112 ONE DEFENDANT: SINGLE COUNT: LESSER INCLUDED OFFENSES

The information in this case charges that:

[READ THE CHARGE IN THE INFORMATION.]

To this charge, the defendant has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON THE OFFENSE CHARGED, OMITTING THE LAST PARAGRAPH.]

If you are not so satisfied, you must not find the defendant guilty of (charged crime),[1] and you should consider whether the defendant is guilty of (lesser included crime)[2] in violation of Section _____ of the Criminal Code of Wisconsin, which is a lesser included offense of (charged crime).

Make Every Reasonable Effort to Agree

You should make every reasonable effort[3] to agree unanimously on your verdict on the charge of (charged crime) before considering the offense of (lesser included crime). However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of (charged crime), you should consider whether the defendant is guilty of (lesser included crime).

[READ INSTRUCTION ON THE LESSER INCLUDED OFFENSE,[4] OMITTING THE WORDS: "AS CHARGED IN THE (INFORMATION) (COMPLAINT)" IF THEY APPEAR.]

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant committed (charged crime) , the offense charged in the information, you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense(s) I have submitted to you.

If you are not satisfied beyond a reasonable doubt that the defendant committed (either one) (any) of the offenses I have submitted to you, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 112 was originally published in 1962 and revised in 1979, 1985, 1990, 1991, and 1996. It was republished without substantive change in 2000.

The 1996 revision changed the text preceding note 1 to conform it to the approach used in instructions with built-in lesser included offenses. See, for example, Wis JI-Criminal 1012, 1014, 1018, and 1022. The revised language is more consistent with the basic premise of the instruction that unanimous agreement on "not guilty" in the charged crime is not necessary before proceeding to consider the lesser included crime. See note 3, below.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

For an alternative way of handling lesser included offenses, see Wis JI-Criminal 112A. Instead of repeating the full instruction in the lesser included offenses, Wis JI-Criminal 112A focuses on the fact which distinguishes the greater offense from the lesser.

Where the defendant has entered a special plea of not guilty by reason of mental disease or defect, the court should so instruct by using the appropriate instructions from the series beginning at Wis JI-Criminal 600.

Wis JI-Criminal 112 is intended to provide a "bridge" or "transition" between the charged crime and a lesser included offense. Some suggested uniform instructions that deal with two or more related offenses have the "transition" built in, making separate use of Wis JI-Criminal 112 unnecessary. (See, for example, Wis JI-Criminal 1012, 1014, 1018, and 1022 dealing with homicide charges and Wis JI-Criminal 6035 and 6036 dealing with controlled substance charges.)

This instruction refers only to the charge "in the information" rather than to the charge "in the (information) (complaint)" because the Committee concluded that lesser included offenses are submitted almost exclusively where the charged crime is a felony. There may be cases, however, where a misdemeanor offense is charged and a lesser included offense is submitted. For example, an attempt could be submitted as a lesser included offense to a charge of misdemeanor theft or battery. See §§ 939.32(1) and 939.66(4). In such cases, the reference to "information" should be changed to "complaint."

1. Here state the short title of the offense charged. Ordinarily, the Criminal Code titles may be used, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

2. Here state the short title of the lesser included offense.

An instruction on a lesser included offense should be given only if the lesser offense is an included offense under § 939.66 and if the evidence reasonably supports acquittal on the greater offense and conviction on the lesser. See SM-6 for a discussion of the evidentiary rules and of problems that may arise in deciding whether to submit lesser included offenses.

3. This paragraph attempts to provide a bridge between the charged crime and the lesser included offense. An unpublished opinion of the Wisconsin Court of Appeals — Pharr v. State, June 18, 1979 — commended this problem to the attention of the Committee.

The court in Pharr reviewed the prior published version of Wis JI-Criminal 112 and found that it had "inherent infirmities": neither the phrase, "If you find the defendant not guilty," nor, "If, however, you are not so satisfied, . . ." advises the jury how it is to arrive at the conclusion that it is not satisfied of guilt. The following was suggested as an improvement:

> We think a pattern jury instruction would better inform the jury of its options without any coercive effect, if it apprised the jury that when deadlocked upon a less than unanimous vote on the guilt of the defendant with respect to the charge in the information or complaint, it may proceed to consider the next lesser included offense. "Deadlocked" could be defined as the jury's conclusion, after full and complete consideration of the evidence, that unanimous agreement is impossible, and that further deliberation on the charged offense would be fruitless. Similar instructions could be formulated to prescribe the same approach to multiple counts and subsequent lesser included offenses.

The basis for the court's decision was the assumption that it would be error for the instruction to require the jury to be unanimous in finding the defendant not guilty of the charged crime before considering the lesser offense. This conclusion was found to be implicit in earlier Wisconsin Supreme Court decisions, Payne v. State, 199 Wis. 615, 227 N.W. 258 (1929), and Dillon v. State, 137 Wis. 655, 119 N.W. 352 (1909). For a discussion of the advantages and disadvantages of requiring unanimity, see United States v. Tsanas, 572 F.2d 340 (2d Cir. 1978). For the view that requiring unanimity on the offense charged is error, see State v. Ogden, 35 Or. App. 91, 580 P.2d 1049 (1978), and People v. Johnson, 83 Mich. App. 1, 268 N.W.2d 259 (1978).

At the other extreme from requiring unanimity is to allow the jury to consider any of the submitted offenses without regard to sequence. The Pharr decision rejected this theory. Other cases also support the usual practice of asking the jury to first consider the charged crime before moving on to consider lesser included offenses. State v. McNeal, 95 Wis.2d 63, 288 N.W.2d 874 (Ct. App. 1980): Pharr v. Israel, 629 F.2d 1278 (7th Cir. 1980).

The Committee concluded that Wis JI-Criminal 112 treats the problem correctly: the jury is told to make every reasonable effort to reach unanimous agreement on the charged crime before moving on to the lesser included crime.

4. If more than one lesser included offense is submitted, the substance of Wis JI-Criminal 112 should be repeated for each offense.

