

494 VERDICTS SUBMITTED FOR MULTIPLE DEFENDANTS: TWO COUNTS: SEPARATE VERDICT ON EACH COUNT REQUIRED

The following four¹ forms of verdict will be submitted to you concerning the charges against each of the defendants.

[IN LIEU OF THE PROCEDURE FOLLOWED BELOW, THE COURT MAY READ EACH SET OF VERDICTS FOR EACH DEFENDANT.]

One reading: "We, the jury, find the defendant," as named in the verdict,² "guilty of (offense charged),³ as charged in the first count of the (information) (complaint)."⁴

Another reading: "We, the jury, find the defendant," as named in the verdict,⁵ "guilty of (offense charged),⁶ as charged in the second count of the (information) (complaint)."⁷

A third reading: "We, the jury, find the defendant," as named in the verdict,⁸ "not guilty of the crime charged in the first count of the (information) (complaint)."

And a fourth reading: "We, the jury, find the defendant," as named in the verdict,⁹ "not guilty of the crime charged in the second count of the (information) (complaint)."

It is for you to determine whether each of the defendants is guilty or not guilty of each of the offenses charged. 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 494 was originally published in 1962 and revised in 1979, 1990, 1991, and 1992. It was republished without change in 2000.

If there are numerous counts alleged to have been committed on different dates, it is best to specify the alleged offenses and the dates of the alleged commission in the verdicts to keep the jury from becoming confused, especially since the state need not prove the exact time of the commission, and the jury is so instructed.

1. Additions to the verdict are required in several situations. In theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. Wis JI-Criminal 1441A provides a recommended instruction for these findings. There are also several so-called penalty enhancers that provide for an increased penalty if specified facts are found. See, for example, Wis JI-Criminal 990, **USING A DANGEROUS WEAPON**, and Wis JI-Criminal 994, **CONCEALING IDENTITY**. See the cited instructions for suggested additions to the verdict.

2. The words "as named in the verdict" should be read to the jury in lieu of the defendant's name and only one set of verdicts need be read. This procedure eliminates repetition, which is not of too much concern where there are only two defendants and a single offense charged. But where there are more than two defendants or more than one or two counts, this procedure will save time.

3. Here should be inserted 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.

In some cases, a more specific reference to the facts of the crime may be necessary. Such a case may be illustrated by the facts in State v. Marcum, 166 Wis.2d 908, 480 N.W.2d 545 (Ct. App. 1992). The information involved multiple counts, each generally charging "having sexual contact in September 1989." Evidence was presented at trial that was inconsistent with regard to the number of occasions on which crimes were allegedly committed and with regard to the nature of the acts that took place on each occasion. The verdicts submitted were also general and failed to specify the acts that were the basis for each charge.

The court in Marcum held that "the jury must be presented with verdict forms that adequately distinguish each separately charged crime." 166 Wis.2d 908, 923. The failure to do so creates a problem of jury unanimity under the sixth amendment and a problem of due process under the fifth amendment. The problem in Marcum could have been cured by referring in the verdict to the facts alleged to constitute each crime.

4. It is important that the reference, "as charged in the (information) (complaint)," appear in the verdict. The Committee feels 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.

5. See note 2, supra.

6. See note 3, supra.

7. See note 4, supra.

8. See note 2, supra.

9. See note 2, 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. . . .