

380B DEFENDANT: VOLUNTARY ABSENCE WITHOUT LEAVE OF COURT GRANTED¹**[During the Trial**

The defendant has the right to appear in this matter. However, (name of defendant) is not present at this time and will instead be represented by (his) (her) attorney. The trial will proceed in (name of defendant)'s absence, which you should not take into consideration in any way, nor should it influence your verdict. Your decision must be based solely on the evidence presented during the trial.]

[Prior to Deliberation²

The defendant had the right to appear in this matter. However, (name of defendant) did not appear in this action and was instead represented by (his) (her) attorney. Despite the trial proceeding in (name of defendant)'s absence, you should not consider this fact in your deliberations, nor should it influence your verdict. Your decision must be based solely on the evidence presented during the trial.]

COMMENT

This instruction was approved by the Committee in April 2024.

This instruction is designed for cases in which an **in-custody** defendant refuses to appear at trial. Whether to use this instruction is up to the discretion of the trial court. As noted, this instruction applies exclusively to in-custody defendants. Any other instances of non-appearance not authorized by the court will involve a defendant either absconding, fleeing, or forfeiting their right to be present due to their conduct.

For situations where the defendant is not present at the trial, and the court has excused the defendant's attendance, see Wis JI-Criminal 380A. For situations where the defendant absconds during the trial, see

Wis JI-Criminal 380C. For situations where a defendant has been removed from the courtroom due to forfeiture by conduct, see Wis JI-Criminal 380D.

In general, a defendant is required to be present. Section 971.04(1) specifies that the defendant “shall be present”:

- (a) at the arraignment;
- (b) at trial;
- (c) during voir dire of the trial jury;
- (d) at any evidentiary hearing;
- (e) at any view by the jury;
- (f) when the jury returns its verdict;
- (g) at the pronouncement of judgment and the imposition of sentence;
- (h) at any other proceeding when ordered by the court.

If the defendant, who is not exempted from attending, deliberately decides not to show up or leaves voluntarily during the trial without the court’s permission, the trial can proceed without the defendant being present. Sub. (3) of sec. 971.04 provides in part:

If the defendant is present at the beginning of the trial and thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absents himself or herself from the presence of the court without leave of the court, the trial or return of verdict of the jury in the case shall not thereby be postponed or delayed, but the trial or submission of said case to the jury for verdict and the return of verdict thereon, if required, shall proceed in all respects as though the defendant were present in court at all times.

In Wisconsin, a defendant cannot be tried in absentia unless they give their consent, which can be implied through their conduct. See State v. Dwyer, 181 Wis. 2d 826, 512 N.W.2d 233 (Ct. App. 1994). See also, State v. Dickson, 53 Wis.2d 532, 546, 193 N.W.2d 17, 25 (1972). Section 971.04 specifies the circumstances under which consent may be inferred from a person’s actions. Specifically, “the defendant is present at the beginning of the trial and thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absents himself or herself from the presence of the court without leave of the court.” Section 971.04(3).

Sub. (3) “sets forth a way that a defendant can forfeit the right to be present at trial: by leaving after the jury has been sworn. The statute does not limit a defendant’s ability to waive the right to be present and does not purport to set forth the exclusive manner in which a defendant can relinquish the right to be present.” State v. Washington, 2018 WI 3, ¶31, 379 Wis. 2d 58, 905 N.W.2d 380 Sub. (3) “was created to attend to the situation in which a defendant absconds, not when an obstreperous defendant seeks to delay and disrupt proceedings through the defendant’s own actions.” Id. at ¶32.

When a defendant chooses to be absent from their trial, a formal on-the-record waiver is favored but not required. State v. Divanovic, 200 Wis. 2d 210, 546 N.W.2d 501(Ct. App. 1996). See also State v. Haynes, 118 Wis.2d 21, 27, 345 N.W.2d 892. Given the rare and complex nature of such cases, the Committee recommends conducting such a proceeding when possible.

1. This instruction is designed specifically for cases in which an in-custody defendant refuses to appear at trial. An example of this would be an in-custody defendant claiming that the court lacks jurisdiction over them and, therefore, voluntarily refusing to appear.

Although the law requires waiver of the right to be present, “when a defendant is voluntarily absent from the trial proceedings, a defendant’s failure to assert the right to be present can constitute an adequate waiver and an express waiver on the record is not essential.” State v. Divanovic, *supra*, 220. See also United States v. Gagnon, 470 U.S. 522, 528–29, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985).

However, it is important to note that if an in-custody defendant refuses to appear at trial, which may be deemed an adequate waiver of their right to be present, they may revoke this waiver at any time.

For instructions on other scenarios of a defendant’s absence, see Wis JI-Criminal 380A, 380C, and 380D.

2. An in-custody defendant who refuses to appear at trial and thereby waives their right to be present can revoke this waiver at any time. Consequently, it is possible for a defendant to be voluntarily absent at the trial’s start and later choose to assert their right to be present, appearing after the trial has commenced.