700 Law Note: Theory Of Defense Instructions; Instructing The Jury On Defensive Matters

Contents

Scope

This Law Note outlines the legal standards for submitting a "theory of defense instruction" and discusses issues relating to instructing on "defensive matters."

Conceptually, there are two types of "defenses":

• an "affirmative defense" recognizes a basis for avoiding criminal liability based on facts that are not inconsistent with – that is, can be present at the same time as – the elements required by the offense definition.[1]

• a "negative defense" [preferably "failure of proof" defense] is based on facts that are inconsistent with an element required by the offense definition and therefore prevent that element from being proved.[2]

This Law Note discusses the procedures for making these defenses an issue in the case, the constitutional and state law principles that apply, and the methods of presenting the defenses to the jury.

I. Theory Of Defense Instructions

A. The Standard

A request for an instruction on the "theory of defense" must be granted when: it relates to the legal theory of a defense as opposed to the interpretation of the evidence urged by the defense, and it is supported by the evidence, and, it is not adequately covered by the other instructions in the case.

These principles were originally discussed in State v. Davidson, 44 Wis.2d 177, 170 N.W.2d 755 (1969). The Davidson statement has been cited often in later cases,[3] but it has not been substantially improved upon. The Davidson court stated:

> Defendant next claims as error the failure of the trial court to give a proposed instruction, the so-called "theory of the defense" instruction. On this point it is important to distinguish between the legal theory on which prosecution or defense relies and the factual evidence adduced in support of such theory. In the case before us, the proposed "theory of defense" instruction submitted by the defense appears to be a summarization of the evidence as the defense sees it. In fact, the defendant's counsel in their brief define a "theory of defense" instruction as ". . . the defendant's theory of the case is a recitation of the facts upon which he relies and the inferences which can reasonably be drawn from these facts." This commingles an explanation as to legal theory with comments on the evidence by the trial judge. The majority of cases cited by defendant on this point are from the federal system, where comments on the evidence may be made by the trial judge. In Wisconsin, trial judges are not to thus comment on the evidence. Such comment

even in the form of a statement that these are the assertions of the defense, is not allowed in Wisconsin.

It is true that the legal theory of prosecution and defense is presented to juries in this state in general instructions, in the reading of the information, and in special defensive instructions such as those relating to self-defense, insanity, etc. It can be prejudicial error for a trial judge to fail to instruct on a special defense if the evidence raises that issue. This relates to the legal theory, not a factual summary. In the instant case, the legal theory of the defense was adequately covered by the instructions. The defendant entered a general plea of not guilty, putting the state to its proof. The trial judge instructed the jury on the fact of such not guilty plea having been entered, the burden of proof resting upon the state, the presumption of innocence, the necessity of the state proving each element of the crime charged, and the duty of the jury to acquit if they did not believe and find him guilty beyond a reasonable doubt. This was adequate coverage of the legal theory of the case of the defendant.

44 Wis.2d 177, 191-92

B. It Must Be A "Legal" Theory of Defense

The right to an instruction on the theory of defense is a right to have the jury instructed on the law. Thus, the Davidson case refers to the "legal" theory of defense. Examples that clearly fit this category are the defenses recognized by the Wisconsin statutes or by case law.

The requested instruction must correctly state a principle that is recognized as a defense to the crime charged. For example, a requested instruction on the defective condition of an automobile was properly refused as not stating a defense to the charge of operating under the influence.[4]

The distinction the Davidson case tries to make is between a "legal theory" and the "factual evidence adduced in support of such a theory." The court held that parties are not entitled to instructions that provide a factual summary of the evidence relied on. For example, the following constitute factual summaries[5] rather than statements of a legal theory:

- "The defendant's theory of defense is that while he acknowledges the fact that he did enter Sanders Collision Service and that he did not have the permission of the owner or occupant, he had no intent to steal before or at the time of entry. He has contended that he entered the building because of the weather and his sleepiness or drunkenness; that he only decided to take liquor after seeing it while he was lying down on the floor. Thus, he says that a necessary element of the crime of burglary does not exist in this case."

