1200G CAUTIONARY INSTRUCTION: EVIDENCE OF VICTIM'S PRIOR SEXUAL CONDUCT — § 972.11(2)(b)

CHOOSE THE APPROPRIATE BRACKETED ALTERNATIVE[S].

EVIDENCE ADMITTED UNDER § 972.11(2)(b)1[1]

[Evidence of prior sexual conduct between (name of victim) and the defendant has been introduced. If you find that this conduct did occur, you should consider it only (describe acceptable purpose).[2] Do not consider it for any other purpose.]

EVIDENCE ADMITTED UNDER § 972.11(2)(b)2[3]

[Evidence of prior sexual conduct on the part of (name of victim) has been introduced. If you find that this conduct did occur, you should consider it only in determining the source or origin of (semen) (pregnancy) (disease).[4] Do not consider it for any other purpose.]

ADD THE FOLLOWING IF "WITHOUT CONSENT" IS AN ELEMENT OF THE CRIME AND THE EVIDENCE RELATES TO CONDUCT WITH A PERSON OTHER THAN THE DEFENDANT.[5]

[In particular, do not consider this evidence in determining whether (name of victim) consented to the alleged sexual (contact) (intercourse).]

EVIDENCE ADMITTED UNDER § 972.11(2)(b)3[6]

[Evidence of prior allegations of sexual assault made by (name of victim) has been introduced. If you find that the allegations were made and were untruthful, consider them only (describe acceptable purpose).[7] Do not consider this evidence for any other purpose.]

EVIDENCE ADMITTED UNDER THE GENERAL, CONSTITUTIONALLY-REQUIRED EXCEPTION[8]

[Evidence of prior sexual conduct on the part of (name of victim) has been introduced in this case. If you find that this conduct did occur, you should consider it only (describe acceptable purpose).[9] Do not consider this evidence for any other purpose.]

COMMENT

This instruction was originally published as Wis JI-Criminal 1200F in 1983 and revised in 1984 and 1990. It was revised and renumbered as Wis JI-Criminal 1200G in 1996 and revised in 2002, 2011, and 2012. The 2012 revision noted additions to the applicability of § 972.1(2) made by 2011 Wisconsin Act 271. This revision was approved by the Committee in December 2022; it updated the comment.

This instruction is intended to advise the jury on the proper use of evidence of prior sexual conduct when that evidence is admitted under § 972.11(2)(b). The statute applies only to prosecutions under twelve specified statutes:

- § 940.225, Sexual Assault;
- § 948.02, Sexual Assault of A Child;
- § 948.025, Engaging In Repeated Sexual Assaults of the Same Child;
- § 948.05, Sexual Exploitation of A Child;
- § 948.051, Trafficking of A Child;
- § 948.06, Incest With A Child;
- § 948.07, Child Enticement;
- § 948.08, Soliciting a Child for Prostitution;
- § 948.085, Sexual Assault of A Child Placed in Substitute Care;
- § 948.09, Sexual Intercourse with a Child Age 16 or Older;
- § 948.095, Sexual Assault of a Student by a School Instructional Staff Person; and,
- § 940.302(2), Human Trafficking, ["if the court finds that the crime was sexually motivated, as defined in s. 980.01(5)."]

Sections 948.07, 948.08, and 948.09 were added by 2011 Wisconsin Act 271 [effective date: April 24, 2012].

The 2001 revision modified this instruction by providing an alternative paragraph for each of the three exceptions recognized by § 972.11(2)(b)1.-3. and for the general, constitutionally-required exception recognized by case law.

Analysis of admissibility under § 972.11(2) involves three steps determining whether: the evidence falls within an exception set forth in § 972.11(2)(b)1.-3.; the evidence is material to a fact at issue; and, the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature. State v. DeSantis, 155 Wis.2d 774, 456 N.W.2d 600 (1990).

When evidence is admitted for a limited purpose, an instruction limiting the jury's consideration to the proper purpose must be given upon request. § 901.06.

Cases have established the following about § 972.11's prior sexual conduct evidence rule:

– "prior" means prior to trial; it is not limited to prior to the incident on which the criminal charge is based. State v. Gulrud, 140 Wis.2d 721, 421 N.W.2d 739 (Ct. App. 1987).

– "sexual conduct" evidence includes evidence of the lack of sexual activity or experience. State v. Mulhern, 2022 WI 42, 402 Wis.2d 64, 975 N.W.2d 209. See also, State v. Gavigan, 111 Wis.2d 150, 158-59, 330 N.W.2d 571 (1983); State v. Mitchell, 144 Wis.2d 596, 600, 609, 424 N.W.2d 698 (1988); State v. Penigar, 139 Wis.2d 569, 408 N.W.2d 862 (1987); and~~,~~ State v. Childs, 146 Wis.2d 116, 430 N.W.2d 353 (Ct. App. 1988).

