

939.48. Self-defense and defense of others

(1) A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

(1m)

(a) In this subsection:

1. "Dwelling" has the meaning given in s. 895.07(1) (h).
2. "Place of business" means a business that the actor owns or operates.

(ar) If an actor intentionally used force that was intended or likely to cause death or great bodily harm, the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force and shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself if the actor makes such a claim under sub. (1) and either of the following applies:

1. The person against whom the force was used was in the process of unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring.
2. The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering

it, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

(b) The presumption described in par. (ar) does not apply if any of the following applies:

1. The actor was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time.

2. The person against whom the force was used was a public safety worker, as defined in s. 941.375(1) (b), who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties. This subdivision applies only if at least one of the following applies:

- a. The public safety worker identified himself or herself to the actor before the force described in par. (ar) was used by the actor.

- b. The actor knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

(2) Provocation affects the privilege of self-defense as follows:

(a) A person who engages in unlawful conduct of a type likely to provoke others to attack him or her and thereby does provoke an attack is not entitled to claim the privilege of self-defense against such attack, except when the attack which ensues is of a type causing the person engaging in the unlawful conduct to reasonably believe that he or she is in imminent danger of death or great bodily harm. In such a case, the person engaging in the unlawful conduct is privileged to act in self-defense, but the person is not privileged to resort to the use of force intended or likely to cause death to the person's assailant unless the person reasonably believes he or she has exhausted every other reasonable means to escape from or

otherwise avoid death or great bodily harm at the hands of his or her assailant.

(b) The privilege lost by provocation may be regained if the actor in good faith withdraws from the fight and gives adequate notice thereof to his or her assailant.

(c) A person who provokes an attack, whether by lawful or unlawful conduct, with intent to use such an attack as an excuse to cause death or great bodily harm to his or her assailant is not entitled to claim the privilege of self-defense.

(3) The privilege of self-defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a 3rd person, except that if the unintended infliction of harm amounts to the crime of first-degree or 2nd-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire, first-degree or 2nd-degree reckless injury or injury by negligent handling of dangerous weapon, explosives or fire, the actor is liable for whichever one of those crimes is committed.

(4) A person is privileged to defend a 3rd person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such that the 3rd person would be privileged to act in self-defense and that the person's intervention is necessary for the protection of the 3rd person.

(5) A person is privileged to use force against another if the person reasonably believes that to use such force is necessary to prevent such person from committing suicide, but this privilege does not extend to the intentional use of force intended or likely to cause death.

(6) In this section "unlawful" means either tortious or expressly prohibited by criminal law or both.

History:

1987 a. 399; 1993 a. 486; 2005 a. 253; 2011 a. 94.

Case Note:

When a defendant testified that he did not intend to shoot or use force, he could not claim self-defense. *Cleghorn v. State*, 55 Wis. 2d 466, 198 N.W.2d 577 (1972).

Sub. (2) (b) is inapplicable to a defendant if the nature of the initial provocation is a gun-in-hand confrontation of an intended victim by a self-identified robber. Under these circumstances the intended victim is justified in the use of force in the exercise of the right of self-defense. *Ruff v. State*, 65 Wis. 2d 713, 223 N.W.2d 446 (1974).

Whether a defendant's belief was reasonable under subs. (1) and (4) depends, in part, upon the parties' personal characteristics and histories and whether events were continuous. *State v. Jones*, 147 Wis. 2d 806, 434 N.W.2d 380 (1989).

Evidence of prior specific instances of violence that were known to the accused may be presented to support a defense of self-defense. The evidence is not limited to the accused's own testimony, but the evidence may not be extended to the point that it is being offered to prove that the victim acted in conformity with his or her violent tendencies. *State v. Daniels*, 160 Wis. 2d 85, 465 N.W.2d 633 (1991).

Imperfect self-defense contains an initial threshold element requiring a reasonable belief that the defendant was terminating an unlawful interference with his or her person. *State v. Camacho*, 176 Wis. 2d 860, 501 N.W.2d 380 (1993).

The reasonableness of a person's belief under sub. (1) is judged from the position of a person of ordinary intelligence and prudence in the same situation as the defendant, not a person identical to the defendant placed in the same situation as the defendant. A defendant's psycho-social history showing past violence toward the

defendant is generally not relevant to this objective standard, although it may be relevant, as in spousal abuse cases, where the actors are the homicide victim and defendant. *State v. Hampton*, 207 Wis. 2d 369, 558 N.W.2d 884 (Ct. App. 1996).

The right to resist unlawful arrest is not part of the statutory right to self-defense. It is a common law privilege that is abrogated. *State v. Hobson*, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), 96-0914.

