# 780 ENTRAPMENT

SUBSTITUTE THE FOLLOWING FOR THE FINAL TWO PARAGRAPHS OF THE INSTRUCTION FOR THE CRIME CHARGED.[1]

**Whether You Should Consider the Defense of Entrapment**

You should consider the defense of entrapment only if you are satisfied beyond a reasonable doubt that the defendant committed all the elements of (name of offense) .

If you are not so satisfied, you must find the defendant not guilty, and you need not consider entrapment.

**The Meaning of "Entrapment"**

"Entrapment" is a defense available to defendants when a law enforcement officer has used improper methods to induce them to commit an offense they were not otherwise disposed to commit.[2]

**Did Police Induce the Defendant?**

First consider whether police induced the defendant to commit the crime. "Induce" means to persuade or influence someone to do something.[3] Giving someone the opportunity to commit the crime is not the same as inducing or persuading someone to commit the crime.[4]

ADD THE FOLLOWING WHEN ILLEGAL SALE OR PROSTITUTION IS INVOLVED.

[A mere offer to buy does not create more than the usual opportunity to commit an offense. For example, when the police desire to obtain evidence against a person who they

 

have some reason to believe is (selling controlled substances) (selling obscene literature) (selling liquor after hours) (engaged in prostitution), it is not improper for the police to pretend to be somebody else and to offer, either directly or through an informer or other decoy, (to purchase the goods which are being sold illegally) (to have intercourse for money). When that occurs, the police are creating only the usual opportunity to commit this kind of an offense.][5]

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that there was inducement.[6]

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.

If you are not satisfied that police induced the defendant to commit the crime, you should find that the defendant was not entrapped and need not consider any other issues relating to entrapment.

If you are satisfied that police induced the defendant to commit the crime, you must consider whether the defendant was entrapped.

**The State's Burden Of Proof**

If you are satisfied that police induced the defendant to commit the crime, the state must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not entrapped.

 

The state may prove that the defendant was not entrapped by showing either:

- that the inducement was not excessive; or,
- that the defendant was predisposed to commit the crime before being induced.

**Was There Excessive Inducement?**

The law recognizes that, in the enforcement of the law, it is often necessary for law enforcement officers to afford persons the freest opportunity to commit offenses which those persons are disposed to commit. Some inducement, encouragement, or solicitation by law enforcement officers is, therefore, permissible. But it is not proper for them to use excessive incitement, urging, persuasion, or temptation.[7] Inducement is excessive when it is likely to induce the commission of an offense by a person not already disposed to commit an offense of that kind. It is the duty of law enforcement officers to detect criminals but not to create them.

**Was the Defendant Predisposed To Commit the Crime?**

Entrapment is present when a person who is not predisposed to commit a crime is induced or persuaded to do so by law enforcement officers. If a person is predisposed to commit a crime, then entrapment is not present, even though law enforcement officers or their agents did induce the person to commit a crime.

In determining whether the defendant was predisposed to commit the crime charged, you may consider the defendant's personal background, the nature and extent of any inducements

 

of the law enforcement officer, and all the other circumstances relating to the alleged offense.[8]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that the defendant committed all _____ elements of (name of offense) [9] and that the defendant was not entrapped, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI-Criminal 780 was originally published in 1971; the Comment was updated in 1986 and 1991. An alternative, Wis JI-Criminal 780A, was published in 1985 and withdrawn in 2001. This revision was approved by the Committee in September 2001.

The instruction was substantially revised in 2001 in an attempt to increase its understandability. The text reorganizes the material of the prior version but retains its substance, which had been approved in several appellate decisions. See, State v. Saternus, 127 Wis.2d 460, 381 N.W.2d 290 (1986), and State v. Hillesheim, 172 Wis.2d 1, 9, 492 N.W.2d 381 (Ct. App. 1992).

This revision provides for integrating the instruction on the defense with the instruction on the elements of the crime. It retains the dual burden of proof approach that was reaffirmed as the law of the state in State v. Saternus, supra. ["Dual burden" refers to the requirement that the defendant establish inducement by satisfying the civil burden of proof, which imposes a duty on the state to prove beyond a reasonable doubt that entrapment was not present.] The Saternus court summarized its holding as follows:

> In short, there is nothing in the statutes, the legislative history of sec. 939.70, Stats., the common law of Wisconsin, or in federal law which prohibits or limits the right of this court to place the burden of persuasion by a preponderance of the evidence on a defendant to show inducementCand, of course, the final burden, that of proving beyond a reasonable doubt that even an "induced" defendant had a prior disposition to commit the crime, concededly rests upon the state. Those burdens were correctly stated by this court in Hawthorne and were correctly incorporated in the jury instructions used in this case. 127 Wis.2d 460, 480-81.

From 1985 to 2001, an alternative version was published, JI 780A, which eliminated the defendant's burden to prove inducement. JI 780A was withdrawn in 2001 in light of the observation in Saternus that "the alternative instruction does not reflect the decisions as determined by Hawthorne and other holdings of this court." 127 Wis.2d 460, 481, n. 13.

 

This instruction reflects the following interpretation of the substance of the entrapment defense:

- the defendant may meet the burden to prove inducement by showing inducement of any kind -- there need not be a showing of excessive or improper inducement at this stage;
- if the defendant does show inducement, the state assumes the burden to prove that entrapment was not present and may do so in either of two ways:
  - by showing that the inducement was not excessive or improper; or,
  - by showing that the defendant was predisposed to commit the crime; and,
- if the state proves that the defendant was predisposed to commit the crime, no amount of inducement is improper.

