

**485 VERDICTS SUBMITTED FOR ONE DEFENDANT: TWO COUNTS:
LESSER INCLUDED OFFENSE ON EACH COUNT**

Six forms of verdict¹ will be submitted to you concerning the charges against the defendant, (name of defendant).

Count One

As to Count One, three forms of verdict will be submitted, one reading: "We, the jury find the defendant, (name of defendant), guilty of (offense charged),² as charged in Count One of the information."³

Another reading: "We, the jury find the defendant, (name of defendant), guilty of (included offense),⁴ in violation of § _____ of the Criminal Code of Wisconsin, at the time and place charged in Count One of the information."⁵

And a third reading: "We, the jury, find the defendant, (name of defendant), not guilty as to Count One."

Count Two

As to Count Two, three forms of verdict will be submitted, one reading: "We, the jury find the defendant, (name of defendant), guilty of (offense charged),⁶ as charged in Count Two of the information."⁷

Another reading: "We, the jury find the defendant, (name of defendant), guilty of (included offense),⁸ in violation of § _____ of the Criminal Code of Wisconsin, at the time and place charged in Count Two of the information."⁹

And a third reading: "We, the jury, find the defendant, (name of defendant), not guilty as to Count Two."

It is for you to determine whether the defendant is guilty or not guilty of each of the offenses submitted to you. You must make a finding as to each count of the (information) (complaint). Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.¹⁰

COMMENT

Wis JI-Criminal 485 was approved by the Committee in February 2012.

This instruction is drafted for the case involving two counts, with a lesser included offense for each count. It calls for submitting three verdicts for each count: guilty of the charged crime; guilty of the lesser included crime; and, not guilty as to that count.

1. Additions to the verdict are required in several situations. For example, in theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. The instructions for those offenses include recommended additional questions for these findings. A number of other criminal offenses also call for additional findings relating to facts that increase the penalty. Again, individual offense instructions will provide recommended questions. Finally, there are several generally applicable "penalty enhancers" that provide for increased penalties if specified facts are found. See Wis JI-Criminal 980 through 999A for suggested additions to the verdict.

2. Here insert the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

3. This instruction refers only to the charge "in the information" rather than to the charge "in the (information) (complaint)" because the Committee concluded that lesser included offenses are submitted almost exclusively where the charged crime is a felony. There may be cases, however, where a misdemeanor offense is charged and a lesser included offense is submitted. For example, an attempt could be submitted as a lesser included offense to a charge of misdemeanor theft or battery. See §§ 939.32(1) and 939.66(4). In those cases, the reference to "information" should be changed to "complaint."

It is important that the reference, "as charged in the information," appear in the verdict. The Committee believes that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142

N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

4. See note 2, supra.
5. See note 3, supra.
6. See note 2, supra.
7. See note 3, supra.
8. See note 2, supra.
9. See note 3, supra.

10. The last two sentences have been added for the situation where joinder of charges, while proper, exposes the defendant to considerable prejudice in that the jury may use the fact of being charged with one offense as proof that the other offense was committed.

In Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975), the defendant was charged with burglary and obstructing an officer. The offenses were joined in a single information and were tried at the same time. The supreme court held that the failure to deliver a proper cautionary instruction on the prejudicial effect of such joinder caused a miscarriage of justice requiring a new trial.

The trial judge in Peters gave Instruction No. 145, Information Not Evidence. This did not go far enough. An instruction was needed that advised the jury that it could not use evidence relating to making false statements to an officer to find the defendant guilty of the crime of burglary. "Such a cautionary instruction must be given in clear and certain terms, because otherwise there is a strong likelihood that the jury will regard the evidence on the obstructing an officer count as sufficient in itself to find the defendant guilty of burglary." Peters, supra at 32.

The decision also recommends an instruction in a case from the 7th Circuit: United States v. Pacente, 503 F.2d 543 (7th Cir. 1974). It reads as follows:

Now, there are two counts in this indictment, and, as I have told you, each one charges a separate crime. You should consider each one separately. The defendant's guilt or innocence of the crime charged in one count should not affect your verdict on the other count. . . .