- "The defendant's theory of defense is that he was neither involved in the burglary nor took any movable property from Ken-Crete Products, was neither a passenger

in nor the owner of the vehicle stopped by the Kenosha County sheriff's deputy, and that his mere presence near the scene of the crime, without more, was not sufficient for conviction."

- "The defendant's theory of defense is that he did not commit the act charged and that the victim is lying."

1. Defenses recognized in statutes

The following generally applicable defenses are recognized in the Wisconsin Statutes.

• intoxication	§ 939.42	[Wis JI-Criminal 755A and 755B]
• mistake	§ 939.43	[Wis JI-Criminal 770]
• coercion	§ 939.46	[Wis JI-Criminal 790]
• necessity	§ 939.47	[Wis JI-Criminal 792]
• self-defense	§ 939.48	[Wis JI-Criminal 800-820]
• defense of others	§ 939.48(4)	[Wis JI-Criminal 830 and 835]
• defense of property	§ 939.49	[Wis JI-Criminal 855 and 860]

Three other defenses, characterized as "privileges," are recognized in § 939.45:

- conduct in good faith and in an apparently authorized and reasonable fulfillment of any duties of a public office – § 939.45(3) [Wis JI-Criminal 870]
- conduct in reasonable accomplishment of a lawful arrest – § 939.45(4) [Wis JI-Criminal 880 and 885]
- conduct in reasonable discipline of child – § 939.45(5) [Wis JI-Criminal 950]

Some statutes recognize defenses specific to a single offense. [Listed at page 10.]

2. Defenses Recognized In Case Law

In addition to the specific privileges listed in subsections (1) through (5) of § 939.45, subsection (6) provides for other, unspecified, privileges: "When for any other reason the actor's conduct is privileged by the statutory or common law of this state." This rule fits with § 939.10, which provides in part: "The common-law rules of criminal law not in conflict with chs. 939 to 951 are preserved." Wisconsin courts have recognized the following "common law" defenses.

• entrapment [Wis JI-Criminal 780]
• alibi [Wis JI-Criminal 775]
• accident [Wis JI-Criminal 772]
• the "legal justification" defense to speeding [State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982); Wis JI-Criminal 2676]
• the special privilege allowing a felon to possess a firearm under certain limited circumstances [State v. Coleman, 206 Wis.2d 198, 556 N.W.2d 701 (1996); Wis JI-Criminal 1343A]

C. The Legal Theory of Defense Must be Supported by the Evidence

Assuming that the theory of defense upon which an instruction is requested is one recognized by law, the evidence must support the instruction. This is the standard rule that applies to the giving of an instruction on any topic.[6] The simplest statement of the standard is that there must be "some evidence" on a matter before it becomes an issue on which an instruction must be given.[7] Although more complicated descriptions of the standard are possible, they are beyond the scope of this discussion.[8] The most useful test may be to ask whether there is enough evidence of a defense to generate a jury issue on its existence or nonexistence. The question is "whether a reasonable construction of the evidence will support the defendant's theory 'viewed in the most favorable light it will reasonably admit of from the standpoint of the accused.'"[9]

Though the burden of producing "some evidence" on a defense is commonly referred to as the defendant's burden, that is not literally correct. The source of the evidence may be facts presented by the prosecution, facts elicited from prosecution witnesses by defense cross-examination, or evidence affirmatively presented by the defense.[10]

D. The Theory Is Not Adequately Covered by Other Instructions

Even if a requested theory of defense instruction correctly states the law and is supported by the evidence, it need not be given "[i]f the instructions of the court adequately cover the law applicable to the facts."[11] Appellate courts have invoked this rule in upholding the refusal to give the following requested instructions:

- A requested instruction that the defendant's "theory of defense" is that he lacked the intent to kill was adequately explained through the general instructions given on intent.[12]

- A requested instruction that the witness did not really see the defendant at the crime scene is adequately covered by the general instruction on credibility.[13]

