517 JURY AGREEMENT: EVIDENCE OF MORE THAN ONE ACT INTRODUCED TO PROVE ONE CHARGE

[USE IN APPROPRIATE CASES.][1]

The defendant is charged with one count[2] of _____. However, evidence has been introduced of more than one act, any one of which may constitute _____.

Before you may return a verdict of guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed the same act and that the act constituted the crime charged.

COMMENT

Wis JI-Criminal 517 was originally published in 1985 and revised in 1992, 1993, and 2001. This revision was approved by the Committee in June 2009 and involved adding the final paragraph to the comment.

1. This instruction should be considered for use when a defendant is charged with multiple counts and evidence of more than one act is offered as proof of one or more of those counts. Wisconsin courts have been reluctant to require that an instruction on jury agreement be given in these cases. But there clearly are situations where the giving of an instruction like Wis JI-Criminal 517 will cure what may otherwise be reversible error. Two examples are State v. Marcum, 166 Wis.2d 908, 480 N.W.2d 545 (Ct. App. 1992), and State v. Chambers, 173 Wis.2d 237, 496 N.W.2d 191 (Ct. App. 1992), discussed in detail at the end of the material following note 2, below.

2. The word "count" was used in the instruction even though it is a word with which a juror may be unfamiliar. Other approaches that did not use "count" were either awkward or inaccurate. "Count" is the word that most accurately describes the situation with which the instruction is concerned, so the Committee concluded that it should be used despite the possibility that it may be unfamiliar to a juror. If the trial judge believes that the risk of confusion is substantial, explanation of what "count" means may be appropriate.

The premise behind this instruction is that there are cases where the jury must unanimously agree on the particular act the defendant committed before he may be found guilty of a crime.

There are a number of situations where jury agreement is not required:

- "use of force" as distinguished from "threat of force," Manson v. State, 101 Wis.2d 413, 304 N.W.2d 729 (1981), Baldwin v. State, 101 Wis.2d 441, 304 N.W.2d 742 (1981);

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- liability as a principal distinguished from liability as an aider and abetter, Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979), May v. State, 97 Wis.2d 175, 293 N.W.2d 478 (1980).

- "mental purpose" as distinguished from "aware that conduct is practically certain . . ." in the definition of criminal intent. State v. Smith, 170 Wis.2d 701, 713, 490 N.W.2d 40 (1992).

- the manner in which each component of a charge under § 946.415 is satisfied [the refusal component, the physical manifestation of refusal with threat component, and the dangerous weapon component]. State v. Koeppen, 195 Wis.2d 117, 536 N.W.2d 386 (Ct. App. 1995).

- whether bodily harm was caused by the slap of a hand or a hit with a board. State v. Heitkemper, 196 Wis.2d 218, 538 N.W.2d 561 (Ct. App. 1995).

- which part of an insurance claim was false in a prosecution under § 943.395. State v. Briggs, 214 Wis.2d 281, 571 N.W.2d 881 (Ct. App. 1997).

- which felony was intended in a prosecution for burglary with intent to commit a felony. State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997).

- the specific act of the defendant that was criminally negligent in a prosecution for negligent homicide. State v. Johannes, 229 Wis.2d 215, 598 N.W.2d 299 (Ct. App. 1999).

- the act intended by a defendant charged with violating § 948.07, Child Enticement. State v. Derango, 2000 WI 89, 236 Wis.2d 721, 613 N.W.2d 833.

- the specific mental disorder that predisposes a person to sexual violence for Chapter 980 commitments. State v. Pletz, 2000 WI APP 221, 239 Wis.2d 49, 619 N.W.2d 97.

Jury agreement is required:

- whether the defendant "used, transferred, concealed, or retained possession of . . ." in prosecutions for theft by employee or bailee under 943.20(1)(b). State v. Seymour, 183 Wis.2d 683, 515 N.W.2d 874 (1994).

- when a statute provides alternative methods of committing a crime, evidence is introduced relating to two or more of those methods, and the methods are "conceptually distinct" – United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

- when evidence of two acts is admitted in support of a single charge, and the defendant has a defense to one of the acts but not to the other – State v. Giwosky, 109 Wis.2d 446, 326 N.W.2d 232 (1982) (Beilfuss, concurring).

A more difficult question is presented when a single count is charged, and evidence of two or more acts, each of which could be the basis of a separate charge, is offered in support of the single count charged. The Wisconsin Supreme Court directly confronted this issue in State v. Lomagro, 113 Wis.2d 583, 335 N.W.2d 583 (1983). In Lomagro, evidence of six separately chargeable sexual assaults was introduced in support of

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one charge. A 4-3 majority held it was not error to fail to instruct the jury that they must unanimously agree on the same act as constituting the charge. The justification was that the six different acts were just alternative ways of committing the crime and that they were not "conceptually distinct." Therefore, jury agreement is not required.

