1750 PERJURY — § 946.31

Statutory Definition of the Crime

Perjury, as defined in § 946.31 of the Criminal Code of Wisconsin, is committed by one who, while under (oath) (affirmation) orally makes a false material statement which the person does not believe to be true, in any proceeding[1] before a court.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant orally made a statement while under (oath) (affirmation).[3]
2. The statement was false when made.
3. The defendant did not believe the statement to be true when made.[4]

   [It is not a defense to a prosecution under this section that testimony which constituted perjury at the time it was given was subsequently corrected or retracted.][5]
4. The statement was made in a proceeding before a court.[6]
5. The statement was material to the proceeding.

   A material statement is one which tends to prove or disprove any fact that is of consequence to the determination of the proceeding in which the statement was made.[7]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 1750 was originally published in 1966 and revised in 1994, 1995, and 2004. This revision was approved in 2020. It corrected a typographical error in the Comment.

This instruction is for a violation of § 946.31, Perjury. Related offenses are covered by § 946.32, False Swearing. See Wis JI-Criminal 1754, 1755, and 1756.

The doctrine of issue preclusion does not bar the State from prosecuting a defendant for perjury allegedly committed at a criminal trial where the defendant was acquitted on a single issue, but where the State claims to have discovered new evidence that the defendant falsely testified regarding that issue. The State must show that the evidence meets the four requirements of the newly discovered evidence test. State v. Canon, 2001 WI 11, ¶¶1, 25, 241 Wis.2d 164, 622 N.W.2d 270.

Multiple counts of perjury based on statements in a single proceeding are permissible where each requires proof of a fact the other does not and each required a new "volitional departure." State v. Warren, 229 Wis.2d 172, 599 N.W.2d 379 (Ct. App. 1999).

Regarding solicitation of perjury, see State v. Manthey, 169 Wis.2d 673, 487 N.W.2d 44 (Ct. App. 1992). The court held that a solicitation of perjury charge was established where the defendant solicited another to pay money to the defendant for false testimony (referring to this as a "double inchoate crime"). 169 Wis.2d 673, 687.

The problem of perjury prosecutions of witnesses after an acquittal in a criminal case is discussed in Shellenberger, "Perjury Prosecutions After Acquittals. . . ." 71 Marquette Law Review 703 (1988).

1. Section 946.31(1) applies to statements made in "any matter, cause, action or proceeding." The instruction uses the term "proceeding" throughout based on the Committee's conclusion that it is a general term that includes the other alternatives. (See, for example, § 801.01(1) which provides: "Proceedings in the courts are divided into actions and special proceedings." Emphasis added.)

2. "Court" is selected from the list of alternatives set forth in § 946.31(1):

(a) A court;
(b) A magistrate;
(c) A judge, referee or court commissioner;
(d) An administrative agency or arbitrator authorized by statute to determine issues of fact;
(e) A notary public while taking testimony for use in an action or proceeding pending in court;

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(f) An officer authorized to conduct inquests of the dead;
(g) A grand jury;
(h) A legislative body or committee.

The instruction must be modified if an alternative other than "court" is involved. See text at notes 6 and 8, below.

See Layton School of Art & Design v. WERC, 82 Wis.2d 324, 262 N.W.2d 218 (1978), for discussion of the alternative set forth in § 946.31(1)(d): ". . . an . . . arbitrator authorized by statute to determine issues of fact."

Omitted from the instruction's definition of the offense is the statutory language: "whether legally constituted or exercising powers as if legally constituted." That phrase was added to § 946.31(1) in 1980 to replace "whether de jure or de facto." (See Chapter 110, section 58, Laws of 1979.) The previous version of this instruction included definitions of "de jure" and "de facto" and followed them with a statement that there is no reason to distinguish between the two for purposes of this offense. The same is true for the current statute's "legally constituted" phrase and therefore the Committee concluded that it is not necessary to include it in the instruction.

This interpretation is supported by State v. Petrone, 166 Wis.2d 220, 479 N.W.2d 212 (Ct. App. 1991). Petrone challenged her perjury conviction on the ground that the reserve judge who conducted the John Doe proceeding at which she made a false statement had not been properly appointed by the chief justice under § 753.075(1). The court rejected the argument, citing the statute: ". . . legally constituted or exercising powers as if legally constituted." The court held that the judge was acting with what was formerly referred to as de facto powers and therefore was covered by the statute. The court cited footnote 7 to the 1966 version of Wis JI-Criminal 1750, which, as explained above, instructed the jury that the distinction between de facto and de jure made no difference. That principle has not changed; the Committee concluded that it is not a matter that needs to be communicated to the jury. As illustrated by the Petrone case, it is a legal matter relating to the scope of the statute, not a factual question for the jury to decide.

3. "Oath" is defined to include "affirmation" in § 990.01(24). The form of the testimonial oath is described in §§ 906.03(2) and 990.01(24). Section 887.01 identifies those who may administer oaths.

Section 906.03(3) provides for taking a statement under affirmation where a person has conscientious scruples against taking an oath and sets forth the form.

