

**276 PRIOR CONVICTIONS ADMISSIBLE TO PROVE CHARACTER —
§ 904.04(2)(b)2.**

CAUTION: THIS INSTRUCTION APPLIES ONLY TO CASES ALLEGING A VIOLATION OF § 940.225(1) OR § 948.02(1)

Evidence has been received that (name of defendant) has been convicted of (first degree sexual assault) (first degree sexual assault of a child).

You may, but you are not required to, conclude from that evidence that the defendant has a certain character. You may also conclude, but you are not required to, that the defendant acted in conformity with that character with respect to the offense charged.

You should give this evidence the weight you believe it is entitled to receive. Before you may find the defendant guilty of the offense charged in this case, the State must satisfy you beyond a reasonable doubt that the defendant is guilty, based on all the evidence.

COMMENT

Wis JI-Criminal 276 was originally published in 2007. This revision was approved by the Committee in October 2015.

This instruction addresses § 904.04(2)(b)2., created as § 904.04(2)(b) by 2005 Wisconsin Act 310. [Effective date: April 21, 2006. Section 3 of the act provides: This act first applies to criminal actions commenced on the effective date of this subsection.] It was renumbered § 904.04(2)(b)2. by 2013 Wisconsin Act 362.

§ 904.04(2)(b)2. reads as follows:

In a criminal proceeding alleging a violation of s. 940.225(1) or 948.02(1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order show that the person acted in conformity therewith.

The reference to "sub. (1) and par. (a)" are to the general rules relating to evidence of character and of other crimes or acts.

There are several limitations on the application of the new rule provided in § 904.04(2)(b):

1) it applies only in prosecutions for

- 1st degree sexual assault under § 940.225(1) and
- 1st degree sexual assault of a child under § 948.02(1);

2) it applies only to evidence of prior **convictions** for

- 1st degree sexual assault under § 940.225(1) and
- 1st degree sexual assault of a child under § 948.02(1);
- NOTE: it includes convictions "of a comparable offense in another jurisdiction"

3) the prior conviction must be similar to the alleged violation in the current trial.

- the Committee concluded that the "similar to" requirement applies not only to prior convictions in Wisconsin but also to prior convictions of a comparable offense in another jurisdiction.

When the requirements are met, the prior conviction is admissible "as evidence of the person's character in order to show that the person acted in conformity therewith." There is no express authority requiring an instruction in this situation. The Committee concluded that providing a suggested model instruction was advisable for use when the trial court decides that one should be given. This is not the typical situation where evidence is admitted for a limited purpose and a cautionary instruction is required if requested. See § 901.06. Rather, it is a situation where a usual limit is not applicable, so the instruction is actually describing the unlimited use authorized in a specific situation. The instruction reads the way it does because it states the opposite of the general rule that excludes priors to prove character.

The instruction is drafted for cases that clearly fit the situation addressed by the statute. There are possible difficulties with other situations that are likely to arise. For example, what if there are lesser included offenses or multiple charges that are not § 940.225(1) or § 948.02 violations? What if evidence of prior convictions is offered under the new rule and also under one of the traditional "other acts" exceptions? Further, the statute does not address whether details of the other crimes are admissible, whether offered by prosecution or by the defense.

The general prohibition on proving character is now found in a rule of evidence C § 904.04. But that rule had its origin in a decision of the Wisconsin Supreme Court, Whitty v. State, 34 Wis.2d 278, 148 N.W.2d 557 (1967), that was based on due process principles:

" . . . the rule we adopt . . . is based upon the premise that the accused is entitled to a procedurally and evidentially fair trial . . ." 34 Wis.2d at 295.

" . . . [when other acts evidence is admitted] it runs the danger . . . of violating the defendant's right to a fair trial because of its needless prejudicial effect on the issue of guilt or innocence." 34 Wis.2d at 297.

The references to "fair trial" seem clearly to invoke a due process basis for the rule – it is the Due Process Clause that insures the right to a fair trial.

The Committee recommends a careful evaluation of the admissibility of evidence offered under the new rule to assure that it is relevant under § 904.01 and that its probative value is not substantially outweighed under § 904.03: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The Federal Rules of Evidence include two provisions that are similar to, but not the same as, the new Wisconsin rule.

Rule 413. Similar Crimes in Sexual Assault Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

Rule 414. Similar Crimes in Child Molestation Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

The primary difference between the federal and the Wisconsin rule is that the federal rule allows consideration of the evidence "on any matter to which it is relevant " while the Wisconsin rule specifies that it may be admitted "as evidence of the person's character in order show that the person acted in conformity therewith."