- "[The defendant's] legal theory of defense was simply that he had not committed the crime. The general instructions given by the court were completely adequate for that situation."[14]

- ". . . [T]he defendant's 'theory' was simply that she did not participate in the drug deal . . . this theory was adequately explained to the jury through the instruction defining the substantive offense. . ."[15]

The Committee recommends that this line of reasoning not be applied in an overly strict manner in certain situations. Many well-recognized defenses negative a required element of the crime. For example, involuntary intoxication and mistake are defenses only when they negative the existence of a state of mind essential to the crime.[16] One could argue that a separate

instruction on such matters is never required because the existence of the mental state is always covered by the instructions defining the substantive offense.[17] An overly literal application of the rule being discussed here obviously would run counter to long-standing practice. The jury ought to be told that the law of the state recognizes that involuntary intoxication or mistake may result in the nonexistence of criminal intent. The recommended practice is to relate the explanation of the defense directly to the element to which it relates.[18]

E. Procedural Considerations

As with any other requested instruction, a proposed "theory of defense" instruction should be submitted to the trial court in writing.[19] The court may reject it if it does not meet the standards discussed here, may use it if it correctly states the law, or may modify it.

The burdens of production and persuasion are discussed below.

F. Conclusion

The Davidson decision offers a framework for evaluating the necessity for instructing on the theory of the defense. The cases interpreting the Davidson rule give considerable leeway in refusing a requested instruction. But the rigid application of the rule may be counterproductive in some cases because the instructions may be helpful in making the jury instructions more understandable.

One of the recommended techniques for improving the understandability of jury instructions is to make them more concrete and less abstract.[20] Emphasizing the facts that relate to a required element is one way to help the jury make the connection between an abstract definition and the case to be decided. Referring to facts can also help to focus the jury's attention on the important issues in the case. For example, if the statutory definition of a crime is complicated and the defense is one of alibi, jurors will be greatly aided by an instruction that helps focus their attention on the alibi issue, rather than on parts of a complicated offense definition that are not in dispute.[21]

II. Affirmative Defenses

A. In General

An "affirmative defense" recognizes a basis for avoiding criminal liability based on facts that are not inconsistent with, and can be present at the same time as, the elements required by the offense definition. That is, all the elements of the crime may be present, but the law recognizes a basis for a finding of not guilty based on facts that are not found in the offense definition.[22] These can properly be called "affirmative defenses" because something affirmative must be done to make them an issue in the case. Sometimes these are further characterized as "privileges," "justifications," or "excuses," but the label is not significant in the context of presenting them to the jury.

An example is self defense in a battery case. All the elements of the crime defined in § 940.19(1) may be present – causing bodily harm, with intent to cause bodily harm, and without the consent of the victim – but the defendant will not be guilty if he or she acted lawfully in self defense as defined in § 939.48.

Affirmative defenses are generally set forth in the statutes and whether or not to recognize an affirmative defense is generally for the legislature to decide. That said, the Wisconsin Supreme Court has recognized affirmative defenses derived from common law.

1. Recognized by statute

Most statutorily recognized affirmative defenses apply generally to all crimes. Section 939.45 recognizes the defense of "privilege" and specifies several:

- coercion under § 939.46 and necessity under § 939.47 [§939.45(1)]
- defense of persons or property under § 939.48 and § 939.49 [§ 939.45(2)]
- good faith actions in fulfillment of duties of public office [§ 939.45(3)]
- conduct in reasonable accomplishment of a lawful arrest [§ 939.45(4)]

There also affirmative defenses applicable to specific offenses. [Listed at page 10.]