4. If the defendant does not know whether the statement is true or false, it is perjury if it turns out to be false, i.e., the statute does not require that the defendant know the statement to be false.

5. This instruction should be given when warranted by the evidence. § 946.31(2).

6. See notes 1 and 2, supra.

7. This definition of "material" was cited with approval in State v. Munz, 198 Wis.2d 379, 382, 541 N.W.2d 821 (Ct. App. 1995). The court held that testimony is material if the court could have relied on it, "irrespective of whether the court ultimately relied upon the testimony in reaching its decision." 198 Wis.2d 379, 385.

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The definition of "material" is adapted from part of the definition of "relevant evidence," in § 904.01. The Judicial Council Committee's Note indicates § 904.01 is consistent with recent Wisconsin cases, including State v. Becker, 51 Wis.2d 659, 188 N.W.2d 449 (1971), which "adopted McCormick's view of the distinction between materiality and relevancy which is imported into § 904.01 by the phrase 'that is of consequence to the determination of the action.'" 59 Wis.2d R67 (1973).

Federal Rule of Evidence 404 is identical. "The rule uses the phrase 'fact that is of consequence to the determination of the action' . . .; it has the advantage of avoiding the loosely used and ambiguous word 'material.'" Federal Advisory Committee's Note, 59 Wis.2d R69.

The 1966 version of Wis JI-Criminal 1750 included the following in parentheses in the text of the instruction:

> (In a proper case, the court may instruct the jury that the statement is material, as a matter of law.)

There was no explanation that identified "a proper case" and no citation of authority for the proposition that materiality was a matter of law.

The Committee decided to delete the parenthetical sentence from the 1993 revision of the instruction because there is no direct authority in Wisconsin for having the judge, as opposed to the jury, decide whether a statement was material.

The history of the Wisconsin perjury statute shows that the 1953 Criminal Code draft eliminated "materiality" altogether. However, it was restored by the Criminal Code Advisory Committee during the 1954-55 discussions of the draft, which essentially reestablished the common law definition of the crime. During those discussions, the minutes indicate that there was a motion to add a definition of "materiality" and include a statement that "materiality is a question of law for the court." The motion failed. (See Minutes of the Criminal Code Advisory Committee, May 26, 1955, pages 2-6.)

Prior to the decision of the United States Supreme Court in United States v. Gaudin, 515 U.S. 506 (1995), the rule in the majority of federal circuits was that materiality is a matter of law for the court to decide. The statement in United States v. Watson, 623 F.2d 1198 (7th Cir. 1980), was typical:

> Although proof of a statement's materiality, . . . is an essential element of the crime charged in the indictment, it is well settled that the determination of materiality is a question of law for the court. . . . Since the issue of materiality is a legal question, not a question of fact, the government need not prove materiality beyond a reasonable doubt. . . .

The Gaudin decision rejected this view, holding that it was error for a trial court to refuse to submit the question of materiality to the jury. Gaudin was charged with violating 18 U.S.C. § 1001 by making false representations on HUD forms in connection with real estate transactions. The government conceded that the statute is violated only when the false representations go to "material facts." The court stated the basic principles that apply to resolving the question presented in this case and rejected government arguments that the basic principles should not apply:

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> The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.

515 U.S 506, 511.

The court found no basis in law or history for treating the materiality differently than other elements of other crimes. It repudiated the decision in Sinclair v. United States, 279 U.S. 263 (1929), which had held that the issue whether questions were "pertinent" under a statute penalizing the refusal to answer questions "pertinent" to a congressional inquiry was for the court, not the jury.

Gaudin, though involving a federal statute, articulated basic constitutional principles that ought to apply to analysis of the Wisconsin perjury statute. Its holding confirms the Committee's conclusion the parenthetical reference in the 1966 version of Wis JI-Criminal 1750 was insufficient authority for removing the materiality element from the jury's consideration. Wisconsin cases have been strict in refusing to approve trial court actions that arguably remove an element from the jury's consideration, even where an element involves largely a "legal" conclusion. See, for example, State v. Leist, 141 Wis.2d 34, 414 N.W. 2d 45 (Ct. App. 1987), where the court held it was error for the trial court to tell the jury that the document involved in the case was "false, sham, or frivolous." (Leist is discussed in the Comment to Wis JI-Criminal 1499.)

This conclusion is further supported by the decision in State v. Williams, 179 Wis.2d 80, 505 N.W.2d 468 (Ct. App. 1993), which involved medical assistance fraud under § 49.49(1)(a). That offense also requires "material" false statements and the court held that it was error for the trial court to deny the defendant the opportunity to introduce evidence relevant to the materiality of the statements made. "If the statements had no legal effect, the court could determine as a matter of law that the false statements were not material. At the very least, the jury should be given the opportunity to determine whether the false statements were material based upon the evidence concerning the legal effect of the statements." 179 Wis.2d 80, 87-88. Thus, if it is error to limit evidence as to "materiality," it should be error to withdraw the "materiality" issue from the jury's consideration.

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