140 BURDEN OF PROOF AND PRESUMPTION OF INNOCENCE

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

Presumption of Innocence

Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent. This presumption requires a finding of not guilty unless in your deliberations, you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty.[1]

State's Burden of Proof

The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.

Reasonable Hypothesis

If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence,[2] you should do so and return a verdict of not guilty.

Meaning of Reasonable Doubt

The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given,[3] arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs

of life.[4]

A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.[5]

COMMENT

Wis JI-Criminal 140 and comment were originally published in 1962 and revised in 1983, 1986, 1987, 1991, 1994, 2016, and 2019. The instruction was republished without substantive change in 2000. The 2019 revision expanded on footnote 5. This revision was approved by the Committee in August 2022; it added a reference to the decision in State v. Trammell, 2019 WI 59, 387 Wis. 2d 156, 928 N.W.2d 564.

This instruction must be provided to the jury in writing. Section 972.10(5) was amended by order of the Wisconsin Supreme Court dated April 30, 1986, to require that the instruction "providing the burden of proof" be included among those provided to the jury in writing. Compare E. B. v. State, 111 Wis.2d 175, 330 N.W.2d 584 (1983), where the Wisconsin Supreme Court held that Wis JI-Criminal 140 was not one of the "substantive" instructions that were to be provided to the jury in writing under the former version of § 972.10(5).

For early discussions of definitions of "beyond a reasonable doubt," see Anderson v. State, 41 Wis. 430 (1877); Emery v. State, 92 Wis. 146, 65 N.W. 848 (1896); Emery v. State, 101 Wis. 627, 650 56, 78 N.W. 145, 152 (1899). Also see Hoffman v. State, 97 Wis. 571, 576, 73 N.W. 51 (1897), where, in reference to the instruction on "reasonable doubt," the court stated: "It needs be a skillful definer who shall make the meaning of the term more clear by the multiplication of words."

The proper definition of "beyond a reasonable doubt" continues to receive attention from appellate courts and persons concerned with the understandability of jury instructions. So called plain language versions are suggested by the Federal Judicial Center Committee to Study Criminal Jury Instructions in Pattern Criminal Jury Instructions (1982) (available in pamphlet from West Publishing Company) and in Sales, Elwork, and Alfini, Making Jury Instructions Understandable (Michie, 1982). Some appellate courts have concluded that "beyond a reasonable doubt" cannot be helpfully defined and that there should be no instruction attempting to define it. For example, the United States Court of Appeals for the Seventh Circuit has concluded that the phrase is "self explanatory and is its own best definition." Federal Criminal Jury Instructions of the Seventh Circuit 2.07, p. 18 (1980). Also see United States v. Kramer, 711 F.2d 789, 794 95 (7th Cir. 1983).

The Committee has carefully reviewed Wis JI-Criminal 140 several times in light of the above. Only minor changes have been made in the text as it was originally drafted in 1962. As the notes below indicate, several parts of the instruction have been approved by the Wisconsin appellate courts. Several cases have held it is error not to give certain parts of the instruction upon request. Rather than risk creating appellate issues by significantly changing the instruction, the Committee decided it was better to retain the original version.

The Committee reviewed Wis JI-Criminal 140 in 1994 in light of a decision of the United States Supreme Court that analyzed definitions of "beyond a reasonable doubt." See Victor v. Nebraska, 511 U.S. 1 (1994). A second case, Sandoval v. California, 511 U.S. 1101 (1994) was addressed in the same decision. The primary issue before the court was the use of "moral certainty" in the definition of "beyond a reasonable doubt." The instruction in Sandoval read as follows:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on **moral evidence**, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a **moral certainty**, of the truth of the charge. [Emphasis added.]

After extensive consideration of what the terms mean today, the court concluded that in the context of all the instructions, the use of "moral evidence" and "moral certainty" was not error.

Wis JI-Criminal 140 has never included the reference to "moral certainty" that is so common in definitions of "beyond a reasonable doubt." The primary case law source for the Wisconsin instruction was Emery v. State, 101 Wis. 627, 78 N.W. 145 (1899). The instruction reviewed there included "moral certainty," but it was not a litigated issue. The early Committee clearly relied on Emery but did not adopt the "moral certainty" language.

One other part of the Sandoval instruction was reviewed – the reference that reasonable doubt "is not a mere possible doubt." The Court rejected the argument, holding the rest of the instruction puts it into proper context. Wis JI-Criminal 140 does not refer to "possible doubt."

The instruction given in Victor was very similar to the one in Sandoval; it included a reference to "moral certainty." But Victor raised two other issues. The Victor instruction defined "reasonable doubt" as "an actual and substantial doubt arising from the evidence." The Court said this was "problematic," since "substantial" could be taken to mean "a large degree," which might be more than the "reasonable" doubt required for acquittal. But the court found that the rest of the instructions put this into proper context by distinguishing it from "mere possibility, from bare imagination, or from fanciful conjecture." Wis JI-Criminal 140 does not refer to "substantial doubt." The Victor instruction also stated: "You may find an accused guilty upon the strong probabilities of the case." The Court found no error: "strong probabilities" was immediately defined as "strong enough to exclude any reasonable doubt."

So, as far as the majority decisions in Victor and Sandoval are concerned, there is nothing that requires or even suggests any change in Wis JI-Criminal 140: none of the challenged language appears in Wis JI-Criminal 140; and the Court found no error in the use of such language.

Three justices found fault with a different aspect of the instruction used in Victor:

> 'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying acting thereon.