While there is no statutory duty to retreat, whether the opportunity to retreat was available goes to whether the defendant reasonably believed the force used was necessary to prevent an interference with his or her person. A jury instruction to that effect was proper. *State v. Wenger*, 225 Wis. 2d 495, 593 N.W.2d 467 (Ct. App. 1999), 98-1739.

When a defendant fails to establish a factual basis to raise self-defense, prior specific acts of violence by the victim have no probative value. The presentation of subjective testimony by an accused, going to a belief that taking steps in self-defense was necessary, is not sufficient for the admission of self-defense evidence. *State v. Head*, 2000 WI App 275, 240 Wis. 2d 162, 622 N.W.2d 9, 99-3071.

Although intentionally pointing a firearm at another constitutes a violation of s. 941.20, under sub. (1) a person is privileged to point a gun at another person in self-defense if the person reasonably believes that the threat of force is necessary to prevent or terminate what he or she reasonably believes to be an unlawful interference. *State v. Watkins*, 2002 WI 101, 255 Wis. 2d 265, 647 N.W.2d 244, 00-0064.

A defendant asserting perfect self-defense against a charge of 1st-degree murder must meet an objective threshold showing that he or she reasonably believed that he or she was preventing or terminating an unlawful interference with his or her person and that the force used was necessary to prevent imminent death or great

bodily harm. A defendant asserting the defense of unnecessary defensive force s. 940.01(2) (b) to a charge of 1st-degree murder is not required to satisfy the objective threshold showing. *State v. Head*, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413, 99-3071.

When a defendant successfully makes self-defense an issue, the jury must be instructed as to the state's burden of proof regarding the nature of the crime, even if the defense is a negative defense. Wisconsin JI-Criminal 801 informs the jury that it "should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, [his] conduct did not create an unreasonable risk to another." This instruction implies that the defendant must satisfy the jury that the defendant was acting in self-defense and removes the burden of proof from the state to show that the defendant was engaged in criminally reckless conduct. *State v. Austin*, 2013 WI App 96, 349 Wis. 2d 744, 836 N.W.2d 833, 12-0011.

When the circuit court instructed the jury to "consider the evidence relating to ... defense of others, in deciding whether defendant's conduct created an unreasonable risk.... If the defendant was acting lawfully in defense of others, his conduct did not create an unreasonable risk to another," the instruction on the state's burden of proof on defendant's defense of others defense was wholly omitted and the instructions were erroneous. *State v. Austin*, 2013 WI App 96, 349 Wis. 2d 744, 836 N.W.2d 833, 12-0011.

Sub. (1m) does not justify continued use of deadly force against an intruder when that intruder is no longer in the actor's dwelling. The applicable definition of the actor's dwelling, s. 895.07(1) (h), requires that the part of the lot or site in question be "devoted to residential use." While s. 895.07(1) (h) lists several parts of a residential lot that are part of a "dwelling," it does not include a parking lot. The common denominator of the listed parts of dwellings is that all are property over which the actor has exclusive control. An apartment

building parking lot is not exclusive to one tenant or devoted to the residential use of any one tenant. *State v. Chew*, 2014 WI App 116, 358 Wis. 2d 368, 856 N.W.2d 541, 13-2592.

Wisconsin law establishes a low bar that the accused must surmount to be entitled to a jury instruction on the privilege of self-defense. The accused need produce only "some evidence" in support of the privilege of self-defense. *State v. Stietz*, 2017 WI 58, 369 Wis. 2d 222, 880 N.W.2d 182, 14-2701.

The jury instruction for self-defense in this case was not erroneous. The circuit court gave the jury a general instruction on the state's burden to establish guilt beyond a reasonable doubt. Because self-defense is a negative defense, the state disproves self-defense beyond a reasonable doubt if the state proves the elements of the crime beyond a reasonable doubt, specifically criminal negligence. Therefore, the jury was aware that the state had to prove criminal negligence the element that self-defense would negate beyond a reasonable doubt. *State v. Langlois*, 2018 WI 73, 382 Wis. 2d 414, 913 N.W.2d 812, 16-1409.

A person may employ deadly force against another, if the person reasonably believes that force is necessary to protect a 3rd-person or one's self from imminent death or great bodily harm, without incurring civil liability for injury to the other. *Clark v. Ziedonis*, 513 F.2d 79 (1975).

Self-defense prior acts of the victim. 1974 WLR 266.

State v. Camacho: The Judicial Creation of an Objective Element to Wisconsin's Law of Imperfect Self-defense Homicide. *Leiser*. 1995 WLR 742.

Home Safe Home: Wisconsin's Castle Doctrine and Trespasser Liability Laws. *Hinkston*. *Wis. Law*. June 2013.