2. Recognized By Court Decision/Common Law

Affirmative defenses not addressed in statutes but recognized in case law include:

- entrapment [Wis JI-Criminal 780]
- the "legal justification" defense to speeding [State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982); Wis JI-Criminal 2676]
- the special privilege allowing a felon to possess a firearm under certain limited circumstances [State v. Coleman, 206 Wis.2d 198, 556 N.W.2d 701 (1996); Wis JI-Criminal 1343A]

3. Statutory Exceptions; Statements That An Offense "Does Not Apply"

A significant number of criminal provisions contain lists of statutory exceptions. For example, § 941.29, prohibiting possession of a firearm by a felon, includes six subsections listing exceptions [subs. (5) through (10)]. The jury instructions typically treat these exceptions like an affirmative defense: the state need not anticipate them in the charging document and they are not issues in the case until supported by "some evidence." If so supported, the state must prove the inapplicability of the exception beyond a reasonable doubt.

Other statutes take a similar approach but instead of identifying an "exception" they provide that the criminal prohibition "does not apply" to certain situations. For example, § 940.32, prohibiting stalking, includes a provision stating that the offense does not apply to conduct

protected by the right to freedom of speech or the right to freedom to assemble [sub. (4)(a)] or to conduct connected to a labor dispute [sub. (4)(a)]. The jury instructions treat these in the same matter as exceptions: if raised, the state must prove beyond a reasonable doubt that the facts recognized by the "does not apply" provision are not present.

The jury instructions assume that these matters will rarely come up at trial. Rather, they would more likely be addressed at the charging/pretrial stage. If they would be raised at trial, they should be treated like affirmative defenses.

4. Intentional Homicide: Affirmative Defenses/Mitigating Circumstances

Matters that can be considered affirmative defenses are addressed by the intentional homicide statutes – § 940.01 and § 940.05 – where they are called mitigating circumstances. These matters – adequate provocation, unnecessary defensive force, coercion, etc. – can be considered affirmative defenses to 1st degree intentional homicide because they can prevent a conviction for that offense. However, they are not defenses to 2nd degree intentional homicide. § 940.05(3). Thus, their effect is to reduce culpability for – that is, to "mitigate" responsibility for – an intentional killing. The policy behind this approach is that the defensive matter reduces the actor's culpability for an intentional killing but does not eliminate it.

The statutes specify the procedure for cases involving a mitigating circumstance: when it is "raised by the trial evidence" the prosecution must prove the absence of that circumstance beyond a reasonable doubt. § 940.01(3). This is consistent with the approach that the decision in State v. Moes [discussed below] identified as the default rule in Wisconsin when the statutes do not expressly provide to the contrary.

B. Constitutional And State Law Requirements

1. United States Constitution

Case law interpreting the U.S. Constitution provides that the prosecution must prove all elements of the crime beyond a reasonable and cannot be relieved of this burden by switching it, or any part of it, to the defendant. Mullaney v. Wilbur, 421 U.S. 684 (1975). A burden of production can be imposed on the defendant to point to sufficient facts to raise a defense that challenges proof of an element, but the burden of persuasion remains on the prosecution to prove that element notwithstanding the evidence challenging it.

However, for true affirmative defenses – those that are not inconsistent with elements of the crime – the burden of persuasion can be placed on the defendant to prove the defense. Patterson v. New York, 432 U.S. 197 (1977); Martin v. Ohio, 480 U.S. 228 (1987).

There can be very close distinctions between an element and facts recognized as an affirmative defense. An example is homicide by intoxicated use of a vehicle under § 940.09. In State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985), the Wisconsin Supreme Court identified the elements of the crime as causing death while operating under the influence.

Proving a causal connection between under-the-influence-operation and the death is not required. Thus, the affirmative defense recognized in § 940.09(2) – that the death would have resulted even if the actor was not under the influence – was not inconsistent with the elements and the burden of persuasion could be imposed on the defendant. The court found that this satisfies the rule of Patterson v. New York.

