2169 INTERFERENCE WITH THE CUSTODY OF A CHILD: AFFIRMATIVE DEFENSES — § 948.31(4)

IF THERE IS EVIDENCE OF AN AFFIRMATIVE DEFENSE RECOGNIZED IN § 948.31(4), SUBSTITUTE THE FOLLOWING FOR THE FINAL TWO PARAGRAPHS OF THE APPLICABLE INSTRUCTION:

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

If you are satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must consider whether the action taken by the defendant (state the applicable defense as set forth in subsecs. (4)(a)1.-4.) .[1]

Wisconsin law provides that it is a defense to this crime if the person took the action (state the applicable defense) .[2]

The burden is on the defendant to satisfy you to a reasonable certainty by the greater weight of the credible evidence that (state the applicable defense) .

By the greater weight of the evidence is meant evidence which, when weighed against that opposed to it, has more convincing power. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that the defendant (state the applicable defense) , 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 the defendant (state the applicable defense) and you are satisfied beyond a

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reasonable doubt that all the elements of this offense have been proved, you should find the defendant guilty.

COMMENT

Wis JI-Criminal 2169 was approved by the Committee in August 1989; the comment was updated in 1994. This revision was approved by the Committee in February 2009; it involved adoption of a new format and nonsubstantive changes to the text.

Subsection (4) of § 948.31 recognizes four affirmative defenses to the crime of interference with the custody of a child and imposes the burden of persuasion on the defendant to establish the defense. When there is evidence raising one of the defenses, the instruction for the offense charged must be modified. This instruction illustrates a general format for modifying the final two paragraphs of the instruction on the substantive offense.

Subsection (4) of § 948.31 provides as follows:

> (4)(a) It is an affirmative defense to prosecution for violation of this section if the action:
>
> 1. Is taken by a parent or by a person authorized by a parent to protect his or her child in a situation in which the parent or authorized person reasonably believes that there is a threat of physical harm or sexual assault to the child;
>
> 2. Is taken by a parent fleeing in a situation in which the parent reasonably believes that there is a threat of physical harm or sexual assault to himself or herself;
>
> 3. Is consented to by the other parent or any other person or agency having legal custody of the child; or
>
> 4. Is otherwise authorized by law.
>
> (b) A defendant who raises an affirmative defense has the burden of proving the defense by a preponderance of the evidence.

The defenses stated in sub. (4)(a).1 and 2. were changed by 1993 Wisconsin Act 302, effective date: April 29, 1994. Before the change, subsection (a)1. referred to actions taken to protect the child "from imminent physical harm or sexual assault"; sub. (a)2. referred to a parent fleeing "from imminent physical harm to himself or herself."

The defenses specified in subsecs. (4)(a)1. and 2. appear to be true "affirmative defenses." That is, they describe facts that are not inconsistent with the facts necessary to constitute the crime. However, the defenses specified in subsec. (4)(a)3. and 4. may, at least in some cases, be the same as the statutory elements of the crimes to which they might apply. For example, subsec. (4)(a)3. provides that the consent of the parent is a defense. If applied to the offense defined in § 948.31(2), it would make consent a defense to a crime which has "without consent" as a required element. It violates due process to relieve

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the state of its burden to prove all required elements beyond a reasonable doubt by use of affirmative defenses or presumptions. (See the more extensive discussion of these principles in the Comment to Wis JI-Criminal 2152.) The Committee recommends that the consent defense not be the subject of a special jury instruction in cases involving charges under § 948.31(1)(b) and § 948.31(2) which have "without consent" as an element, at least where the consent issue relates to the consent of one individual. (It could be possible, one supposes, that the charge could be based on taking a child without the consent of the legal guardian and the defense could be raised that the parent consented. In such a case, the elements of the crime and the defense could coexist, avoiding constitutional problems.) The Committee perceives no problem in treating consent as an affirmative defense to charges under § 948.31(3) because "without consent" is not an element of that crime. Similar problems could arise with respect to the "otherwise authorized by law" defense specified in subsec. (4)(a)4. Care should be taken to assure that the defense does not duplicate, and shift the burden of persuasion on, a fact that is already identified by the statute as a fact necessary to constitute the crime.

The former version of one statute replaced by § 948.31 – § 946.715, 1985-86 Wis. Stats. – also recognized defenses that were similar to some of those at issue here. One of those provisions recognized a defense if the action was taken "to protect the child from imminent physical harm." (Compare subsec. (4)(a)1., above.) The constitutionality of that defense was extensively discussed in State v. McCoy, 143 Wis.2d 274, 420 N.W.2d 107 (1988), affirming 139 Wis.2d 291, 407 N.W.2d 319 (Ct. App. 1987). The court held that the phrase "imminent physical harm" was not unconstitutionally vague because "[i]t gives reasonable notice of proscribed conduct to persons bent on obedience of the law and to those who must apply it," 143 Wis.2d 274, 288.

In McCoy, supra, the Wisconsin Supreme Court also held that the legislature intended that a "reasonable person" standard apply to the defense:

> While recognizing that § 946.715, Stats., does not expressly articulate the level of objective or subjective belief a person must hold before the privilege to conceal arises, an analysis of this statute supports a finding that a reasonable person standard was intended. Subsection (1) of the statute evidences the legislature's broad concern for deterrence of parental child snatching, regardless of the marital status of the parents, creating a remedy for the other parent by imposing felony sanctions. Subsection (2) expressly exempts a person from liability when providing protection for minor children who are in danger of imminent physical harm. We conclude that both provisions can only be harmonized by imposing a reasonableness standard on action taken to protect a child from imminent harm.
>
> The language of this statute encourages the maintenance of parental rights against unlawful interruption. A test, as proposed by the defendant, based strictly on subjective belief would vitiate this purpose, permitting a child to be concealed any time harm seemed imminent to a parent, no matter how irrational the belief. This court has determined that an interpretation which fulfills the objectives of a statute is to be favored over an interpretation which would defeat legislative objectives. Belleville State Bank v. Steele, 117 Wis.2d 563, 570, 345 N.W.2d 405, 409 (1984). A subjective standard would not serve the objectives of this statute.

143 Wis.2d 274, 290-91.

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Thus, the court concluded that "[l]anguage requiring the defendant's actions to be 'reasonably necessary' . . . properly reflected the treatment of this privilege as a statutory defense." 143 Wis.2d 274, 291.

For a discussion of the evidence required to raise the affirmative defense, see State v. Inglin, 224 Wis.2d 764, 592 N.W.2d 666 (Ct. App. 1999).

1. Here summarize the applicable defense from subsec. (4)(a)1.-4. For example, for the defense set forth in (4)(a)1., the statement might be completed as follows: ". . . that the parent took the action to protect the child in a situation in which the parent reasonably believed that there was a threat of physical harm to the child."

2. See note 1, supra.

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