The defense of entrapment, while adopted in almost all jurisdictions, is not based on the United States Constitution. Thus, while decisions of the U.S. Supreme Court and the federal courts are often referred to in connection with the entrapment defense, those decisions are not binding on the states. The two leading Wisconsin cases are State v. Hochman, 2 Wis.2d 410, 413, 86 N.W.2d 446, 448 (1957) and Hawthorne v. State, 43 Wis.2d 82, 168 N.W. 85 (1969).

In State v. Hochman, the Wisconsin Supreme Court defined entrapment as follows: "Entrapment is the inducement of one to commit a crime not contemplated by him for the mere purpose of instituting criminal prosecution against him." In Hawthorne v. State, the court adopted the "origin of intent" test and further held that the accused has the burden to show by a preponderance of the evidence that the inducement occurred and the state has the burden to show beyond a reasonable doubt that the accused has a prior disposition to commit the crime. The Wisconsin analysis follows that developed by the United States Supreme Court in Sorrells v. United States, 287 U.S. 435 (1932), and Sherman v. United States, 356 U.S. 369 (1958).

The most recent entrapment decision of the United States Supreme Court is Jacobson v. United States, 503 U.S. 540, 549 (1992), holding that in federal prosecutions, the government "must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."

**Evidentiary Basis for Instructing On Entrapment**

The Wisconsin Court of Appeals reversed a conviction for failure to submit an entrapment instruction in State v. Schuman, 226 Wis.2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999), identifying the proper evidentiary standard as follows:

> Only "slight evidence' is required to create a factual issue and put the defense before the jury. United States. v. Kessee, 992 F.2d 1001, 1003 (9th Cir. 1993). . . The evidence may be "weak, insufficient, inconsistent or of doubtful credibility," United States. v. Sotlo-Murillo, 887 F.2d 176, 178 (9th Cir. 1989) . . . ; but the defendant is entitled to the instruction unless the evidence is rebutted by the prosecution to the extent that no rational jury could entertain a reasonable doubt as to either element." United States. v. Hoyt, 879 F.2d 505, 509 (9th Cir. 1989).

 

**Entrapment and Denial of Guilt**

In Mathews v. United States, 485 U.S. 58, 62 (1988), a case involving a federal prosecution originating in Milwaukee, the Court held "that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." The holding resolved a split in the federal courts, where several circuits had held that a defendant must "admit the offense" in order to claim entrapment. The Supreme Court addressed the issue by referring to general principles that entitle a defendant to an "instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews at 63. This extends even to inconsistent defenses, if supported by the evidence.

The Mathews holding involves the standard for entrapment in federal courts and is not binding on state courts because entrapment is not constitutionally based. Wisconsin cases suggest a contrary result. In State v. Jansen, 198 Wis. 2d 765, 543 N.W.2d 552 (Ct. App. 1995), the defendant was charged with attempted possession of marijuana with intent to deliver. In a bench trial, the court found him not guilty of that crime because he was entrapped and because intent to deliver was not proven. But the court found him guilty of the lesser included offense of simple possession. The court of appeals held this was error because it is bound by State v. Monsoor, 56 Wis.2d 689, 203 N.W.2d 20 (1973), which held that a defendant who stands on the entrapment defense could not request instructions on lesser included charges. But see, Hawthorne v. State, 43 Wis.2d 82, 94, 168 N.W. 85 (1969): "It does not seem logical to force the defendant to admit guilt in order to raise the issue of entrapment. . . [and providing examples.]

1. The Committee has determined that instructions on "defenses" should be combined with the instruction on the elements of the crime. See State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

2. This statement is based on State v. Hochman, 2 Wis.2d 410, 413-14, 86 N.W.2d 446 (1957).

3. This is based on the common dictionary definition of "induce." See, for example, The American Heritage Dictionary of the English Language, 3rd Edition, 1992, at p. 921: "To lead or move, as to a course of action, by influence or persuasion."

4. This statement is based on State v. Hochman, 2 Wis.2d 410, 414, 86 N.W.2d 446 (1957).

5. State v. Hillesheim, 172 Wis.2d 1, 9, 492 N.W.2d 381 (Ct. App. 1992); State v. Bjerkaas, 163 Wis.2d 949, 955, 472 N.W.2d 615 (Ct. App. 1991).

6. Placing the burden of persuasion on the defendant, and using the civil burden, was approved in State v. Saternus, 127 Wis.2d 460, 381 N.W.2d 290 (1986).

7. "Simply cultivating a friendship with a person . . . does not constitute entrapment." State v. Bjerkaas, 163 Wis.2d 949, 956, 472 N.W.2d 615 (Ct. App. 1991), citing, State v. Boutch, 60 Wis.2d 443, 449, 210 N.W.2d 730 (Ct. App. 1973).

 

8. Evidence of conduct occurring after the charged offense may be admissible if it is relevant to predisposition. State v. Monsoor, 56 Wis.2d 689, 703-04, 203 N.W.2d 20 (1973); State v. Pence, 150 Wis.2d 759, 442 N.W.2d 540 (Ct. App. 1989). There is no fundamental difference in the analysis whether the evidence is treated as other acts evidence under § 904.04(2) or character evidence under §§ 904.04(1) and 904.05(2). Pence, at 758-60.

9. Refer to the uniform instruction for the charged crime for the number of elements and the short title of the crime. For example, for a charge of delivering a controlled substance, the statement would read as follows:

> If you are satisfied beyond a reasonable doubt that the defendant committed all three elements of delivery of a controlled substance and that the defendant was not entrapped, you should find the defendant guilty.

 