Evidence may relate both to a challenge to the proof of an element and the establishment of a defense. An example is a charge of 1st degree intentional homicide where the evidence tends to show that the defendant was extremely frightened and upset at the time he or she fired a pistol toward the victim. This evidence could support a challenge to the intent to kill element: I was so upset/frightened I shot toward the victim without aiming and without intent to cause death. The state must prove intent to kill notwithstanding this evidence. The evidence could also support an affirmative defense/mitigating circumstance like adequate provocation: I reasonably believed the victim had done something that caused me to lack self-control completely and which would have caused complete lack of self-control in an ordinary person.[23] The defendant should be allowed to present both the failure of proof defense – there is insufficient evidence of intent to kill – and the affirmative defense – adequate provocation was present. It is not proper to require a defendant to elect between the defenses. See Martin v. Ohio, supra, which discusses this issue in connection with the Ohio statutes defining murder and self defense.

2. Wisconsin State Law

Wisconsin recognizes two approaches to the burden of persuasion on affirmative defenses. The general rule provides that if the defense shows "some evidence" of an affirmative defense, the burden of persuasion is on the state to disprove it. This is not required by the U.S. Constitution [see Patterson v. New York, supra]; it is based on state law. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979). But, where a statutorily recognized affirmative defense satisfies the Patterson test, some statutes specifically place the burden of persuasion on the defendant.

a. The General Rule – State v. Moes

Moes was charged with 1st degree murder [now termed 1st degree intentional homicide] and raised the defense/mitigating circumstance of coercion under § 939.46. On appeal, he claimed the jury instructions did not clearly impose the burden on the state to disprove coercion, denying him due process. The Wisconsin Supreme Court undertook the analysis that Patterson requires, first identifying the elements of the crime: cause death, with intent to kill. Then the court identified the facts constituting the defense of coercion: a threat by other than a coconspirator, that causes the actor to reasonably believe that committing the crime is the only means of preventing death or great bodily harm to the actor or another. The court found that the facts constituting the defense are not inconsistent with the elements of the crime: one can cause death with the intent to kill and still satisfy the requirements for coercion. Thus, under Patterson there is no due process barrier to imposing the burden of persuasion on the defendant to prove the affirmative defense of coercion.

However, the court held that Wisconsin state law imposed the burden of persuasion on the prosecution to disprove affirmative defenses. This was based on § 939.70, enacted as part of the 1956 revision of the Criminal Code, which provides that no provisions of the new code "shall be construed as changing the existing law with respect to presumption of innocence or burden of proof." The court held that "existing law" required the state to disprove affirmative defenses.

b. Statutes Placing The Burden Of Persuasion On The Defendant

The Moes general rule does not apply where the statute defining an offense specifically assigns the burden of persuasion to the defendant. This is permitted under the U.S. Constitution as interpreted in Patterson v. New York when the facts recognized by the defense are not inconsistent with – can exist at the same time as – the elements of the crime. This approach is also permissible under Moes, which recognized that assigning the burden of persuasion in this situation is a matter of state law choice. When the Patterson test is met, the legislature is free to choose to impose the burden of persuasion on the defendant. For example:

940.09(2)	Homicide By Intoxicated Use Of A Vehicle/Firearm [JI 1185, 1186, 1186A, 1187, 1189, 1190, 1191]
940.25(2)	Injury [Great Bodily Harm] By Intoxicated Use Of A Vehicle [JI 1262, 1263, 1263A, 1266]
943.201(3)	"Identity Theft" [JI 1458]
943.201(3)	"Identity Theft – Entity" [JI 1459]
943.23(3m)	Operating Motor Vehicle Without Owner's Consent [JI 1465A]
948.05(3)	Sexual Exploitation Of A Child [JI 2121A]
948.11(2)(c)	Exposing A Child To Harmful Material [JI 2142A]
948.22(6)	Failure To Support [JI 2152A]
948.31(4)	Interference With [Child] Custody [JI 2169]

Each of these provisions assigns the burden of persuasion to the defendant to establish the defense by "a preponderance of the evidence." [Note: the uniform instructions for these defenses use the equivalent description of the civil burden of persuasion: "to a reasonable certainty by the greater weight of the credible evidence."]

