

**112A LESSER INCLUDED OFFENSE: ALTERNATIVE STYLE**

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 CRIME CHARGED, OMITTING THE LAST PARAGRAPH.]

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

**Make Every Reasonable Effort to Agree**

You should make every reasonable effort to agree unanimously on your verdict on the charge of (crime charged) 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 (crime charged), you should consider whether the defendant is guilty of (lesser included crime).

The difference between (crime charged) and (lesser included crime) is that (crime charged) requires one additional element: (here identify the fact which distinguishes the crime charged from the lesser included crime).

If you are satisfied beyond a reasonable doubt that all the elements of (crime charged) were present, except the element requiring that \_\_\_\_\_, you should find the defendant guilty of (lesser included crime).

In other words, if you are satisfied beyond a reasonable doubt that the defendant (here summarize elements of the lesser included crime), you should find the defendant guilty of (lesser included crime).

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 (crime charged), 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 I have submitted to you.

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

#### COMMENT

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

The 1996 revision changed the third paragraph of the instruction 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, Wis JI-Criminal 112.

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.

This instruction provides an alternative way of presenting a lesser included offense to the jury. The uniform instruction, Wis JI-Criminal 112, requires reading the instruction for the charged crime and also the instruction for the lesser included offense. This will usually result in substantial repetition without clearly identifying the difference between the two offenses.

Wis JI-Criminal 112A highlights the difference between the greater and lesser offenses rather than rereading the full instruction for the lesser included crime. It is especially suitable for those cases where a single element distinguishes the greater from the lesser offense, such as armed robbery and unarmed robbery. Wis JI-Criminal 112A EXAMPLE illustrates how Wis JI-Criminal 112A would be used for such a case.

Wis JI-Criminal 112A is not suitable for cases where the difference between the greater and lesser offenses is not clearly specified by a single element.