180 STATEMENTS OF DEFENDANT

The State has introduced evidence of (a statement) (statements) which it claims (was) (were) made by the defendant. It is for you to determine how much weight, if any, to give to (the) (each) statement.

In evaluating (the) (each) statement, you must determine three things:[1]

- whether the statement was actually made by the defendant. Only so much of a statement as was actually made by a person may be considered as evidence.
- whether the statement was accurately restated here at trial.
- whether the statement or any part of it ought to be believed.

ADD THE FOLLOWING IF A STATEMENT RESULTING FROM AN UNRECORDED CUSTODIAL INTERROGATION IS ADMITTED AT A TRIAL FOR A FELONY AND NO EXCEPTION APPLIES

[It is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony. You may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in this case.]

CONTINUE WITH THE FOLLOWING IN ALL CASES

You should consider the facts and circumstances surrounding the making of (the) (each) statement, along with all the other evidence in determining how much weight, if any, the statement deserves.

COMMENT

Wis JI-Criminal 180 was originally published in 1962 and revised in 1967, 1991, 1999, 2007, and 2008. This revision was approved by the Committee in July 2015; it changed the title to "Statements of Defendant" and added to the Comment; no change was made in the text.

1. The list that follows may be modified where a matter listed is not at issue in the case. For example, if there is a recorded statement, the first two matters may not be subject to dispute.

The Recording Requirement – § 973.155

The 2007 revision of this instruction was intended to comply with requirements imposed by 2005 Wisconsin Act 60. Act 60 created § 968.073, Recording custodial interrogations, which provides that "it is the policy of this state" to make an audio or audio-visual recording of any custodial interrogation of a person suspected of committing a felony, unless certain exceptions apply. Act 60 also created § 972.115, Admissibility of defendant's statement, which, in sub. (2)(a) provides that if a statement resulting from an unrecorded custodial interrogation is admitted at trial B and no exception applies B the court "shall instruct" the jury as follows:

> . . . . it is the policy of this state to make an audio and visual recording of a custodial interrogation of a person suspected of committing a felony and the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case.

These sections were enacted with a delayed effective date: "The treatment of sections 968.073 and 972.115 of the statutes first applies to custodial interrogations . . .conducted on January 1, 2007." Section 51, 2005 Wisconsin Act 60.

The recording requirement applies only to statements that are the result of interrogation, not to a suspect's "unsolicited comment about his presence in the area . . . not provoked by any statement or action" on the part of police. State v. Banks, 2010 WI App 107, 328 Wis.2d 107, 790 N.W.2d 526. The Wisconsin rule regarding recording interrogation would apply to an interview by Milwaukee police officers of a defendant in a St. Paul, Minnesota, jail, not the Minnesota rule – which requires suppression of unrecorded statements. State v. Townsend, 2008 WI App 20, 307 Wis.2d 694, 746 N.W.2d 493. [However, the rule did not apply in Townsend because the interrogation occurred in 2004 and the Wisconsin rule applies beginning with interrogations conducted on January 1, 2007.]

In State v. Jerrell C. J., 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110, the Wisconsin Supreme Court mandated, under its supervisory power, that "custodial interrogations of juveniles . . . be electronically recorded where feasible, and without exception when questioning occurs at a place of detention." ¶3, ¶58. Though phrased as a mandate to police agencies, the court characterized its holding as a rule of evidence, that "would render the unrecorded interrogations and any resultant written confession inadmissible as evidence in court." ¶47. Jerrell C. J. did not discuss a cautionary instruction as an alternative remedy. The Jerrell C. J. rule is codified in § 938.195 and § 938.31 and specifies suppression of the statement as the remedy.

One of the exceptions to the recording requirement is that "exigent public safety circumstances existed that prevented the making of" a recording or "rendered the making of such a recording unfeasible." § 972.155(2)(a)5. The same exception applies to the recording requirement for juvenile cases, which was found to apply in State v. Joel I.-N., 2014 WI App 119, 358 Wis.2d 404, 856 N.W.2d 654. Also see, State v. Dionicia M., 2010 WI App 134, 329 Wis.2d 524, 791 N.W.2d 236, where the court found that recording was feasible and that the juvenile code suppression remedy applies.