C. Instructing The Jury

1. In The Absence Of A Specific Statute

Where a generally-applicable affirmative defense is involved, the court should instruct on the elements of the crime and, if burden of production has been satisfied, instruct on the substance of the defense. The instructions must provide that the burden is on the state to prove all elements of the crime and to prove that the defense does not apply – all beyond a reasonable doubt. [This is the procedure required by Moes v. State, supra.]

Many of the published instructions have versions that integrate the affirmative defense with the offense definition. For example, Wis JI-Criminal 1220A Battery: Self-Defense In Issue,

integrates an instruction on self-defense with the elements of battery under § 940.19(1). After defining the elements of battery, the instruction adds material beginning with the caption "Self-Defense Is An Issue In This Case." It then defines the law of self-defense and provides that "the state must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense."

2. Where A Statute Places The Burden Of Persuasion On The Defendant

Several Wisconsin statutes provide that the burden of persuasion is on the defendant to establish an affirmative defense recognized for a particular crime. [See list above.] The court should instruct on the elements of the crime and, if the burden of production has been satisfied, instruct on the substance of the defense. The instructions must provide that the burden is on the state to prove all elements of the crime beyond a reasonable doubt and that the burden is on the defendant to prove the defense by the greater weight/preponderance of the evidence.

Instructions typically call for adding a section captioned "Consider Whether the Defense Has Been Proved." The content of the defense is described and the jurors are told that the burden is on the defendant to prove that the defense is established "by the greater weight of the credible evidence" and that if they are so satisfied they must find the defendant not guilty.

III. Negative [Failure of Proof] Defenses

A. In General

Defenses in this category are sometimes referred to as "negative defenses" but the term "failure of proof defense" is used here as a more accurate description of their function. A failure of proof defense is based on facts that are inconsistent with an element required by the offense definition and therefore prevent that element from being proved.[24]

An example is a claim in a theft case that the person believed the property he or she took was his or her own. The elements of theft under § 943.20(1)(a) require intentionally taking and carrying away property of another without the owner's consent. "Intentionally" further requires that the actor knew the property belonged to another. § 939.23(3). If the actor actually believes that the property belonged to him or her, the prosecution fails to prove the knowledge element.

Some failure of proof defenses are recognized in the statutes. Mistake – § 939.43(1) – and involuntary intoxication – § 939.42(2) – are defenses when they "negative the state of mind essential to the crime."

Failure of proof defenses can exist whether or not they are recognized in the statutes – any fact that is logically relevant to the non-existence of an element of a crime can be a defense.

B. Constitutional And State Law Requirements

Case law interpreting the U.S. Constitution provides that the prosecution must prove all elements of the crime beyond a reasonable doubt and cannot be relieved of this burden by switching it, or any part of it, to the defendant. Mullaney v. Wilbur, 421 U.S. 684 (1975). A burden of production can be imposed on the defendant to point to sufficient facts to raise a defense that challenges proof of an element, but the burden of persuasion remains on the prosecution to prove that element notwithstanding the evidence challenging it.

The corollary of this rule is that the defendant has a due process right to challenge the elements of the crime and to introduce relevant evidence to support that challenge. Martin v. Ohio, 480 U.S. 228 (1987); Chambers v. Mississippi, 410 U.S. 284 (1973).

Because the rule is constitutionally-required, it is the same in Wisconsin.

C. Instructing The Jury

There are published instructions for the two codified failure of proof defenses: JI 770 Mistake and JI 755B Involuntary Intoxication. They each call for relating the instruction on the defense to the mental state to which it applies. The jurors are instructed that they must consider the evidence in deciding whether the state has proved the element beyond a reasonable doubt. In other words, if evidence relevant to the nonexistence of an element has been admitted, the state must prove the existence of the element notwithstanding the potentially element-negating evidence.

For example, JI 770 provides in part:

> Evidence has been received which, if believed by you, tends to show that the defendant believed that [HERE IDENTIFY THE DEFENDANT'S BELIEF]. You must consider this evidence in deciding whether the defendant acted with the (describe mental state) required for this offense.