– "sexual conduct" evidence includes written notes relating to sexual activity. State v. Vonesh, 135 Wis.2d 477, 401 N.W.2d 170 (Ct. App. 1987).

After § 972.11 was adopted in 1976, the supreme court held that prior sexual conduct evidence may be admissible even if it does not fit one of the statutory exceptions in § 972.11(2)(b)1.-3. See State v. Gavigan, 111 Wis.2d 150, 157-60. Gavigan involved evidence of the victim's lack of prior sexual experience introduced by the state. The court accepted the state's concession that testimony of the victim's virginity prior to being assaulted was covered by the definition of "sexual conduct" because that phrase includes evidence of the lack of sexual activity or experience. Id., at 158-59. The court held, however, that the evidence was admissible because it was offered "to prove a fact independent of the complainant's prior sexual conduct which is relevant to an issue in the case~~.~~"—in Gavigan, lack of consent. Id., at 157-61. The decision also held that a cautionary instruction should be given to "state the limited purpose of the evidence and inform the jury that the evidence may not be considered as indicating the complainant's prior sexual conduct." Id., at 158.

The legislature responded to Gavigan by enacting 1983 Wisconsin Act 449. Effective May 18, 1984, section 972.11(2)(c) was created to read:

(c) Notwithstanding § 901.06, the limitation on the admission of evidence of or reference to the prior sexual conduct of the complaining witness in par. (b) applies regardless of the purpose of the admission or reference unless the admission is expressly permitted under par. (b) 1., 2., or 3.

The supreme court has acknowledged that the creation of subsection (2)(c) limited the Gavigan decision, and that doing so was not an unconstitutional invasion of the powers of the judicial branch. Mulhern, 402 Wis.2d 64, ¶¶24-26; State v. Mitchell, 144 Wis.2d 596, 612-19.

In State v. Herndon, 145 Wis.2d 91, 426 N.W.2d 347 (Ct. App. 1988), the court held that § 972.11(2) must be subject to exceptions based on the defendant's 6th amendment right to present evidence and to

confront adverse witnesses:

> . . . where the evidence to be admitted is probative of the complainant's bias or prejudice, shows that she has a motive to fabricate, or shows a continuing pattern of conduct, the trial court must balance the probativeness of the evidence against its prejudicial nature. A refusal to allow this evidence in all cases based solely upon an evidentiary rule is a violation of the defendant's sixth amendment rights to confront adverse witnesses and present witnesses on his own behalf.

The court identified a six-part test to be used in conducting the required balancing. The Wisconsin Supreme Court adopted a similar rationale and balancing test in State v. Pulizzano, 155 Wis.2d 633, 456 N.W.2d 325 (1990). See note 8, below.

1. This paragraph is drafted for use where evidence is admitted under sub. (2)(b)1. of § 972.11, which provides an exception to the rape shield rule for "evidence of the complaining witness's past conduct with the defendant."

2. The issue to which the evidence is relevant should be described in this blank.

Determining whether past conduct between the complaining witness and the defendant is admissible for an acceptable purpose is a highly fact-dependent inquiry. Wisconsin case law suggests that past conduct can be relevant to the issue whether the act involved in the case was "without consent," but does not provide clear guidance.

State v. Neumann, 179 Wis.2d 687, 508 N.W.2d 54 (Ct. App. 1993), involved changes of forcible sexual assault – without consent and by use or threat of force – by Neumann against his girlfriend. The trial court allowed evidence of prior consensual sexual activity between them, but then instructed the jury that it could not be considered in determining whether there was consent. The court of appeals found this was error, but harmless because the evidence of prior consensual non-violent sexual conduct has virtually no probative value regarding consent to sexual intercourse by the use or threat of force. In a footnote, the court noted that while Wisconsin had no case directly on point, other jurisdictions have generally concluded that prior consensual activity is relevant to the consent issue. 179 Wis.2d 687, 701-02, footnote 5.

In State v. Jackson, 216 Wis.2d 646, 575 N.W.2d 475 (1998), the court held that while evidence of prior conduct between the complaining witness and the defendant fit the exception under sub. (2)(b)1., the evidence was still not admissible. "[M]erely offering proof of the general type described in a particular exception is not enough to defeat the rape shield statute." 216 Wis.2d 646, 658. The defendant must establish that the evidence is "of sufficient probative value to outweigh its inflammatory and prejudicial nature." See § 971.31(11). In this case, the defendant failed to do that. 216 Wis.2d 646, 663.

3. This paragraph is drafted for use where evidence is admitted under sub. (2)(b)2. of § 972.11, which provides an exception to the rape shield law for "evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered."

