

314 DEFENDANT WEARING A VISIBLE RESTRAINING DEVICE IN THE PRESENCE OF JURORS

The defendant has appeared in court wearing a restraining device. This must not be considered by you in any way and must not influence your verdict in any manner.

COMMENT

Wis JI-Criminal 314 was originally published in 2009. This revision added to the Comment and was approved by the Committee in June 2011; it added "visible" to the title and updated the Comment.

This instruction is intended to implement the requirement identified in State v. Champlain, 2008 WI App 5, 307 Wis.2d 232, 744 N.W.2d 889. Champlain held that "whenever a defendant wears a restraint in the presence of jurors trying the case, the court should instruct that the restraint is not to be considered in assessing the proof and determining guilt." 2008 WI App 5, ¶33.

Champlain also held that "under the circumstances of this case, the trial court had an affirmative, sua sponte duty to inquire into the necessity for the [security] device once the court became aware of the situation." 2008 WI App 5, ¶32. A general reference to "custom and practice" or to the policy of the sheriff's department is not sufficient. State v. Miller, 2011 WI App 34, 331 Wis.2d 732, 797 N.W.2d 528, at footnote 2, citing State v. Grinder, 190 Wis.2d 541, 552, 527 N.W.2d 326 (1995).

Neither the duty to make an inquiry nor the duty to instruct arises in a case where the restraints are not visible to the jury. State v. Miller, supra, ¶11.

Wisconsin case law has recognized that, generally, a criminal defendant should not be restrained during the trial. Sparkman v. State, 27 Wis.2d 92, 133 N.W.2d 776 (1965). However, physical restraint may be imposed if the trial finds restraint reasonably necessary to maintain order. State v. Cassel, 48 Wis.2d 619, 180 N.W.2d 607 (1970).

State v. Cassel, supra, cited with approval the then-current ABA Standard for criminal justice that addressed the restraint issue. The current version of that standard provides in part as follows:

Standard 15-3.2. Control, restraint or removal of defendants and witnesses

....

(c) No defendant should be removed from the courtroom, nor should defendants and witnesses be subjected to physical restraint while in court unless the court has found such restraint necessary to maintain order. Removing a defendant from the courtroom or subjecting an individual to physical restraint in the courtroom should be done only after all other reasonable steps have been taken to insure order. In ordering remedial measures, the court must take all reasonable steps to preserve the defendant's right to confrontation of witnesses and consultation with counsel.

(d) If the court orders physical restraint or removal of a defendant from the courtroom, the court should enter into the record of the case the reasons therefor. Whenever physical restraint or removal of a defendant or witness occurs in the presence of jurors trying the case, the court should instruct those jurors that such restraint or removal is not to be considered in assessing the proof and determining guilt.

ABA Standards For Criminal Justice, Trial By Jury (3rd Ed. 1994).