Because failure of proof defenses can exist whether or not they are recognized in the statutes, a similar instruction should be considered whenever there is evidence of a fact that is logically relevant to the non-existence of an element of a crime.

IV. Inconsistent Defenses

Requests for instructions on defenses should not be denied solely because the defenses might be characterized as "inconsistent." As a practical matter, it may be difficult for significantly different claims to be persuasive or understandable, but any defensive matters supported by a reasonable view of the evidence should be presented to the jury. "As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63 (1988).

V. The "Insanity Defense"

What is commonly referred to as the "insanity defense" is designated in Wisconsin as "not guilty by reason of mental disease or defect." See §§ 971.15 - 971.17. An outline of the substance and procedure is provided at Wis JI-Criminal 600 Introductory Comment.

The defense is similar to other affirmative defenses in the sense that it is not an issue in the case until the defendant raises it. It differs from other affirmative defenses in that it must be raised by a special plea pursuant to § 971.06(1)(d) and is adjudicated in a two-part procedure set forth in § 971.165.

The first phase involves a determination of guilt [by plea or trial] just like any other case. If there is a trial, the defendant is entitled to raise any defenses that are supported by the facts, including a challenge to any mental state required by the offense definition.[25]

If guilt is established at the first phase, the second phase addresses whether the defendant is "not guilty by reason of mental disease or defect." If there is a trial as to the second phase, the burden of persuasion is on the defendant to establish to a reasonable certainty by the greater weight of the evidence that:

- as a result of mental disease or defect, the defendant lacks substantial capacity either
- to appreciate the wrongfulness of the conduct OR
- to conform his or her conduct to the requirements of law.

If the defendant meets this burden, the result is a finding of guilty but "not guilty by reason of mental disease or defect." This is better characterized as "guilty but not criminally responsible" because the result of "success" at the second phase is not an acquittal but relief from criminal punishment and a commitment for treatment. § 971.17(1).

COMMENT

Wis JI-Criminal 700 Law Note was originally published in 1990. This revision was approved by the Committee in June 2020.

1. See State v. Watkins, 2002 WI 101, ¶¶39-40, 255 Wis.2d 265, 647 N.W.2d 244 and State v. Campbell, 2006 WI 99, ¶51, footnote 10, 294 Wis.2d 100, 718 N.W.2d 649. Also see, §1.8(c) Affirmative Defenses, LaFave, Substantive Criminal Law 2d Ed., (West 2003).

2. The Wisconsin Supreme Court refers to "negative defenses" in State v. Watkins and State v. Campbell, note 1 supra. "Failure of proof defenses are nothing more than instances where, because of the 'defense,' the prosecution is unable to prove all the required elements of the offense . . ." § 21. A System of Defenses, Robinson, Criminal Law Defenses, (West Thomsen 1984-2019).

3. See the cases cited in notes 12-16, below.

4. State v. Gaudesi, 112 Wis.2d 213, 332 N.W.2d 302 (Ct. App. 1983).

5. The examples are based on instructions discussed in unpublished decisions of the Wisconsin Court of Appeals. The Committee believes they illustrate requested instructions calling for discussion of the evidence and, therefore, may properly be refused.

6. See, e.g., Turner v. State, 64 Wis.2d 45, 51, 218 N.W.2d 502 (1974).

7. For example, ". . . the defendant must point to some evidence of the degree of intoxication which constitutes a defense." State v. Strege, 116 Wis.2d 477, 486, 343 N.W.2d 100 (1984), emphasis added.