4. This tracks the language of sub. (b)2. of § 972.11, which goes on to specify the uses to which the evidence may be put: "for use in determining the degree of sexual assault or the extent of injury suffered." The Committee concluded that the latter need not be communicated to the jury; it merely describes the reasons the evidence was admitted. See State v. Dodson, 219 Wis.2d 65, 580 N.W.2d 181 (1998), finding

reversible error in the refusal to admit evidence to show alternative source of physical injury.

Evidence that the hymen of an eight-year-old victim was dilated is not admissible under the "source of . . . disease" exception. In the Interest of Michael R. B., 170 Wis.2d 713, 727-730, 499 N.W.2d 641 (1993). However, it was error to exclude the testimony of a doctor called by the defense who would have testified about the normal dilation of an eight-year-old's hymen. 170 Wis.2d 713, 733.

Evidence that the complainant did not have sexual intercourse in the week prior to the alleged sexual assault was not admissible to show "the origin of semen, pregnancy or disease" or for the purpose of "determining the degree of sexual assault or the extent of injury suffered." State v. Mulhern, 2022 WI 42, ¶¶41-42, 402 Wis.2d 64, 975 N.W.2d 209.

5. This optional paragraph is intended for use when the prior sexual conduct evidence relates to the victim's activity with someone other than the defendant. It is meant to emphasize one of the protections rape shield laws are designed to provide: that it is not to be assumed that a person consented to a sexual act merely because that person has consented to sexual activity in the past. Evidence of prior sexual conduct with the defendant is addressed by sub. (2)(b)1. in the preceding bracketed paragraph.

6. This paragraph is drafted for use where evidence is admitted under sub. (2)(b)3. of § 972.11, which provides an exception to the rape shield law for "evidence of prior untruthful allegations of sexual assault made by the complaining witness." It is intended to emphasize that the jury must first determine that other allegations of sexual assault were made and that those allegations were false. This is consistent with the 3-step procedure set forth in State v. DeSantis, 155 Wis.2d 774, 456 N.W.2d 600 (1990): the evidence falls within the exception set forth in § 972.11(2)(b)3.; the evidence is material to a fact at issue; and, the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature. As to the first step, the evidence must be "sufficient to support a reasonable person's finding that the complainant made prior untruthful allegations." DeSantis, supra, 155 Wis.2d 774, 788.

In State v. Ringer, 2010 WI 69, 326 Wis.2d 351, 785 N.W.2d 448, the court noted that DeSantis used two different statements in describing the test: whether a jury could reasonably find that there was a prior untruthful allegation and whether it could reasonably infer that there was a prior untruthful allegation. To resolve this perceived inconsistency, the court adopted "could reasonably find" as the proper statement. The court also held that the fact that there was no prosecution in connection with the prior allegations, "in and of itself, does not support a finding that the allegations were untruthful." Ringer, ¶40.

7. The issue to which the evidence is relevant should be described in this blank. Usually, that issue will be credibility.

8. This paragraph is drafted for use where evidence is admitted under the general, constitutionally-based, exception based on the defendant's due process right to present relevant evidence. The applicability of the exception is to be determined by using a five-part test, adopted in State v. Pulizzano, 155 Wis.2d 633, 456 N.W.2d 325 (1990):

> (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect.

If the defendant's offer of proof meets the five-part test, "the court must determine whether the defendant's rights to present the proffered evidence are nonetheless outweighed by the State's compelling interest to exclude the evidence." State v. Dodson, 219 Wis.2d 65, ¶11, 580 N.W.2d 181 (1998). For a case finding that the prior acts did not closely resemble those of the instant case, see State v. Dunlap, 2002 WI 19, 250 Wis.2d 466, 640 N.W.2d 112.

Pulizzano held that the evidence offered in that case was relevant to show an alternative source of sexual knowledge on the part of the child victim. The court also held that "[l]imiting instructions should be given to restrict the trier of fact's use of the evidence to that purpose." 155 Wis.2d 633, 656. Also see the following, each finding that excluding evidence offered for this purpose was reversible error: State v. Dodson, 219 Wis.2d 65, 580 N.W.2d 181 (1998); State v. Moats, 156 Wis.2d 74, 457 N.W.2d 299 (1990); and, State v. Jagielski, 161 Wis.2d 67, 467 N.W.2d 196 (Ct. App. 1991). In State v. Hammer, 2000 WI 92, 236 Wis.2d 686, 613 N.W.2d 629, the court held evidence of sexual acts between a child victim and others on the day before the crime was not admissible to show bias and a motive to fabricate.

9. The issue to which the evidence is relevant should be described in this blank. For example: ". . . you should consider it only as it relates to an alternative source of sexual knowledge." See, State v. Pulizzano, note 8, supra.