Technical Assistance Practice Advisory
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Necessity Defense

The rationale of the necessity defense is based on public policy:

> [T]he law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.

State v. Bailey, 77 Wash.App. 732, 740, 893 P.2d 681, 685 (1995) (quotingWayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 50, at 382 (1972)).

Some Washington cases hold the necessity defense is applicable only when a defendant acts in response to a force of nature:

> Generally, necessity is available as a defense when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law. The defense is not applicable where the compelling circumstances have been brought about by the accused or where a legal alternative is available to the accused.

State v. Diana, 24 Wash.App. 908, 913-914, 604 P.2d 1312, 1316 (1979). See also State v. Turner, 42 Wash.App. 242, 247, 711 P.2d 353, 356 (1985) (quoting W. LaFave & A. Scott, *Criminal Law* § 50, at 381 (1972)) (defendant could not claim necessity defense when she tried to smuggle drugs into prison due to threats to her husband and son if she did not because "[w]ith the defense of necessity, the pressure must come from the physical forces of nature ... rather than from other human beings"); State v. Gallegos, 73 Wash.App. 644, 650-651, 871 P.2d 621, 625 (1994) (necessity defense unavailable because defendant was reacting to friend's need for assistance, not to "a physical force of nature"). However, other Washington cases suggest that the necessity defense might be appropriate even in the absence of a force of nature. See State v. Jeffrey, 77 Wash.App. 222, 226, 889 P.2d 956, 958 (1995) (necessity defense instruction that does not require force of nature to have caused emergency is appropriate in "certain circumstances").

In order to bring the necessity defense, a defendant must present some evidence that her "actions were necessary to avoid a greater harm or that no reasonable legal alternatives were available." State v. White, 137 Wash.App. 227, 232, 152 P.3d 364, 366 (2007). Typically, a defendant must also be "confronted with an unforeseen and sudden situation" in order to assert the necessity defense. White, 137 Wash.App. at 232.

Once a defendant has brought the necessity defense, the defendant must meet three requirements to prevail on the necessity defense:

> [T]he defendant must prove by a preponderance of the evidence that (1) he or she reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, and (3) no legal alternative existed.

Gallegos, 73 Wash.App. at 650-651.

Normally, a defendant asserting the necessity defense must prove that defense by a preponderance of the evidence. However, "when a property owner charged with unlawful hunting or waste of wildlife presents sufficient evidence that he exercised his constitutional right to protect his property from destructive game, the burden shifts to the State to disprove this justification." State v. Vander Houwen, 163 Wash.2d 25, 36, 177 P.3d 93, 98 (2008).

Necessity Defense and Specific Crimes

The "uncontrollable circumstances" defense available in bail jumping cases is a "specific iteration of the principals underlying the necessity defense" and displaces the need to give a specific necessity defense instruction. White, 137 Wash.App. at 231.

The necessity defense is not available to support the mercy killing of an injured game animal. State v. Bailey, 77 Wash.App. 732, 740-741, 893 P.2d 681, 685 (1995).

"Washington does not recognize a common law defense of medical necessity for the use of marijuana." State v. Butler, 126 Wash.App. 741, 747, 109 P.3d 493, 496 (2005).

The necessity defense can be a defense to unlawful possession of a firearm in some circumstances. State v. Jeffrey, 77 Wash.App. at 226.