320A LAW NOTE: SUBSTANTIVE USE OF PRIOR INCONSISTENT STATEMENTS

[THE COMMITTEE HAS CONCLUDED THAT AN INSTRUCTION ON THIS TOPIC IS NOT NECESSARY.][1]

COMMENT

Wis JI-Criminal 320A was originally published in 1989 and republished as a law note without substantive change in 2001.

Prior to the adoption of the Rules of Evidence in 1974, all prior inconsistent statements were limited to impeachment use. Wis JI-Criminal 320 (© 1971) was the cautionary instruction for use in such situations. However, under § 908.01(4)(a)1, prior inconsistent statements can be used as substantive evidence. Wis JI-Criminal 320 was amended in 1976 to apply only to prior inconsistent statements obtained in violation of Miranda. Such statements continue to be admissible only for impeachment purposes (provided they are voluntary and trustworthy).

Wis JI-Criminal 320A was created in 1989 to provide a more accessible place for a discussion of the substantive use of prior inconsistent statements. The history of the Wisconsin rule is set forth in the Comment to Wis JI-Civil 420, which is included below, following note 1.

1. The Committee concluded that a separate instruction on the substantive use of prior inconsistent statements is not necessary. Under the current rules, such statements are to be treated the same as any other evidence.

In State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (1980), the defendant claimed it was error for the trial court to refuse to give a special instruction on prior inconsistent statements. He specifically requested Wis JI-Criminal 320 (© 1971), which limited the consideration of such statements to impeachment use. The trial court refused, giving general instructions on credibility (Wis JI-Criminal 300 and 305) instead. The court of appeals upheld the trial court, noting that the evidentiary rule had changed and that the prior inconsistent statements could be considered as substantive evidence. "Although no special attention was drawn to the prior inconsistent statements, . . . no such treatment was needed. The jury was entitled under the instructions given to determine the weight to be accorded the victim's statements." 99 Wis.2d 430 at 442.

In State v. Lenarchik, 74 Wis.2d 425, 247 N.W.2d 80 (1976), the Wisconsin Supreme Court held that "where a witness denies recollection of a prior statement, and where the trial judge has reason to doubt the good faith of such denial, he may in his discretion declare such testimony inconsistent and permit the prior statement's admission into evidence." 74 Wis.2d at 436.

The Comment to Wis JI-Civil 420 offers the following summary of the development of the rule allowing substantive use of prior inconsistent statements.

SUBSTANTIVE USE OF PRIOR INCONSISTENT STATEMENTS

In the past edition, Wis JI-Civil 420 instructed that prior inconsistent statements of a witness could not be considered by the jury as substantive evidence. The Committee withdrew this instruction in 1980 due to changes in statutory and case law as explained below.

Based on Wis. Stat. § 908.01(4)(a)1 and the decision of the Wisconsin Supreme Court in Vogel v. State, 96 Wis.2d 372, 291 N.W.2d 838 (1980), a prior inconsistent statement may be considered by the jury as substantive evidence when:

1. the statement in question is inconsistent with the declarant's testimony at trial, and

2. the declarant is available for cross-examination concerning the statement.

The evidentiary rule governing the use of prior inconsistent statements at trial has undergone a marked change since the court's 1956 decision in State v. Major, 274 Wis. 110, 79 N.W.2d 75 (1956). In Major, the court adhered to the long-standing rule that previous inconsistent statements of a witness could not be accorded any value as substantive evidence. Instead, such statements could only be used at trial for the limited purpose of impeachment.

In 1969, the court modified this general rule by holding that under certain conditions, a witness' prior inconsistent statement could be regarded as substantive evidence. Gelhaar v. State, 41 Wis.2d 230, 163 N.W.2d 609 (1969). Following the Gelhaar decision, the Committee's comment to Wis JI-Civil 420 set forth the following conditions under which prior statements could be considered by the jury as substantive evidence:

(1) When the witness acknowledges making the statement, or the statement is proved to have been written or signed by him, or given by him as testimony in a former judicial or official hearing, and

(2) When the witness has testified to the same events in a contrary manner at the present proceedings, and

(3) When the party against whom the statement is offered is afforded an opportunity to cross-examine the witness.

The modified rule in Gelhaar admitting certain extrajudicial statements as substantive evidence did not, however, include prior consistent statements, nor did it apply to the prior inconsistent statements of a party's own witness, even if hostile. The limitations on the use of prior inconsistent statements which were retained in Gelhaar were reaffirmed in Irby v. State, 60 Wis.2d 311, 315, 210 N.W.2d 755 (1973).

Under the Wisconsin Rules of Evidence, adopted after the Irby decision, inconsistent statements are not hearsay when the declarant testifies at trial and is subject to cross-examination concerning the statement. Wis. Stat. § 908.01(4)(a)1 states in pertinent part:

> 908.01 Definitions. The following definitions apply under this chapter: . . .

> (4) Statements which are not hearsay. A statement is not hearsay if: (a) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> 1. Inconsistent with his testimony, ...

In Vogel v. State, supra, the supreme court concluded that this new rule of evidence eliminated all impediments to the substantive use of the prior inconsistent statements of a witness:

> We therefore conclude that the court of appeals was correct in its holding that Lindsey's prior inconsistent statement was properly admissible under the Wisconsin Rules of Evidence as substantive evidence against the defendant. The statement in question was inconsistent with Lindsey's testimony at trial and he was available for cross-examination concerning it. Under Sec. 908.01(4)(a)1, no more is required. 96 Wis.2d at 386.

See also State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980), in which the court of appeals cited State v. Vogel to support the use of prior inconsistent statements as substantive evidence.