State v. Moore, 2015 WI 54, 363 Wis.2d 376, 864 N.W.2d 827, involved the arrest and interrogation of a 15 year old who was later waived to adult court where his trial took place. The court considered which remedy applies in this situation: suppression under the juvenile code rule or a jury instruction under § 972.155. The court did not resolve that question:

> Resolving the question of remedy here would yield no satisfactory answer. Fortunately, that is not necessary on the facts of this case. . . No four members of this court agree on the proper remedy for violation of § 938.195 in the criminal prosecution of a person under the age of 17, but a majority does agree that any error in admitting Moore's confession was harmless in this case. ¶¶90, 91.

Voluntariness and Trustworthiness

This instruction is to be used when evidence has been admitted relating to a statement made by the defendant. For the statement to have been admissible, the court will have determined that it was obtained in compliance with Miranda and that it was voluntarily made. The statement must still be evaluated by the jury in terms of its "trustworthiness," that is, its weight and credibility. Jackson v. Denno, 378 U.S. 368 (1964); Lego v. Twomey, 404 U.S. 477 (1972); State ex rel. Goodchild v. Burke, 27 Wis.2d 244, 258-65, 133 N.W.2d 753 (1965); State v. Verhasselt, 83 Wis.2d 647, 659, 266 N.W.2d 342 (1978). The jury should also consider whether the statement was accurately related at trial by the witness. State v. Miller, 35, Wis.2d 454, 465, 151 N.W.2d 157 (1967).

While the determination of "voluntariness" is for the court and the evaluation of "trustworthiness" is for the jury, it is obvious that many of the same facts are relevant to both determinations. However, the legal issues are different. The court will have determined that the statement is admissible by the time the jury hears it and the jury is not reviewing or duplicating that legal finding. Rather, the jury is to determine the weight and credibility of the statement. While case law has referred to this as "trustworthiness," the Committee concluded that there was little value in retaining the use of that term in the instruction and it was eliminated in the 1999 revision in favor of referring simply to "weight."

A variety of special circumstances may affect the weight, or trustworthiness, of a statement. In cases where a statement is of great importance, the court may find it appropriate to add to the standard instruction to recognize the special circumstances. However, the substance of the addition would be to advise the jury to consider the special circumstances in terms of the weight the statement is to be accorded. Instructions formerly published, which highlighted certain special circumstances, have been withdrawn (Wis JI-Criminal 182, 185, and 187, all copyright 1962).

The Wisconsin Supreme Court has discussed a variety of special circumstances in terms of their effect on the trustworthiness of confessions:

- whether the statement was preceded or followed by other statements. Lang v. State, 178 Wis. 114, 189 N.W. 558 (1922); State v. Schlise, 86 Wis.2d 26, 271 N.W.2d 619 (1979).

- whether the defendant suffered from mental incapacity. State v. Bronston, 7 Wis.2d 627, 97 N.W.2d 504 (1959).

- whether the defendant was so intoxicated that his statement was not credible. State v. Verhasselt, 83 Wis.2d 647, 266 N.W.2d 342 (1978).

- whether the statement was signed by the defendant (not relevant). Kutchera v. State, 69 Wis.2d 834, 230 N.W.2d 750 (1975).

- whether the statement was corroborated by other evidence in the case. Larson v. State, 86 Wis.2d 187, 271 N.W.2d 647 (1978); Schultz v. State, 82 Wis.2d 737, 264 N.W.2d 245 (1978); Triplett v. State, 65 Wis.2d 365, 222 N.W.2d 689 (1974); Holt v. State, 17 Wis.2d 468, 117 N.W.2d 626 (1962).

In State v. Bannister, 2007 WI 86, 302 Wis.2d 158, 734 N.W.2d 892, the Wisconsin Supreme Court held that the common law rule that a confession must be corroborated is a rule of sufficiency of the evidence, not admissibility. It is sufficient that there is corroboration of any "significant fact" — it need not establish elements of the crime or relate to a particular fact within the confession. Under the facts of the Bannister case, evidence of morphine in the blood of Michael Wolk was evidence that he used morphine, and corroborated Bannister's confession that he delivered morphine to Wolk.

