 (1985-86 Wis. Stats.) also recognized inability to provide support as an affirmative defense but did not explicitly place the burden of persuasion on the defendant. [The suggested uniform jury instruction treated it as imposing only a burden of production on the defendant – once there was evidence of inability to pay support, the state had to prove the defendant did have the ability to pay. See Wis JI-Criminal 1264 8 1986.] The former statute was reviewed in State v. Duprey, 149 Wis.2d 655, 439 N.W.2d 837 (Ct. App. 1989). The court assumed that the defendant did have the burden of persuasion and upheld the constitutionality of the statutory scheme. The court held that because inability to pay does not negate any element of the crime, requiring the defendant to prove it does not unconstitutionally shift any burden to him.

Statutes like new § 948.22 have been reviewed by the U.S. Supreme Court and the U.S. Court of Appeals for the 7th Circuit. In Hicks v. Feiock, 108 S.Ct. 1423 (1988), the U.S. Supreme Court reviewed a California statute that treated failure to pay support as a contempt offense. It was like Wisconsin's statute in that it required intentional failure to pay support but made inability to pay an affirmative defense. The issue before the Court was whether the statute imposed a civil or a criminal penalty. A standard for resolving that question was set forth, and the case was remanded for application of that standard. Not directly addressed was the question whether, if the statute did impose a criminal penalty, it violated due process to require the defendant to prove inability to pay where the intentional failure to pay was an affirmative defense. The state court held that ability to comply was an element of the crime, not an affirmative defense, and that the attempt to make the defendant prove the defense was a due process violation. The Supreme Court concluded it was bound by the state court's determination of this issue and did not analyze it.

The Indiana nonsupport statute was reviewed by the U.S. Court of Appeals for the 7th Circuit in Davis v. Barber, 853 F.2d 1418 (7th Cir. 1988). Section 35-46-1-5 of the Indiana Code defines criminal nonsupport as "knowingly or intentionally fails to provide support" and provides that "it is a defense that the accused person was unable to provide support." The Seventh Circuit noted that Hicks set the standard to be used in analyzing the statutory scheme: one looks to state law to determine what the

elements of the crime are. The court concluded that under Indiana law, ability to pay is not an element. That being the case, due process principles do not prevent making inability to pay an affirmative defense. Further, the court specifically rejected several of the defendant's arguments. First, inability to pay is not the negative side of the requirement that the failure to pay be "intentional" or "knowing." As Indiana law defines those terms, either "conscious objective" or "awareness of a high probability" is sufficient. Inability to pay is not inconsistent with awareness of a high probability that he is failing to provide support. (NOTE: In this respect, the recent change in the definition of "intentionally" under Wisconsin law may save the Wisconsin nonsupport statute – it now includes "mental purpose" and "aware(ness) that the conduct is practically certain to cause the result.") Second, the court rejected the defendant's argument that general principles of criminal liability require that acts be voluntary. Assuming this general rule applies to omissions, the seventh circuit concludes that the general rule is not applicable where a specific statute defines the offense in a contradictory manner.

If one can say that intentional failure to provide support does not require ability to pay, making inability to pay an affirmative defense with the burden of persuasion on the defendant does not violate the due process clause of the U.S. Constitution. Given the decisions in Duprey and in Davis v. Barber, the Committee concluded that the Wisconsin statute is likely to be interpreted as a constitutional definition of the crime of failure to support.

3. If the misdemeanor offense is charged, delete the phrase "for 120 or more consecutive days" from this paragraph and in the other places it appears. See discussion in note 1, supra.

4. 1985 Wisconsin Act 56 added "grandchild support" to the statute. "'Grandchild support' means an amount which a person is legally obligated to provide under s. 49.90(1)(a)2 and (11)." Subsec. 948.22(1)(b). In a case involving a grandparent's failure to support, the suggested instruction needs to be modified by substituting "grandchild support" throughout the instruction.

5. The statute uses the terms "spousal" or "child" support and defines them by reference to other statutes using the terms. See subsecs. (1)(a) and (c) of § 948.22. For the purposes of instructing the jury, the Committee concluded that definition of "support" would rarely be necessary in the usual case. Should the facts present an issue, the statutes referenced in subs. (1)(a) and (c) may offer some guidance. See note 3, supra, regarding the revision of the statute to include "grandchild support."

