162 AGREED FACTS

[IF THE AGREED FACTS GO TO AN ELEMENT OF THE CRIME, A PERSONAL WAIVER BY THE DEFENDANT IS REQUIRED.][1]

The district attorney and the attorney for defendant have stipulated or agreed to the existence of certain facts, and you must accept these facts as conclusively proved. (In this case, the district attorney and defendant's attorney have stipulated to the following facts:)

[state the agreed facts][2]

COMMENT

Wis JI-Criminal 162 was originally published in 1962 and revised in 1983. The comment was updated in 1990. The 1995 revision added the bracketed material at note 1. The instruction was republished without substantive change and with an updated comment in 2000.

The Committee recommends giving this instruction at the time the stipulation is received and as part of the instructions at the end of the case.

While the instruction states that the "district attorney and the attorney for the defendant have stipulated," it is good practice to assure that the defendant understands and joins in the agreement. This avoids later argument whether the stipulation involved an issue on which the defendant's personal participation was required or merely a matter of trial tactics within the purview of defense counsel. See Poole v. United States, 832 F.2d 561 (11th Cir. 1987).

Strictly speaking, a stipulation is an agreement between the parties. As such, the state is not required to join in a proposed stipulation. However, an offer by the defendant to admit a fact may make further proof of that fact unnecessary, either because such proof would be irrelevant or because its probative value would be outweighed by the risk of unfair prejudice. See State v. McCallister, 153 Wis.2d 523, 451 N.W.2d 764 (Ct. App. 1989).

Also see Meyers v. State, 193 Wis. 126, 127, 213 N.W. 645 (1927): ". . . the admission of the existence of a fact dispenses with proof thereof."

The trial court's role with regard to stipulations offered by the parties was discussed in Birts v. State, 68 Wis.2d 389, 395-96, 228 N.W.2d 351 (1975):

> . . . as a matter of public policy the entire judicial process in a criminal or civil proceeding is a search for truth, and the trial court's important role as a fact finder should not be usurped by the district attorney entering into a stipulation on a matter of fact which, in the end, has to be determined by the finder of fact. . . .
>
> Therefore, we conclude that the trial court possessed the power to refuse to accept the stipulation proposed by the assistant district attorney in this case and, in so refusing, was free to make findings contrary to its terms.

The Birts case involved a stipulation offered in connection with a motion to withdraw a guilty plea. The parties offered to agree that the defendant would not have pled guilty had he known of the effect on his mandatory release date.

1. Special caution must be exercised when an offered stipulation removes an element of the crime from the jury's consideration. In that situation, the defendant must personally waive the right to have the jury find the element beyond a reasonable doubt. See State v. Villarreal, 153 Wis.2d 323, 450 N.W.2d 519 (Ct. App. 1989), discussed in the Comment to Wis JI-Criminal 990. But see State v. Benoit, 229 Wis.2d 630, 600 N.W.2d 193 (Ct. App. 1999): it was not error to fail to obtain an express, personal, waiver where a stipulation as to nonconsent was obtained in a burglary case.

2. The last portion of this instruction (in parentheses) is optional because the Committee has concluded that by attempting to paraphrase stipulations, the trial judge may commit unintentional error by doing so incorrectly. This danger can be minimized if all stipulations are required to be put into writing before being accepted by the court.

