

327 IMPEACHMENT OF DEFENDANT AS A WITNESS: PRIOR CONVICTION OR JUVENILE ADJUDICATION

Evidence has been received that the defendant (name) has been [convicted of crime(s)] [adjudicated delinquent]. This evidence was received solely because it bears upon the defendant's character for truthfulness as a witness. It must not be used for any other purpose, and, particularly, you should bear in mind that a [criminal conviction] [juvenile adjudication] at some previous time is not proof of guilt of the offense now charged.

COMMENT

Wis JI-Criminal 327 was originally published in 1962 and revised in 1979, 1991, 1996, and 2001. This revision was approved by the Committee in June 2018.

This instruction is to be given upon request when evidence of prior convictions is admitted to impeach a defendant who has testified. See Wis JI-Criminal 325 for an instruction on impeachment of a witness other than the defendant. Evidence of prior crimes admitted as "other acts" evidence under § 904.04(2) is addressed by Wis JI-Criminal 275.

The 2018 revision changed the second sentence of the instruction to refer to "character for truthfulness" in place of "credibility." This conforms the instruction to the text of § 906.09 as amended by order of the Wisconsin Supreme Court, effective January 1, 2018. See 2017 WI 92. The first two subsections of the amended statute read as follows:

906.09 Impeachment by evidence of conviction of crime or adjudication of delinquency.

(1) GENERAL RULE. For the purpose of attacking character for truthfulness, a witness may be asked whether the witness has ever been convicted of a crime or adjudicated delinquent and the number of such convictions or adjudications. If the witness's answers are consistent with the previous determination of the court under sub. (3), then no further inquiry may be made unless it is for the purpose of rehabilitating the witness's character for truthfulness.

(2) EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Factors for a court to consider in evaluating whether to admit evidence of prior convictions for the purpose of attacking a witness's truthful character include:

- (a) The lapse of time since the conviction.
- (b) The rehabilitation or pardon of the person convicted.
- (c) The gravity of the crime.
- (d) The involvement of dishonesty or false statement in the crime.

- (e) The frequency of the convictions.
- (f) Any other relevant factors.

A comprehensive Judicial Council Note explains the change and is published in the Wisconsin Statutes.

The 1996 revision added "adjudicated delinquent" to the instruction. Section 906.09 was amended by 1995 Wisconsin Act 77 to allow impeachment by evidence of juvenile adjudication.

The rationale for allowing the proof of prior convictions to impeach is that one who has been convicted of a crime is less likely to be a truthful witness. See State v. Kruzycki, 192 Wis.2d 509, 531 N.W.2d 429 (Ct. App. 1995); State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991); Liphford v. State, 43 Wis.2d 367, 168 N.W.2d 549 (1969). But the admissibility is supposed to be limited to this purpose – the effect on credibility. Whenever evidence is admitted for a limited purpose, a jury instruction describing the limits must be given on request. See Wis. Stat. § 901.06.

Section 906.09 as amended codifies the common law rule addressed in Nicholas v. State, 49 Wis.2d 683, 183 N.W.2d 11 (1971), the court addressed the common law rule in existence in Wisconsin before the adoption of the Rules of Evidence. The present rule under § 906.09 is the same. A testifying defendant, or any other witness, can be asked two questions: 1) "Have you ever been convicted of a crime?" and, 2) "How many times?" If the witness answers truthfully, that ends it. If witness is not truthful, questions can be asked about each conviction, referring to them by the name of the offense. But the questioner may not go into the facts relating to the underlying crimes. Also see State v. Sohn, 193 Wis.2d 346, 535 N.W.2d 1 (Ct. App. 1995); and State v. Midell, 39 Wis.2d 733, 159 N.W.2d 614 (1968).

A trial court considering whether to admit evidence of prior convictions for impeachment purposes should consider the following factors: (1) the lapse of time since the conviction; (2) the rehabilitation or pardon of the person convicted; (3) the gravity of the crime; and (4) the involvement of dishonesty or false statement in the crime. State v. Smith, 203 Wis.2d 288, 295-96, 553 N.W.2d 824 (Ct. App. 1996), citing State v. Kruzycki, supra at 525. The court must also determine that the probative value of the evidence is not outweighed by the danger of unfair prejudice. See §§ 906.09(3) and 901.04.