

270 EVIDENCE AS TO DEFENDANT'S CHARACTER — § 904.04(1)(a)

Testimony has been received regarding the character of the defendant for

_____.¹

Consider this along with all the other evidence in arriving at your verdict, giving it the weight you believe it is fairly entitled to receive.

COMMENT

Wis JI-Criminal 270 was originally published in 1962 and revised in 1983, 1991, and 1998. It was republished without substantive change in 2000.

The 1998 revision substantially modified the text by eliminating references that tied the character evidence directly to the beyond a reasonable doubt standard. The Committee concluded that those references were unnecessary and more likely to be confusing to the jury than helpful.

This instruction is intended for use only when evidence of a defendant's "pertinent trait of character" has been admitted under § 904.04(1)(a). Evidence offered under this rule is presented for its circumstantial value: the defendant is trying to show that his or her character at the time of the alleged offense was such that it is unlikely that he or she committed the crime. Character evidence will have probative value only if it relates to a character trait that is relevant to the offense charged. Thus, the statute requires that the evidence be of a "pertinent" character trait.

When evidence of character is admissible, proof may be by testimony as to reputation or testimony in the form of an opinion. On cross-examination, inquiry is allowed into specific instances of conduct. (Sec. 904.05.)

Because the justification for the admission of character evidence is that a person of such character would be less likely to commit the crime charged, only evidence relating to the defendant's character before the crime was committed should be admissible. This will usually involve knowledge obtained or opinions formed prior to the alleged commission of the crime charged. The test would be one of basic relevance: Does the proffered evidence tend to establish the defendant's character at the time the alleged crime was committed?

1. The pertinent character trait should be identified in the blank provided in the instruction. Examples would be: "being peaceable and law-abiding" (where the charge involved assaultive behavior); "being honest and having integrity" (where the charge involved dishonesty or corruption); "always telling the truth" (where the charge involved fraud).

Character Evidence Generally

This instruction is adapted from that which was approved in Niezorawski v. State, 131 Wis. 166, 177, 111 N.W. 250 (1907). In that case the court stated:

. . . With reference to evidence of the good reputation of defendant the instructions requested were:

If you believe the testimony of the witness called who testified to the good reputation of the defendant as to his honesty and integrity, such testimony may be in itself sufficient to raise in your minds a reasonable doubt as to his guilt of the offense charged in the indictment, and if you entertain such doubt you must return a verdict of not guilty.

The defendant had no more right to have this evidence separately pointed out by the court to the jury as such which may be in itself sufficient to raise a reasonable doubt than he would have to take any other item of evidence from which an inference favorable to the defendant might be raised and call it separately to the attention of the jury with this particular comment, almost suggestion. The charge of the court on this subject shows the proper way of presenting such matters to the jury by instruction. We quote it for precedent:

Testimony has been received as to the good reputation of the defendant for honesty and integrity previous to the time it is alleged he committed the offense charged in the indictment. Such testimony of good reputation should be considered by you in connection with all the other evidence in the case, and if after such consideration you entertain any reasonable doubt as to the guilt of the defendant, you must acquit him; but if from all the evidence in the case, including the testimony as to the good reputation of the defendant, you are satisfied of his guilt beyond a reasonable doubt, then it is immaterial what his reputation has heretofore been as to honesty and integrity.

The instruction requested in the Niezorawski case and found to be improper is similar to the so-called standing alone instruction that has been considered by several federal courts. The United States Court of Appeals for the Seventh Circuit has rejected the "standing alone" instruction for federal prosecutions. In United States v. Burke, 781 F.2d 1234 (7th Cir. 1985), the court overruled an earlier decision and rejected the uniform instruction for the circuit which had provided:

You should consider character evidence together with and in the same manner as all the other evidence in the case. Character evidence alone may create a reasonable doubt of the defendant's guilt." (Pattern instruction 3.15, Federal Criminal Jury Instructions of the Seventh Circuit)

Burke rejected the instruction for several reasons:

- (1) No evidence should be considered "standing alone."
- (2) If any evidence is to be singled out, character evidence is the wrong kind. "It does not speak to the question whether the accused committed the crime. People of impeccable reputation may commit crimes, and when they are charged with crime the question is whether they did it, not whether they enjoy a high social standing. . . . Character evidence is a dispensation from the ordinary rules of evidence, and a curious dispensation it is. It aids exclusively the well-connected." 781 F.2d 1234, 1239.

(3) Two U.S. Supreme Court decisions [Michelson v. United States, 335 U.S. 469 (1948); Edgington v. United States, 164 U.S. 361 (1896)] cited as supporting a "standing alone" instruction are distinguished: the usually-cited portions were either dictum or addressed to different issues.

The Burke case has a complete and interesting discussion of character evidence that helps to put the approach used in Wis JI-Criminal 270 in context. Its conclusion regarding the "standing alone" instruction is consistent with that of the majority of the federal circuits. See United States v. Pujana-Mena, 60 U.S.L.W. 2343, for a summary of how this issue is currently treated in the circuits and a complete discussion of the issue.

The general rules relating to the admissibility and method of proof of character are set forth in §§ 904.04 and 904.05. The general rule is that "evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." Section 904.04(1). The rationale behind the rule has been described as follows:

The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of the issues, unfair surprise and undue prejudice.

Michelson v. United States, 335 U.S. 469, 475-76 (1948).

In criminal cases, the rule of nonadmissibility applies to the prosecution's case-in-chief: the prosecution may not introduce evidence of the defendant's bad character for the purpose of showing that the defendant acted in conformity with that character in committing the crime charged. However, the defendant may introduce evidence of good character in any case. When this occurs, the prosecution may respond with evidence tending to rebut the defendant's evidence.

When evidence of character is admitted, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Section 904.05(1). Affirmative proof of character by reference to specific instances of conduct is allowed only where character is an essential element of a charge, claim, or defense. Section 904.05(2). Few, if any, crimes presently exist in Wisconsin where the character of the defendant is an essential element.

Evidence of other crimes or wrongs is not admissible to show the defendant's bad character but may be admissible for certain other purposes specified in § 904.04(2). See also Wis JI-Criminal 275.

Evidence of the character of the victim of a crime is admissible in the following situations: when offered by the defendant; when offered by the prosecution in rebuttal of character evidence offered by the defendant; and when offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor and the evidence is of a character trait of peacefulness. Section 904.04(1)(c). There is no standard instruction relating to evidence of the victim's character.

With respect to evidence as to a witness' character, such evidence is limited to character for truth and veracity and may be introduced only after the witness' character for truthfulness has been attacked. See § 906.08 and Wis JI-Criminal 330.

In State v. Bedker, 148 Wis.2d 257, 410 N.W.2d 802 (1989), the court held that evidence that the defendant had never been convicted of a crime was not admissible to prove she was of law-abiding character. It is not reputation testimony or opinion. Further, "it does not follow from the fact that the person has never been convicted of a crime that the person is law-abiding. Lawless persons may avoid convictions." 149 Wis.2d 257, 269.

The admissibility of expert opinion testimony on a defendant's character trait of nonhostility and nonaggressiveness is discussed in State v. King, 75 Wis.2d 76, 248 N.W.2d 458 (1977).