

122 TWO DEFENDANTS: SINGLE COUNT: INCLUDED OFFENSE

The information in this case charges that:

[READ THE CHARGE IN THE INFORMATION.]

To this charge, each of the defendants 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 FOR THE CHARGED CRIME, OMITTING LAST TWO PARAGRAPHS.]

If you are satisfied beyond a reasonable doubt that the defendant (first defendant) did (list the elements of the charged crime), you should find the defendant (first defendant) guilty of (charged crime) as charged in the information.

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

If you are satisfied beyond a reasonable doubt that the defendant (second defendant) did (list the elements of the charged crime), you should find the defendant (second defendant) guilty of (charged crime) as charged in the information.

If you are not so satisfied, you must not find the defendant (second defendant) guilty of (charged crime),³ and you should consider whether (second defendant) is guilty of (lesser included crime),⁴ in violation of § ___ of the Criminal Code of Wisconsin, which is a lesser included offense of (charged crime).

Make Every Reasonable Effort to Agree

With respect to each defendant, you should make every reasonable effort⁵ 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 against one defendant of (charged crime), you should consider whether that defendant is guilty of (lesser included crime).

[READ INSTRUCTION FOR LESSER INCLUDED CRIME, OMITTING LAST TWO PARAGRAPHS.]

If you are satisfied beyond a reasonable doubt that the defendant (first defendant) did (list the elements of lesser included crime), you should find the defendant (first defendant) guilty of (lesser included crime).

If you are not so satisfied, you must find the defendant (first defendant) not guilty.

If you are satisfied beyond a reasonable doubt that the defendant (second defendant) did (list the elements of the lesser included crime), you should find the defendant (second defendant) guilty of (lesser included crime).

If you are not so satisfied, you must find the defendant (second defendant) not guilty.

It is for you to determine, as to each defendant, whether that defendant is guilty or not guilty of an offense. You must make a finding as to each defendant separately, and, at the close of these instructions, the court will submit to you separate verdicts regarding each defendant.

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

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

COMMENT

Wis JI-Criminal 122 was originally published in 1962 and revised in 1979, 1990, and 1996. This revision was approved by the Committee in January 2000.

The 1996 revision changed the text preceding notes 1 and 3 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.

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.

See Wis JI-Criminal 492 for corresponding instruction on verdicts submitted.

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.
3. Note 1, supra.
4. Note 2, supra.
5. See note 3, Wis JI-Criminal 112.