Wis JI-Criminal 140 has a rough equivalent of this statement, which Justice Ginsberg criticized, citing the conclusion of the committee that drafted the Federal Judicial Center instructions. She also commended the definition of reasonable doubt provided in those instructions. The Committee previously reviewed the Federal Judicial Center instruction and did not believe it was a substantial improvement on Wis JI-Criminal 140. And, Wisconsin case law specifically supports including such a statement. See note 4, below.

The Committee carefully reviewed Wis JI-Criminal 140 again after the Wisconsin Supreme Court decision in State v. Trammell, 2019 WI 59, 387 Wis. 2d 156, 928 N.W.2d 564. Trammell considered arguments that four provisions of Wis-JI Criminal 140, when considered together, unconstitutionally reduced the burden on the state to prove guilt beyond a reasonable doubt. The provisions are: 1) the "important affairs of life" analogy (see also note 4, below); 2) the "reasonable hypothesis consistent with the defendant's innocence" statement (see also note 2, below); 3) the negative definition of reasonable doubt, which specifies that a reasonable doubt is not a doubt based on guesswork or speculation or arising from sympathy or a fear to return a verdict; and 4) the "search for the truth" language (see note 5, below). The supreme court reviewed each of the challenged passages in the context of the instructions as a whole and concluded that Wis JI-Criminal 140 did not lower the burden of proof. Id., 387 Wis. 2d 156, ¶¶29-59.

1. It has been held that an instruction as to the presumption of innocence which correctly told the jury that it attends the accused throughout the trial, but which the trial court qualified by adding, "until such time, if at all, as it is overcome by credible evidence" is erroneous, because the jury may have inferred from this that, at some stage of the trial before its conclusion, sufficient evidence had been adduced to overcome the presumption, thus shifting the burden upon the accused. Roen v. State, 182 Wis. 515, 196 N.W. 825 (1924). See also Riley v. State, 187 Wis. 156, 160, 203 N.W. 767 (1925), and Windahl v. State, 189 Wis. 424, 427, 207 N.W. 694 (1926).

2. Lipscomb v. State, 130 Wis. 238, 244, 109 N.W. 986 (1906), held it was error to refuse a requested instruction: "You are instructed that if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case acquit the defendant," where the substance of that instruction had not been covered in the general charge.

The Committee has received inquiries about the "reasonable hypothesis of innocence" provision. The Wisconsin Supreme Court clarified its meaning in State v. Poellinger, 153 Wis.2d 493, 503, 451 N.W.2d 752 (1990):

> The rule that the evidence must exclude every reasonable hypothesis of innocence does not mean that if any of the evidence brought forth at trial suggests innocence, the jury cannot find the defendant guilty. The function of the jury is to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved. The jury can thus, within the bounds of reason, reject evidence and testimony suggestive of innocence. Accordingly, the rule that the evidence must exclude every reasonable hypothesis of innocence refers to the evidence which the jury believes and relies upon to support its verdict.

3. Defining reasonable doubt as one "for which a reason can be given" was first approved in Butler

v. State, 102 Wis. 364, 368 69, 78 N.W. 590, 591 92 (1899). Recent affirmations of this part of the instruction are found in State v. Cooper, 117 Wis.2d 30, 35 36, 344 N.W.2d 194 (Ct. App. 1983), and State v. Bembenek, 111 Wis.2d 617, 641 42, 331 N.W.2d 616 (Ct. App. 1983).

4. The term "the graver transactions of life" was held not to be an equivalent of the approved expression "the most important affairs of life" in McAllister v. State, 112 Wis. 496, 88 N.W. 212 (1901). This case also held that reasonable doubt should be defined as a doubt which should cause a reasonable, prudent person to pause or hesitate in the most important affairs of life rather than as "[a] doubt which would govern and control a prudent man and deter him from acting" in such affairs. 112 Wis. 496, 503, emphasis in original.

5. In 1987, the Committee revised the final sentence of the instruction by deleting the following phrase which had come after the word "truth": ". . . and give the defendant the benefit of a reasonable doubt." The phrase was dropped because it seemed to be redundant and because the instruction seemed to read better without it.

In 2016, the Committee received several inquiries about the phrase "you are to search for the truth," some based on a recent law review article. Cecchini and White, "Truth Or Doubt? An Empirical Test Of Criminal Jury Instructions," 50 U. Richmond Law Review 1139 (2016). After careful consideration, the Committee decided not to change the text of the instruction. Challenges to including "search for the truth" in the reasonable doubt instruction have been rejected by Wisconsin appellate courts. State v. Avila, 192 Wis.2d 870, 890, 532 N.W.2d 423 (1995) (overruled on other grounds in State v. Gordon, 2003 WI 69, ¶40, 262 Wis.2d 380, 663 N.W.2d 765): "In the context of the entire instruction, we conclude that [JI 140] did not dilute the State's burden of proving guilt beyond a reasonable doubt." See also, Manna v. State, 179 Wis. 384, 399 340, 192 N.W. 160 (1923). The Wisconsin Supreme Court affirmed the use of the search for the truth language in State v. Trammell, 2019 WI 59, 387 Wis.2d 156, 928 N.W.2d 564, holding that, when read as a whole, "Wis JI-Criminal JI 140 does not unconstitutionally reduce the State's burden of proof below the reasonable doubt standard." Id., ¶¶2, 29-38, 51-59. If an addition to the text is desired, the Committee recommends the following, which is modeled on the 1962 version of Wis JI-Criminal 140:

> You are to search for the truth and give the defendant the benefit of any reasonable doubt that remains after carefully considering all the evidence in the case.