Chief Justice Beilfuss wrote the dissent which concluded that the jury should have been instructed that they must agree on one act that constituted the crime. The dissent would apply the "conceptually distinct" analysis only where a single crime could have been committed in alternative ways (e.g., armed robbery by use of force or threat of force; theft by taking and carrying away or concealing property of another). This analysis should not apply in Lomagro, says the dissent, because each of the acts was separately chargeable. If acts are separately chargeable, the "conceptually distinct" issue does not even arise. Whenever evidence of acts that could be separately charged is introduced in support of a single charge, the Lomagro dissent would require a special instruction on jury agreement.

The Lomagro holding was reevaluated in State v. Gustafson, 119 Wis.2d 676, 351 N.W.2d 653 (1984). Again by a 4-3 decision, the court declined to overrule Lomagro, holding that it was not error for the trial court to fail to give an instruction requiring that the jury agree on which of several acts constituted the single count of sexual assault at issue. The court of appeals decision in Gustafson had found error in the failure to give an instruction on jury agreement and even suggested an instruction for use in such cases (see 112 Wis.2d 369, 379, 332 N.W.2d 860 (Ct. App. 1983)). Also see State v. McMahon, 186 Wis.2d 68, 519 N.W.2d 621 (1994).

While the Wisconsin Supreme Court has made it clear in Lomagro and Gustafson that failing to give an instruction like JI-517 is not reversible error, the Committee concluded that publishing an instruction for optional use was worthwhile. Giving this kind of supplemental instruction on jury agreement when requested in cases like Lomagro and Gustafson should help to assure that the defendant's right to a unanimous jury is honored and that needless litigation is avoided. The disadvantage is that it may require jury unanimity where it is not absolutely required and thus risk prolonging or complicating jury deliberations.

The problems that use of Wis JI-Criminal 517 may avoid are 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. Only the general unanimity instruction (Wis JI-Criminal 515) was given. The verdicts submitted were also general and failed to specify the acts that were the basis for each charge.

The court in Marcum reversed the conviction on the ground of ineffective assistance of counsel. Counsel was ineffective for failing to request a unanimity instruction and for failing to pursue more specific verdicts. The court 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. [See Wis JI-Criminal 484, note 2, for a discussion of addressing this problem by being more specific in the verdicts.]

The problem in Marcum could have been cured by giving an instruction like Wis JI-Criminal 517 that would have required the jury to be unanimous about the specific act that formed the basis for each count. However, the failure to give Wis JI-Criminal 517 was not directly reviewed because it was not requested. Further, since it was labelled as an "optional" instruction, the court noted that failure to give it could not be

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considered error. [See the discussion of Gustafson and Lomagro, supra.] The Marcum court also relied on the title to the former version of Wis JI-Criminal 517, which referred to "One Charge, Evidence of More Than One Act." The court interpreted this title as limiting the instruction to cases where only one charge was present. That had not been the Committee's intent; the instruction was meant to apply to any case where evidence of more than one act was admitted in support of a single charge. The 1992 revision changed the title to cure this problem.

In State v. Chambers, 173 Wis.2d 237, 496 N.W.2d 191 (Ct. App. 1992), the defendant was charged with six counts of sexual assault and testimony was admitted as to more than six acts that would constitute sexual assault. The court noted that because of the evidence of multiple acts and the fact that a party to crime situation was involved, the jury could have assigned guilt to the defendant under several different theories. The court further noted that this could have presented the problem that required reversal of the convictions in Marcum (supra) but held that the unanimity problem was solved in this case by the giving of an instruction that told the jury that they must be unanimous about the specific act that formed the basis for each count. The instruction given by the trial court in Chambers, though not cited as such, was essentially the same as Wis JI-Criminal 517. (Compare the trial court's instruction at 173 Wis.2d 237, 258, with the text of Wis JI-Criminal 517.)

In State v. Becker, 2009 WI App 59, 318 Wis.2d 97, 767 N.W.2d 585, the court of appeals rejected a challenge based on Marcum (supra). The defendant was charged with two counts of sexual assault of a child based on two acts. Neither the information nor the jury instructions tied a particular act to a particular count. The court of appeals held that the defendant waived his right to challenge jury instructions that were unclear regarding jury unanimity and waived his argument that the trial court erroneously answered the jury's question about unanimity in the way it did. However, the court also offered "the following edifying clarifications":

> ¶10 . . . . This entire issue could have been avoided if the State had not put it in play with its sloppy draftsmanship. In the complaint and information, the district attorney did not tie the specific act of Becker touching the victim's vaginal area to a specific count; nor did he tie the specific act of Becker allowing or causing the victim to touch his penis to a separate, specific count. Where a defendant, such as Becker, is charged with multiple acts violating a criminal statute, the district attorney should tie a specific act to each count in the case. The complaint and/or information should then specify in each count the specific act to which it applies. This should also be done if there are multiple acts occurring at different times or on different days. If the district attorney fails to charge with particularity, defense counsel should bring a motion to make the complaint and/or information more definite and certain. Finally, the trial court is not a lemming and should not overlook sloppy charging by the State. Rather, regardless of the State's lack of care, the trial court should take great care to not give generic, nonspecific instructions or verdict forms to the jury. Having conveyed, with particularity, how to avoid this problem in the future, we continue with our analysis.

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