8. A more complete statement that attempts to relate the evidentiary standard to the requirement that the state to disprove defenses provides:

> [I]f it appears from the evidence, either that produced by the state or by the defense, that a jury, under a reasonable view of the evidence, could conclude that the state has not sustained its burden of disproving [the defense].
> State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

It may be questioned whether the "some evidence" standard can be elaborated upon in a helpful way. The Model Penal Code uses the phrase "[when] there is evidence supporting the defense." The commentary indicates that the "draft does not attempt to state how strong the evidence must be to satisfy the test 'that there is evidence' supporting the defense. . . . It should suffice to put the prosecution to its proof beyond a reasonable doubt that the defendant shows enough to justify such doubt upon the issue." Model Penal Code § 1.13 (Tent. Draft No. 4, 1955), Commentary at 110. A commentator has concluded that "the commentary on what will satisfy the burden of producing evidence is singularly unhelpful," but points out that "in the context of particular issues, and recurring fact situations, however, courts have developed a common law of sufficiency for this purpose." Underwood, "Burdens of Persuasion in Criminal Cases," 86 Yale L. J. 1299, 1335 (1983).

9. State v. Mendoza, 80 Wis.2d 122, 153, 258 N.W.2d 260 (1977), citing Ross v. State, 61 Wis.2d 160, 172, 211 N.W.2d 827 (1973). Both cases addressed the issue in the context of the sufficiency of the evidence to require submitting an instruction on a lesser included offense based on a claim of self defense.

10. "In some instances the prosecution's case may contain sufficient evidence in support of the defendant's position to generate a jury issue." Patterson v. New York, 432 U.S. 197, 231 n. 17 (1977) (Powell, J., dissenting). Also see State v. Felton, note 8, supra: "[I]f it appears from the evidence, either that produced by the state or by the defense . . ."

11. State v. Pruitt, 95 Wis.2d 69, 80, 289 N.W.2d 343 (Ct. App. 1980).

12. State v. Pruitt, supra.

13. Johnson v. State, 75 Wis.2d 344, 307, 249 N.W.2d 593 (1977).

14. State v. Lenarchick, 74 Wis.2d 425, 456, 247 N.W.2d 80 (1976).

15. State v. Roubik, 137 Wis.2d 301, 309, 404 N.W.2d 105 (Ct. App. 1987).

16. Sections 939.42(2), 939.43(1).

17. See, for example, Justice Callow's dissent in State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981), where he argued that where a recognized defense [in this case, intoxication] negates an element of the crime, it is unnecessary to advise the jury specifically that the State must "disprove" that defense: "It is elementary that to prove a thing exists one must in effect disprove its nonexistence. Thus when a jury is instructed that the state must prove intent beyond a reasonable doubt, it means there must be no reasonable doubt arising from intoxication or any other intent-negating factor." 102 Wis.2d 423, 442-43.

18. See, for example, Wis JI-Criminal 770 Mistake.

19. Section 972.10(5).

20. See, for example, Elwork, Sales & Alfini, Making Jury Instructions Understandable (Michie 1982); Charrow & Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," 79 Columbia Law Review 1306 (1979); and Strawn & Buchanan, "Jury Confusion: A Threat to Justice," 59 Judicature 478 (1976).

21. Care must be taken to assure that adequate instruction is given on each element of the crime. This discussion assumes that the defense is requesting the attention-focusing instruction.

22. See note 1, supra.

23. See §§ 939.44 and 940.01(2)(a).

24. "Failure of proof defenses are nothing more than instances where, because of the 'defense,' the prosecution is unable to prove all the required elements of the offense . . ." § 21. A System of Defenses, Robinson, Criminal Law Defenses, (West Thomsen 1984-2019).

25. In State v. Steele, 97 Wis.2d 72, 97-98, 294 N.W.2d 2 (1980), the Wisconsin Supreme Court held that expert opinion testimony on the defendant's capacity to form a mental element required as an element of the crime is not admissible at the first phase of the trial. Cases decided after Steele have made it clear that the rule excluding expert testimony is limited to expert opinion testimony on the capacity to form intent based on mental health history. State v. Flattum, 122 Wis.2d 282, 361 N.W.2d 705 (1985) and State v. Repp, 122 Wis.2d 246, 362 N.W.2d 41 (1985). [Emphasis added.] For a helpful discussion of what the current rule is and how it developed, see Haas v. Abrahamson, 910 F.2d 384 (7th Cir. 1990).