6. This is the definition of "intentionally" provided in § 939.23. The "aware that his conduct was practically certain to cause that result" alternative was added by the 1987 revision of the homicide statutes. See Wis JI-Criminal 923A and 923B for further discussion of the definition of "intentionally." The unusual composition of § 948.22 makes unclear the mental state that is required. With offenses involving the failure to do something, "intentionally" is usually interpreted to require a showing that the defendant be able to do what is required: a failure to do X cannot be "intentionally" done unless the person knew he was supposed to do X and had the ability to do it.

Two provisions of § 948.22 are inconsistent with this definition of "intentionally." Subsec. (4) provides that failure to pay the amount required by court order or an amount equal to that derived from the AFDC standards (§ 49.19(11)(a)1) is "prima facie" evidence of intentional failure to provide support. The Committee concluded that the "prima facie" case should be implemented as described in note 7, below.

The second problematical subsection is subsec. (6) which provides that ". . . affirmative defenses include but are not limited to inability to provide child or spousal support." As explained above, the usual definition of "intentionally" requires that there be ability to that which is required.

7. Subsection (4) of § 948.22 recognizes two facts as "prima facie evidence" of intentional failure to provide support: failure to make payments required by court order, when the person knows or reasonably should have known that he or she is required to pay support under an order; or, in a situation where there is no court order, failure to pay an amount equal to the AFDC level set forth in § 49.19(11)(a)1, when the person knows or reasonably should have known that he or she has a dependent. The "knows or reasonably should have known" requirements were added to the statute by 1989 Wisconsin Act 212. (The instruction suggests an addition for a case involving a court order. For a case involving the AFDC formula, a similar addition would be necessary.)

The suggested paragraphs attempt to instruct on the effect of a prima facie case in the way required by § 903.03: if the jury finds that the basic fact (failure to pay as required by a court order) exists, it may find that the presumed fact (intentional failure to provide support) exists, but it is not required to do so. Before finding the defendant guilty, the jury must be satisfied beyond a reasonable doubt, from all the evidence, that the failure to support was intentional. See Wis JI-Criminal 225.

An instruction in these terms was approved in State v. Schleusner, 154 Wis.2d 821, 825, 454 N.W.2d 51 (Ct. App. 1990).

8. See § 948.22(5). A comparable provision in the previous version of this statute, § 940.27(6), 1985-86 Wis. Stats. was discussed in State v. Schleusner, note 6, supra.

Support payments made as a result of the state's interception of tax refunds count as support payments. See State v. Lenz, cited in the Comment preceding note 1, Wis JI-Criminal 2152.

9. The basic offense is punished as a Class A misdemeanor. The penalty increases to that of a Class E felony if a person fails to provide support "for 120 or more consecutive days." In State v. Duprey, 149 Wis.2d 655, 439 N.W.2d 837 (Ct. App. 1989), the court of appeals interpreted this part of the statute as it applies to an order requiring payment of 25% of income as child support. The court held that the state is not required to prove that the defendant in fact had income for 120 consecutive days where the amount of the support obligation is determined on a percentage basis.

10. This statement is taken directly from subsec. (6) of § 948.22.

A defendant's "lack of financial resources alone is insufficient to demonstrate inability to pay. If a defendant has the capacity to become gainfully employed and realize earnings it is no valid defense to felony nonsupport." State v. Clutter, 230 Wis.2d 472, 479, 602 N.W.2d 324 (Ct. App. 1999).

Evidence of "incarceration is relevant to a defense of inability because, depending on the circumstances of incarceration, incarceration may prevent a person from being employed and therefore may prevent a person from having earnings with which to pay child support. Whether a person commits a crime in order to avoid paying child support is a question of fact for the jury." State v. Stutesman, 221 Wis.2d 178, 184, 585 N.W.2d 181 (Ct. App. 1998).

11. This is a slight revision of the standard description of the civil burden of proof, intended to improve its understandability. No change in meaning is intended.

12. This statement is included to assure that both options for a not guilty verdict are clearly presented:

(1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and

(2) not guilty even though the elements are proven, because the defense has been established.